“Don’t Drive Angry!” It Isn’t Groundhog Day, But Another Court Upholds ADP’s Restrictive Covenants

Client Advisories

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Bill Murray’s words in the 1993 classic Groundhog Day have so far withstood the test of time. So too might a principle (if not the words themselves) recently enunciated by a New Jersey appeals court.

If it seems like we just wrote about a court upholding and enforcing (after modifying) ADP’s restrictive covenants against former employees who went to work for a competitor, that’s because we did. In that case, *ADP v. Rafferty*, 923 F.3d 113 (3d Cir. 2019), the Third Circuit examined ADP’s Restrictive Covenant Agreement (“RCA”), which contained a non-solicitation provision that prohibited certain high-performing former employees from soliciting ADP’s current or prospective clients and marketing partners for one year following termination of employment. The RCA’s non-compete provision prohibited the former employees from working for a competitor in the same geographic area for two years after termination. The Third Circuit held that the RCAs were not unenforceable per se, and sent the cases back to the district courts for “blue penciling,” which is the process by which the court modifies restrictive covenants to the extent that they’re unreasonable.[1]

The most recent case, *ADP v. Kusins*, 2019 WL 3367212 (N.J. Super. Ct. Ap. Div. July 26, 2019), may inspire a sense of déjà vu. This time, the New Jersey Superior Court, Appellate Division, dealt with the same challenge to the RCA raised by ADP former employees who went to work for the same competitor. And the court reached the same conclusion: the RCA required blue penciling, but was otherwise enforceable.

As you may recall, the *Rafferty* court relied on 50 years of New Jersey case law to conclude that, if a restrictive covenant is overbroad, the answer is to modify, rather than invalidate, the restrictive covenant. In doing so, the court must balance the employer’s legitimate business interests with the need to avoid hindering competition or employee mobility, while also protecting the public from harm. Since the lower courts in *Rafferty* simply invalidated the RCA, the Third Circuit remanded the cases so the lower courts could apply the blue-pencil rule.

The *Kusins* court relied on *Rafferty* and the body of New Jersey case law to reach the same conclusion: to the extent the RCAs were unreasonable, they should be blue-penciled. The court then went a little further than the

Rafferty court and offered some specific guidance on how the lower court should blue-pencil the RCA. First, the court noted that the RCA's non-solicitation provision could apply only to clients with whom the former employee was involved or about whom the former employee learned while employed by ADP. Second, for the non-compete provision, the former employees could only be prohibited from working for competitors in the same geographic area where they worked for ADP.

Thus, ADP substantially prevailed in this case, in much the same way as it did in *Rafferty*. However, it's important for businesses to remember the costs associated with enforcing restrictive covenants. Both *Rafferty* and *Kusins* held that the RCAs were unreasonably broad and required blue-penciling. In fact, ADP conceded that the RCAs were overbroad insofar as they purported to prohibit solicitation of ADP's prospective clients, regardless of whether the former employee learned about the prospective client while working for ADP. ADP admitted that blue-penciling was appropriate for that clause, and the court agreed.

The bottom line is that it's in an employer's interest to ensure that its restrictive covenants are reasonable and enforceable as written. If you invite the court to pick up the blue pencil, there's a chance you'll get more blue lead than necessary. *Kusins* actually involved six consolidated appeals. That means ADP had to litigate six individual cases at the trial-court level and an appeal, and then go back to the trial court for remand. Although the *Kusins* court substantially upheld the RCAs, it only did so after a considerable amount of time (and money) was spent on litigation.

Employers should take the time now to evaluate their restrictive covenants in light of these recent developments in the law. And that's where we can help. Archer's Trade Secret Protection and Non-Compete 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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[1] If "blue penciling" seems familiar, it's because we also wrote about it recently.