

# Non-Compete & Trade Secrets Report

DEVELOPMENTS IN PROTECTING BUSINESSES AGAINST UNFAIR COMPETITION

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## North Dakota Supreme Court Upholds Judgment for Competing in Breach of Employment Contract while Still Employed

By V. John Ella on August 13, 2013



The North Dakota Supreme Court upheld a judgment finding two employees of SolarBee, Inc., a North Dakota corporation that manufactures solar-powered water circulators, liable for a total of \$621,800 in damages for breaching a non-compete agreement while still employed. The Court's decision in *SolarBee, Inc. v. Walker*, No. 2012015 (June 24, 2013), is a reminder that employers are not completely without legal remedies in North Dakota, a state which generally bars restraints on solicitation or competition after employment ceases. (See North Dakota Century Code, Section 9-08-06.)

The decision in *SolarBee* is also remarkable in that the plaintiff did not plead breach of employment contract in its complaint. Plaintiff sued for breach of a proprietary information agreement (a separate document), misappropriation of trade secrets, breach of fiduciary duty, civil conspiracy and unlawful interference with business. At trial, the employment agreements were admitted into evidence without objection. Plaintiff argued that the defendants "breached" both the proprietary information agreements and the employment agreements. The trial court agreed and the North Dakota Supreme Court affirmed, allowing an "amendment by implication" where the claim was raised by plaintiff in pre-trial briefing and at trial without objection by defendants.

It also is interesting that the Court's decision *SolarBee* suggests that plaintiff's claim for breach of fiduciary duty was dismissed because it was premised on a North Dakota statute, N.D.C.C. Section 59-01-09, that was repealed in 2007. In many states, competing while employed would constitute a violation of breach of a common law duty of loyalty. It does not appear that the North Dakota Supreme Court has recognized a duty of loyalty based on common law, although it has found a similar duty under N.D.C.C. Section 34-02-14 (stating in part "[a]n employe who has any business to transact on the employe's own account similar to that entrusted to the employe's employer shall give the latter the preference always.") See *Warner and Company v. Solberg*, 634 N.W.2d 65, 72 (N.D. 2001). Employers doing business in North Dakota should continue to tread carefully and consider the use of employment contracts which prohibit competition while employed, as well as other protections, in the absence of clarity on the scope of an employee's duty of loyalty under North Dakota common law.



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