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Company Index
 Newsletters
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The Case Against Non-Compete Clauses

By John Roemer
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If one Californian has his way in court later this month, a New Jersey-based company may wish it never required him to sign an employment clause that forbade him from working for a competing company.

Non-compete clauses may be a standard feature of employment contracts in many states, but they're banned under California law. So when Thomas Kovanic left his Southern California marketing post at **GlobeSpan (GSPN)**, a DSL technology provider, to take a job at a competing company, he decided he didn't want to wait for a GlobeSpan lawyer to come calling about the clause he'd signed. By suing first, Kovanic kept the case in California, where the law is in his favor. If GlobeSpan had won the race to a New Jersey courthouse, a judge there might well have enforced the non-compete clause.

Kovanic's lawsuit is the first-known case of an employee taking the initiative to attack a non-compete clause in an employment contract, and so far, it's been successful in court: After a judge granted Kovanic a preliminary injunction to halt enforcement of the non-compete clause, GlobeSpan released Kovanic and a dozen of its other California-based employees from their non-compete obligations.

While Kovanic's attorney, Kenneth C. Mennemeier of Sacramento, Calif., says he and his client initially only wanted to cancel the non-compete clause, they decided to up the ante when GlobeSpan responded to the suit with full-scale litigation and asked that the case be heard in federal court. Kovanic's lawyers are now seeking restitution for lost wages and attorney's fees and punitive damages for Kovanic and the company's other California-based employees. "We'll argue that through our efforts, we've secured freedom for numerous people and delivered something of value," Mennemeier says. "That entitles us to recovery." GlobeSpan's attorney, Trish M. Higgins of **Orrick, Herrington & Sutcliffe (dossier)** in Sacramento, declined to discuss the case in detail but said she hoped that the court would dismiss the matter at an upcoming Feb. 20 hearing. That seems unlikely, however, because the judge already has denied an earlier motion to dismiss the suit,

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saying the company's use of a non-compete clause for California workers constitutes an "unfair business practice" under state law.

If Kovanic recovers damages from his former employer, it could have a chilling effect on other companies that require California employees to sign non-compete agreements as a condition of employment. And the repercussions could be felt nationwide, as judges are increasingly reluctant to enforce non-compete agreements, even in states where they are legal, says Douglas Towns, an Atlanta-based employment law expert. "The new economy labor force is more mobile, and courts understand that," he says. In one landmark case, an employee of New York's **EarthWeb** ([EWBX](#)) got out of a one-year non-compete agreement after a federal judge observed that the agreement was needlessly excessive in his case: "When measured against the information technology industry in the Internet environment, a one-year hiatus from the work force is several generations, if not an eternity."

For now, many employers seem to bank on the fact that California-based employees won't realize that non-compete agreements can't be enforced under state law. "Employers will seek to push the envelope for deterrent effect," Towns says. "Business ethics don't really get involved here."

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- **GlobeSpan, Inc.** ([GSPN](#))
- **Orrick, Herrington & Sutcliffe LLP** ([dossier](#))

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