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Contracts HB 30

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CONTRACTS

Illegal and Void Contracts Generally: Amend Chapter 8 of Title 13 of the Official Code of Georgia Annotated, Relating to Illegal or Void Contracts Generally, so as to Repeal Section 2 Part 1 of Chapter 8 of Title 13 of the Official Code of Georgia Annotated, Relating to Contracts in Partial Restraint of Trade; Change Provisions Relating to Contracts Contravening Public Policy; Repeal Article 4 of Chapter 8 of Title 13, Relating to Restrictive Covenants in Contracts; Provide a Statement of Legislative Findings; Define Certain Terms; Provide for Applicability; Provide for the Enforcement of Contracts that Restrict or Prohibit Competition in Certain Commercial Agreements; Provide for the Judicial Enforcement of Such Provisions; Provide for the Modification of Such Provisions; Provide for Rebuttable Presumptions; Provide for Enforcement by Third-Parties; Provide for Construction; Provide for Related Matters; Provide for an Effective Date and Applicability; Repeal Conflicting Laws, and for Other Purposes.

CODE SECTIONS:	O.C.G.A. §§ 13-8-2.1 (amended), -50, -51, -52, -53, -54, -55, -56, -57, -58, -59 (new)
BILL NUMBER:	HB 30
ACT NUMBER:	99
GEORGIA LAWS:	2011 Ga. Laws 399
SUMMARY:	The Act primarily focuses on restrictive covenants in employer-employee relationships, specifically defining and codifying reasonable restraints on trade. The Act is in response to a constitutional amendment ratified by the voters on November 2, 2010, which was said to have left uncertainty in the realm of restrictive covenant agreements. This Act intends

to remove any such uncertainty by reenacting the substantive provisions from the 2010 constitutional amendment and also by enacting new Code sections. The Act provides that any contract against the public policy of law cannot be enforced. Overall, the Act states that reasonable restrictive covenants in employment contracts are valid and enforceable. The Act repeals existing Code sections and replaces those sections with new Code sections that give directives to the court that lean towards upholding restrictive covenants.

EFFECTIVE DATE: May 11, 2011

History

Until recently, non-compete covenants in Georgia employment contracts had to be written according to specific rules set out by the judiciary that, if not followed precisely, would cause the non-compete covenants to be unenforceable.¹ In 2009, House Bill (HB) 173² was introduced and enacted to provide legislative guidance for employers drafting employment contracts that contained restrictive covenants.³ However, such a statute would only be valid if changes were made to the Georgia Constitution to allow the General Assembly the power to authorize contracts that restrict competition.⁴ In 2010, Georgia voters passed a constitutional amendment to allow the State to legislate employment contracts that contain restrictive

1. McKenna Long & Aldridge, LLP, *Georgia Legislature Attempts to Clear Up Uncertain Validity of New Noncompete Law*, Feb. 16, 2011, <http://www.mckennalong.com/news-advisories-2453.html> (last visited June 3, 2011) [hereinafter McKenna Article].

2. HB 173 passed. Act No. 64, 2009 Ga. Laws 231. HR 178 was the proposed constitutional amendment, which passed the General Assembly in 2010 and was a ballot measure during the November 2010 general election. 2010 Ga. Laws 1260. It was necessary for this constitutional amendment to be adopted by the voters for the Act (HB 173) to be effective.

3. McKenna Article, *supra* note 1.

4. *Compare* GA. CONST. art. III, § 6, para. 5 (as it read in 2010) *with* GA. CONST. art. III, § 6, para. 5 (as amended effective Jan. 2011).

covenants, meaning the Georgia Code now sets forth the specifics for drafting and upholding non-compete clauses.⁵ Voters ratified this constitutional amendment on November 2, 2010,⁶ but the constitutional amendment was not effective until January 1, 2011.⁷ Uncertainty ensued, however, because HB 173 stated that statutory changes would go into effect the day after ratification of the constitutional amendment—November 3, 2010—while the actual constitutional amendment did not go into effect until January 1, 2011.⁸

This uncertainty led to the introduction of HB.⁹ Overall, HB 30 started out as a replica of the bill that had previously passed, with the only noticeable difference being that this new law would be effective when approved by the Governor.¹⁰ But public concern quickly grew over this alleged “replica” when constituents realized the new bill had provisions that would seriously impact their ability to obtain new employment in a declining economic climate.¹¹ HB 30 not only fills the gap in terms of when the new law is effective, but also adds provisions to the current Code section that will now require employers to do things such as list specific competitors that employees are precluded from working for instead of simply specifying a general geographical restriction.¹²

5. *See generally* O.C.G.A. § 13-8-56(1) (2010).

6. *See* HB 30, as introduced, 2011 Ga. Gen. Assem.

7. *See* McKenna Article, *supra* note 1.

8. Neal Weinrich, *Legislation Introduced Which Would Re-enact Georgia's New Restrictive Covenants Legislation*, GEORGIA NON-COMPETE & TRADE SECRET NEWS, Jan. 28, 2011, <http://www.georgia-noncompete.com/2011/01/legislation-introduced-which-would-re-enact-georgia%E2%80%99s-new-restrictive-covenants-legislation/>.

9. *See* O.C.G.A. § 13-8-56(1) (2010).

10. *See* McKenna Article, *supra* note 1.

11. Video Recording of House Proceedings, Feb. 22, 2011 at 1 hr., 32 min., 56 sec. (remarks by Rep. Brian Thomas (D-100th)), <http://www.gpb.org/lawmakers/2011/day-17> [hereinafter House Video].

12. Michael Elkon, *Georgia House of Representatives Passes "Fix" to Restrictive Covenant Act*, TRADING SECRETS, Feb. 25, 2011, <http://www.tradesecretslaw.com/2011/02/>.

*Bill Tracking of HB 30**Consideration and Passage by the House*

Representative Wendell Willard (R-49th) sponsored HB 30.¹³ The House read the bill for the first time on January 24, 2011.¹⁴ The bill was read for the second time on January 25, 2011, and Speaker of the House David Ralston (R-7th) assigned the bill to the House Judiciary Committee.¹⁵

The bill, as originally introduced, sought to “remove any . . . uncertainty” surrounding HB 173 that was enacted during the 2009 legislative session.¹⁶ Specifically, the bill stated that HB 30 “shall become effective upon its approval by the Governor.”¹⁷ This provision was added because the validity of the 2010 Restrictive Covenants Act was at question due to it becoming effective prior to the effective date of the constitutional amendment.¹⁸ The House Judiciary Committee offered a substitute to the bill, which made an additional revision to Code section 13-8-56.¹⁹ This revision addressed what constitutes a reasonable time period that a restrictive covenant could limit or restrict an employee from seeking employment with a competitor. As originally introduced, the bill allowed for “a time period equal to or measured by [the] duration of the parties’ business or commercial relationship.”²⁰ The substitute instead provided that “during the term of the [employment] relationship, a time period equal to or measured by [the] duration of the parties’ business or commercial relationship is reasonable, provided that the reasonableness of the time period after a term of employment shall be as provided for in Code section 13-8-57.”²¹ The House Judiciary Committee favorably reported on the substitute on February 15, 2011 and the bill was read for a third time in the House

13. House Video, *supra* note 11, at 1 hr., 23 min., 55 sec. (remarks by Rep. Wendell Willard (R-49th)).

14. State of Georgia Final Composite Status Sheet, HB 30, May 24, 2011.

15. *Id.*

16. HB 30, as introduced, § 1, p. 1, ln. 22–24, 2011 Ga. Gen. Assem.

17. *Id.*

18. *See infra* History.

19. HB 30 (HCS), 2011 Ga. Gen. Assem.

20. HB 30, as introduced, § 4, p. 9, ln. 292–93, 2011 Ga. Gen. Assem.

21. HB 30 (HCS), § 4, p. 9, ln. 292–95, 2011 Ga. Gen. Assem.

on February 22, 2011.²² Despite several concerns noted by Representative Brian Thomas (D-100th) and Representative Carl Rogers (R-26th) during the February 22, 2011 House floor debate,²³ the bill passed the House the same day by a vote of 104 to 58.²⁴

Consideration and Passage by the Senate

Senator Bill Cowser (R-46th) sponsored the bill in the Senate.²⁵ The bill was read by the Senate for the first time on February 23, 2011.²⁶ Lieutenant Governor Casey Cagle (R) assigned the bill to the Senate Judiciary Committee, which offered a substitute to HB 30. The Committee substitute amended Code section 13-8-56 by making the time period, as revised by the House in its Committee substitute, based solely on the parties' relationship, removing the words "business or commercial" from the relationship requirement.²⁷ This substitute was favorably reported by the Senate Judiciary Committee on March 28, 2011, read for a second time by the Senate on March 29, 2011, and read for a third time and passed by the Senate on April 12, 2011.²⁸ The bill passed the Senate by a vote of 42 to 6.²⁹ Despite this seemingly small change, on April 14, 2011, the House refused to agree to the Senate's changes.³⁰ That same day, the Senate receded from its substitute to HB 30.³¹ On April 21, 2011 the bill was sent to the Governor for his approval and signed into law on May 11, 2011.³²

22. State of Georgia Final Composite Status Sheet, HB 30, May 24, 2011.

23. House Video, *supra* note 11, at 1 hr., 32 min., 32 sec. (remarks by Rep. Brian Thomas (D-100th), followed by remarks by Rep. Carl Rogers (R-26th)). Representative Thomas and Representative Rogers raised several concerns regarding how this bill would negatively impact their constituents in the current job market. *Id.* Representative Thomas feared that employees would be forced to sign contracts containing restrictive covenants with no geographical limitations, thereby making it difficult for employees to change jobs and move to a new employer that was in the same geographical territory as their current employer. *Id.* Representative Rogers shared Representative Thomas's concerns, that job-seeking constituents would be "hamstrung because of this legislation" should they attempt to find a new job in their field of expertise in the area they live and work. *Id.*

24. *Id.*; Georgia House of Representatives Voting Record, HB 30 (Feb. 22, 2011).

25. Georgia General Assembly, HB 30, Bill Tracking, http://www1.legis.ga.gov/legis/2011_12/sum/hb30.htm.

26. State of Georgia Final Composite Status Sheet, HB 30, May 24, 2011.

27. HB 30 (SCS), § 4, p. 9, ln. 293, 2011 Ga. Gen. Assem.

28. State of Georgia Final Composite Status Sheet, HB 30, May 24, 2011.

29. Georgia House of Representatives Voting Record, HB 30 (Feb. 22, 2011).

30. State of Georgia Final Composite Status Sheet, HB 30, May 24, 2011.

31. *Id.*

32. *Id.*

The Act

The Act amends Chapter 8 of Title 13 of the Official Code of Georgia Annotated with the primary purpose of establishing a date that the new laws on restrictive covenants will be effective.³³ The changes to the Code addressing restrictive covenants in the Act are expressly designed to “provide statutory guidance so that all parties to such agreements may be certain of the validity and enforceability of such provisions and may know their rights and duties according to such provisions.”³⁴

The Act attempts to clear up the ambiguity as to when employers and employees should begin using the guidelines set forth by the law in drafting non-compete covenants in Section 5 of the Act, which states that it “shall become effective upon its approval by the Governor . . . and shall apply to contracts entered into on and after such date and shall not apply in actions determining the enforceability of restrictive covenants entered into before such date.”³⁵

The Act now expressly authorizes such a modification in Code section 13-8-54, stating that “if a court finds that a contractually specified restraint does not comply . . . then the court may modify the restraint provision.”³⁶ The Act defines “modify” as “[s]evering or removing that part of a restrictive covenant that would otherwise make the entire restrictive covenant unenforceable,” and “[e]nforcing the provisions of a restrictive covenant to the extent that the provisions are reasonable.”³⁷ While the court cannot rewrite a contract, the Act gives a court the power to strike portions of the contract in order to enforce the provisions that are found legal and to limit other provisions it deems unreasonable.

The Act also broadens the customer nonsolicitation provision.³⁸ According to pre-existing Georgia law, this provision had to be narrowly defined to include only the customers an employee had

33. See O.C.G.A. § 13-8-50, et. seq. (Supp. 2011).

34. O.C.G.A. § 13-8-50 (Supp. 2011).

35. 2011 Ga. Laws 409.

36. O.C.G.A. § 13-8-54 (Supp. 2011).

37. O.C.G.A. § 13-8-51 (Supp. 2011).

38. See O.C.G.A. § 13-8-51 (Supp. 2011); O.C.G.A. § 13-8-51(10) (Supp. 2011).

actual contact with during his or her employment.³⁹ The Act broadens the definition of material contact to include both customers and potential customers that the employee had actual contact with.⁴⁰ Additionally, the Act includes in the definition customers and potential customers that the employee “dealt [with] on behalf of the employer,” that the employee “supervised,” that the employee “obtained confidential information [from] in the ordinary course of business as a result of the employee’s association with the employer,” and any customer or potential customer that the employee made a sale from which “results or resulted in compensation, commissions, or earnings . . . within two years prior to the date of the employee’s termination.”⁴¹ Additionally, this provision no longer requires that employers define the types of products or services that are considered competitive for this provision to be enforceable.⁴²

Section 4 of the Act creates a new Code section 13-8-53, which places a limit on the types of employees with whom an employer can enter into a restrictive covenant agreement.⁴³ Pre-existing Georgia law allowed the employer and *any* employee to enter into a non-compete agreement.⁴⁴ The Act now limits the types of employees to sales persons, managers who oversee two or more employees, and individuals who constitute “key employees” under the Act.⁴⁵ The Act also no longer requires that there be any express reference to the geographic area that is considered competitive.⁴⁶ This latter provision in the Act has raised concern among individuals who work and reside in Georgia, but whose employers have a wide geographical reach.⁴⁷

39. See Ford & Harrison LLP, *Noncompete News: Uncertainty Remains Regarding Georgia Noncompete Laws*, Mar. 14, 2011, <http://www.jdsupra.com/post/documentViewer.aspx?fid=e2a68246-8a21-403e-914b-e831ff35c38f>.

40. See O.C.G.A. § 13-8-51 (Supp. 2011). This addition deeply concerned Representative Rogers, who stated that this bill has the ability to “put a lot of [Georgia citizens] out of business for a minimum of two years.” House Video, *supra* note 11, at 1 hr., 38 min., 24 sec. (remarks by Rep. Rogers (R-26th)).

41. O.C.G.A. § 13-8-51(10) (Supp. 2011).

42. See Ford & Harrison LLP, *supra* note 39.

43. See O.C.G.A. § 13-8-53 (Supp. 2011).

44. See Ford & Harrison LLP, *supra* note 39.

45. See O.C.G.A. § 13-8-51(5) (Supp. 2011).

46. See O.C.G.A. § 13-8-56 (Supp. 2011).

47. See House Video, *supra* note 11, Feb. 22, 2011 at 1 hr., 32 min., 32 sec. (remarks by Rep. Brian Thomas (D-100th)). Representative Thomas spoke out against this broad change to the law, arguing that if an employee signed one of the contracts, got a job and very soon after was let go because there was no more work, that this employee would not be able to pursue their career so long as they were “dealing with any customers or any geography that happened to include your former employer.” *Id.*

Analysis

The Act broadens pre-existing Georgia non-compete covenant laws in ways that make these agreements very asymmetrical in favor of employers. A prime example and major concern is the customer nonsolicitation provision found in the new law. Previously, this type of provision had to be narrowly defined to only include customers the employee had actually contacted.⁴⁸ Another hotly contested change is the broadening of the geographical area covered in the restrictive covenant. The new version of the Act basically removes any specific limitations as to the geographic reach of a restrictive covenant, allowing an employer to prevent an employee from working for a competitor located not only in Georgia, but potentially nationwide as well.⁴⁹ Concern abounds because the changes that the Act makes to the law seem very employer-focused. Given the current economic slowdown which began in 2008 and, as of 2011, continues to result in high unemployment, it is not difficult to understand that many are concerned that the passage of the Act will do nothing to help Georgia's rising unemployment numbers, but instead make it that much more difficult for individuals to negotiate jobs with employers who feel empowered to draft heavily one-sided employment contracts.

Those in support of the Act believe that it will help draw more employers to Georgia, and this was one of the main reasons supporters rallied behind the bill to ensure its enactment.⁵⁰ According to the bill's House sponsor, Representative Wendell Willard (R-49th), companies that allow employees access to their trade secrets can be harmed by these employees if and when they are hired by a direct competitor and use this information in their new employment, thereby causing financial harm to the original employer.⁵¹ Additionally, supporters urge that there are parts of the law that are beneficial to employees. For instance, prior to this law, employers could require that any employee agree to the non-compete

48. *Id.*

49. House Video, *supra* note 11, at 1 hr., 34 min., 07 sec. (remarks by Rep. Brian Thomas (D-100th)).

50. *Id.* at 1 hr., 29 min., 31 sec. (remarks by Rep. Wendell Willard (R-49th)).

51. *Id.*

provision.⁵² Now, employers can only enforce a non-compete covenant against certain employees.⁵³ For this reason, supporters stress that the Act provides heightened protection to employees to ensure that employment contracts are not overbroad.

Unintended Consequences

Supporters of the Act do not foresee any unintended consequences arising from its passage⁵⁴ because the type of employment agreements the Act permits are not novel.⁵⁵ However, those opposed to the Act believe that the new law may bring about unintended consequences to the State, such as less economic development, fewer high-paying, information technology jobs, and less predictability in litigation.

Some practitioners in Georgia are concerned that the legislation is not well-thought out in terms of its future impact.⁵⁶ As previously mentioned, supporters of the bill believe that it will be good for Georgia's economy.⁵⁷ However, the opposition has pointed out that

52. Ford & Harrison LLP, *supra* note 39.

53. *See id.* (stating that non-compete covenants only include employees who customarily and regularly solicit customers, engage in making sales, have a primary duty of managing a company or one of its departments or subdivisions, directs the work of two or more employees, has the authority to hire and fire employees, or performs duties of a "key employee" or "professional" as defined by the Act).

54. Telephone Interview with Rep. Wendell Willard (R-49th) (Apr. 1, 2011) [hereinafter Willard Interview] (on file with the Georgia State University Law Review).

55. Telephone Interview with Kevin Levitas (D-82nd) (Apr. 4, 2011) [hereinafter Levitas Interview] (on file with the Georgia State University Law Review) (explaining that if they had foreseen unintended consequences, they would have been addressed). Further, Mr. Levitas, a former representative, pointed out that other states have these kinds of laws, and they function well. *Id.*

56. Telephone Interview with Benjamin I. Fink, Shareholder in Berman Fink Van Horn P.C. (Apr. 5, 2011) [hereinafter Fink Interview] (on file with the Georgia State University Law Review) (indicating that he was opposed to both the initial legislation from 2009 and the Act because he did not feel the legislature studied the issue carefully enough before acting. For example, he feels the legislature ignored several academic studies which found that greater enforcement of non-competes hinders entrepreneurial activity and economic development and the fact that there are no academic studies which find otherwise.). Mr. Fink "concentrates his litigation practice on disputes involving non-compete agreements, trade secrets, and other competition-related matters." Super Lawyers: Attorney Profile, Benjamin I. Fink, <http://www.superlawyers.com/georgia/lawyer/Benjamin-I-Fink/f6b234a4-72d3-4005-ab5e-bb1254c39a58.html>. Mr. Levitas deemed Mr. Fink to be the "chief opponent" of the bill. Levitas Interview, *supra* note 55. *See* Telephone Interview with Rep. Carl Rogers (R-26th) (April 4, 2011) [hereinafter Rogers Interview] (on file with the Georgia State University Law Review) (stating that he believes this bill is not as well thought out as it should be and that it was a knee-jerk reaction to an occurrence with a large pharmaceutical company).

57. Levitas Interview, *supra* note 55 (stating that one of the reasons he supports the Act is because it will make Georgia more economically competitive with neighboring states).

when non-compete contracts are “liberally enforced,” it can result in fewer start-up companies and small businesses.⁵⁸ Further, other opponents of the Act are fearful that the entrepreneurial spirit in Georgia will be lost, or at least diminished.⁵⁹ On the other hand, supporters believe that the Act will make the state more attractive to businesses that did not previously want to relocate or expand within Georgia because of the laws previously in force.⁶⁰

Some people believe that essentially all employees will be forced to sign these agreements, and if they refuse, they will either not be hired, or they will be fired.⁶¹ Thus, even many people who are *currently* employed will be affected by this Act, as employers now can ask those who are already working for them to make a choice: sign a non-compete agreement or be fired.⁶² This is a difficult choice for people to make in the current tough economy.⁶³ Opponents express further concerns that if people sign these contracts and later leave their job, they will essentially be told that they could not make a living or stay in the area in which they currently work;⁶⁴ however, supporters have tried to allay these concerns. For example, Representative Willard explained that the bill will not take away one’s right of employment or one’s right to make a livelihood;

58. Fink Interview, *supra* note 56 (explaining that some academic studies have shown that agreements, such as those in issue in the Act, may hinder competition and therefore, economic development; for example, non-competes are outlawed in California, a factor which has helped foster the most successful entrepreneurial environment in the world in Silicon Valley).

59. Rogers Interview, *supra* note 56; *see also* *Rakestraw v. Lanier*, 104 Ga. 188, 30 S.E. 735, 738 (1898) (holding that contracts in unreasonable restraint of trade are contrary to public policy in part because they “discourage industry and enterprise, and diminish the products of ingenuity and skill; prevent competition, and enhance prices, and expose the public to all the evils of monopoly”). *Rakestraw* set the court’s tone on restrictive covenants in Georgia for well over a century. Fink Interview, *supra* note 56.

60. Levitas Interview, *supra* note 55.

61. Rogers Interview, *supra* note 56.

62. Fink Interview, *supra* note 56. Further, Mr. Fink explained that he does not think that, in Georgia, an employee could bring a cause of action for being fired for refusing to sign a non-compete (absent discrimination or violation of some other employment-related statute), as he or she may be able to do in some other states. *Id.* *See also* House Video, *supra* note 11, at 1 hr., 36 min. (remarks by Rep. Thomas (D-100th)) (stating that because “Georgia is a right-to-work state, you can be fired, laid off, your position terminated at any point for any reason, it doesn’t matter”).

63. Fink Interview, *supra* note 56 (expressing concern given that Georgia’s unemployment numbers remain at record highs).

64. Rogers Interview, *supra* note 56 (pointing out that the bill does not specifically define the geographic territory it covers, so it will be open to interpretation). He expressed even further concern, stating “[o]nce you are lassoed with restrictions and when you can be fired in Georgia without cause, you are then bound by this contract for two years—this is a long time.” *Id.*

further, he stated that the bill is limited in regards to whom it applies.⁶⁵ Nonetheless, there is a fear that, in the current economy, employees will not have any negotiating power in these types of contracts, leading to an unfair result.⁶⁶

Those in opposition to the Act do not believe, as supporters do,⁶⁷ that the Act will bring about more clarity to the law.⁶⁸ Supporters wanted to codify what they believe the existing case law is to make people aware of what can and cannot go into an employment contract.⁶⁹ Further, they felt that the status of these contracts was unclear because of the lack of guidance and the way in which courts seemed to change their position on these contracts.⁷⁰ Thus, supporters believe that the Act will bring predictability by outlining both the rights and responsibilities in place, both during and after a term of employment.

The Act's Impact on Georgia Law

Clarifying the law was a goal of the supporters of the Act.⁷¹ Even the Court of Appeals of Georgia noted that “the area of non-compete clauses is one in which similar clauses beget dissimilar results and each case must be considered on its own particular facts.”⁷² However, those who oppose this Act believe its passage will only bring about

65. House Video, *supra* note 11, at 1 hr., 40–42 min. (remarks by Rep. Willard (R-49th)).

66. *Id.* at 1 hr., 36 min. (remarks by Rep. Thomas (D-100th)).

67. Levitas Interview, *supra* note 55 (stating that there was a “plethora” of case law in Georgia, some of which was contradictory, meaning the laws seemed to change depending on in which court the case was located).

68. Fink Interview, *supra* note 56 (explaining that under the new law the decision whether a non-compete agreement will or will not be enforced, or to what extent it will be enforced, is entirely up to the judge to which the case is assigned).

69. Levitas Interview, *supra* note 55. See also House Video, *supra* note 11, at 1 hr., 31 min. (question by Rep. Mike Jacobs (R-80th), stating “is it not true that the two year time period that exists in the bill was intended to be a codification of the existing law, the existing case law, with regard to what a reasonable time period for a non-competition covenant is?”). See, e.g., *U3S Corp. of Am. v. Parker, et al.*, 202 Ga. App. 374, 376–78, 414 S.E.2d 513, 515–17 (Ct. App. 1991) (where a covenant with a two-year provision was found to be valid and enforceable).

70. Willard Interview, *supra* note 54.

71. See *supra* Unintended Consequences.

72. *U3S Corp. of Am.*, 202 Ga. App. at 380, 414 S.E.2d at 518 (quoting *Colquitt v. Network Rental*, 195 Ga. App. 244, 393 S.E.2d 28 (Ct. App. 1990)).

more litigation, causing employees to be forced into a courtroom to challenge their contract.⁷³

Prior to the Act, Georgia did not follow the “blue pencil” doctrine of severability in employment contracts.⁷⁴ Opponents believe that the ability for judges to change the contract to say what they think it should say is not necessarily the best option.⁷⁵

In addition, it remains unclear what happens to restrictive covenants entered into before the Governor signed this new law, but after the 2010 constitutional amendment was ratified by the voters.

In order for HB 173 to truly be in effect, the Georgia constitution had to be amended, and this amendment had to be ratified by the voters. This crucial step was necessary because the changes in the law that HB 173 was proposing would not have been constitutional otherwise. This key factor caused a gap in law—while HB 173 stated an effective date of November 3, 2010, the constitutional amendment would not go into effect until January 1, 2011.

On January 24, 2011, the Georgia Court of Appeals held that November 3, 2010 was the trigger date and that any restrictive covenants entered into prior to that date would not be subject to the Restrictive Covenants Act.⁷⁶ What law the courts were going to apply during the period of limbo starting November 3, 2010 until May 11, 2011, when the Act became law, was unclear, leaving many law firms with no choice but to take a wait-and-see approach.⁷⁷ An ever bigger issue that has not yet come before the courts is what may happen if someone challenges the law based on the disconnect between the effective dates and how that challenge would impact employee contracts created and entered into after November 3, 2010, but before the effective date of the Act.

73. Rogers Interview, *supra* note 56.

74. *Dent Wizard Int'l Corp. v. Brown*, 272 Ga. App. 553, 556, 612 S.E.2d 873, 877 (Ct. App. 2005) (explaining that because Georgia did not allow the court to use blue-penciling, the contract at issue in this case was unenforceable in its entirety). The blue-pencil test is a “judicial standard for deciding whether to invalidate the whole contract or only the offending words. Under this standard only the offending words are invalidated if it would be possible to delete them simply by running a blue pencil through them as opposed to changing, adding, or rearranging words.” BLACK’S LAW DICTIONARY 74 (3rd Pocket ed. 2006).

75. Rogers Interview, *supra* note 56.

76. *Cox v. Altus Healthcare and Hospice, Inc.*, 308 Ga. App. 28, 30, 706 S.E.2d 660, 663–64 (Ct. App. 2011).

77. *See Ford & Harrison LLP*, *supra* note 39.

Georgia Compared to Other States

Prior to the Act, Georgia was one of only eight states that did not permit “blue penciling.”⁷⁸ Therefore, although some opponents might not like this idea,⁷⁹ it might make sense for Georgia to follow suit. Furthermore, since it is the court’s role to determine “[w]hether the restraint imposed by the employment contract is reasonable,”⁸⁰ it is important that Georgia courts have good guidance from the legislature.⁸¹

Public Policy Problems and Benefits

Generally, agreements in restraint of trade in Georgia are contrary to public policy.⁸² However, even prior to passage of the Act, courts found these restrictive agreements valid “if . . . the restraint contracted for appears to have been for a just and honest purpose, for protection of legitimate interests of the party in whose favor it is imposed, reasonable as between them, and not specially injurious to the public.”⁸³

Even those who oppose the Act believe that the old law likely needed some changes; however, they feel that the changes to the law do not sufficiently address the old problems,⁸⁴ and perhaps simply create new ones.⁸⁵

78. See Seyfarth Shaw LLP, “Blue Penciling” *Non-Competition Agreements*, <http://www.tradesecretslaw.com/uploads/file/Updated%20Blue%20Penciling%20Non-Competition%20Sheet.pdf> (last visited Sept. 6, 2011); see also Levitas Interview, *supra* note 55 (explaining that Georgia laws were harsh prior to the Act, as it was an “all or nothing state”). Previously, Georgia was precluded from blue-penciling because of a constitutional provision, and the legislature could not pass laws to the contrary because of this provision. *Id.*

79. See *supra* The Act’s Impact on Georgia Law.

80. *Dent Wizard*, 272 Ga. App. at 556, 612 S.E.2d at 876 (explaining that the court’s determination should take into account “the nature and extent of the trade or business, the situation of the parties, and all other circumstances”) (quoting *Habif, Arogetti & Wynne v. Baggett*, 231 Ga. App. 289, 292(2), 498 S.E.2d 346 (Ct. App. 1998)).

81. Levitas Interview, *supra* note 55 (explaining that it is the legislature’s job to establish policy, and the court’s job to apply that policy, using a constitutional lens).

82. *U3S Corp. of Am. v. Parker*, 202 Ga. App. 374, 377–78, 414 S.E.2d 513, 516 (Ct. App. 1991); *Dent Wizard*, 272 Ga. App. at 555, 612 S.E.2d at 875 (Ct. App. 2005) (“Generally, contracts in restraint of trade or that tend to lessen competition are against public policy and are void.”) (citing *Habif, Arogetti & Wynne v. Baggett*, 231 Ga. App. 289, 292, 498 S.E.2d 346, 350 (Ct. App. 1998)).

83. *U3S Corp. of Am.*, 292 Ga. App. at 377–78, 414 S.E.2d at 516 (quoting *Durham v. Stand-By Labor of Ga.*, 230 Ga. 558, 561, 198 S.E.2d 145, 148 (1973)).

84. Fink Interview, *supra* note 56 (discussing how some problems that employers complained about

The opposition has been quick to point out that the Act covers “the vast majority of employees,” has a very wide geographic scope that covers “those areas in which the employer does business,” and places “no specific limitations . . . in terms of the geographic breath of [it].”⁸⁶ Because of this, those opposed to the Act believe that “there are things in [it] that will come back to haunt [Georgians].”⁸⁷

In addition, those who are opposed to the Act believe that it is too overprotective of employers and companies.⁸⁸ After all, the employer is typically the one who drafts the contract, and the employee only has the option of taking it or leaving it.⁸⁹ However, the supporters believe that it is a balanced approach—after some compromises were made—giving rights to both employees and employers.⁹⁰

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were not addressed by the new law). Mr. Fink would have considered changing some things about the law, too. Under the old law, there were two main problems. First, if an employee had a non-solicitation agreement in his contract, it could not be severed from an unenforceable non-compete and separately enforced. Second, an employer could not prohibit an employee from accepting unsolicited business. Thus, if a client contacted an employee (as opposed to the employee contacting the client), then the employee could not be prohibited from working with the client, absent an enforceable non-compete. Mr. Fink would have preferred for the legislature to fix these problems, perhaps by saying no work could be done for the client for a set amount of time, regardless of who solicited whom. *Id.*

85. *See supra* Unintended Consequences.

86. House Video, *supra* note 11, at 1 hr., 32 min. (remarks by Rep. Thomas (D-100th)).

87. *Id.*

88. Rogers Interview, *supra* note 56 (explaining that he discussed this Act with an attorney who believed even the old legislation went too far, but this new legislation will extend it, rendering it overprotective for companies).

89. Rogers Interview, *supra* note 56. He continues by saying that this Act also covers individuals that were not previously covered, such as independent contractors and brokers. *Id.*

90. Levitas Interview, *supra* note 55. Mr. Levitas gave two examples of this. First, the new bill now allows the court to look at the economic hardship of enforcement of the employment contract and to consider this along with other factors in making its determination. Second, he explained that the business must establish a legitimate business interest behind the contract for it to be enforceable. *Id.*