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The Corporate Lawyer

The newsletter of the Illinois State Bar Association's Section on Corporate Law

Protectable interests in restrictive covenants expanded

By Michael P. Tomlinson[1]

In May 2010, the Illinois State Bar Association's *Corporate Lawyer* newsletter published a useful article regarding how to draft enforceable non-competition agreements in Illinois. Peter A. Steinmeyer and Jake Schmidt, *Drafting Enforceable Non-Competition Agreements in Illinois*, Ill. State Bar Ass'n *Corporate Lawyer* newsletter, Vol. 47 #7, May 2010.[2] Among other things, the article provided the following six practical steps attorneys can take in drafting non-competition agreements to improve the chances that a court will enforce them:

(1) Consider drafting a choice of law provision specifying the law of another state to govern covenant's enforceability if there is a legitimate relationship between the parties and the designated state;
(2) Draft a covenant that is no broader in scope than absolutely necessary;
(3) Be realistic about the duration of the agreement and consider including a tolling provision to account for periods of violation;
(4) Consider drafting separate "non-competition" and "non-solicitation" of customer clauses with different durations;
(5) Include a "severability clause providing that the invalidity of one provision shall not affect the validity of another provision"; and
(6) Include a "blue pencil" clause allowing and asking any court reviewing the covenant to edit any problematic portions of the restriction to include the maximum restriction permissible under the law.

See id. The article also discussed how the decision of the Fourth District Court of Appeal in *Sunbelt*, which rejected the legitimate-business-

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Case law developments

Home Improvement Act

***K Miller Construction v. McGinnis*. (Opinion 109156)**

In a long-awaited but more or less now insignificant decision, the Court held that the Illinois Home Improvement Act does not act as a bar to preventing contractors who did not give homeowners estimates for repairs and the Consumer booklet outlining their rights from seeking enforcement of contracts against homeowner using either equitable or contractual remedies.

NOTE: While the underlying statute was amended to clear up the fact that the legislation was not intended to be construed as a bar, there is some pretty interesting analysis in the opinion about when a statute should be read to foreclose a remedy and when it should not. Here, they said the appellate court missed the mark by miles, not inches.

—Submitted by Frank M. Grenard, Johnson & Bell Ltd. Chicago, Illinois

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Protectable interests in restrictive covenants expanded

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interest test for examining whether a restrictive covenant's scope was reasonable, introduced more uncertainty in Illinois regarding what was required for a restrictive covenant to be deemed enforceable. *Id.* This article follows up on the above-referenced May 2010 discussion by examining the implications for the enforceability of restrictive covenants in Illinois following the recent decision by the Second District Court of Appeal in *Reliable Fire Equipment Company v. Arrendondo et al.*, No. 2-08-0646, 2010 WL 4967924 (2d Dist. Dec. 3, 2010).[3]

Recent decisions preceding *Reliable Fire*

Before discussing *Reliable Fire*, it is first useful to recall that two months prior to issuing its opinion in *Reliable Fire*, the Second District decided *Steam Sales Corp. v. Summers*, No. 2-10-0073, 2010 WL 2970375 (2d Dist. Oct. 4, 2010). The *Steam Sales* decision was the first major restrictive covenant decision since the Fourth District issued its opinion in *Sunbelt Rentals, Inc. v. Ehlers*, 394 Ill. App. 3d 421, 432 (4th Dist. 2009). The *Sunbelt* Court rejected the legitimate-business-interest test and held that only the time and territory restrictions had to be reasonable for a restrictive covenant to be enforceable. *Sunbelt*, 394 Ill. App. 3d at 432. Ultimately, the *Steam Sales* Court did not have to decide whether it was *required* to apply a test other than the legitimate-business-interest test in determining whether a restrictive covenant was reasonable because it found the facts of that case satisfied the legitimate-business-interest test in any event. *Steam Sales*, 2010 WL 2970375, at *10-*11.

Although it did not need to decide whether to agree with the *Sunbelt* Court's analysis, the *Steam Sales* Court stated in dicta that "to the extent that *Sunbelt* can be interpreted to require analysis of *only* the time and territory aspects of a restraint, we note that the reasonableness of time and territory should still be evaluated *in relation to a protectable interest*." *Id.* at *11 (internal citation omitted) (emphasis in original). As I recently wrote in analyzing the importance of the *Steam Sales* case, "[the case is] significant because it indicates that there may be cases in which the courts will evaluate whether protectable interests other than the already-recognized legitimate business interests can suffice to show the reasonableness of a restrictive covenant." Michael P. Tomlinson, *Employers and Their Attorneys Left Wanting More Guidance After First Major Post-Sunbelt Decision Regarding Reasonableness of Restrictive Covenants*, *available at* <www.tomlinson-law.com/RestrictiveCovenantcases.aspx>.

The *Reliable Fire* Court's Expansion of Protectable Interests

In its December 3, 2010 *Reliable Fire* decision, the Second District squarely addressed the framework within which to analyze the reasonableness of a restrictive covenant's scope, though it did so through three separate opinions. The majority of justices agreed that the post-employment restrictive covenants at issue were not enforceable, but differed as to how to describe the test to be applied regarding whether their scope was reasonable. *Id.*

The lead opinion, written by Justice Zenoff, avoided rejecting the legitimate-business-interest test outright by finding that it was broad enough to encompass protectable interests other than only those involving a near-permanent relationship or potential misappropriation of confidential information. *Id.* at *21 ("[t]he legitimate-business-interest test need not be inflexible if broadly construed.") Specifically, the lead opinion stated the following:

> However, in our view, those opinions like *Lifetec and Appelbaum*, which treat the two prongs of the legitimate-business-interest test as categorical pronouncements, may be unduly restrictive. Other criteria may exist that warrant protection under the law beyond those enumerated in the two traditional prongs of the legitimate-business-interest test. Yet, we find that no other interest has been established in the record beyond plaintiff's desire to shield itself from ordinary competition.

Id. at *22.

As such, although the lead opinion applied the legitimate-business-interest test and appeared to retain it in name, it also seemed to clarify or broaden its application or scope.[4] Further, in concluding its analysis of the scope of the restrictive covenants at issue and finding them unenforceable, the lead opinion stated, "[b]ecause plaintiff cannot demonstrate a protectable interest, *that is, one over and above the suppression of ordinary competition*, to justify a restraint of trade, it is unnecessary to proceed to a time-and-territory analysis." *Id.* at *30 (Emphasis added). Thus, the the overriding principle in determining whether the scope of a restrictive covenant is too broad remains whether it seeks to do something other than suppress "ordinary competition." If it does, then under the approach espoused by the lead opinion in *Reliable Fire*, the interest it seeks to protect may be upheld based on an analysis of a flexibly applied and broadly construed legitimate-business-interest test, which may encompass scenarios outside of those found in that test's often-cited two prongs.

Both the special concurrence written by Justice Hudson and the dissent written by Justice O'Malley took issue with Justice Zenoff's approach in applying what was, at least in theory, a broader legitimate-business-interest test. Both opinions favored applying essentially a totality-of-the-circumstances approach instead of engaging in a "*post hoc* revision of the test." *See id.* at *33 (Hudson, J., specially concurring); *id.* at *34 (O'Malley, J. dissenting). As the special concurrence pointed out, the lead opinion arrived at its flexible application of the legitimate-business-interest test by seizing on the wording in a minority of cases that applied the test, which described its two prongs as the two situations that "generally" would satisfy the test. *Id.* at *32 (Hudson, J., specially concurring). However, very few courts actually apply the legitimate-business-interest tests so flexibly. *Id.* at *32 (Hudson, J., specially concurring). In fact, as the special concurrence stated, the majority of courts view the two often-cited prongs of the legitimate-business-interest as "a sine qua non for the enforcement of a covenant not to compete." *Id.* (also stating that "[f]ar more often than not, the legitimate-business-interest test has been presented as representing the only two circumstances under which an employer can

enforce a covenant not to compete.").

What *Reliable Fire* Means For Drafting Enforceable Restrictive Covenants In Illinois

Regardless of how the analytical framework for testing the scope of a restrictive covenant is described, one thing appears clear based on the *Reliable Fire* decision (and the *Steam Sales* dicta): at least as far as the justices in the Second District are concerned, satisfying the two often-cited prongs of the legitimate-business-interest test is no longer the exclusive means for businesses to demonstrate a protectable interest. *See, e.g., id.* at *33 (Hudson, J., specially concurring) ("It would appear, however, that a careful reading of the three opinions in this case makes clear that this district is no longer committed to a strict application of the two restrictive prongs of the legitimate-business-interest test."). However, one must keep in mind that Illinois has a unified appellate court, meaning the Second District's decision is not binding on the other districts. *See id.* at *45 (O'Malley, J. dissenting). Thus, the appellate court is now fractured severely regarding how to analyze whether a restrictive covenant is reasonable in scope. Indeed, recall that the last pronouncement from the Fourth District in *Sunbelt* rejected the need to analyze whether a protectable interest needed to be demonstrated at all, reasoning that parties should be able to contract to protect whatever interests they want. *Id.* at *25. The issue therefore appears to be ripe for the Illinois Supreme Court to step in and provide some much needed guidance on the issue. Perhaps *Reliable Fire* will be the case that provides that guidance.

Assuming that some protectable interest will have to be demonstrated, what other protectable interests will qualify?[5] In all likelihood, the answer ultimately will be that it will depend on the facts and circumstances of the case, including the nature of the business at issue. The lead opinion in *Reliable Fire* indicated that "[p]laintiffs engaged in businesses that engender customer loyalty, as with unique products or personal services, tend to fare better under the legitimate-business-interest test than do businesses with customers who use many different suppliers simultaneously to meet their needs." *Id.* at *21 ("However, no fast rules apply in regard to outcome . . . ."). It also stated that "sales (as opposed to professional services) will generally not as easily satisfy the near-permanent requirement" of the legitimate-business-interest test." *Id.* at *29. However, as the special concurrence warns, these should not be taken as categorical pronouncements for every case. *Id.* at *34 (Hudson, J., specially concurring) ("In short, I do not believe that professional services indicate substantial relationships as a matter of law.").

Moreover, the facts and circumstances of a case will need to be viewed in light of the policy from which the legitimate-business-interest test arose in the first instance – "protecting a person's ability to pursue his or her chosen occupation." *Id.* at *19. As the lead opinion in *Reliable Fire* pointed out, "[t]he inquiry into whether the employer desires to prohibit competition *per se* or whether the employer has an interest over and above stifling competition is, therefore, logically a threshold question, although not always, as in *Lawrence & Allen*." *Id.* at *19; *see also id* at *27 ("[R]estrictive covenants are a restraint on trade, and courts will strictly construe them to ensure that their intended effect is not to prevent competition *per se*."). Of course, only time and an Illinois Supreme Court decision will provide the complete framework for determining whether the scope of a restrictive covenant is reasonable.

Conclusion

Until there is an Illinois Supreme Court decision on the issue, attorneys still have the legitimate-business-interest test, which now appears only to be a partial or incomplete framework. Nevertheless, it remains advisable whenever possible for businesses to draft restrictive covenants so as to conform to one of the two general situations courts have recognized as representing protectable interests: "where (1) because of the nature of the business, the customers' relationships with the employer are near-permanent and the employee would not have had contact with the customers absent the employee's employment; or (2) the employee gained confidential information through his employment that he attempted to use for his own benefit." *Steam Sales Corp.*, 2010 WL 2970375, at *10. In addition, the overall guiding principle in determining whether the scope of the covenant will be upheld is whether it is attempting to do something "over and above" simply suppressing "ordinary" competition. *See Reliable Fire*, 2010 WL 4967924 at *30.

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2. The article is available at *http://www.tradesecretsnoncompetelaw.com/uploads/file/Steinmeyer%20article2.pdf*. An earlier version of the article, written prior to the decision in *Sunbelt Rentals, Inc. v. Ehlers*, 394 Ill. App. 3d 421, 432 (4th Dist. 2009), was published in the April 2009 *Illinois Bar Journal*.

3. Also *available at http://www.state.il.us/court/Opinions/AppellateCourt/2010/2ndDistrict/December/2080646.pdf*. The opinion has not yet been released for publication in the permanent reporters and as such, remains subject to revision or withdrawal.

4. Curiously, after finding that the legitimate-business-interest test was flexible enough to account for protectable interests other than those encompassed by the two prongs of the legitimate-business-interest test, the lead opinion proceeded to apply the two "traditional" prongs of the legitimate-business-interest test to invalidate the restrictive covenants at issue. *Id.* at *27-*31. Perhaps it was because it could not perceive of other factors beyond those traditionally discussed in connection with the legitimate-business-interest test based on the evidence presented in *Reliable Fire*. Indeed, the Court clearly held that the plaintiff's evidence did not demonstrate a protectable interest beyond the suppression of ordinary competition. *Id.* at *30.

5. Based on its detailed analysis of prior Illinois Supreme Court cases, the lead opinion in *Reliable Fire* found that "decisions of our supreme court track the common-law rule that a restraint must protect some legitimate interest of the promisee." *Reliable Fire*, 2010 WL 4967924 at * 19.

Case law developments

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***Irwin Industrial Tool v. Dept. of Revenue*. (Opinion 109300)**

Use tax imposed by Illinois Department of Revenue for aircraft purchased by IL company's subsidiary in NE but used a lot in IL to transport executives hither and yon. IDR assessed use tax for entire value of aircraft. Irwin argued it should, at a max, be assessed for the percentage of time the aircraft was actually in IL (4 percent). SCt said IDR is correct.

NOTE: Interesting analysis of use tax which says if you are in IL and buy out of state and no sales tax is paid to state where product originated, IL resident is subject to use tax. This may have a significant impact on internet sales where no tax is collected by "seller" or "drop shipper" although the product is shipped to and used in IL. I would bet that given the pretty clear ruling by IL SCt, IDR will begin some serious enforcement of Use Tax.

—Submitted by Frank M. Grenard, Johnson & Bell Ltd. Chicago, Illinois

Litigators - Insurance Coverage

***West American Insurance v. Yorkville*. (Opinion 108285)**

Twenty-seven-month delay in providing written notice to insurance company of defamation lawsuit filed against insured and being defended by insured was not sufficient to decline request for defense filed a few months before trial because insurance agent had told insured that he did not think these kinds of things were covered by GLI and that position could have provided a "reasonable belief of non coverage" which was not dispelled until the insured talked to a different insurance company agent who said it should be covered. Justice Freeman wrote a lengthy dissent, essentially saying the policy provision should control and a 27-month delay is not "immediate notice."

—Submitted by Frank M. Grenard, Johnson & Bell Ltd. Chicago, Illinois

***KFC Corporation v. Iowa Department of Revenue*, IA SCT (2010)**

The Iowa Supreme Court holds that the state of Iowa has the right to impose income tax liability and penalties on out of state corporations which derive revenue from Iowa but have no physical presence in the state. In the instant case, KFC was assessed $250,000 in taxes and penalties for three tax years based upon its receipt of franchise and license fees from Iowa franchisors. In a unanimous opinion, the Court found there was no federal constitutional bar to the taxing of non-resident corporations and observed "it might be argued that state supreme courts are inherently more sympathetic to robust taxing powers of states than is the United States Supreme Court."

—Submitted by Frank M. Grenard, Johnson & Bell Ltd. Chicago, Illinois

***McFee v. Nursing Care Management of America, Inc.*, Slip Opinion No. 2010-Ohio-2744.**

In Ohio, the Ohio Supreme Court ruled that although companies may not terminate employees because they are pregnant, companies may distribute and enforce a neutral policy that is not facially discriminatory. Thus, in *McFee v. Nursing Care Management of America, Inc.*, Slip Opinion No. 2010-Ohio-2744, the Supreme Court held that a policy was not discriminatory which required employees to work for at least one year before becoming eligible to take maternity leave. In Ohio, there is no mandatory leave requirement for all employees and companies have the discretion to draft, distribute and enforce facially neutral leave policies.

—Submitted by Alan M. Kaplan, Masuda Funai, Schaumburg, IL

Other noteworthy legal tidbits

The Ohio Military Family Medical Leave Act became effective on July 2, 2010 and supplements the federal Family and Medical Leave Act. The Ohio law applies to all public and private sector employers with 50 or more employees, although the 50 employees do not have to work within 75 miles of each other. The Ohio law allows employees in Ohio to take up to 10 days or 80 hours of unpaid leave each 12-month period, if one of the employee's immediate family members is called into active duty or is injured in the line of duty. Employees may take the Ohio leave after exhausting the federal FMLA leave.

—Submitted by Alan M. Kaplan, Masuda Funai, Schaumburg, IL ■

"Employer bashing" or "concerted action": Consider your electronic use policy

By Frank M. Grenard

The National Labor Relations Board ("NLRB") has decided to take on employer policies which are designed to prevent employees from commenting about their employers and/or supervisors in social network internet sites.

In a "first-of-its-kind" complaint, the NLRB has challenged the discharge of a Connecticut woman who worked as an emergency medical technician and was fired, inter alia, after likening her supervisor to a psychiatric patient in a posting on her Facebook page. Following her posting, other employees joined the "e-discussion" with their own criticisms.

The employer, American Medical Response of Connecticut Inc. ("AMRC"), determined that the posting violated a provision in its employment policy which provided that: "Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors."

In its complaint, the NLRB asserted that the termination was "to discourage employees from engaging in … concerted activities" which it determined was an unfair labor practice in violation of the National Labor Relations Act, 29 USC 151, et seq.

There were other violations alleged in the complaint involving claims that the employee was not allowed to meet with her union representatives regarding threatened discipline and that the termination was also intended to discourage membership in labor organizations but for the purpose of this note, those alleged violations are not significant.

Following the NLRB's filing of the complaint at the end of October, 2010, a press release was issued by the agency which did not address the union representation portions of the complaint. Instead, the release specifically noted that:

> "An NLRB investigation found that the employee's Facebook postings constituted protected concerted activity, and that the company's blogging and internet posting policy contained unlawful provisions, including one that prohibited employees from making disparaging remarks when discussing the company or supervisors and another that prohibited employees from depicting the company in any way over the internet without company permission. Such provisions constitute interference with employees in the exercise of their right to engage in protected concerted activity.

Lafe Solomon, Acting General Counsel of the NLRB, has been quoted as saying the use of social networking is the same as talking at the water cooler and employees talking to each other about conditions or work are protected by the NLRA. Jonathan Kreisberg, the Hartford Connecticut NLRB Regional Director agreed, taking the position that someone using their own computer on their own time on their own social network page should be able to talk about their employer and supervisors without facing discipline for doing so.

While the AMRC complaint dealing with the use of social network sites is unique, the NLRB has been involved in successfully challenging "similar" matters in other contexts such as an employer maintaining a rule prohibiting negative conversations about employees and/or managers, *Claremont Resort, Inc*., 344 N.L.R.B 832 (2005); and determining that if one employee acts in a manner to try to enlist the support of his fellow employees for their "mutual aid and protection", the NLRB will consider the individual action as "concerted" as long as it is engaged in with the object of initiating or inducing . . . group action., *Benjamin Franklin Plumbing*, 352 N.L.R.B. 525 (2008) citing *Phillips Petroleum Co. & Paper*, 339 N.L.R.B. 916 (2003).

As crafted, however, the AMRC Complaint, if sustained, may require many corporate employee policies to be revisited and refined in order to address issues related to "after work" electronic publication by employees. What is too restrictive? What is appropriate? Time will tell.

The case is initially scheduled for hearing on January 25, 2011 and the decision may be several weeks or months down the line. ■

Frank M. Grenard is a member of the Chicago law firm of Johnson & Bell, Ltd. A 1977 graduate of Northwestern University School of Law, Frank is licensed in Illinois, Iowa, Indiana, Nebraska and Michigan and concentrates his practice in the areas of corporate, commercial transaction, and real estate, and litigation related to those areas. He has been a member of the Corporate Law Departments Section for 20 years and currently serves on the Section Council as vice-chairman. He is also a member of the ISBA Military Affairs Committee.

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Saturday, 3/5/11- Downer's Grove, Double Tree—DUI, Traffic and Secretary of State Related Issues. Presented by the Traffic Laws/Courts Section. 8:55-4:00.

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Friday, 3/25/11- Chicago, ISBA Regional Office—Medical Marijuana: Workplace Issues. Presented by the ISBA Labor and Employment Section. 8:55-12:00.

Friday, 3/25/11- Quincy- Quincy Country Club—General Practice Update. Presented by the ISBA Bench and Bar Section; co-sponsored by the Adams County Bar Association. 8:30-5**.** ■

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