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1st District: Insurance broker's non-compete clause unenforceable

Panel finds terms of agreement prevent worker from remaining in the same field

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A state appeals panel has ruled that do-not-compete provisions in a former employee's contract are too broad for an insurance brokerage firm to legally enforce.

Under the terms of the agreement as the firm argued, the employee would either need to leave his field of work or only handle similar work overseas.

AssuredPartners Inc. and ProAccess LLC filed their suit against William Schmitt in August 2013 in Cook County Circuit Court alleging breach of contract and tortious interference. The plaintiffs sought injunctive relief.

In 2014, Cook County Circuit Judge Jean Prendergast Rooney ruled that the restrictive covenants in Schmitt's employment agreement with AssuredPartners and ProAccess were overly broad and too unreasonable as a matter of law.

Rooney also refused to modify or "blue pencil" the scope agreement so that it would comply with state law. She also rejected the request from the insurance companies to modify their claims.

Rooney denied summary judgment for the tortious interference count. That part of the suit is proceeding in circuit court with an added claim of breach of fiduciary duty.

Carmen D. Caruso of the Carmen D. Caruso Law Firm, representing the plaintiff, said he believes his clients have a strong case.

"We expect to prevail when the case goes to trial on the remaining claims," Caruso said, adding that pretrial materials in that case are due in April and the case should go to trial by summer.

Robert A. Chapman of Chapman & Spingola LLP, who represents Schmitt, said in a statement that his client is "confident that he will prevail on the remaining claims pending before the trial court."

In a 24-page opinion written by 1st District Appellate Justice Laura Liu, the panel upheld Rooney's ruling.

The Oct. 26 ruling focused on provisions that stemmed from a senior management agreement Schmitt signed in 2012.

The year before, ProAccess, a New Jersey-based firm with offices in Chicago, and its parent company, Herbert L. Jamison & Co., were brought by AssuredPartners.

While all ProAccess employees were required to sign new employment agreements containing restrictive covenants after AssuredPartners' acquisition, Schmitt was given the option as a senior manager to enter into a different kind of agreement.

This agreement guaranteed him a base salary of $240,000 and four years of employment in exchange for adhering to the restrictive covenants that were the subject of the lawsuit.

Liu wrote that both Schmitt and the insurance companies characterize the circumstances surrounding the senior management agreement differently. Schmitt said he believed he had to sign it to keep his job; AssuredPartners described the agreement as being the results of significant negotiations.

Schmitt had worked for ProAccess since 2006 as an insurance broker specializing in lawyers' professional liability insurance (LPLI).

In May 2013, he sought to pursue arbitration against AssuredPartners, alleging that he had not received adequate compensation in 2012. He resigned four months later and soon began to work for Insurance Solutions Network LLC, specializing in LPLI.

Laura Liu

Days after he resigned, Schmitt sent his contact information "to the customers named in a ProAccess customer expiration list that he had serviced during his employment."

Liu wrote that the list contains important customer data.

On appeal, the panel agreed with the circuit court that the restrictive covenants within Schmitt's employment agreement were not reasonable.

For instance, the panel found the noncompetition provision would have prevented Schmitt from working with all types of professional liability insurance.

"[T]he restrictive covenant that plaintiffs seek to enforce acts as a blanket prohibition intended to bar Schmitt form working as a broker, in any capacity, within the entire universe of professional liability insurance business anywhere in the country," Liu wrote. "Such a prohibition is overbroad and unenforceable as a matter of law."

> *"Plaintiffs ... cannot cure the defects in these restrictive covenants by merely rewording, or 'rephrasing' their original claims, as the circuit court pointed out."*

Schmitt cited the 2005 1st District ruling *Arcor v. Hass* in his defense. The panel in *Arcor* also found a noncompete provision within an employment contract to be unreasonable because it " 'preclude[d] [him] from working, in any capacity, in the industry in which Arcor does business.' "

Even if the agreement were tailored to cover only legal professional liability insurance, the panel said it also failed a "reasonabless" test because it also prevents Schmitt from practicing anywhere in the United States.

"Both the geographic scope of [the senior management agreement] and the scope of activities it seeks to suppress clearly exceed that which is necessary to protect ProAccess and Jamison from threats against its business interest in the customer expiration list," Liu wrote.

The restrictive covenants also prevented Schmitt from contacting any potential customers of ProAccess and from using any information he acquired while working there in the future, even if that information was considered common knowledge in his profession. The panel ruled against these provisions as well.

ProAccess and AssuredPartners had argued that, even if the circuit court found the agreement to be overbroad, it should have amended the agreement so it conforms to Illinois law.

But the panel said the deficiencies are "too great to permit modification." The panel also upheld the Rooney's decision to refuse the insurance company's request to modify their claims. "Plaintiffs ... cannot cure the defects in these restrictive covenants by merely rewording, or 'rephrasing' their original claims, as the circuit court pointed out," Liu wrote.

Justices Joy V. Cunningham and Maureen E. Connors concurred in the opinion.

In addition to Chapman, Chapman & Spingola partner Sara Siegall and Michael J. Merrick, managing member of Merrick Law Firm LLC, also represented Schmitt.

"The appellate court's published decision makes clear that Illinois courts, in this post-*Reliable Fire* world, will still strike down facially overbroad restrictive covenants as a matter of law and will decline an employer's after-the-fact request to 'blue pencil' patently unenforceable restraints so that they comply with Illinois law," Chapman said in a statement.

Meanwhile, Caruso said the companies will respect the appellate court's ruling and will not appeal to the Illinois Supreme Court.

The case is *AssuredPartners, Inc., et al., v. William Schmitt*, 2015 IL App (1st) 141863.

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