Law

Restrictive Covenant Update

Steven R. Press
is a shareholder with Baker, Donelson, Bearman, Caldwell, & Berkowitz, P.C. in Atlanta. The firm has offices in five states and the District of Columbia, as well as the United Kingdom.

What was once a fairly uniform body of precedent attorneys could use to advise their clients has been replaced by the discretion of each individual judge presiding over a matter.

Georgia Law on restrictive covenants is about to change, drastically

By Steven R. Press

You may remember voting on Amendment 1 in the November 2010 ballot. Amendment 1 asked, "Shall the Constitution of Georgia be amended so as to make Georgia more economically competitive by authorizing legislation to uphold reasonable competitive agreements?"

Worded that way, it is no surprise that the Amendment passed.

The Restrictive Covenants In Contracts Act (the "Act") follows the Amendment. Before we review how the Act alters Georgia's law on non-competition agreements, there is uncertainty as to the effective date of the Act. The Act states it becomes effective the day following ratification, which was November 2, 2010. However, the House Resolution was silent on the effective date of the Amendment.

Under the Georgia Constitution, unless otherwise provided in an Amendment or resolution, an Amendment only becomes effective on January 1 following ratification. Therefore, it would be unconstitutional for the Act to become effective prior to January 1, 2011 and it is unclear whether the Act remains unconstitutional today. The legislature is discussing whether to hold another vote on the Act to cure this procedural flaw.

Assuming the procedural flaws get cured, the Act applies inter alia to employees or independent contractors in possession of specialized skills, customer contacts, customer information or confidential information. Prior to the Act, under precedent developed through the appellate courts, if either a non-compete (prohibition against competing in a certain territory for a certain period of time) or a non-solicitation (prohibition against soliciting certain customers for a certain period of time) was unenforceable in the Employer-Employee context for any reason, both were unenforceable. Georgia court's would not "blue-pencil" an unenforceable covenant to make it enforceable because employer's who over-reached were not to be rewarded with any relief.

The result of the well-established precedent was that most attorneys familiar with this area of law could read a covenant and opine with a high degree of certainty as to whether the restrictive covenant would be enforced by the Georgia courts. Under the Act, that is no longer the case in the Employer-Employee context. Georgia Courts are now directed to "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."

If a court finds that a non-competition or non-solicitation covenant is overly broad, the court may modify the restraint to grant "the relief reasonably necessary to protect" and "achieve the original intent of the contracting parties."

What was once a fairly uniform body of precedent attorneys could use to advise their clients has been replaced by the discretion of each individual judge presiding over a matter. While this leads to uncertainty, employers can approach restrictive covenant disputes with greater confidence that they will receive some relief, if not all the relief they envisioned.

Three more things to note: First, the Act provides that a restrictive covenant with a term of two years or less from termination shall be presumed reasonable and a longer term shall be presumed unreasonable. Second, prior precedent required that a confidentiality agreement contain a specified duration of enforcement. Under the Act, an employee may agree to maintain confidentiality "for as long as the information or material remains confidential." Third, the significance of the Act cannot be overstated.

To the extent you have restrictive covenants, now is the time to have them updated by counsel. While this area of law is highly fluid, steps can be taken to protect an employer to extents greater than in the past. BB