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Employment Law

Noncompete Controversy Taking Shape in Pa. Supreme Court

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It appears that things are starting to heat up in the world of noncompete clauses in employment agreements. Apparently, the Pennsylvania Supreme Court kicked off a firestorm of arguments when it decided to grant review of the Superior Court's decision in *Socko v. Mid-Atlantic Systems of CPA*, 2014 PA Super 103, 99 A.3d 928, appeal granted, 105 A.3d 659 (Pa. 2014). As reported in The Legal on Dec. 23, 2014, in "Pa. Justices Take on Noncompete Agreement Case," the Superior Court's decision affirmed a York County trial judge's ruling that defendant Mid-Atlantic Systems of CPA Inc.'s noncompete covenant with plaintiff David M. Socko was unenforceable because the employer failed to offer Socko, who was already working for the company, any benefit or change in job status. The *Socko* decision spurred a great deal of commentary in the employment law world when the three-judge panel held that the Uniform Written Obligations Act (UWOA) does not operate in the case of noncompetes.

The Superior Court's decision was the first by an appellate court addressing the question, but there have been a number of decisions from the courts of common pleas and federal district courts, with conflicting results. Now, the Supreme Court will tackle the conflict. Oral argument is scheduled for May 6, however, that deadline may be pushed back in light of some recent amicus curiae applications. On March 20, the Supreme Court granted the amicus request of a Pittsburgh lawyer, Richard Matesic. Matesic filed an amicus brief alleging that he represents individuals in employment and consumer protection-related litigation and that he maintains a "scholarly interest in the issues presented by this appeal."

In his amicus brief, Matesic urged the Supreme Court to affirm the judgment of the Superior Court, because "the strict enforcement Mid-Atlantic seeks runs entirely counter to the long-established public policy of this commonwealth, which prohibits enforcement of a noncompete agreement, obtained from an employee after the commencement of the employment relationship, unless it can be shown the employee received adequate consideration in exchange for the agreement."

On April 16, two prominent employee-side lawyer's groups filed their own application to file an amicus brief. The Western Pennsylvania Employment Lawyers Association and the National

Employment Lawyers Association of Eastern Pennsylvania (which, in full disclosure, these authors are members of) asked the Supreme Court for permission to submit a brief to address issues not raised by any party or amicus in other briefs. The organizations maintained that they have an interest in the *Socko* determination insofar as the groups represent "individual employees in cases involving labor, employment and civil rights disputes throughout the commonwealth of Pennsylvania, and are committed to working for those who have been illegally treated in the workplace." The amicus request by the employee-rights organizations has been opposed by Mid-Atlantic on timeliness grounds.

The history of Pennsylvania law on restrictive covenants, as the Superior Court related in the *Socko* opinion and similar to most states, starts with the recognition that they are agreements in restraint of trade. As such, they are antithetical to the open market principles that have made American businesses the engines of world growth and this country the most economically productive ever seen. It remains the case that Pennsylvania has been hostile to the restraint of trade, and the general rule of law in the commonwealth is that "restraints of trade, if nothing more appear, are bad," as in *Keeler v. Taylor*, 53 Pa. 467, 468-69 (1866).

Two exceptions have been recognized: where the agreement is ancillary to the sale of a business, and where it is incident to an employment relationship. Between the two, contracts incident to employment have traditionally been viewed with somewhat greater skepticism because they may prevent a former employee from earning a living and because of the reduced likelihood that the parties have equal power in their negotiation. Even the exceptions are viewed with disfavor, and are subject to requirements that do not apply to most other contracts. These include that they protect a legitimate business interest, and the mere avoidance of competition for the best employees does not qualify.

As noted in the *Socko* decision, the rule against these restraints was originally adopted in 14th century England to prevent business owners from preventing the movement of skilled workers at a time when they were in short supply, according to the opinion, citing *Morgan's Home Equipment v. Martucci*, 390 Pa. 618, 136 A.2d 838, 844 (1957). Restrictive covenants must also be reasonably limited in duration and scope. And they must be supported by adequate consideration.

As explained by the Superior Court, with other contracts, there is no requirement that consideration be adequate. The courts are not to look behind the parties' own assessments of the values of the things they agree to exchange. At common law, where a written contract is executed under seal, there does not even need to be other consideration. Nominal consideration is also enough. But, since restrictive covenants have negative public policy implications, even the ones allowed by exception must be supported by "adequate" or "valuable" consideration. The initiation of a new employment relationship satisfies this requirement, but the mere continuation of an already existing relationship does not.

Here enters the UWOA, 33 P.S. Section 6, enacted May 13, 1927, which states that a signed writing "shall not be invalid for or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." There is nothing in the statute stating that the magic language will be considered "adequate" consideration, just as there is nothing in the law governing most contracts that requires an examination of the value of the consideration exchanged. But employment relationships and restraints of trade are different.

Employers enjoy other protection for the legitimate interests of their business in protecting their intellectual property, trade secrets and confidential information. Employees have duties of loyalty, and those who are officers have additional fiduciary responsibilities. There are causes of action for interference with contract, unfair competition, conversion and fraud. The law has had very good policy reasons for erecting hurdles in the way of this, and one of those hurdles would be eliminated if the UWOA applied to noncompete clauses in employment agreements.

In short, the requirement of valuable consideration tests whether there really is a legitimate business justification for the restraint of trade, as opposed to a desire to perpetuate diminished bargaining power for employees. It is a valuable safeguard to preserve an open market for labor, and ought not to be discarded. The Superior Court relied on a century of jurisprudence disfavoring noncompetes in the employment context to conclude that mere reliance on the UWOA is not adequate consideration to support a post-hire noncompete.

More importantly, the bigger issue is whether an employment contract containing a post-hire noncompete clause, which is unsupported by additional consideration, should be exempt from the UWOA altogether. A contract that violates public policy is not one that should be enforced by any court, whether the magic language from the UWOA appears, or not. An employment agreement with a noncompete provision that is unsupported by consideration is one such agreement. Indeed, the Superior Court got it right. We shall see if the Supreme Court agrees.

Jeffrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.* ***William T. Wilson*** *is a partner at MacElree Harvey in West Chester with 35 years' experience, whose practice is concentrated on employment law, representing employees, small and medium-sized businesses. He is also a retired colonel in the U.S. Army, having served in Iraq and Kosovo, among other places. His firm serves clients in a wide variety of practice areas.* •
