

**DEFEATING EMPLOYERS' MOTIONS FOR PRELIMINARY  
INJUNCTIONS TO ENFORCE NON-COMPETE AGREEMENTS:  
THE CRITICAL CASES**

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I.	Absent a Written and Signed Noncompetition Agreement, Limitations on Competition May Not Be Enforceable . . . . .	6-24
II.	A Noncompetition Agreement Signed by Unionized Employees Who Were Subject to a Collective Bargaining Agreement, Is Void and Unenforceable for Lack of Consideration . . . . .	6-24
III.	Customer Lists Are Not Trade Secrets, and Further, Protection of Trade Secrets Under Mutsa Was Not Intended to Create a Non-Compete Agreement . . . . .	6-25
IV.	A Confidentiality Agreement May Not Be Transformed into a Non-Compete Agreement . . . . .	6-26
V.	Michigan Courts Have Refused to Adopt the "Inevitable Disclosure Doctrine" as a Basis for Granting Preliminary Injunctive Relief to Non-Compete Plaintiff Employers. . . . .	6-26
VI.	Courts Are Not Obligated to "Blue Line" Unreasonable Non-Compete Agreements. . . . .	6-27
VII.	A Noncompete Clause Designed to Protect the Employer from Fair Competition Is Unreasonable and Constitutes an Unreasonable Trade Restriction . . . . .	6-27
VIII.	Restricting a Sales Representatives' Contact with Any Potential Customer of His Former Employer Is Unreasonable and Not Necessary to Protect the Employer's Legitimate Business Interests . . . . .	6-28
IX.	A Noncompete Agreement Without a Geographical Restriction May Not Be Enforceable . . . . .	6-29
X.	The Geographic Scope of the Noncompete Agreement Will Be Defined Narrowly So as to Allow the Employee to Work While Protecting the Former Employer's Legitimate Business Interests . . . . .	6-30
XI.	2 and 3 Year Limitations on a Person's Right to Compete Maybe Unreasonable . . . . .	6-30
XII.	The Employer's Line of Business Restriction Will Be Narrowly Construed . . . . .	6-31
XIII.	A Non-Compete Agreement May Be Unenforceable Subsequent to the Expiration of an Employment Contract . . . . .	6-32
XIV.	Non-Compete Agreements Are Not Reasonable, and Are Therefore Void, Where a Former Employer Seeks to Prohibit Former Employees from Using General Knowledge Gained During Employment . . . . .	6-32

XV. Michigan Historically Disfavors Noncompetition Agreements and the Court Refused to Interpret an Allegedly Ambiguous Noncompetition Agreement in Favor the Employer . . . . .	6-32
Exhibits	
Exhibit A Fact Scenarios . . . . .	6-35
Exhibit B Article Links . . . . .	6-39

**I. Absent a Written and Signed Noncompetition Agreement, Limitations on Competition May Not Be Enforceable**

A. *Central Cartage Co v Fewless*, 232 Mich App 517, 591 NW2d 422 (1998).

The court considered the question of whether a former employee could be retrained from competing with his employer absent a written agreement limiting the former employee's right to compete. The former employee worked as the company's vice president of automotive sales and became aware of an opportunity for the company to enter into a new line business, using refrigerated trucks to haul baby formula. This opportunity was presented to the employer, who rejected it. Subsequently, the former employee's wife set up a company to broker this new business with other trucking companies. After the employer became aware of the wife's business, it terminated the former employee and filed a complaint against him and his wife, which included a "common-law obligation not to compete." *Id.* at 523.

The court of appeals upheld a jury verdict rejecting the former employer's claim that the employee was restrained from competing with its subsequent to his dismissal and stated: "Absent an agreement not to compete, [the employee] was free, upon termination of his employment, to use his skill, experience, and general knowledge to compete against [the employer] in both the refrigerated trucking industry and the third-party logistics business. *Id.* at 527.

B. *Computer Training Corp v Graves*, No 211079, 1999 Mich App LEXIS 2426 (1999).

The trial court refused to enforce a noncompetition agreement that was not signed and dated. The court of appeals affirmed the trial court's ruling in favor of employee because it found that employer had failed to demonstrate an irreparable injury. Further, the court of appeals found that employer failed to argue the issue of whether the parties' had a binding agreement in its brief and therefore, had abandoned it.

**II. A Noncompetition Agreement Signed by Unionized Employees Who Were Subject to a Collective Bargaining Agreement, Is Void and Unenforceable for Lack of Consideration**

*QIS, Inc., v Industrial Quality Control, Inc.*, 262 Mich App 592, 686 NW2d 788 (2004).

The employer threatened to withhold union employees' paychecks if they did not sign a noncompetition agreement. The employees subsequently signed the non-compete agreement but later proceeded to violate its terms by starting a competing business. Initially, the trial court found that the noncompetition agreement fatally conflicted with the collective bargaining agreement. The Court of Appeals disagreed and remanded. On remand, the trial court found the noncompetition agreement unenforceable on the grounds that the employees altered their just cause contract (the collective bargaining agreement) without adequate consideration when they signed the agreement not to compete.

The Court of Appeals agreed and held that the noncompetition agreement was void. *Id.* at 593. The court began its analysis stating that these employees had a just cause employment contract, by way of the collective bargaining agreement. Further, the court pointed out that the employees, by joining a union, had yielded their employment bargaining power to that union, which had secured just cause employment for them. The court reasoned that by threatening to fire the employees if they did not sign the noncompetition agreement, the employer was asserting that their failure to do so would constitute just cause for termination. However, the court found that to hold that to be the case, effectively stripped the union of all bargaining power it had been given by allowing the employer to unilaterally change the terms of the employment agreement with subsequent threats of termination. The court concluded that the non-compete agreement was unenforceable because there was no adequate consideration for altering their existing employment contract (the collective bargaining agreement).

### **III. Customer Lists Are Not Trade Secrets, and Further, Protection of Trade Secrets Under Mutsa Was Not Intended to Create a Non-Compete Agreement**

*McKesson Medical-Surgical Inc. v Micro Bio-Medics, Inc.*, 266 F Supp 2d 590 (E.D.M.I. 2003).

Plaintiff McKesson, a medical sales supply company, sued two former representatives and their new employer for misappropriation of trade secrets. *Id.* at 591. The representatives had **not** signed non-compete agreements. Nevertheless, McKesson insisted that by way of the representatives' using customer lists they had developed while at McKesson, they had stolen trade secrets. The representatives asserted that they had received information from these customers after their employment with McKesson ended, via their own personal contact lists and public records.

The court held that the customer lists were not trade secrets, and that the representatives were free to use them. *Id.* at 596. The court cited *Hayes-Albion v Kuberski*, 421 Mich 170, 364 NW2d 609 (1999), which held that customer lists compiled by employee's through their contacts during their employment do not constitute trade secrets. In adopting this position, the court explained that the representatives here were not stealing information that McKesson had kept secret. The representatives themselves had knowledge of these customers, and further, there existed **no non-compete agreement of any kind** between the parties. The court concluded stating: "To allow McKesson to prevail on its trade secrets claim in the case at bar would essentially interpret MUTSA to be a blanket, statutorily created non-compete agreement between sales people and their former employers. This would not serve the purpose of trade secrets law." *Id.* at 598 If an employer

wishes to restrict the employee's uses of such information subsequent to the end of the employment relationship, it must do so by way of an appropriate non-compete agreement.

#### **IV. A Confidentiality Agreement May Not Be Transformed into a Non-Compete Agreement**

*Degussa Admixtures, Inc. v Burnett*, 471 F Supp.2d 848 (WD Mich 2007).

Plaintiff, Degussa, manufactured chemical and mineral admixtures for concrete products. Defendant, Burnett, worked for Degussa as a sales representative for 16 years. While Burnett signed a confidential information agreement, he **never** signed a non-competition agreement. Upon terminating his employment with Degussa, Burnett accepted a sales position with one its direct competitors and in a short period of time, he was successful in selling his new employer's products to his old customers.

Degussa brought suit two months after Burnett resigned, claiming that Burnett took its confidential business information including a customer list, pricing information etc. Specifically, Degussa alleged that Burnett violated the Michigan Uniform Trade Secrets Act (MCL 445. 1901).

The Court found that: "Degussa brought its action with **no** evidence of wrongdoing." *Id.* at 852. Degussa sought to voluntarily dismiss its complaint and Burnett sought sanctions for attorney fees and costs. In disputing Burnett's motion to obtain sanctions, Degussa argued that it reasonably believed that Burnett had been exposed to a wealth of its trade secrets during his employment and that "they would inevitably be disclosed" while working for his current employer. The Court noted that Michigan had never adopted the inevitable disclosure doctrine and further, even it had, "...for a party to make a claim of threatened misappropriation, whether under a theory of inevitable disclosure or otherwise, the party must establish more than the existence of generalized trade secrets and a competitor's employment of the party's former employee who has knowledge of the trade secrets." *Id.* at 856 (citation omitted).

In rejecting Degussa' inevitable disclosure argument, the Court held: "...most of Plaintiff's theories are a **thinly disguised attempt to turn Burnett's confidentiality agreement into a non-competition agreement.**" *Id.* at 857. The Court concluded that Degussa' claims against Burnett were "objectively unsupported" and that its "invocation of the MUTSA to prevent legitimate competition **constituted an improper purpose.**" As a result the Court granted Burnett's motion for attorney fees and costs.

#### **V. Michigan Courts Have Refused to Adopt the "Inevitable Disclosure Doctrine" as a Basis for Granting Preliminary Injunctive Relief to Non-Compete Plaintiff Employers**

*Kelly Services v Marzullo*, 591 F Supp 2d 924 (ED Mich 2008).

In *Kelly*, the plaintiff employer argued that because the defendant, its former vice president, worked for a competitor in violation of his non-compete clause, the court should enjoin defendant from working at his new job to protect plaintiff's trade secrets. *Id.* at 941. This argument, commonly referred to as the "inevitable disclosure doctrine," is based on a presumption that in violating a non-compete agreement, a defendant is sure to disclose trade secrets to his new employer. *Id.*

In *Kelly*, the court reiterated Michigan's refusal to adopt such a speculative doctrine. *Id.* at 943. The court pointed out that the plaintiff had no evidence concerning defendant's release of trade secrets or other confidential information, nor the inevitability of such disclosures. The court enunciated its alignment with prior Michigan case law, emphasizing the importance of an individual's ability to change jobs. *Id.* (See also *CMI International, Inc. v Internet International Corp.*, 251 Mich App 125, 649 NW2d 808 (2002); *Degussa Admixtures, Inc. v Burnett*, 471 F Supp 848 (WD Mich 2007).)

## **VI. Courts Are Not Obligated to "Blue Line" Unreasonable Non-Compete Agreements**

*Complete Home Care v Gutierrez*, 2004 WL 1459450 (Mich App) (unpublished June 29, 2004).

Plaintiff, Complete Home Care, asserted that Defendant, Gutierrez, a former employee, breached a covenant not to compete. Gutierrez provided home health care services to individuals and Gutierrez was assigned to assist a specific client. Gutierrez resigned her employment with Complete Home Care to accept a position with a competitor and subsequently, she continued providing services for that same client. The non-compete agreement stated that Gutierrez could not provide **any** services for a six month period to clients who she had serviced on behalf of Complete Home Care.

The trial court granted Gutierrez' motion for summary disposition finding the covenant was **unreasonably broad** as to the type of employment restricted and therefore invalid pursuant to MCL 445.774a. The court of appeals affirmed. While finding the six-month duration of the covenant to be reasonable, the appellate court held that the restriction on Gutierrez performing "any services for the client" was unreasonably broad.

Further, the trial court refused to "blue line" the covenant to make it reasonable. Pursuant to MCL 445.774a, the trial court "**may** limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited." The court of appeals held that, "[T]he statute **does not** dictate that a court **must** limit the agreement." As a result, the court of appeals affirmed the trial court's decision not to exercise its discretion to blue line the agreement.

## **VII. A Noncompete Clause Designed to Protect the Employer from Fair Competition Is Unreasonable and Constitutes an Unreasonable Trade Restriction**

- A. *Northern Michigan Title Co of Antrim-Charlevoix v Bartlett*, 2005 WL 599867 (Mich App).

The president of a title company signed a noncompete that prevented her from working in the title insurance business in the same county for 5 years. Subsequently, the president moved to another title company, and the former employer sued. *Id.* at \*2.

The court ruled that the agreement was **unenforceable** because it did not protect the title company's reasonable business interests. Rather, the court held that the effect of such an agreement was to restrict competition entirely. The court differentiated between a situation where an employee's subsequent job amounted to

unfair competition, and one where the employee merely competed in a normal manner in the marketplace. Specifically, the court determined that “a noncompete agreement that protects an employer’s ‘reasonable competitive interest’ **must not restrain or monopolize trade or commerce.**” *Id.* at \*4. The court concluded that because the president was not using trade secrets or any other confidential information, she did not impose unfair competition on the title company, and therefore the clause was unenforceable.

- B. In *Godlan v Whiteford*, Nos 227696, 231555, 2003 Mich App LEXIS 610 (Mar 11, 2003) (unpublished).

The court found that the employer did not have a “reasonable competitive business interest” in precluding a former employee from working directly for one of the employer’s customers and further, the clause constituted “an unreasonable restraint of trade.” Accordingly, the court refused to enforce the noncompete clause. The employer in *Godlan* sold computer software, and the former employee accepted a job with one of the employer’s customers to handle its “in-house computer related needs.” *Id.* at \*5.

The court rejected the employer’s argument that the former employee would use its trade secrets and confidential business information in this new job: “The decision in *Follmer, Rudzewicz & Co, PC v Kosco*, 420 Mich 394, 362 NW2d 676 (1984), is instructive as to the types of non-competition agreements that are reasonable. In particular, the Court stated that, ‘an employee is entitled to the unrestricted use of general information acquired during the course of his employment or information generally known in the trade or readily ascertainable,’ but an employer may protect ‘confidential information, including information regarding customer’ by contract. *Id.* at 402–403.” *Godlan*, 2003 Mich App LEXIS 610, at \*4.

Finally, the *Godlan* court concluded that in this new job the former employee was “not ‘competing’ with plaintiff in the most natural sense of the term... Given that [the customer] would be free in general to hire any person to assist with such work, we perceive no basis on which the plaintiff has a legitimate competitive interest precluding [the customer] from hiring [the former employee] to perform such work.” *Id.* at \*5.

### **VIII. Restricting a Sales Representatives’ Contact with Any Potential Customer of His Former Employer Is Unreasonable and Not Necessary to Protect the Employer’s Legitimate Business Interests**

*Frontier Corp v Telco Communications Group*, 965 F Supp 1200 (SD Ind 1997).

In *Frontier*, a long distance telecommunications sales representative signed a one year noncompete, which had no geographic limitation. The representative asserted that since the noncompete in effect prevented her from calling on any potential customer throughout the country, it was unreasonable.

The employer argued that the clause was reasonable in that tele-communication sales are a nation-wide business. *Id.* at 1207. The employer asserted that, because telecommuni-

cation sales took place on a national scale, in a highly competitive business sector, the clause was necessary to protect its reasonable competitive business interests. *Id.*

The court held that the clause was overbroad, and went beyond the scope of reasonableness. *Id.* The court pointed out that the clause prohibited the representative from cold-calling anyone, even though there would be no way to know whether that person was a customer of the employer or not. *Id.* Further, the court noted that given the breadth of the telecommunications business, prohibiting one sales representative from soliciting employer customers with whom she had never had contact was simply overbroad. *Id.*

## **IX. A Noncompete Agreement Without a Geographical Restriction May Not Be Enforceable**

### **A. *Whirlpool Corp v Burns*, 457 F Supp 2d 806 (WD Mich 2006).**

The court denied enforcement of a noncompetition provision without a geographical restriction, ruling that, although plaintiff-employer's business was international in scope, enforcing a ban on defendant's selling home appliances anywhere in the world for a one-year period would extend far beyond plaintiff's reasonable competitive business interests.

The court admitted that in certain instances, an unrestricted or global restriction may be valid. However, the court reiterated that the scope of the noncompete must be reasonable, and must go no further than is reasonably necessary to protect the employer's legitimate business interest. In this case, the employee worked as an entry level sales person for four years. The court found that the employee did not have sufficient confidential information about Whirlpool to warrant an absolute bar on his working in the business anywhere in the world.

### **B. *Capaldi v Liftaid Transport, LLC*, 2006 WL 3019799 (Mich App).**

The court stated while the market for a product maybe worldwide, that does **not** establish that the former employer was operating on a worldwide basis. The employer had the obligation to demonstrate that it was operating on a worldwide basis in order for the court to grant it a comprehensive worldwide prohibition to protect its legitimate business interests from its former employee gaining an unfair advantage in competition. The appellate court reversed the trial court's granting the employer's summary disposition as to the enforceability of the non-compete covenant on a worldwide basis.

### **C. *Gateway 2000 v Kelly*, 9 F Supp 2d 790 (ED Mich 1998).**

The court rejected a noncompetition agreement as being unreasonable, in part because it too broadly defined the employer's line of business. While the court applied Iowa law as specified by the agreement, it noted that the final outcome was not affected by the choice-of-law decision. Gateway's business involved building and selling made to order computers. Defendant had been employed by Gateway since 1989 and though his education was limited relative to engineering and computers, he moved up the ladder to become a manufacturing engineer supervisor.

At the outset of his employment, defendant executed a noncompetition agreement, the scope of which included all states and countries where Gateway sold its products. The court found that the prohibition practically prohibited defendant from working anywhere in the world. The court found the scope of the agreement troubling because it left Gateway free to terminate defendant's employment contract "at a moment's notice and with no strings attached," while defendant was "tied to Gateway for one year following the end of his employment because there is nowhere in the world he can relocate to." *Id.*

## **X. The Geographic Scope of the Noncompete Agreement Will Be Defined Narrowly So as to Allow the Employee to Work While Protecting the Former Employer's Legitimate Business Interests**

*Comtech Int'l Design Group, Inc v Price*, No 245144, 2003 Mich App LEXIS 1275 (May 27, 2003) (unpublished).

The agreement limited the former employee from competing with the former employer, "within a radius of fifty miles (50) miles of any offices(s) and/or area(s)" to which she had been assigned. The employer in this case provided "contractual technology staffing solutions with offices in Troy, Michigan and Windsor, Ontario." After resigning, the former employee accepted a job with Bartech (a direct competitor) at its Troy office. The trial court interpreted the language of the noncompetition agreement to mean that because Bartech had an office in Troy, that the employee was barred from working for Bartech anywhere in the world. In effect, the trial court interpreted "competing" simply as acquiring employment.

The court of appeals reversed, holding that the clause in question did not operate to trigger a global prohibition on the employee's work for Bartech. The employee was not barred from working anywhere in the world because she was hired into Bartech's Troy office. The employee could work for Bartech so long as she worked outside of the 50 mile radius of employer's offices.

## **XI. 2 and 3 Year Limitations on a Person's Right to Compete Maybe Unreasonable**

A. *Grigg Box v Michigan Box*, 2009 WL 3401111 (Mich App) (Oct. 22, 2009).

Plaintiff, Grigg Box, sought to enforce a covenant not to compete as against a former sales representative, Defendant, Gentinne. The trial court found that the three year limitation was unreasonably long and limited it to 18 months. In addition, the trial court found that the limitation on Gentinne sales activities was unreasonable and permitted him to solicit, but not actually sell products to his former customers.

Grigg Box argued that the trial court improperly blue lined the non-compete agreement in that it lacked the statutory power to do so. The court of appeals rejected that argument and affirmed the trial court's order.

- B. *Medhealth Sys Corp v Kerr*, No 219619, 2001 Mich App LEXIS 710 (Jan 9, 2001).

The court in *Medhealth* held that under the circumstances, “a duration of more than one-year for the covenant not to compete is unreasonable.” *Medhealth*, 2001 Mich App LEXIS at \*3. The noncompete agreement prohibited an athletic trainer from working as a trainer for two years after terminating his employment with the employer, who provided athletic training, physical rehabilitation, physical therapy, and sports medicine services from its offices in Riverview and Plymouth.

- C. *Lawley v A & M Logistix*, 1998 WL 34182467 (ED Mich).

The court held that a two-year limitation on the former employee’s right to compete was unreasonable. In *Lawley*, the former employee worked for the employer as a sales and event manager. In rejecting the noncompete’s two-year limitation on the former employee’s right to compete, the court noted that the former employee had been providing logistical services to automobile companies for 20 years and had been employed by defendant for only 7 of those years. The former employee had extensive experience in the industry, including the development of numerous business contacts, and the non-competition agreement would ostensibly remove him from working in his industry for two years. *Id.*, slip op at \*4.

The *Lawley* court concluded that if it were to find that the non-competition agreement was enforceable, it would limit its duration to six months; the court “believes any prohibition on Lawley’s activity in the field of his only substantial expertise and experience beyond a period of six months would be unreasonable.” *Id.* slip op at \*5. Clearly, the *Lawley* court was motivated to substantially reduce the duration of the period the former employee was restricted from competing with the employer, based on that former employee’s personal background, experience, and, presumably, his apparent inability to find comparable work in another line of business.

## **XII. The Employer’s Line of Business Restriction Will Be Narrowly Construed**

*Kelsey-Hayes Co v Malecki*, 765 F Supp 402, *vacated and complaint dismissed following settlement*, 889 F Supp 158 (ED Mich 1991).

In *Kelsey-Hayes*, the court rejected an automobile supplier’s noncompetition agreement, which barred the employee from competing in the “same or similar Field of ABS [anti-lock braking systems]” for 2 years. The employee had worked for the supplier for less than a year on programming ABS for light cars and trucks. When the employee left and took a position with a company where he worked on ABS on heavy trucks, the supplier sued. The court concluded that if it were to interpret the ambiguous language of the contract as meaning that the employee could not work in any field of ABS, that the provision would be too broad to be reasonable. *Id.* at 406

### **XIII. A Non-Compete Agreement May Be Unenforceable Subsequent to the Expiration of an Employment Contract**

*Stahl v Digestive Disease Associates*, 2009 WL 763436 (Mich App).

In *Stahl*, an employee physician signed a 2-year employment contract with his employer, a medical corporation. The contract contained a non-compete clause prohibiting the physician from working within 150 miles of the corporation for two years after separation. Prior to the contract expiring, the corporation notified the physician that he would not be made a partner in the corporation, but could remain employed as an associate. The physician rejected the corporation's offer to remain as an associate and the corporation responded that it was "therefore clear that [his] employment end[ed]" on the last day of the contract period. The physician left the corporation and filed for declaratory relief that the non-compete was null and void.

The Michigan Court of Appeals affirmed the trial court's ruling, holding that the physician was not bound by the non-compete clause because the obligation ended with the expiration of the contract. The court found that the physician was prohibited from competing with the corporation **only** if he separated through termination or resignation **during** the term of the contract.

### **XIV. Non-Compete Agreements Are Not Reasonable, and Are Therefore Void, Where a Former Employer Seeks to Prohibit Former Employees from Using General Knowledge Gained During Employment**

*Teachout Security Services, Inc. v Thomas*, 2010 WL 4104685 (Mich App).

*Teachout* involved a noncompetition agreement signed by security guards. The agreement prohibited the security guards from working for a competing security company at the same site for a period of 12 months. The security guards had received two days of training from their former employer prior to beginning work. After separation, the guards began working for the competing company at the same site, and the former employer sued for breach of the noncompete. The trial court granted summary disposition in favor of the security guards, refusing to enforce the non-compete agreement.

The Michigan Court of Appeals affirmed the trial court, holding that the noncompete clause was unreasonable in violation of MCL 445.774a. *Id.* at \*1. Rejecting the security company's claim that its business interests justified the clause, the court noted that the guards had gained no secret or confidential information from the security company, but had minimal, standardized training. *Id.* at \*2. Finally, the court found that in light of these facts, the employer failed to demonstrate a legitimate and reasonable business interest which required protection by way of enforcing of the non-compete agreement.

### **XV. Michigan Historically Disfavors Noncompetition Agreements and the Court Refused to Interpret an Allegedly Ambiguous Noncompetition Agreement in Favor the Employer**

*United Rentals (N America), Inc v Keizer*, 202 F Supp 2d 727 (WD 2002), *aff'd*, 355 F3d 399 (6th Cir. 2004).

*United* dealt with a general manager, who worked for a construction company. During the general manager's employment with the construction company, he also served as president of a competing enterprise owned by his step-son. The company knew of the employee's role as president of the competing company. After the general manager left the construction company, it sued him based on his involvement with his step-son's competing enterprise. The noncompetition agreement as between the general manager and the construction company prevented him from working in the county where the construction company was located. The construction company argued that the non-compete provision should be interpreted more broadly so as to prohibit him from competing in a wider area.

Applying Michigan principles of contract interpretation, the court held that even if the agreement were to be found to be ambiguous, it would be construed against the drafter, the construction company. The court found that the plain meaning of the non-compete agreement limited its enforcement to the county in which the construction company was located. Finally, in light of Michigan's history of disfavoring such agreements and the specific facts involved in the instant case (i.e. the construction company's knowledge of the general manager's involvement with a competitor during the term of his employment), it would be inappropriate to interpret the agreement more broadly so as to limit the former general manager's right to compete in a broader area.

