BUSINESS LITIGATION

The Minnesota Supreme Court Weighs in on Non-Compete Clauses

By Aaron Hartman

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In the recent case of *Sysdyne Corporation v. Brian Rousslang, et. al.*, 860 N.W.2d 347 (Minn. 2015), the Minnesota Supreme Court held that tortious interference with a non-compete agreement may be "justified" by a defendant's good-faith reliance on advice of counsel, provided that the legal advice is obtained through reasonable inquiry. Despite concerns that the court's ruling would "unfairly transfer the consequences of erroneous legal advice onto [an] innocent party," the *Sysdyne* court did not find that "reliance on advice of counsel *per se* justifies tortious interference with contract." Rather, the party asserting the defense must carry its burden of showing that the opinion was the result of a "reasonable inquiry" by the lawyer and relied upon in "good faith" by the client.

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The fact pattern in *Sysdyne* is familiar to any lawyer who represents clients in non-compete cases. Brian Rousslang worked as an account manager for *Sysdyne* Corporation. As part of his employment, Rousslang signed a 12-month non-compete agreement. Rousslang left *Sysdyne* to take a similar position with Xigent Solutions, LLC a competitor of *Sysdyne*. Prior to hiring Rousslang, Xigent obtained a copy of Rousslang's non-compete agreement and showed it to an outside lawyer. The lawyer concluded that Rousslang's non-compete was overbroad as to Rousslang's pre-existing customers (i.e., those customers with whom Rousslang had a relationship before he began working for *Sysdyne*) and therefore, the entire agreement was unenforceable.

Sysdyne sued Rousslang for breach of contract and Xigent for tortious interference with contract. On summary judgment, the trial court agreed with the lawyer's conclusion that the non-compete was unenforceable as to Rousslang's pre-existing customers. The trial court disagreed with the lawyer's conclusion that the entire non-compete was unenforceable. The matter proceeded to trial. During trial, the trial court determined that Rousslang breached the non-compete agreement and awarded money damages to Sysdyne.

Where *Sysdyne* departs from the garden-variety non-compete case is that, despite finding that the non-compete was enforceable, and despite finding that Rousslang was in breach, the court concluded that Xigent was justified in interfering with the contract. Xigent "conducted a reasonable inquiry into the enforceability of the non-compete agreement" and, based on advice of counsel, "honestly believed that the [agreement] was unenforceable." The *Sysdyne* court affirmed the trial court's findings even though Xigent did not offer a "detailed explanation" of the substance of counsel's advice during the trial. A lack of detail may be relevant to the reasonableness of a party's reliance on the advice, but it does not preclude a party from prevailing upon the defense.

It is tempting to read the *Sysdyne* opinion and conclude that, prior to hiring an employee subject to a non-compete, all employers should obtain a generalized legal opinion declaring the potential employee's non-compete unenforceable. Under *Sysdyne*, counsel's opinion need not be correct in order to assert the defense. Minnesota case law suggests that an opinion declaring that a non-compete is unenforceable should not be difficult to obtain. Most Minnesota appel-

late opinions at least mention a policy of treating non-competes with disfavor, and numerous grounds exist for finding that a non-compete is invalid, such as over breadth (as was argued in *Sysdyne*) and lack of consideration, to name just two.

However, *Sysdyne* does not suggest that any opinion will suffice. Non-compete agreements are enforceable in Minnesota, and reliance on advice of counsel does not *per se* justify tortious interference with contract. The defense must be the result of a "reasonable inquiry" by the lawyer and relied upon in "good faith" by the client. The attorney's opinion – which in other contexts is protected by the attorney-client privilege – will be exposed to scrutiny by the court and opposing counsel. *Swanson v. Domning,* 86 N.W.2d 716, 722 (Minn. 1957) (holding that plaintiff waived the attorney-client privilege by stating that she had relied on the advice of counsel in deciding not to sign a contract for deed). An outcome-driven analysis that emphasizes some important facts while glossing over others will not sustain the defense. As in all other cases, care must be taken to ensure that the defense has a sound legal and factual basis.

Care must also be taken in the manner in which the opinion is communicated to the client. A cynical reading of *Sysdyne* suggests that when it comes to explaining the reasoning behind an opinion of unenforceability, less is more. A "detailed explanation" of counsel's advice is not necessarily required in order to prove the justification defense. *Sysdyne*, 860 N.W.2d. at 354 ("the fact that legal advice was verbal and undocumented may be relevant to the reasonableness of the defendant's reliance on the advice, but does not necessarily preclude the possibility that the facts of a particular case may establish justification"). Laying out all of the pros and cons to your client (i.e., "I think you win because the agreement is unenforceable, but here are the reasons a court might conclude otherwise...") might later undermine your client's ability to say that he or she acted in "good faith." Thus, *Sysdyne* arguably places an attorney's duty to advise his or her client of the risks and benefits of a particular course of action at odds with the client's ability to assert the justification defense.

While it is unlikely that the Minnesota Supreme Court intended to create a situation where candid advice takes a back seat to "don't ask, don't tell," lawyers on both sides of non-compete cases should at least be aware that conflicting motives exist. Before providing an opinion, lawyers representing the hiring employer should explain the availability of the justification defense, including the consequences that come with it (such as privilege waiver), to their clients. Any resulting opinion should have a sound legal and factual basis. For their part, lawyers representing the former company should use all available discovery tools to diligently examine all of the circumstances underlying counsel's opinion.