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Lighten Up on 'Blue Pencil' Use

By Richard M. Schall and Patricia A. Barasch, December 4, 2006

Since the New Jersey Supreme Court's decision 36 years ago in *Solari Industries v. Malady*, 55 N.J. 571, courts in this state have been permitted to "blue pencil" noncompete agreements to make their terms "reasonable and not oppressive."

Using their blue pencils, the courts on occasion have removed provisions from noncompete agreements when found unnecessary to protect the legitimate interests of an employer, narrowed the agreements' geographic scope and/or shortened the agreements' duration.

While blue penciling may have its place in those cases where relatively minor adjustments can make the provisions of a noncompete agreement reasonable and consistent with the law, overuse of the practice serves only to reward employers who would impose an oppressive agreement on employees.

Such an employer knows an overly broad noncompete agreement will serve as a blunt deterrent to its employees who might otherwise seek new employment. But that employer also knows that, even though it has imposed a patently oppressive noncompete agreement on its employees, the worst that can happen is that a court will bail it out by blue penciling the agreement to render it enforceable.

In being too quick to pull out their pencils, New Jersey courts have lagged behind courts in a number of states, including those of our neighbor, Pennsylvania, which have been much more sensitive to the perniciousness of overly broad noncompete agreements. In this regard, a particularly insightful decision is that of Judge Stewart Dalzell in *Fres-co System U.S.A Inc. v. Bodell*, 2005 U.S. Dist. LEXIS 28140 (E.D. Pa. 2005). In that case, the court refused to grant the employer's request that it blue pencil the noncompete agreement, holding that to do so would only reward the employer for the "gratuitous overbreadth" of the agreement it had drafted.

The *Fres-co* court observed that "the objection to such a practice [blue penciling] is that it tends to encourage employers . . . possessing superior bargaining power over that of their employees . . . to insist upon unreasonable and excessive restrictions, secure in the knowledge that the promise may be upheld in part, if not in full."

In the court's view, were it to blue pencil the noncompete agreement at issue, it would excuse the employer for failing to draft a narrowly tailored agreement, resulting in a "heads the employer wins, tails the employee loses" situation. Finally, the *Fres-co* court recognized that "an employer who extracts a covenant in furtherance of such a purpose [an intent to oppress the employee] comes to the court of equity with unclean hands and is, therefore, not entitled to equitable enforcement of the covenant."

New Jersey's courts can learn from the example set by Judge Dalzell in *Fres-co*. In almost every area of employment law, our courts have established a strong record of protecting the rights of employees of this state to be free from discrimination, harassment and oppression.

Indeed, even in *Solari*, where our Supreme Court first approved the use of blue penciling of noncompete agreements, the justices cautioned about its overuse, noting that, "when an employer, through superior bargaining power, extracts a deliberately unreasonable and oppressive noncompetitive covenant he is in no just position to seek, and should not receive, equitable relief from the courts."

Unfortunately, over time, our courts have increasingly lost sight of this principle. They now lag behind the courts of other states in curbing the imposition of unnecessarily broad noncompete agreements that serve both to unfairly restrain employees from making a better livelihood for themselves and their families and to stifle free and fair competition. Were our courts a little less willing to pull out their blue pencils, they would be taking an important step toward bringing this area of New Jersey's law in line with our state's otherwise outstanding tradition of providing strong protection to the rights of its employees.

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