

An October 17, 2013 decision by the Arizona Court of Appeals may substantially raise the bar for Arizona employers seeking to enforce restrictive covenants entered into by their employees, including covenants to protect confidential information. *See Orca Communications Unlimited, LLC v. Ann J. Noder et al.*, 1 CA-CV 12-0183 (Oct. 17, 2013). While most restrictive covenant cases focus on the reasonableness of the covenant duration and geographic scope, this case makes clear that the language of the restrictions is also critical to enforcing them. This case also highlights the risk for employers in using overreaching restrictive covenants.

In 2002, Orca Communications, a public relations firm, hired Ann Noder as its President. Noder had no professional public relations experience prior to joining Orca; she learned everything about the business on the job.

Noder signed a Confidentiality, Customer and Employee Non-Solicitation, and Non-Competition Agreement that prevented her from advertising, soliciting or providing conflicting services for any entity that competes with Orca.

The Agreement also prevented Noder from inducing any former or present Orca customer or prospective customer to terminate its relationship with Orca. Thus, Noder was prohibited from soliciting or accepting business from any person or entity that had contracted with Orca for any product or service, or whom Orca had contacted for the purpose of proposing business, or which had been solicited by Orca, or which Noder knew or had reason to know that Orca had considered or planned to solicit for business purposes.

Both the covenant not to compete and the customer non-solicitation covenant applied during Noder's employment with Orca and for the longest of the following periods found by a court to be reasonable: 18, 15, 12, nine or six months following the termination of Noder's employment. The covenant not to compete and the customer non-solicitation covenant were also limited by a restricted geographic territory. That is, Noder agreed not to be employed by any entity, or to solicit business from any current or prospective customer, located within the largest of the following geographic areas that a court deemed reasonable: all of the United States; all of Maricopa County, Arizona; or within 150, 100, 50, 25 or 10 miles of Orca's Phoenix, Arizona headquarters.

The Agreement also contained a confidentiality provision that prohibited Noder from using or disclosing Orca's confidential information without the company's consent. The Agreement defined "Confidential Information" as knowledge or information not generally known to the public or in the public relations industry that Noder learned from her employment with Orca and that related to Orca, its business partners, or the business of its customers or potential customers. It excluded "publicly known" information and information "readily accessible to the public in a written publication," but included information that was only available through "substantial searching of published literature" or that had to be "pieced together" from a number of publications and sources. The confidentiality provision did not contain a geographical restriction, but rather bound Noder anywhere in the world, at any time or for up to 12 months after her employment ended, whichever duration a court found reasonable. Noder formed a competing public relations firm, resigned from Orca, and allegedly began using Orca's confidential information to solicit business from its customers. Orca sued Noder for violating the Agreement and asserted additional business tort claims. The trial court dismissed the lawsuit, finding, with respect to the restrictive covenants, that each was overbroad and therefore unenforceable. Orca appealed.

The Arizona Court of Appeals affirmed the trial court's dismissal of the restrictive covenant claims, finding that the non-compete and customer non-solicitation covenants were overbroad, as they went beyond protecting Orca's legitimately protectable business interests and instead amounted to an unlawful restraint on trade. The court stated that the covenant not to compete did not simply restrict Noder from pursuing employment in which she would likely use or disclose Orca's confidential business information, but also restricted her from pursuing any type of work in the public relations industry. This, the court observed, would prevent her from competing *per se* in the public relations industry.

Likewise, the customer non-solicitation covenant imposed a restraint greater than necessary to protect Orca's legitimate interests, as it not only prevented Noder from soliciting business from persons and entities who were Orca customers at the time her employment ended, but also prevented her from soliciting or accepting business from potential customers and prospects with whom Orca had no business ties, and former customers in whom Orca no longer had a protectable interest.

The Arizona Court of Appeals also held that the confidentiality provision in Noder's Agreement was overbroad as it defined as "confidential" certain information that is publicly available, albeit requiring some effort to acquire. The court observed that "[i]nformation easily or readily available to the public remains public knowledge and not protectable as confidential information even if a member of the public may have to expend substantial time to gather it and comprehend its significance." Moreover, the Agreement defined as "confidential" all information that Noder came across during her employment with Orca, regardless of whether the information was truly confidential, that is, not known to the public and substantially inaccessible.

Finally, Orca failed to include a geographical restriction in the confidentiality provision. As a result, the Agreement as written prevented Noder from using all knowledge that she acquired during her employment by Orca at any time for the rest of her life, or at least for 12 months after her employment with Orca ended, anywhere in the world. The court suggested that the absence of a geographical restriction and the overbreadth of the definition of "Confidential Information" rendered the confidentiality provision overbroad, and was a *de facto* limitless covenant not to compete.

Notably, the court did not address the enforceability of the step-down provisions that Orca included in the restrictive covenants. Arizona employers often include progressively narrower geographical and temporal alternatives ("step-downs") in their restrictive covenants because of the state's adoption of the "blue pencil" doctrine, which allows courts to strike out grammatically severable, overbroad provisions in restrictive covenants and instead enforce the maximum reasonable alternative. Because the prohibited conduct itself was overbroad, the court did not decide whether the inclusion of the step-down provisions rendered the restrictive covenants reasonable.

This decision is an important reminder to Arizona employers that restrictive covenants must be carefully drafted so that they are narrowly-tailored to the legitimate interests sought to be protected. Both the prohibited activity and the duration and geographic scope provisions must be limited, to only what is necessary to protect to protect legitimate interests, such as the preservation of valuable current customer relationships and the protection of truly confidential information.

The decision is also noteworthy as it suggests that even confidentiality provisions – which often are drafted so as to apply in perpetuity – may, in certain circumstances, be treated like covenants not to compete and covenants not to solicit, and should be limited in duration and geographic scope to ensure enforcement.

Employers with Arizona employees are urged to review their restrictive covenant agreements to ensure that they are not overbroad and therefore unenforceable. In particular, employers should consider whether the restrictive covenant language goes beyond what is needed to protect confidential information, customer relationships and other protectable interests, and whether the confidentiality provisions apply to information which is not truly confidential, such that the absence of temporal or geographical limits may render them unenforceable. Your Squire Sanders (US) LLP labor and employment lawyer is available to assist.

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