

Noncompete News: Eleventh Circuit Reaffirms Distinction Between Noncompete Provisions and Nonsolicitation of Customers Provisions in Georgia

6/22/2010

In a recent decision, *H&R Block Eastern Enterprises, Inc. v. Morris*, the Eleventh Circuit Court of Appeals reversed a trial court's decision holding certain restrictive covenants unenforceable under Georgia law. After H&R Block informed Ms. Morris that she was ineligible for rehire, she started a competitive tax service and began preparing returns for former H&R Block clients that she had serviced. H&R Block sought to enjoin Ms. Morris from violating the noncompete and nonsolicitation provisions of her employment agreement.

Section 11(a) of the agreement, labeled Noncompetition Covenant, stated that, for a two-year period following the expiration of the agreement, Ms. Morris could not:

directly or indirectly, provide any of the following services to any of the Company's Clients: (i) prepare tax returns, (ii) file tax returns electronically, or (iii) provide any alternative or additional service or product that associate provided or offered as an employee of the company. . . .

These restrictions were limited to (i) a territory identified as Ms. Morris's district of employment (which was identified previously in the agreement) and (ii) a twenty-five-mile radius as measured from the office to which Ms. Morris was assigned. Attached to the agreement was a map that actually identified the restricted territory. The agreement further defined "company clients" as "(i) every person or entity with whom associate had contact because associate prepared or electronically transmitted their federal or state tax return during the term of this agreement and (ii) every person or entity with whom associate had contact because associate provided or offered additional or alternative services or products to such person or entity as an employee of the company during the term of this agreement."

The trial court analyzed this provision of the agreement as a nonsolicitation of customers provision. Under Georgia law, a nonsolicitation of customers provision may **not** prohibit an employee from **accepting** unsolicited business from that customer. The Eleventh Circuit, however, stated that the trial court undertook an improper analysis. Relying on *Habif, Arogeti and Wynne v. Baggett*, a 1998 Georgia Court of Appeals decision, the Eleventh Circuit explained the difference between a noncompetition and a nonsolicitation of customers provision. A noncompetition covenant "may preclude the employee from accepting related business (whether solicited or not) from any clients (whether previously contacted by him or not) if the employee is officed in, or is to

perform the restricted activities in, a forbidden territory." A noncompetition provision must contain "a territorial limitation sufficient to give the employee notice of what constitutes a violation of the restrictive covenant by specifying with particularity the territory in which the employee's conduct is restricted." A noncompetition provision must further restrict the type of activities the employee is prohibited from performing. On the other hand, a nonsolicitation covenant was designed primarily to protect the employer's investment of time and money in developing customer relationships, and only requires a territorial restriction if the forbidden clients include clients with whom the employee did not have a relationship prior to his departure. A nonsolicitation of customers covenant may not preclude the employee from accepting unsolicited business from the employer's clients.

The Eleventh Circuit determined that the trial court inappropriately applied the nonsolicitation of customer analysis to what was, in fact, a noncompete. The noncompete provision had an appropriate duration (two years). With regard to territorial coverage, the covenant was limited to a specifically identified district of employment to which Ms. Morris was assigned while at H&R Block and a twenty-five mile radius from the H&R Block office where Ms. Morris worked. The geographic area was illustrated by a map accompanying an agreement, and was thus identified and disclosed to Ms. Morris at the time she signed the contract. Finally, the scope of prohibited activities was sufficiently narrow. The provision prohibited her from performing those duties she performed on behalf of H&R Block, which included the preparation of tax returns. Indeed, the agreement's prohibited activity restriction was even more narrow than that required by Georgia law because it limited those prohibited activities to providing these tax services only to the company clients with which she had contact while employed by H&R Block.

Because the Eleventh Circuit determined that the noncompetition provision was enforceable under Georgia law, it then went on to analyze the independent nonsolicitation of customers provision that the trial court had automatically rendered unenforceable (because under Georgia law a noncompetition provision and nonsolicitation of customers provision rise and fall together; if one is unenforceable the other is automatically rendered unenforceable). The nonsolicitation of customers provision prevented Ms. Morris from directly or indirectly soliciting or attempting to solicit any company client with which Ms. Morris had contact while at H&R Block for the purpose of offering tax preparation services. The nonsolicitation restriction was for a two-year period. Because the nonsolicitation of customers provision did not prohibit Ms. Morris from accepting business from those clients with which she had contact, had a reasonable time restriction, and limited the purpose of the solicitation to the provision of those services offered by H&R Block, the Eleventh Circuit held that the nonsolicitation of customers provision was also enforceable.

Bottom Line

This decision is important for several reasons. First, it demonstrates Georgia's unique approach to restrictive covenant law. Over a period of decades, the courts have developed a fairly bright-lined set of tests to determine whether restrictive covenants are or are not enforceable. While the purposes of a noncompete provision and a nonsolicitation of customers provision can and often do overlap, they are distinct creatures under Georgia law and they are subject to different tests for reasonableness. This decision also affirms that Georgia's existing restrictive covenant law is not necessarily pro-employer or pro-employee. Rather, if a restrictive covenant is drafted to be enforceable under Georgia law, it will be upheld if it is violated. Here, there was no dispute that Ms. Morris had performed tax services for former H&R Block clients that she serviced, and that she did so within the restricted territory. Accordingly, the court was compelled to follow the law that has been developed over the decades.

Finally, this decision is important because it reaffirms the distinction between noncompetition and nonsolicitation of customers provisions and reminds noncompetition practitioners of the distinction the courts use to determine whether these provisions are enforceable.