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Noncompete News: Georgia Court uses Restrictive Covenant Act to Blue Pencil Nonsolicit Agreement

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Executive Summary: In the first published decision applying Georgia's new Restrictive Covenants Act ("RCA"), the federal district court for the Northern District of Georgia "blue penciled" or modified an otherwise overbroad nonsolicitation of customers provision.

In *PointeNorth Insurance Group v. Zander*, Zander, an insurance broker, signed a nonsolicit and nondisclosure agreement on May 11, 2011 (ironically, the same day the legislation curing any constitutional defect in the RCA became effective). In September 2011, Zander resigned and created a competing insurance company. When Zander sent an e-mail to people that may have included some of PointeNorth's client, PointeNorth sued.

The nonsolicit at issue stated that Zander, for a 2-year period post employment "will not solicit, accept or attempt to solicit or accept . . . business from any of the Employer's clients . . . with whom Employee had any contact **or** who were clients of Employer within three months immediately preceding such termination of this Agreement."

After reviewing the history of the RCA, and acknowledging that the agreement was subject to the RCA, the Court held:

"Because the agreement . . . was signed on May 11, 2011, that agreement is subject to the new legislation which allows this court to blue pencil any overbroad or otherwise offensive passages. Thus, while the Court finds the restrictive covenants overbroad in that they extend to "any of the Employer's clients" – not just the ones with whom Zander interacted – the Court may remedy that finding by blue penciling the provision to only apply to customers that the Defendant contacted and assisted with insurance." Accordingly, the Court enjoined Zander "from soliciting any of PointeNorth's customers with whom Zander had contact during her employment."

Under the law that exists for any Georgia agreement signed prior to November 1, 2011 (and arguably any agreement that was signed prior to May 11, 2011), the above nonsolicit of customers would have been struck down and rendered unenforceable for two primary reasons: (1) the nonsolicit included a provision prohibiting Zander from "accepting" work from customers, and prior Georgia law (and arguably law under the RCA) would find automatically overbroad a nonsolicit that restricted an employee from accepting – as opposed to soliciting – business from a customer; and (2) the nonsolicit including a restriction against soliciting all of the employer's customers, not just the

ones with which Zander had contact.

What is interesting to note – and may likely be a pattern for future decisions – is that the Court applied the law that existed prior to the RCA to define what it believed was reasonable and what it believed was unreasonable (and therefore needed to be blue penciled). Nevertheless, this Court's use of the new blue pencil rule allowed an otherwise unenforceable nonsolicit to survive.

If you have any questions regarding the Court's decision or other labor or employment issues, please contact Jeff Mokotoff, jmokotoff@fordharrison.com, the author of this article and editor of the *Noncompete News,* or the Ford & Harrison attorney with whom you usually work.