Supreme Court Holds that Restrictive Covenants Within One Agreement May Be Divisible

Jul 17 2009

Practice Area: Health Industry Labor, Employment and Immigration & Labor and Employment

Wisconsin courts have frequently found that if any restrictive covenant within an agreement was unlawful, the entire agreement was unenforceable. However, on July 14, 2009, in *Star Direct, Inc. v. Dal Pra*, the Wisconsin Supreme Court issued a decision that could increase the enforceability of restrictive covenants in Wisconsin. The Court held that separate covenants within one agreement may be divisible and separately enforceable, even if one or more of the covenants are found to be unenforceable.

Supreme Court's Holding
The Court's previous decisions had indicated that, if one covenant within an agreement was unenforceable, all related covenants within that agreement were also unenforceable. The Court in noted that "in practice, most restrictive covenant provisions cover similar types of activity, or at least have substantial overlap. . .thus . . . [the prior interpretation] does in fact render nearly all covenants not to compete unenforceable if one provision of one of the covenants is unreasonable."

In *Star Direct*, the Court explicitly rejected this interpretation. The Court noted that Wis. Stat. § 103.465, the statute governing restrictive covenants in the employment context, relates to "covenants," not to the whole employment contract, so it does not preclude divisibility. The Court noted that the fact that different covenants in an agreement overlap in terms of the length of limitation or the activities that are restricted does not necessarily mean the clauses cannot be divided. The Court recognized that employers have multiple protectable interests that may apply separately in similar situations, such as an agreement not to solicit customers, an agreement to protect confidential business information, and an agreement not to solicit employees. The Court identified that the "foundational inquiry for determining whether a covenant is divisible is whether, if the unreasonable portion is stricken, the other provision or provisions may be understood and independently enforced." Under this new rule, if a contract includes a non-compete provision, a non-solicitation provision, and a confidentiality provision, those covenants may be enforceable even if one is "unreasonable" under Wisconsin law, provided the other provisions can stand alone if the unenforceable one is eliminated.

The Court noted that provisions within one contract may still be indivisible if they cannot stand alone. The Court explained that provisions of an agreement would still stand or fall together if the provisions are so intertwined by references from one provision to another within a document that each provision cannot be read without looking back to the others. Drafters of restrictive covenants should take care to define terms and consequences separately in an introductory paragraph or within each contractual provision to increase the chances of enforceability.

Effect Going Forward
In the past, a finding that one provision within an agreement was unreasonable likely rendered all restrictive covenants in the agreement unenforceable. Now, even if one provision is deemed unenforceable, other provisions within the agreement may still stand. It is increasingly important to draft agreements to allow each provision to survive on its own if others are ultimately eliminated. Terms, definitions, penalties, conditions or other elements of the agreement should not be cross referenced among different restrictive covenants within the agreement.

Wisconsin courts remain unable to "blue pencil" within a provision of an agreement, so it is still very important to include geographic, durational, and other limitations on the scope of each provision. If such elements are missing from a particular covenant, that covenant would still be eliminated in its entirety. Now, however, other valid covenants within the same agreement may stand.

Conclusion
This decision is beneficial for employers who have agreements containing multiple restrictive covenants. It does not reduce, and in fact heightens, the need for careful drafting of restrictive covenants, but it should mean less dire consequences if one provision of an agreement is deemed unreasonable.

We recommend that employers review their non-compete agreements and other restrictive covenants on a yearly basis to maintain compliance with changes in the law and in the business climate.

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