

## **Employers And Their Attorneys Left Wanting More Guidance After First Major Post-Sunbelt Decision Regarding Reasonableness of Restrictive Covenants**

**By Michael P. Tomlinson**

*October 26, 2010* – Last year, the Illinois Appellate Court of the Fourth District shook up Illinois restrictive covenant case law by rejecting the “legitimate-business-interest test,” a test that has been used by courts to determine whether a restrictive covenant is reasonable (together with the reasonableness of the covenant’s time and geographic limitations), and thus enforceable. *Sunbelt Rentals, Inc. v. Ehlers*, 394 Ill. App. 3d 421, 432 (2009). In order for a business to show that a restrictive covenant was reasonable under the test, an employer had to show that the covenant protected a “legitimate business interest.” Pursuant to applicable case law, a legitimate business interest exists 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. v. Summers*, No. 2-10-0073, 2010 WL 2970375, \*10 (2d Dist. Oct. 4, 2010).<sup>1</sup>

In an opinion that at the very least made attorneys and judges rethink the viability of the legitimate-business-interest test, the *Sunbelt* Court rejected the test, finding that its use was not consistent with the “supreme court’s long history of analysis in restrictive covenant cases.” *Sunbelt*, 394 Ill. App. 3d at 431. The *Sunbelt* Court instead cited the reasonableness test applied by the Illinois Supreme Court in *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill.2d 52, 76 (2006), which requires that “[i]n determining whether a restraint is reasonable it is necessary to consider whether enforcement will be injurious to the public or cause undue hardship to the promisor, and whether the restraint imposed is greater than is necessary to protect the promisee.” *Steam Sales*, 2010 WL 3970375, at \*10 (quoting *Mohanty*, 225 Ill.2d at 76 (quotations and citations omitted)).

In the first major restrictive covenant decision by the Illinois appellate court following *Sunbelt*, the Court in *Steam Sales Corporation v. Summers* recognized that “application of *Mohanty*’s reasonableness test versus the legitimate-business-interest test can lead to different results . . . because the legitimate-business interest test is outcome-determinative in cases where the employer is unable to establish either a near-permanent relationship or the attainment of confidential information.” *Id.* at \*11. As the *Steam Sales* Court pointed out, the legitimate-business-interest test makes it more difficult for employers to show that a restrictive covenant is reasonable than simply applying the *Mohanty* test. *Id.* As the Court stated, under the legitimate-business-interest test “a restraint that is reasonable in terms of time and territory will still not be enforceable if the employer is unable to establish a legitimate business interest.” *Id.* However, “[d]oing away with the legitimate-business-interest test would not relieve an employer of

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<sup>1</sup> Also available at <http://www.state.il.us/court/Opinions/AppellateCourt/2010/2ndDistrict/October/2100073.pdf>. The opinion has not yet been released for publication in the permanent reporters and as such, remains subject to revision or withdrawal.

demonstrating a protectable interest; it would simply allow for a more contextual approach dependent on the particular facts and circumstances of the case.” *Id.*

Ultimately, because applying the legitimate-business-interest test was not outcome-determinative in *Steam Sales*, the Court found that it did not have to decide whether it was *required* to apply a test other than the legitimate-business-interest test.<sup>2</sup> *Id.* Rather, because the Court found a legitimate business interest to be present, it found that a sufficient protectable interest existed. *Id.* In other words, because a legitimate business interest was present, the Court did not need to determine whether any other claimed protectable interest was sufficient to show that the restrictive covenant at issue was reasonable. After finding that the time limitation and lack of a geographic limitation were reasonable, the Court affirmed the circuit court’s decision to grant a preliminary injunction enforcing the covenant.

Despite not having to decide whether to agree with the *Sunbelt* Court’s analysis, the *Steam Sales* Court stated, “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.* (internal citation omitted) (emphasis in original). Although dicta, these comments seem to provide at least some guidance for practitioners and judges dealing with the issue of whether a restrictive covenant is enforceable. Most importantly, it appears that while the appellate court may be willing to reevaluate whether an employer needs to satisfy the legitimate-business-interest test for its restrictive covenant to be deemed reasonable, a showing of *some* protectable interest will be required. For now, satisfying the legitimate-business-interest test seems to suffice to show that a protectable interest exists. As such, to the extent possible, employers and attorneys drafting restrictive covenants should continue to take the steps necessary to ensure that the interest the covenant is intended to protect is one of the recognized “legitimate” business interests (*i.e.*, existence of near permanent relationships or protection of confidential information).

It is difficult to determine at this point what other types of interests the courts may deem to be protectable as the case law develops. However, even the cases discussed by the *Sunbelt* Court can be seen as not simply examining the time and territory restrictions in a covenant, but rather

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<sup>2</sup> The covenant at issue in *Steam Sales* contained no geographic limitation, but restricted the employee as follows:

For a period of two (2) years following the termination of Summers’ employment with Steam Sales, Summers shall not solicit, offer to provide, provide sell or offer to sell any service or product identical to or similar to those which Steam Sales sells to any customer to whom Summers or Steam sales has made sales during the immediately preceding two (2) year period prior to the date the employment relationship ends.”

as protecting interests in current customers or patients (regardless of whether those relationships were near permanent), if the restraints are tailored narrowly enough in terms of both time and geographic scope. *See Sunbelt*, 394 Ill. App. 3d at 428-30. The *Steam Sales* decision 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.

If you have any questions regarding drafting, seeking to enforce, or defending against the enforcement of restrictive covenants, contact Michael P. Tomlinson at Tomlinson Law Office, P.C. Mr. Tomlinson will help you ensure that your rights are protected to the fullest extent possible. For more information, call (312) 726-8770 or e-mail [mtomlinson@tomlinson-law.com](mailto:mtomlinson@tomlinson-law.com).