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Dulling The Blue Pencil

Greater flexibility shown in interpreting restrictive covenants

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The law of restrictive covenants in employment had been well settled in Connecticut for many years: Non-compete agreements must be reasonable as to scope, geography and time; and non-solicitation agreements may only relate to actual customers.

Above all, employment restrictive covenants are to be narrowly construed and Connecticut adopted the blue pencil rule, by which the only alteration a court may make to unreasonable terms of a non-compete agreement is to strike them out, leaving language that is either enforceable or meaningless.

While these simple rules of construction led to creative drafting (where, for example, employees agreed to be bound by six months, then six months more and six months more, instead of simply 18 months), they also led to a good degree of certainty: Either the restrictive covenants were well-drafted with severable terms or you were out of luck.

A June 2009 Appellate Court decision, however, may signal a large-scale change to these rules. In *Rogal v. Randall*, the Appellate Court interpreted an employment agreement to prohibit an employee from soliciting the former employer's customers for two years even though the restrictive covenant contained no prohibitory language.

In October 2009, the State Supreme Court certified the question of whether the Appellate Court properly determined that the trial court should have supplied missing words in a non-solicitation provision in an employment agreement, but *Rogal* is currently good law.

Missing Words

The defendant, Uta Peters Randall, had been employed as an insurance broker by plaintiff Hilb Rogal & Hobbs Co. (Rogal), an insurance brokerage firm. While employed by Rogal, Randall signed an "Employment, Non-Solicitation, and Confidentiality Agreement," pursuant to which she agreed that for two years after she ceased working for Rogal, "directly or indirectly, solicit, divert, or take away insurance-related business" from plaintiff. Missing were the words by which she agreed "not to" solicit business away from Rogal. As written, the restrictive covenant contained no language prohibiting Randall's future activities.

While working at Rogal, Randall provided services to Staples, the office supply retailer. More than a year after she left Rogal, Randall pitched Staples for her new employer and won the business. This resulted in an annual loss of more than $500,000 in broker fees to Rogal, which sued to enforce the non-solicitation agreement.

The Superior Court considered the missing words in the non-solicitation clause to be fatal, stating that the clause, as written, was meaningless and unenforceable. The Appellate Court reversed and remanded for a new trial. Interestingly, the Appellate Court did not reform the agreement to make it enforceable because the plaintiff failed to request that remedy. Instead, the court exercised a new power to review and interpret restrictive covenants.


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First, the court found that the "intent of the non-solicitation agreement is plain from the objective reading of the contract," given the title of the agreement and subheadings in the agreement. The court then supplied the prohibitory language without resorting to the equitable remedy of reformation because "the contract's words may be interpolated, transposed or even rejected" to carry out the parties' intention.

The court had the authority to supply the omitted words since from the context it could ascertain what words should have been used.

The rule before *Rogal* led to predictable outcomes, even if they were at times unjust. The *Rogal* decision is not unfair, but it is a departure that causes uncertainty and will lead to increased litigation on this issue.

Disputes that in the past may have settled or not even been raised may now be fertile grounds of contention, since a party now has authority for the proposition that the intent of the parties should trump the language of the agreement.

Outside the employment law context, there is nothing particularly controversial about focusing the analysis on the intent of the parties and interpreting a contract

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to include missing words that can be inferred from the context to carry out that intent. But restrictive covenants are narrowly construed because they interfere with a person's ability to make a living and may, if not narrowly tailored, be an unlawful restraint on trade.

Under current law, non-compete agreements can only be blue-penciled, which is at odds with any intent-based interposition, transposition or addition of words. Consequently, if *Rogal* stands, it is unlikely that courts will engage in widespread rearranging or adding words to non-compete agreements any time soon. Nonetheless, *Rogal* does signal a possible chipping away of the blue-pencil rule in Connecticut toward a rule that considers the express intent of the parties and would give meaning to non-compete agreements that might otherwise be unenforceable.

Brave New World

For example, in some states courts are permitted to alter unreasonable non-compete language to make it reasonable if the agreement contains a clause specifically requesting such alteration to carry out the intent of the parties. Connecticut non-compete agreements do not typically include such a clause because other than striking out words, courts applying our law cannot alter the agreement.

The intent-based analysis of *Rogal*, if applied to non-compete agreements, can bridge the gap between the sometimes harsh consequences of the blue pencil despite the parties' clear intent. The immediate application of *Rogal* to all non-compete agreements would, however, create the same uncertainty that now exists for non-solicitation agreements as a result of *Rogal*.

If such exercise were limited to agreements containing clauses requesting alteration, it would maintain the predictable interpretation of existing non-compete agreements while permitting parties to choose whether to have the court exercise greater flexibility to carry out their intent in future non-compete agreements. This would result in a more just result, even if you foolishly draft a restriction for 18 months instead of three successive periods of six months each.

Briefing for the *Rogal* Supreme Court appeal is set to begin next month. For the foreseeable future, however, in this brave new world of alterable restrictive covenants, the written word is not necessarily the final word. ■