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## Client Advisory

### What are You #Workingfor?: Third Circuit Saves ADP's Restrictive Covenant with the Blue-Pencil Rule

The members of our Trade Secret Protection and Noncompete Group often field some variation of the same question from clients: if a court finds that my restrictive covenant is too broad, what happens? Will the court toss it? Modify it? If so, how? [We have written about this topic before.](#)

But now the Third Circuit Court of Appeals has issued a precedential opinion interpreting New Jersey law, vacating and remanding two district court decisions that had held that ADP's restrictive covenant agreements ("RCAs") were unenforceable *per se* and therefore not enforceable to any extent. In so doing, the Third Circuit instructed the lower courts to apply long-standing New Jersey law and "blue pencil" the RCAs. In other words, the lower courts should have modified the RCAs by altering their restrictions on post-employment activities to make them reasonable, and then enforced them, rather than invalidating them. This is good news for businesses concerned about protecting their customer relationships, trade secrets, and confidential business information.

In *ADP v. Rafferty*, --F.3d--, 2019 WL 1868701 (3d Cir. Apr. 26, 2019), the court reviewed ADP's two-tiered restrictive covenant policy. The first tier, which applied to all employees upon hire, imposed a one-year ban on the solicitation of current and prospective clients and marketing partners with whom the employee was involved or exposed. The second tier-the RCA-was reserved for high-performing employees who accepted ADP's stock-option award program. The RCA expanded the nonsolicitation provision, covering more clients business partners whom the employees could not solicit. The RCA also contained a one-year noncompete.

Two ADP employees left to work for a competitor and ADP sued. The trial court held that ADP's first-tier restrictive covenant was enforceable, but that the RCA was unenforceable in its entirety. ADP appealed.

The appeals court began by noting that, for almost 50 years, New Jersey law has required courts to "blue pencil," or partially enforce, overbroad restrictive covenants to balance employers' legitimate business interests while not unreasonably hindering competition or employee mobility. This rule, announced in *Solari Industries v. Malady*, 264 A.2d 53(N.J. 1970), established that, in determining whether to enforce a post-employment restrictive covenant, courts must consider whether the restrictive covenant protects the employer's legitimate business interest, imposes an undue hardship on the employee, and injures the public. When employers go too far with restrictive covenants, courts

generally do not simply throw them out, but instead impose limitations to make them reasonable.

In this case, the appeals court held that ADP had a legitimate business interest in its client relationships and goodwill, which the RCAs were in place to protect. Because the high-performing employees were the ones with the most extensive client contact, they could do the most damage to ADP by working for a competitor, justifying the heightened restrictions on their post-ADP employment activities. The court went on to reject the defendants' argument that the RCAs were unreasonable because they were selectively imposed.

These cases are now on their way back to the trial courts to determine the extent to which the RCAs are reasonable, and thus enforceable. And therein lies the message that this case provides. To be enforceable, restrictive covenants must be reasonable. Make sure that your restrictive covenants are reasonable *now* to minimize the chance you will have to go to court to have them enforced. However, if a court does find them unreasonable, New Jersey law provides a safety net in the blue pencil rule. That does not mean that all judges get it right-in this case, two federal district court judges invalidated the RCAs. Drafting a restrictive covenant requires the balancing of multiple considerations, and the process will benefit from consultation with attorneys who have experience drafting and defending them. The advice of experienced counsel could maximize the chance that a court will find your restrictive covenant reasonable, or at least invoke the blue pencil rule, rather than invalidating the restrictive covenant in its entirety.

And that is where we can help. Archer's [Trade Secret Protection and Noncompete Group](#) boasts a team of attorneys with a wealth of experience in drafting and reviewing restrictive covenants. And, if the need arises, we can also enforce restrictive covenants through litigation. If you have questions, feel free to call [Dan DeFiglio](#) at (856) 616-2611, [Anthony Fassano](#) at (856) 616-2618, or any member of Archer's Trade Secret Protection Group in Haddonfield, N.J., at (856) 795-2121, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, or in Philadelphia, Pa., at (215) 963-3300.

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