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To Strike or to Rewrite?

Judicial Modification Under New Georgia Non-Competition Statute

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Georgia courts may now "modify," a specific, defined term under the new Georgia statute, an overly broad and unreasonable restrictive covenant entered into after May 11, 2011, but just what does "modify" mean under the statute? Does it mean that "the blue pencil strikes but does not rewrite?" The question is simple — may a court rewrite the provision to add and create new language or is it limited only to striking the offensive language? There is no ready answer for that in the statute or prior Georgia case law, and courts in other jurisdictions are split on "Modification."

Here's what the Georgia statute (OCGA 13-8-51) provides:

(11) "Modification" means the limitation of a restrictive covenant to render it reasonable in light of the circumstances in which it was made. Such term shall include:

(A) Severing or removing that part of a restrictive covenant that would otherwise make the entire restrictive covenant unenforceable; and

(B) Enforcing the provisions of a restrictive covenant to the extent that the provisions are reasonable.

(12) "Modify" means to make, to cause, or otherwise to bring about a modification.

In two sections of the new statute there are references to judicial modification. For example, OCGA 13-8-53(d):

> (d) Any restrictive covenant not in compliance with the provisions of this article is unlawful and is void and unenforceable; provided, however, that a court may modify a covenant that is otherwise void and unenforceable as long as the modification does not render the covenant more restrictive with regard to the employee than as originally drafted by the parties.

See also OCGA 13-8-54.

Interestingly, in most references in the statute to 'including,' the language is more than just 'including;' it is typically, "including, without limitation." See, for example, the definition of Products or Services; Employee; Employer; Legitimate Business Interest; and Enforcement by Third Parties; not so with "Modify."

Courts in other states that have considered what "modify" means are split on the issue. The majority view is that the court has the power to rewrite the language to render the provisions enforceable. However, in a number of states, such as Indiana, North Carolina, Virginia and Arizona, "even though the courts may prune contracts under the blue pencil rule, they will not rewrite them for the parties."

Georgia courts have had judicial authority to exercise "blue penciling" in sale of business covenants for some time. In those cases, the rule is reasonably clear, "The blue pencil marks, but it does not write…." *Hamrick, et al. v. Kelly*, 260 Ga 307; 392 S.E. 2d 518 (1990); *Jenkins, et al. v. Jenkins Irrigation, Inc., et al.*, 244 Ga. 95, 259 S.E. 2d 47 (1979). The court in *Hamrick* discussed 'blue pencil severance,' citing other Georgia cases, and refused to enforce or reduce a post-sale 75 mile radius non-competition restrictive covenant on the premise that the geographic scope was overly broad and too vague and that the trial court had, in effect, abused its discretion by reforming and rewriting the restrictive covenant by reducing the 75 mile radius to 50 miles.

Certainly there is statutory language that might support judicial rewriting of the restrictive covenant. For example, OCGA 13-8-53(c)(1) ends with, "The postemployment covenant shall be construed ultimately to cover only so much of such estimate as it relates to the activities actually conducted, the products or services actually offered or the geographic areas actually involved within a reasonable period of time prior to termination." OCGA 13-8-54(a) provides, " A court shall construe a restrictive covenant to comport with the reasonable intent and expectations of the parties to the covenant and in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement."

In one of the first cases under the new statute, a federal District Court Judge in *PointeNorth Insurance Group v. Gwendololyn Zander, et al.*, decided September 30, 2011, issued a preliminary injunction that enforced some of the terms of a written employment agreement executed after the effective date of the new statute. The court enforced that part of the restrictive covenant that prohibited the former employee, a licensed insurance broker, from soliciting insurance agency clients with which she had contact during her employment with the plaintiff. However, the court struck from the agreement a provision that would have prevented her from soliciting insurance business from her former employer's clients with which she had no contact. The court did not discuss or dive into the murky "modify" waters, because it was relatively easy to strike the offending language without creating any new language.

Conclusion

Until there is definitive judicial guidance on the precise meaning of "modify," employers might be wise to draft their restrictive covenants for Georgia employees in a fashion that assumes the court will strike offending provisions but will not rewrite the restrictive covenant or otherwise substitute its own perception of what might be intended by the parties and would be reasonable under the circumstances. The answer may lie in 'step down' provisions which have been upheld in some jurisdictions, notably Arizona, where the court kept striking until it reached alternative temporal and geographic limits contained in the agreement that the court determined to be reasonable and within the law.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the author:

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