Labor & Employment Law News

Atlanta Bar Association
Lawyers Who Serve

A Publication of the Atlanta Bar Association, Labor & Employment Law Section

SPECIAL EDITION WINTER 2012

A Message from the Editor

By Benjamin I. Fink, *Berman Fink Van Horn P.C.*

As many of you are aware, I am not a traditional labor or employment lawyer. Most of my practice involves litigating non-compete, trade secret and other competition-related disputes. Since many members of the Labor & Employment Law section also practice in this area, I thought it would be interesting to put together a special edition of the section newsletter to address some of the recent developments in this area of the law. If you practice in this area regularly, or even occasionally, I hope you will find this edition of the newsletter of interest.

I want to thank all the people who have contributed articles to this special edition of the newsletter. I also want to thank Brantly Watts for her help in putting together this issue.

As I requested in the last regular edition of the newsletter, please begin thinking about articles and ideas for the next regular edition of the newsletter. If you have an article you would like to have published in the next edition of the newsletter, please have it to me by the beginning of February, as I anticipate the next edition being published in mid-February.

Thank you again for the opportunity to serve you as a member of the L&E Section Board. If you have any comments, suggestions or criticisms regarding the newsletter, please feel free to give me a call or send me an email. My telephone number is 404-261-7711 and my email address is bfink@bfvlaw.com.

In This Issue

If you are interested in submitting an article or information to be included in this newsletter, contact:

Newsletter Editor
Benjamin I. Fink,
Berman Fink Van Horn P.C.
bfink@bfvlaw.com

Not So Fast! Was the Ballot Language of the November 2010 Proposal to Amend the Georgia Constitution for the Restrictive Covenant Act Unconstitutional?

By David Pardue, *Attorney at Law*

I. In the November 2010 Election the Legislature Had to Win a Vote on a Proposed Amendment in Order to Make The New Restrictive Covenant Act Enforeceable.

One of the proposals to amend the Georgia Constitution that was on the ballot in November 2010, enabled the State General Assembly to wipe from the books decades of controversial Georgia appellate court cases. Over the years, the business community felt that Georgia courts had made it too difficult to draft and enforce post-employment restrictions on competition or solicitation. Responding to concerns expressed by employers about their apparent inability to enforce restrictive covenants reliably, the General Assembly attempted to change the law in 1990 by enacting O.C.G.A. § 13-8-2.1. This statute, however, was held unconstitutional in its entirety in the case of *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371 (1991), because it called for courts to enforce restrictive covenants "to the extent reasonable and necessary to protect the interests of the party benefiting from the covenant," which would "breathe life into contracts otherwise plainly void as being impermissible" under the Constitution. *Id.* at 372.

SEE *LANGUAGE*, Page 2

***LANGUAGE*, continued from Page 1**

Jackson & Coker relied upon Ga. Const. Article III, Section VI, Par. V(c), which expressly prohibits the General Assembly from authorizing laws that hamper competition. Paragraph V(c) states, "The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void."

The general rule of the case law was that this Constitution provision prohibited only "unreasonable" limits on post-employment competition. However, many observers felt that the net effect of the complicated and Byzantine case law was that it was very difficult to enforce any post-termination noncompete or nonsolitication clause in a Georgia court. Likewise, the business community felt that Georgia had developed a stigma as unfriendly to employers because of its reputation as a difficult place to enforce noncompete clauses in contracts. As a lawyer practicing in this field, there is no question that Georgia law was a minefield that many unsuspecting drafters were unable to get through safely. Because "blue penciling" restrictive covenants was outlawed, one "mistake" in the covenants often defeated all restrictions in an agreement. In many cases, one could review a noncompete and, within minutes, tell the client that it was unenforceable. On the other hand, reasonable noncompetes were enforceable in their entirety, and a skilled lawyer could draft them.

In a recent legislative session, the General Assembly resurrected the plan to revamp the law on post-employment restrictions by enacting HB 173, a bill the General Assembly stated had a purpose to protect "legitimate business interests" as well as improving predictability in the enforceability of these contracts. The Act passed the House on March 12, 2009, passed the Senate on April 1, 2009, and Governor Perdue signed it into law on April 29, 2009. In light of the holding of the Georgia Supreme Court in the *Jackson & Coker* case, however, the General Assembly knew that it would also need to amend the Georgia Constitution in order to render the statute constitutional. The Amendment process is spelled out in the Constitution. It begins with a legislative proposal for an amendment, which, if passed, is then presented to the voters in a referendum. A "summary" of the Proposal to amend the Constitution is then required to be drafted by the Legislative Counsel, the Attorney General, and the Secretary of State, and that proposal has to be published in the legal organ of each County. Also, the Constitutional Amendments Publication Board may publish the proposal in "no more than" 20 newspapers in the state. Following this process, a proposal was written to make the necessary Amendment to the Constitution, and it was approved by the General Assembly. That proposal appeared on the November 2010 ballot and passed easily with a "Yes" vote.

II. The November Election's Troubling Ballot Language

What the voters saw on their ballot in November 2010, however, said nothing to indicate that they were voting to make restrictive covenants, noncompetes or nonsolicitation agreements easier to enforce, or indeed that they were voting on anything related to noncompetes and nonsolicitation clauses whatsoever. The ballot stated simply, "Shall the Constitution of Georgia be amended so as to make Georgia more economically competitive by authorizing legislation to uphold reasonable competitive agreements?" Of course, behind the proposal a lot more was at stake. The law the Legislature needed an amendment for was already "in the can" so to speak. So the consequence of passing the amendment to the Constitution was already apparent to a voter, but only if they already knew what was going on. The November vote was, truly, an up-or-down vote on a statute that had already been passed. One would think that a realistic ballot would let the folks in the booth know that this is what was happening.

This ballot "enabling language" allowed the proposed change to the limits in the Constitution, therefore allowing the implementation of the legislation already voted on by the General Assembly. The ballot language was clearly written by supporters of the legislation to ensure a "Yes" vote by voters so that the General Assembly could get past the referendum and assume the power that it had already invoked by voting a new law into place. Clearly, the author of the proposal seemed to feel that the proposed law was going to make Georgia "more competitive," whatever that means, though it is not clear for whom the competition would be increased. Maybe the net effect of the Restrictive Covenant Act would be good for business in Georgia.

That is not the question for this article, however. The question is whether the desire to win the election and pass the new law justified the use of comically vague and manipulative ballot language. More importantly, for a lawyer who practices in the area representing both employers and employees in negotiating, drafting, and counseling on restrictive covenants, the question is whether this new law is at risk because of poorly written ballot language, and if so, will it withstand attack. What should an attorney drafting a restrictive covenant after the effective date of the new law do to make sure the contract will be enforceable for sure? Should lawyers tell their clients to be conservative and make new covenants that would safely be enforceable under the old Georgia law, lest the new law be struck down, at least temporarily, as a result of the faulty ballot language?

The ballot language obviously was not written in an effort to be evenhanded or informative to the voters as to what exactly was at stake in their vote. It was written in manipulative language that might as well have asked voters whether the General Assembly should favor capitalism or improve health care. In an informal survey of a roomful of CFO-types after the election, the voters in the room were asked if they knew they had voted on a law to make restrictive covenants more enforceable. Only one person

SEE *LANGUAGE*, Page 3

Do you have an article suggestion for the Labor & Employment Law Section Newsletter?

We want to hear from you!

Please contact Benjamin Fink with your ideas & suggestions at bfink@bfvlaw.com.

***LANGUAGE*, continued from Page 2**

raised his hand.

For this practitioner, the answer is that the new law is at substantial risk of being overturned based on a ruling that the November 2010 ballot language was unconstitutionally vague and manipulative. There is a very good reason to believe that, based on a close reading of the Constitution and the case law, the ballot language is at risk if a good challenge is mounted by a capable attorney. I have counseled clients to be conservative and negotiate restrictive covenants that could still be enforced under the old Georgia common law, unless and until the challenges to the law work their way through the courts.

III. Georgia Courts Usually Have Limited Review of Ballot Language Due to the General Powers Delegated to the Legislature in the Constitution.

For years, the Georgia courts have been very uneasy about taking a close look at the ballot language of proposals to amend the Georgia Constitution. A line of cases culminating in 1992 with *Donaldson v. Department of Transportation*, 262 Ga. 49 (1992), holds that the courts have virtually no ability to review what the Legislature puts on the ballot with respect to a proposed amendment, based on the notion of limited judicial review and the awesome General Powers of the General Assembly. This line of cases leans heavily on the General Powers clause of the Constitution set forth in Art. III Section VI. Par. I.

Donaldson involved an amendment to the waiver of sovereign immunity, and thus did not affect a power limited under Art. III. Section VI Par. V. The *Donaldson* Court refused to question the language put on the ballot regarding the proposed amendment, stating that "the only limitation on the General Assembly in drafting ballot language is that the language be adequate to enable the voters to ascertain which amendment they are voting on." 262 Ga. at 51, citing *Sears v. State*, 232 Ga. 547 (1974). What this means is that the voters must be able to determine which of the amendments published in the manner prescribed by law is which. In other words, under *Donaldson,* the ballot drafter can be as vague and manipulative as it wants to be, and nothing will be done by the courts if the voter can pick out which proposal goes with which amendment published in the newspaper. What *Donaldson* did not say is <u>why</u> *Sears* and its predecessor cases took this unusually limited approach to reviewing the ballot language for problems.

The *Sears* court was asked to review the ballot language on a proposed amendment that had to do with the validity of certain state bonds. That court noted the limits of judicial review over the Georgia General Assembly in most cases. "The inherent powers of our State General Assembly are awesome. Unlike the United State Congress, which has only delegated power, typically the state legislatures are given by the people the full lawmaking powers." 232 Ga. at 553. *Sears* goes on, "the legislature is absolutely unrestricted in its power to legislate, so long as it does not undertake to enact measures prohibited by the State or Federal Constitution." *Id.*

Sears is right, in normal situations the General Assembly has power to make the laws it feels are necessary. The Georgia Constitution gives the Legislature General Powers in Article VI Par. I. It states: "The General Assembly shall have the power to make all laws not inconsistent with this Constitution, and not repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state."

IV. The Constitutional Provision Regarding Anticompetitive Contracts is Not Part of the General Powers of the General Assembly, and Thus the Rationale for Limited Review of the Ballot Language Based on the Case Law Is Inapplicable.

In summary, therefore, the courts have been wary of closely reviewing ballots in past elections because the General Powers clause gives mighty powers to the legislature to do as it sees fit in passing the laws of Georgia. In other words, the General Assembly has the job of passing the laws, and the courts simply make sure the Assembly follows the rules and the Constitution. The amendment that enables the Restrictive Covenant Act, however, is in a completely different ball park than the amendments at stake in *Donaldson* and *Sears*. The ballot proposal in November 2010 relates to powers totally outside the General Powers of the Georgia legislature. That is because the <u>limit</u> on the legislative powers of the legislature over anti-competitive contracts is not within the rubric of the General Powers clause. Instead, the operation of the Constitution where the anticompetitive restrictions on the General Assembly are located in Art. III. Section VI. Par. V) has the opposite effect of the General Powers. Article III, Section VI, Paragraph V(c) is the provision that expressly prohibits the General Assembly from authorizing laws that limit competition.

SEE *LANGUAGE*, Page 4

SAVE THE DATE

Section Happy Hour

Tuesday, February 21, 2012
at The Lawyer's Club

More information to be posted soon.
Check your emails or visit
www.atlantabar.org for updates.

***LANGUAGE*, continued from Page 3**

As set forth above, that part of the Constitution makes clear that the General Assembly shall not have the power to make laws that would authorize "any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition." The Paragraph itself is entitled "Specific Limitations."

Thus, the *Donaldson* case and its predecessors do not apply to the November 2010 ballot, and the subsequent amendment, because neither the *Donaldson* case, nor the cases relied upon by *Donaldson* deal with ballot language for proposed amendments to Article III, Section VI, Paragraph V, sets out five and only five powers in which the General Assembly has no power. Instead, *Donaldson* and its predecessors rely on the General Powers given to the General Assembly in all but the five areas where the General Power is taken away. Rather than an exercise of the awesome power of the legislature, the November 2010 ballot proposal to amend Art. III. Section VI. Paragraph V. of the Constitution involves the legislature attempting to take back powers that the people of the State of Georgia specifically told the General Assembly that it does not have.

There is no case law on what level of scrutiny the courts should apply to ballot language where the General Assembly is seeking to usurp the specifically limited powers set forth in Paragraph V. But one presumes that the scrutiny would be very strict because the courts would be the only guardian that the voters would have to protect the Constitution from radical power plays by the Assembly. When courts do anything to give a thumbs down on legislative behavior, the cry from the loser in that battle is that it is judicial legislation. In this case, however, there is an express role for the dourts under substantive due process. The cases set forth above acknowledge that a voter has a substantive due process right to have clear communications from the legislative body.

Certainly, *Donaldson* and its predecessors are utterly irrelevant here in seeking guidance on how closely the courts should review the ballot language. *Donaldson* has nothing to do with this amendment and this ballot. The Georgia Supreme Court not only has the ability to carefully review the language of the ballot, but it most likely has the obligation to do so. Given the fact that common sense shows that the ballot language was engineered to command a yes vote, it seems clear that the ballot language was unconstitutionally vague and a violation of the substantive due process of the voters. As much as the fans of the Restrictive Covenant Act might dislike the result, one could hardly think of a more important time for the Georgia courts to strictly review the language of the ballot and determine whether the General Assembly improperly communicated with the voters what they were doing in that election.

V. The Elected Judges in Georgia Are Part of the Political Process and Must Review Closely Any Proposal By the Legislature to Amend Their Own Specifically Limited Powers in Article III Section VI. Paragraph V.

The General Assembly's draftsmen obviously wrote the November 2010 ballot language in order to secure a "Yes" vote from uninformed voters. When the people have no idea what they are voting about, the people and the process are not trustworthy, and there is absolutely no reason the Supreme Court has to sit back and watch this happen. The very first statement in the Georgia Constitution, after the Preamble, is the due process clause, which states that "No person shall be deprived of life, liberty, or property except by due process of law." Art. I, Sec. I, Par. I. A cornerstone of due process in a free society is that elections be fair and honestly conducted.

Even more importantly, the Constitution itself gives the courts the power of judicial review. It is well settled that "our Georgia Constitution also provides: "Legislative acts in violation of this Constitution, or the Constitution of the United States, are void, and the Judiciary shall so declare them."" Art. I, Sect. II, Par. V.; *Barrett v. Hamby*, 235 Ga. 262, 267 (Ga. 1975).

The *Donaldson* court said it "must" trust the political process where the General Powers of the General Assembly are at issue. But that is not the case where the specifically limited powers of the Assembly are at issue. First, the State Supreme Court **is** a part of the political process. The Supreme Court judges in Georgia are elected and do not serve for life like federal judges. They are subject to being voted out of office just like the General Assembly.

Despite its refusal to review the proposal at issue, *Donaldson* goes on to gently chide the General Assembly, stating that it should draft clear language about the purpose and effect of each constitutional amendment. Then, however, the court states, based on simple policy reasons, why it believes that it should not review the ballot language in that particular case to determine if that happened (then it goes ahead and reviews the ballot anyway, concluding that it was not misleading). 262 Ga. at 51. The *Donaldson* court states as a reason not to undertake review that "constitutional amendments are often complex." *Id.* Not a single amendment is cited to give an example of a "complex" amendment. Yet the court hypothesizes that "any summary of the proposal may be subject to various interpretations, even the legislators who sponsor an amendment may not agree on the purpose and effect of a particular amendment." That statement may be true, and where the General Powers of legislature are under review, it makes sense. However, where the General Assembly attempts to give itself powers that the people specifically limited in the Constitution, there ought to be a more searching and careful review of the ballot. In order to fulfill due process and its other duties to the people, the General Assembly should make, as suggested by *Donaldson*, a plain and simple statement about the purpose and effect of the amendment.

Donaldson states, "Moreover, the court must trust the people and the political process to determine the contents of the Constitution. We must presume that the voters are informed on the issues and have expressed their convictions in the ballot box." *Id.* In other words, the court is saying it must assume that the reasonable voter can: (1) read the misleading language in the ballot, whatever it is; (2) refer back to a prior reading of the proposed amendment in the legal organ or newspaper; (3) remember what he or she thought about the proposal before the election; and (4) then totally ignore and discount the manipulative ballot language on election day. The *Donaldson* court was saying that its hands were tied, and that even if the General Assembly poorly drafted the ballot, it could not act. But *Donaldson's* point of view may not be relevant where the "awesome" General Powers of the legislature are not an issue and instead we are dealing with specifically limited powers. Logic

SEE *LANGUAGE*, Page 5

***LANGUAGE*, continued from Page 4**

dictates that a ballot proposed by the legislature to amend the specific restrictions placed on the legislature by the people has to be subject to the strictest review possible. To put it more bluntly, courts clearly have the right to stop the legislature from directly misleading or making false statements to the people.

There is more support in the Constitution supporting strict scrutiny. The Georgia Constitution states that "All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them." Art. I, Sect. II, Par. I. This kind of language is not contained in the federal constitution, but it cannot be overlooked here. In plain language, the people of the State of Georgia have stated that its Public Officers cannot do things that are dishonest or misleading and uphold their position as trustees of the people. They cannot mislead the people. The Supreme Court has noted this duty for public officials. "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Malcolm v. Webb*, 211 Ga. 449, 86 S.E.2d 489 (1955). This honor applies not only to individuals but to the government itself, which is specifically referred to in this Constitutional provision. Not only are the individual Public Officers trustees, but so are the bodies of government these individuals make up.

This public trust is most at risk in the process of manipulating elections. Under Georgia's system of government, the method of expressing the will of the people is by voting in a legally held election. *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946).

The road to serfdom is paved with good intentions. The General Assembly is occupying a position of trust, and an effort to mislead the people, to abuse the process of law in amending the constitution, and to cynically seize back power that was already expressly taken away from it is troubling, even if the intentions are good. The very job of the Court is not to acquiesce in such a circumstance. These are not judges appointed for life, they are Public Officers who are trustees of the people and the people's rights under the Constitution. The judicial "restraint" required of federal, unelected judges is not at issue here. There is a job to do, and that is to review these ballot provisions in light of the duties of not only the General Assembly, but also the Supreme Court, to be "trustees of the people."

The result is that the November 2010 ballot is at risk of being struck down because the language used was so vague and misleading that it violated the rights of the voters to know what they were voting for or against. The General Assembly may have to go back and do the election all over again—this timewith a more clear and simple statement of what the amendment to the Constitution actually does to the powers and rights of the General Assembly. This means the Restrictive Covenant Act may not have been properly implemented unless and until constitutionally-sound ballot language is put before the voters and they vote yes. Certainly, this might frustrate those who want the new law to be enforced. However, open and just government may require such a result.

David Pardue practices business, intellectual property and real estate litigation. He obtained his undergraduate degree from Tulane University and his law degree from Yale Law School.

Labor & Employment Law Section Board of Directors 2011-2012

Chair
Daniel M. Klein

Vice Chair/Chair-Elect
William C. (Cory) Barker

Secretary/Treasurer
Ian E. Smith

Immediate Past Chair
Mary M. (Peggy) Brockington

Members at Large

Robert W. Capobianco
Andrea Doneff
Amanda Farahany
Benjamin I. Fink
Marcia Ganz
Ellen B. Malow
Adriana Midence
A. Lee Parks Jr.

Contact the Labor & Employment Law Section Board of Directors at
sections@atlantabar.org

The Debut of the Blue Pencil

By Benjamin I. Fink and Neal F. Weinrich,
Berman Fink Van Horn P.C.

As readers of this newsletter are well aware, restrictive covenant law in Georgia recently underwent significant changes. One of the most notable changes is that Georgia judges can now modify or "blue pencil" overbroad restrictive covenants. *PointeNorth Ins. Group v. Zander*, Civil Action No. 1:11-CV-3262-RWS, 2011 WL 4601028 (N.D. Ga. Sept. 30, 2011), is the first published decision in which a judge has used the "blue pencil" to modify a covenant in an agreement governed by the new Restrictive Covenants Act. This decision provides some interesting insights into how the new law will be interpreted and applied.

Gwendolyn Zander was a licensed insurance broker for Risk Management Continuum, Inc. ("Risk"). On April 1, 2011, PointeNorth Insurance Group ("PointeNorth") acquired Risk. After the acquisition, on May 11, 2011 (which was the same day that House Bill 30, the Restrictive Covenants Act, was signed by the Governor and went into effect), Ms. Zander executed her employment agreement. The agreement contained a post-termination restrictive covenant which, for twenty-four months following the termination of the agreement, prohibited Ms. Zander from soliciting, accepting or attempting to solicit or accept, directly or by assisting others, business from any of PointeNorth's clients which would be in competition with the products or services offered by PointeNorth, including actively sought prospective clients, with whom Ms. Zander had any contact or who were clients of PointeNorth within the three months immediately preceding termination of the agreement.

Ms. Zander terminated her employment on September 1, 2011. She then created a new entity and affiliated herself with a competitor of PointeNorth. PointeNorth filed an action in state court, asserting various claims against her. Ms. Zander removed the lawsuit to federal court. PointeNorth then sought injunctive relief against Ms. Zander with respect to the non-solicitation covenant, as well as a non-disclosure covenant in her agreement.

In ruling on PointeNorth's motion for a preliminary injunction, Judge Story of the Northern District of Georgia found that PointeNorth had demonstrated a substantial likelihood of success on the merits of its claims for breach of the restrictive covenants in her agreement. Judge Story explained the recent changes to Georgia's restrictive covenants law and noted that "because the employment agreement which contains the non-solicitation and nondisclosure agreements was signed on May 11, 2011, that agreement is subject to the new legislation which allows this Court to blue pencil any overbroad or otherwise offensive passages." Judge Story stated further that "while the Court finds the restrictive covenants overbroad in that they extend to 'any of the employer's clients' – not just the ones with whom Defendant Zander interacted – the Court may remedy that finding by blue penciling the provision to only apply to customers that the Defendant contacted and assisted with insurance." Judge Story also found that the other prerequisites for injunctive relief were met, noting in particular that, "based on the recent legislation, Georgia's public policy now supports the enforcement of restrictive covenants."

Judge Story granted PointeNorth's motion for preliminary injunction and enjoined Ms. Zander from soliciting any of PointeNorth's customers with whom Defendant Zander had contact during her employment and from disclosing any confidential information she obtained during her employment. Judge Story thus modified or blue penciled the portion of the covenant which was overbroad in that it restricted Ms. Zander from soliciting business from clients with whom she had not had material contact, but enforced the covenant as to those clients with whom Ms. Zander had contact. Interestingly, without expressly stating he was doing so, Judge Story also blue penciled the portion of the covenant which restricted Ms. Zander from accepting unsolicited business. Such a restriction was unenforceable under the old Georgia law and the new law does not appear to change this rule. *See*, *e.g.*, *Waldeck v. Curtis 1000, Inc.,* 261 Ga. App. 590, 583 S.E.2d 266 (2003) ("…. a non-solicitation provision may not contain a bar on the acceptance of business from unsolicited clients").

As noted above, this is the first published decision where a judge has used the "blue pencil." Given the specific wording of the injunctive relief entered, Judge Story appears to have "re-written" the non-solicitation covenant, rather than simply "striking" the offensive portions. The new law arguably vests judges with authority to adopt either approach. Specifically, O.C.G.A. section 13-8-53(d) states that "[a]ny restrictive covenant not in compliance with the provisions of this article is unlawful and is void and unenforceable; provided, however, that a court may ***modify*** a covenant that is otherwise void and unenforceable as long as the ***modification*** does not render the covenant more restrictive with regard to the employee than as originally drafted by the parties." (emphasis added); s*ee also* O.C.G.A. § 13-8-54(b). Under O.C.G.A. section 13-8-51(11), a "modification" means the "limitation of a restrictive covenant to render it reasonable in light of the circumstances in which it was made. *Such term shall include*: (A) [s]evering or removing that part of a restrictive covenant that would otherwise make the entire restrictive covenant unenforceable; and (B) [e]nforcing the provisions of a restrictive covenant to the extent that the provisions are reasonable." (emphasis added). Thus, under O.C.G.A. section 13-8-51(11), "severing" the overbroad portion of a covenant is arguably a *non-exclusive* example of the ways in which a judge may modify a covenant to make it reasonable.

In short, the statute arguably permits judges to not only strike offensive provisions from covenants, *but also to re-write them*. Judge Story's approach in *PointeNorth* therefore appears in line with the authority vested to him by the new statute. However, the issue of whether the new law authorizes judges only to strike overbroad provisions does not appear to have been argued in *PointeNorth*.

In conclusion, while practitioners in this area eagerly await decisions applying the blue pencil to revise the territory or scope of an overbroad *non-competition* covenant, Judge Story's use of the blue pencil to revise the overbroad *non-solicitation* covenant in *PointeNorth* provides some initial insight into how judges will utilize the "blue pencil" going forward.

Benjamin I. Fink and Neal F. Weinrich are with the Atlanta law firm Berman Fink Van Horn P.C. where they focus their practices on trade secret, non-compete and other competition-related disputes.

Forum Selection Clauses in the Restrictive Covenant Context: A New Development

by Rob Capobianco, *Jackson Lewis LLP*

Georgia's new restrictive covenant law garnered much attention in 2011. Equally important was the decision from the Georgia Court of Appeals in *Bunker Hill Int'l, Ltd. v. Nationsbuilder Ins. Servs., Inc.*, 309 Ga. App. 503, 710 S.E.2d 662 (2011). Prior to *Bunker Hill*, businesses with operations in Georgia could avoid restrictive covenant litigation in Georgia by using forum selection clauses. Indeed, although the Georgia Court of Appeals had never addressed the issue directly, dicta suggested that forum selection clauses were enforceable in Georgia even when contained in agreements with restrictive covenants. *Bunker Hill*, however, directly confronted the issue.

In *Bunker Hill*, the Georgia Court of Appeals had to decide whether an Illinois forum selection clause was enforceable in an agreement containing restrictive covenants. Recognizing that forum selection clauses are invalid when they contravene a strong public policy of the forum in which a lawsuit is brought, the Court held that a party can invalidate a forum selection clause in an agreement containing restrictive covenants in Georgia if it can show that (a) at least one of the covenants violates Georgia public policy (in other words, it is unenforceable in Georgia) and (b) such a covenant is likely enforceable in the state selected by the forum selection clause (an Illinois court in *Bunker Hill*). Because at least one of the restrictive covenants at issue violated Georgia public policy and was likely enforceable in Illinois, the Court of Appeals held that the forum selection clause was unenforceable.

Over time, as more restrictive covenants are drafted consistent with Georgia's new restrictive covenant law and Georgia's new public policy regarding restrictive covenants expressed therein, it presumably will become more difficult for employees to satisfy the first prong of *Bunker Hill's* analysis as fewer restrictive covenants should violate Georgia public policy. For restrictive covenants entered into prior to Georgia's new restrictive covenant law, however, employers need to recognize that they can no longer rely on a forum selection clause to avoid restrictive covenant litigation in Georgia. Thus, *Bunker Hill* is yet another reason why employers with operations in Georgia should consider revising their restrictive covenant agreements.

Robert Capobianco is a partner in the Atlanta office of Jackson Lewis where he represents employers in all types of employment litigation, including trade secret and restrictive covenant litigation.

Advanced Employment Law: Updates and Issues

March 15, 2012 - 9:00 am to 4:45 pm
at the W Atlanta Midtown Hotel

Topics Include:

- Supreme Court and Eleventh Circuit Update on Employment and Labor Law
- Whistleblower Claims - Where are we Today?
- Labor Law - What Are the NLRB and the Courts Doing With Proposed New Regulations and Recent Decisions?
- Practical Issues Around Termination
- Wage and Hour Class Actions, Including How Dukes Will Affect Both Class And Collective Actions
- Social Media

Speakers Include:

- Martin M. Arlook, *National Labor Relations Board*
- William Cory Barker, *Paul Hastings Janofsky & Walker, LLP*
- Andrea Doneff, *John Marshall Law School*
- Margaret H. Campbell, *Ogletree Deakins*
- A. Craig Cleland, *Ogletree Deakins*
- James D. Fagan, Jr., *Stanford Fagan LLC*
- Amanda A. Farahany, *Barrett & Farahany LLP*
- Deborah Gonzalez, *Law2SM*
- Daniel M. Klein, *Buckley & Klein, LLP*
- Michael A. Sullivan, *Finch McCranie, LLP*
- James M. Walters, *Fisher & Phillips*
- C. Geoffrey Weirich, *Editor-in-Chief of Lindemann and Grossman's* Employment Discrimination Law *treatise, Paul Hastings Janofsky & Walker, LLP*

Registration and more information to be posted soon. Please check your emails and www.atlantabar.org for updates.

Why Are You Still Ignoring Me? Will Georgia Courts Still Disregard Choice-of-Law Provisions in Employment Agreements Containing Restrictive Covenants in Light of Georgia's New Non-Compete Law?

By Benjamin I. Fink and Neal F. Weinrich, *Berman Fink Van Horn P.C.*

Introduction

It has been a little over a year since the passage of the referendum on the November 2010 election ballot that resulted in the new Georgia restrictive covenant act (the Act).[1] Because the Act only applies to agreements entered into *after* it was enacted,[2] most current non-compete cases still involve agreements governed by the old law.[3] Thus, the Georgia courts have not had many occasions to provide guidance with respect to the Act itself, and many questions remain unanswered.[4] Nevertheless, the courts have provided some guidance on one important issue arising from the Act's passage, namely, whether the shift in Georgia public policy that the Act represents has an impact on analyzing whether a choice-of-law provision in an employment agreement executed *before* the Act—and that calls for *another* state's law to govern the enforceability of the agreement and the restrictive covenants in it—is enforceable.

Before the Act, the Georgia courts regularly made clear that they would not enforce provisions choosing the law of another state in restrictive covenant agreements when doing so would contravene the public policy of the State of Georgia. But with the General Assembly's passing the Act and the electorate's approving the referendum enabling the Act, there is now a question of whether these courts should continue to disregard such choice-of-law provisions when determining the enforceability of covenants in contracts entered into *before* the passage of the Act.

Several recent federal court decisions have addressed this issue. This article explains the historical background and recent statutory and constitutional changes in Georgia that are at the heart of this question, and it also surveys those decisions.

Background

Since 1977, starting with *Nasco v. Gimbert,* the Georgia courts have consistently held in the restrictive covenant context that the laws of a jurisdiction chosen by the parties would not be applied by Georgia courts if applying that law would violate the policy of, or would infringe, the interests of the State of Georgia.[5] In *Nasco*, the Georgia Supreme Court held that, in this circumstance, state law would trump the law of any foreign jurisdiction:

> the law of the jurisdiction chosen by the parties to a contract to govern their contractual rights will not be applied by Georgia courts where application of the chosen law would contravene the policy of, or would be prejudicial to the interest of the state. [Restrictive] Covenants . . . affect the interest of this state . . . and hence their validity is governed by the public policy of this state.[6]

In 2003, the Georgia Supreme Court resoundingly reaffirmed the rationale of *Nasco* in *Convergys Corp. v. Keener.*[7] The U.S. Court of Appeals for the Eleventh Circuit had certified this question to the Georgia Supreme Court: "Whether a Court applying Georgia conflict of laws rules follows the language of Restatement (Second) Conflict of Laws § 187(2) and, therefore, first must ascertain whether Georgia has a 'materially greater interest' in applying Georgia law, rather than the contractually selected forum's law before it elects to apply Georgia law to invalidate a non-compete agreement as contrary to Georgia public policy?"[8] However unsettling to the Eleventh Circuit, in *Convergys*, the Georgia Supreme Court answered this question in the negative.[9]

Thus, under the law as it existed before the Act passed, to the extent the parties' chosen foreign law would permit enforcement of restrictive covenants that were considered overbroad under Georgia law, honoring the choice-of-law provision was considered repugnant to the State's public policy. It was well settled that in these circumstances courts should disregard the choice-of-law provision and instead apply Georgia law. For example, in *Hostetler v. Answerthink, Inc.*, the employee's non-solicitation agreement had a choice-of-law provision requiring the application of Florida law. The employee brought an action in Georgia seeking a declaratory judgment that the non-solicitation provision in his agreement was invalid under Georgia law. The trial court disregarded the Florida choice-of-law provision, found the covenant unenforceable under Georgia law, and enjoined the former employer from seeking to enforce the covenant. Following *Nasco* and *Convergys*, the Georgia Court of Appeals affirmed the trial court's ruling.[10]

The New Law: An About-Face in Georgia's Public Policy

The rationale in *Nasco* with respect to choice-of-law provisions was rooted in the Georgia courts' historic hostility to restrictive covenants in employment agreements. With the passage of the Act and the referendum, however, Georgia law has drastically changed such that enforcement of restrictive covenants is now *favored*.

During the 2009 legislative session, the Georgia House of Representatives and Senate overwhelmingly passed House Bill 173, legislation that would drastically change the law concerning restrictive covenants in Georgia. The bill was signed by the Governor on April 29, 2009. Given that the hostility to restrictive covenants was rooted in the Georgia Constitution, however, before the law could become effective, an amendment to the Georgia Constitution had to be approved. Absent such an amendment, the legislation would likely suffer the same fate as the Restrictive Covenant Act of 1990, which the Georgia

SEE *PROVISIONS*, Page 9

***PROVISIONS* continued from Page 8**

Supreme Court declared unconstitutional.[11]

A resolution proposing to amend the Constitution to authorize the General Assembly to legislate in the area of restrictive covenants was voted on and passed in the 2010 legislative session.[12] As a result, on November 2, 2010, Georgia voters were asked to answer the following question: "Shall the Constitution of Georgia be amended so as to make Georgia more economically competitive by authorizing legislation to uphold reasonable competitive agreements?" An overwhelming majority of Georgia voters answered this question "yes," and the proposed amendment passed.[13]

As a result of uncertainty as to the effective date of the new law (and potential constitutional infirmities as a result of this uncertainty), House Bill 30 was introduced in the 2011 session of the Georgia House of Representatives.[14] This bill essentially reenacted House Bill 173 and was intended to cure any issue with respect to the effective date of the new law. House Bill 30 was passed by the General Assembly and took effect when it was signed by the Governor on May 11, 2011.[15]

Together, the passage of the referendum and the Act represent a landmark shift in Georgia public policy with respect to restrictive covenants, particularly in the employment context.

The Act's Application to Pre-Existing Contracts

The text of the Act explicitly provides that it only applies to contracts entered into on and *after* its effective date and does *not* apply in actions determining the enforceability of restrictive covenants entered into before that date.[16] The Georgia Court of Appeals and several federal district courts have held that the Act does not apply retroactively.[17]

But a significant question is how the change in public policy affects the analysis of choice-of-law provisions requiring courts to apply another state's law which are contained in agreements entered into *before* the effective date of the Act. Although the Act itself does not apply retroactively, the issue is whether public policy has changed such that choice-of-law provisions in agreements containing restrictive covenants that were entered into prior to the new law going into effect should now be honored—even if they would not have been under the prior common law.

The Argument for Applying Georgia's "New" Public Policy When Deciding Whether to Honor a Choice-of-Law Provision.

The argument in favor of applying Georgia's "new" public policy with respect to restrictive covenants is straightforward. Georgia's public policy with respect to restrictive covenants has fundamentally changed. The Act took effect after an amendment to the Georgia Constitution authorizing the General Assembly to legislate about restrictive covenants. The amendment was ratified in the November 2010 election. Therefore, because of the passage of both the amendment and the Act, arguably, Georgia public policy concerning restrictive covenants has changed, and enforcement of restrictive covenants in Georgia is now favored. Thus, with respect to agreements signed before the effective date of the Act, the question that the courts have and will continue to be asked is not what substantive law to apply (i.e., the Act or the Georgia common law in place prior to the Act), but rather whether they should honor the parties' *agreed-upon* choice-of-law given Georgia public policy.

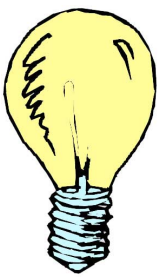
In *Nasco,* the Georgia Supreme Court held that "the law of the jurisdiction chosen by the parties to a contract to govern their contractual rights will not be applied by Georgia courts where application of the chosen law would contravene the policy of, or will be prejudicial to the interest of, this state."[18] This holding arguably requires a court to examine Georgia's present-day "policy" and "interest" when deciding whether to honor a choice-of-law provision. Those current policies and interests are arguably best evidenced by the General Assembly's statements in O.C.G.A. section 13-8-50: "The General Assembly finds that reasonable restrictive covenants contained in employment and commercial contracts serve the legitimate purpose of protecting legitimate business interests and creating an environment that is favorable to attracting commercial enterprises to Georgia and keeping existing businesses within the state."

"Expressions of the legislature through statutes are conclusive on the question of public policy . . ."[19] Given the amendment's passage and the Act, not only do we have an expression of the legislature which is arguably conclusive on the question of public policy, but we also have a constitutional amendment that was ratified by more than two-thirds of Georgia voters in the November 2010 election.[20] Thus, one can argue that, because Georgia's public policy now favors the enforcement of restrictive covenants, a finding that the restrictive covenants in the parties' contract are enforceable under the chosen foreign law is consistent with, rather than contrary to, Georgia public policy. Accordingly, arguably, *Nasco* and its progeny no longer support the argument that the courts should *disregard* the parties' choice of foreign law.

This was the line of reasoning initially adopted in *Boone v. Corestaff Support Services, Inc*.[21] In *Boone,* Judge Story was asked to decide whether to apply Delaware or Georgia law in analyzing the enforceability of certain restrictive covenants in an employment agreement and a non-compete agreement that were

SEE *PROVISIONS*, Page 10

Labor & Employment Law Section Suggestion Form



We are always seeking new ways to better serve our members.

Do you have a suggestion for the Labor & Employment Law Section? Let us know by filling out our online suggestion form.

***PROVISIONS* continued from Page 9**

signed before the Act's effective date. Both agreements contained choice-of-law provisions stating that Delaware law was to govern both agreements.[22] The plaintiff argued that because the Act applied prospectively, it could have no impact on the case. But Judge Story found that this argument missed the point and held that the Delaware choice-of-law provision should be honored:

> [t]he threshold question is not whether the New Act applies in this case, but whether this Court in determining the enforceability of restrictive covenants in the Non-Compete will apply the Delaware choice-of-law provision contained therein. The answer to this question depends on whether Georgia's public policy is in conflict with the application of Delaware law. The New Act expresses the current public policy of Georgia in relation to restrictive covenants in employment agreements.
>
> With the enactment of the New Act, the Georgia General Assembly announced a shift in Georgia's public policy, such that it is not in contravention of Delaware law. . . . The New Act also expresses a preference for construing 'a restrictive covenant to comport with the reasonable intent and expectations of the parties to the covenant and in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement.' . . . Finally, the New Act expresses Georgia's policy preference for the 'blue pencil' rule, which allows a court to 'modify a covenant that is otherwise void and unenforceable so long as the modification does not render the covenant more restrictive with regard to the employee than as originally drafted by the parties.'
>
> ***Delaware law is in accord with Georgia's new public policy position on restrictive covenants in employment agreements. Therefore, the Court applying Georgia's choice-of-law rules would honor the parties' selection of Delaware law in determining the enforceability of the restrictive covenants in the Non–Compete.***[23]

Thus, relying upon the Act as evidence of a shift in Georgia's public policy, Judge Story found that applying Delaware law to the restrictive covenants in the employment agreements would not violate Georgia's public policy. According to him, Georgia public policy has changed such that choice-of-law provisions in agreements signed before the effective date of the Act need to be looked at differently than before. Despite this, Judge Story subsequently reversed himself when he granted a motion for reconsideration.

The Argument Against Applying Georgia's "New" Public Policy Retroactively

In reversing his prior decision, Judge Story found that he had disregarded several decisions from the Georgia Court of Appeals that had been decided following the passage of the referendum.[24] One of the decisions is *Bunker Hill Int'l, Ltd. v. NationsBuilder Ins. Servs., Inc*, which the Georgia Court of Appeals decided on May 5, 2011.[25] There, an employee and his new employer brought an action seeking a declaration that the restrictive covenants the employee had entered into with his previous employer were unenforceable under Georgia law.[26] That employment agreement was executed before the effective date of the Act.[27] The employee and his new employer also sought to invalidate a mandatory forum-selection clause in the agreement, which required that any dispute about the parties' rights under the agreement be litigated in Illinois.[28] The Georgia Court of Appeals held that the forum-selection provision was void because applying it would result in an Illinois court's enforcing at least one covenant in violation of Georgia public policy.[29]

Judge Story found that the Georgia Court of Appeals' decision in *Bunker Hill* relied upon Georgia's public policy at the time the agreement was signed to hold that the non-compete and non-solicitation provisions of the agreements were unenforceable in Georgia.[30] Therefore, he concluded, he had erred in *Boone I* in applying Georgia's current public policy to the choice-of-law analysis.[31] He went on to find that the Court of Appeals had recently reached the same conclusion in two other cases—*Gordon Document Products, Inc. v. Serv. Techs., Inc.*,[32] and *Cox v. Altus Healthcare and Hospice, Inc*.[33] Having examined *Bunker Hill*, *Gordon Document Products* and *Cox*, he determined that he had made a clear error of law in his first order when he concluded that

SEE *PROVISIONS*, Page 11

***PROVISIONS* continued from Page 10**

the public policy embodied in the Act should control whether the Delaware choice-of-law provision was enforceable.[34] Instead, he needed to apply Georgia's public policy *as it existed at the time Boone entered into the agreement*. Therefore, applying Georgia's old public policy required that the Delaware choice-of-law provision be disregarded.[35]

Although Judge Story's rationale in reaching the conclusion he reached is plain, it is unclear whether the *Bunker Hill*, *Gordon Document Products*, or *Cox* cases actually require the result that he reached. First, although the *Bunker Hill* case was decided after the referendum and after the original version of the Act was supposed to go into effect, it was decided *before* the newest version of the Act was signed into law by Governor Deal. Second, in the *Bunker Hill* case, neither party argued that the change in public policy in Georgia, as evidenced by the referendum or the Act, required the court to analyze the enforceability of the forum-selection provision differently. This may have been the case because the appeal in *Bunker Hill* was docketed before the constitutional amendment had even taken effect.[36] Third, the portion of the *Bunker Hill* decision cited by Judge Story to support his conclusion simply says that the *law* of restrictive covenants as it existed before the November 2010 ratification of the Act should be applied. Yet there is no dispute that the Act is not retroactive. The issue is whether *public policy* has *changed* such that courts should continue to disregard choice-of-law provisions.[37] While the *Bunker Hill* case certainly provided the opportunity for the Court of Appeals to address whether public policy in Georgia has changed, reviewing the briefs in that case as well as the decision demonstrates that this argument was not made, and the Court of Appeals did not specifically address the issue.

As for the *Gordon Document Products* and *Cox* cases, those cases involved only applying the law to determine whether restrictive covenants were enforceable. They did not involve choice-of-law, forum-selection, or any similar issues that would implicate public policy either at the time the agreements were signed or at the time the decisions were made. Moreover, House Bill 30, which amended the Act, was not signed into law by Governor Deal until May 11, 2011, *after* the Court of Appeals' January 24, 2011 ruling in *Cox*. Therefore, it was unclear in *Boone II* why Judge Story relied on those decisions in coming to the conclusion he reached.[38]

Judge Treadwell Adopts Judge Story's Analysis

Judge Story's August 3, 2011 opinion appears to have been the first to tackle this issue. A little more than a month after *Boone II*, however, Judge Treadwell of the Middle District of Georgia issued an opinion addressing the same question in *Becham*.[39] *Becham* involved employment agreements containing restrictive covenants that were executed in 2000.[40] One of the agreements contained a choice-of-law provision stating that the agreement was governed by Pennsylvania law.[41] On December 1, 2010, the employee notified his employer that he would be resigning effective December 31.[42] The same day, his manager sent him an e-mail with proposed separation terms, one of which was that he would continue to honor his obligations under the restrictive covenants in the agreement, which was to be governed by Pennsylvania law.[43] The employee responded to the e-mail accepting the separation terms on the same day.[44]

Shortly before the employee began working for a competitor the following February, he filed an action seeking a declaratory judgment that his restrictive covenants were unenforceable.[45] He quickly sought summary judgment.[46] In response, his former employer argued that the restrictive covenants were valid under Pennsylvania law and that the application of Pennsylvania law would not offend Georgia's *new* public policy favoring restrictive covenants.[47] The former employer also argued that he had reaffirmed the restrictive covenants at a time when Georgia's new public policy was in effect: both when he accepted the severance terms on December 1, 2010—which was after the successful ballot referendum—*and* when he accepted a severance payment in January 2011—which was after the constitutional amendment had taken effect.[48]

Relying on Judge Story's decision in *Boone II*, Judge Treadwell rejected the former employer's argument that the court should enforce the Pennsylvania choice-of-law provision because the application of Pennsylvania law would not offend Georgia's *new* public policy favoring restrictive covenants.[49] Specifically, he held that "[i]t is apparent that the General Assembly did not intend for the 2009 and 2011 versions of O.C.G.A. § 13-8-2.1 to have any retroactive application."[50] Judge Treadwell also rejected the former employer's argument that by accepting payments in January *after* the constitutional amendment had taken effect on January 1, 2011, Georgia new public policy should apply: "Here, [the former employer's] alleged reaffirmation occurred when [the plaintiff] 'accepted' [his then-employer's] severance terms on December 1, 2010, when Georgia's old public policy was in place. The fact that payments may have been made after the effective date of the constitutional amendment does not change the date of acceptance. Thus, because any reaffirmation occurred before January 1, 2011, old Georgia law applies."[51]

Judge Treadwell thus disregarded the Pennsylvania choice-of-law provision, found that the covenants were unenforceable under old Georgia law, and granted summary judgment in the employee's favor on his declaratory judgment counterclaim.[52]

Conclusion

While employees with older agreements containing restrictive covenants and choice-of-law provisions may take some comfort in Judge Story and Judge Treadwell's decisions and may well believe that a judge would likely invalidate their choice-of-law provisions and apply Georgia's old law to assess the enforceability of their restrictive covenants, this issue is by no means settled. Certainly, other federal judges may take a different view.[53] Ultimately, the Georgia Court of Appeals and the Georgia Supreme Court will have to answer this question directly.[54]

Accepting the argument that Georgia's old public policy should apply to agreements signed before the effective date of the Act will result in ignoring the parties' bargained-for agreement that a foreign state's law would govern their obligations—all in order to avoid contravening Georgia public policy considerations that no longer exist. An argument can be made that such an approach makes no sense as a practical matter.[55]

That said, a perhaps equally compelling argument can be made

SEE *PROVISIONS*, Page 12

***PROVISIONS* continued from Page 11**

that employees who knew that a Georgia court would disregard their choice-of-law provision calling for the application of another state's law, based on Georgia public policy in place at the time they entered into their employment agreements, should not be penalized by retroactive application of an unforeseen change in public policy. Further, given the historic hostility of the Georgia courts to restrictive covenants in the employment context as well as the General Assembly's clear intent that the *new law* does not apply retroactively, it would not be unreasonable to expect the Georgia Court of Appeals and the Georgia Supreme Court to agree with the latter argument that the new public policy should also *not* be applied retroactively. Such an approach would arguably be consistent with Georgia case law addressing whether retroactive application of a new *law* is appropriate.[56]

As with many questions relating to the application of the Act, this issue is yet another one where attorneys must counsel their clients as best as they can until the Georgia appellate courts provide more guidance.

Benjamin I. Fink and Neal F. Weinrich are with the Atlanta law firm Berman Fink Van Horn P.C. where they focus their practices on trade secret, non-compete and other competition-related disputes.

(Endnotes)

1 O.C.G.A. section 13-8-50 *et. seq.*

2 *See* H.B. 30, 151th Gen. Assemb., Reg. Sess. (Ga. 2011), at § 5 ("This Act ... 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"); *see also* H.B. 173, 150th Leg., Reg. Sess. (Ga. 2009), at § 4 (same).

3 *See Gordon Document Prods., Inc. v. Serv. Techs., Inc.*, 308 Ga. App. 445, 448 n. 5, 708 S.E.2d 48 (2011) (applying old law to 2003 and 2007 agreements); *Cox v. Altus Healthcare and Hospice, Inc.*, 308 Ga. App. 28, 30, 706 S.E.2d 660, 664 (2011) (applying old law to 2009 agreement); *see also Becham v. Synthes (U.S.A.)*, 2011 WL 4102816, at *6 (M.D. Ga. Sept. 14, 2011) (applying old law to covenants agreed to on December 1, 2010 – i.e., after H.B. 173 went into effect but before the necessary constitutional amendment took effect on January 1, 2011); *Boone v. Corestaff Support Servs., Inc.*, 2011 WL 3418382 (N.D. Ga. Aug. 3, 2011) (applying old law to 2008 agreement).

4 As of the date of this article, the authors are aware of only one published opinion in which a Georgia court has scrutinized covenants under the new law. *See PointeNorth Ins. Group v. Zander*, Civil Action No. 1:11-CV-3262-RWS, 2011 WL 4601028 (N.D. Ga. Sept. 30, 2011) (blue-penciling overly broad customer non-solicitation covenant in May 11, 2011 employment agreement to apply only to customers that the former employee contacted or assisted with insurance) (Story, J.).

5 *Convergys Corp. v. Keener,* 276 Ga. 808, 582 S.E.2d 84 (2003) (answering certified question from the Eleventh Circuit regarding enforcement of choice-of-law provisions in restrictive covenant context); *Nasco, Inc. v. Gimbert*, 239 Ga. 675, 676, 238 S.E.2d 368, 369 (1977); *see also Enron Capital & Trade Resources Corp. v. Pokalsky*, 227 Ga. App. 727, 730, 490 S.E.2d 136, 139 (1997) (holding that although the parties may have chosen the law of a foreign jurisdiction to govern, a Georgia court will not enforce a restrictive covenant "particularly distasteful" to Georgia public policy and law).

6 239 Ga. at 676, 238 S.E.2d at 369.

7 276 Ga. 808, 582 S.E.2d 841 (rejecting "materially greater interest" test set forth in Restatement (Second) of Conflicts, § 187(2) and finding that *Bryan v. Hall Chemical Co.,* 993 F.2d 831 (11th Cir. 1993), and *Nordson Corp. v. Plasschaert*, 674 F.2d 1371 (11th Cir. 1982), were "erroneous"); *see also Manuel v. Convergys Corp.*, 430 F.3d 1132 (11th Cir. 2005); *Hostetler v. Answerthink, Inc.*, 267 Ga. App. 325, 328-29, 599 S.E.2d 271, 274-75 (2004); *Hulcher Services, Inc*. v. *R.J. Corman R.R. Co., LLC*, 247 Ga. App. 486, 543 S.E.2d 461 (2000); *Wolff v. Protégé Systems, Inc.*, 234 Ga. App. 251, 506 S.E.2d 429 (1998).

8 *Keener v. Convergys Corp.*, 312 F.3d 1236 (11th Cir. 2002).

9 276 Ga. 808, 582 S.E.2d 84.

10 267 Ga. App. 325, 599 S.E.2d 271.

11 This statute was declared unconstitutional by the Georgia Supreme Court. *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371, 405 S.E.2d 253 (1991).

12 H.R. 178, 150th Gen. Assemb., Reg. Sess. (Ga. 2010), at § 1 (amending Article III, Section VI, Paragraph V, Subparagraph c of the Constitution). Subparagraph c previously stated that "[t]he General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void."

13 For a discussion of whether the language used in the ballot referendum was constitutional, see David Pardue's article in this newsletter.

14 The uncertainty surrounding when the law took effect was an oft-discussed topic in the blogosphere and other arenas. *See*, *e.g.*, Legislation Introduced Which Would Re-enact Georgia's New Restrictive Covenants Legislation, http://www.georgia-noncompete.com/2011/01/legislation-introduced-which-would-re-enact-georgia%E2%80%99s-new-restrictive-covenants-legislation/ (Jan. 28, 2011). Indeed, H.B. 30 acknowledged as such. *See* H.B. 30, 151th Gen. Assemb., Reg. Sess., (Ga. 2011), at § 1 ("It has been suggested by certain parties that because of the effective date provisions of HB 173 …, there may be some question about the validity of that legislation").

15 *See generally Becham*, 2011 WL 4102816, at *4 ("In sum, the 2009 law become effective November 3, 2010, but without the necessary constitutional foundation in place. The constitutional amendment changing Georgia's public policy

SEE *PROVISIONS*, Page 13

***PROVISIONS* continued from Page 12**

became effective January 1, 2011. The legislation curing any constitutional defect became effective May 11, 2011").

16 *See supra* note 2.

17 *See supra* note 3.

18 239 Ga. at 676, 238 S.E.2d at 369.

19 *Integon Indem. Corp. v. Canal Ins. Co.*, 256 Ga. 692, 693, 353 S.E.2d 186, 187 (1987) (*citing Greenwood Cemetery Inc. v. The Travelers Indem. Co.,* 238 Ga. 313, 316-17, 232 S.E.2d 910, 913-14 (1977). *See also Board of Lights and Waterworks v. Dobbs*, 151 Ga. 53, 105 S.E. 611 (1921) ("the expression of the legislature is conclusive on the question of public policy").

20 *See* Georgia Secretary of State Official Results of the Tuesday, November 2, 2010 General Election, http://sos.georgia.gov/elections/election_results/2010_1102/swqa.htm (last visited January 13, 2012).

21 2011 WL 2358666 (N.D. Ga. June 9, 2011) ("*Boone I*").

22 *Id.*, at *2.

23 *Id.*, at *5-6 (citations omitted) (emphasis added).

24 2011 WL 3418382 (N.D. Ga. Aug. 3, 2011) ("*Boone II*").

25 309 Ga. App. 503, 710 S.E.2d 662 (May 5, 2011).

26 *Id.*, at 503, 710 S.E.2d at 664.

27 *Id.*, at 504, 710 S.E.2d at 664.

28 *Id.*, at 505, 710 S.E.2d at 665.

29 *Id.*, at 507-8, 710 S.E.2d at 666. *Compare Iero v. Mohawk Finishing Products, Inc.*, 243 Ga. App. 670, 534 S.E.2d 136 (2000) (finding that New York choice-of-venue provision is enforceable and affirming trial court's order granting motion to dismiss based on forum-selection provision).

30 *Boone II,* 2011 WL 3418382, at *2.

31 *Id.*, at *3.

32 308 Ga. App. 445, 708 S.E.2d 48 (March 16, 2011).

33 308 Ga. App. 28, 706 S.E.2d 660 (Jan. 24, 2011).

34 *Boone II,* 2011 WL 3418382, at *3.

35 *Id.*, at *3-4.

36 *See* Docket/Case Inquiry System: Results, http://www.gaappeals.us/docket/results_one_record.php? docr_case_num=A11A0749 (last visited January 13, 2012).

37 *See*, *e.g.*, *Park-Ohio Indus., Inc. v. Carter*, No. 06-15652, 2007 WL 470405, at *9 (E.D. Mich. Feb. 8, 2007) (analyzing the implications on a choice-of-law analysis of the repeal in 1985 of Michigan's anti-restrictive covenant act and stating that "... a state's law and its public policy are not always synonymous, and ...they do not have to be for choice-of-law purposes"); *Shipley Co. v. Clark*, 728 F.Supp. 818, 826 (D. Mass. 1990) (analyzing implications of the repeal of the Michigan statute on the enforceability of a Massachusetts choice-of-law provision and stating that "[e]nforcement of the choice-of-law provision... would violate Michigan *law*, but not Michigan *policy*") (emphasis in original).

38 In an October 17, 2011 Order which denied a request that he certify to the Supreme Court of Georgia the question of whether a Georgia court should consider the State's current public policy or the public policy in effect at the time a contract was entered into when evaluating a choice-of-law provision, Judge Story emphatically found that *Bunker Hill* did address this issue: "... the Court finds [based on *Bunker Hill*] that the Georgia Court of Appeals has definitively settled the issue ...". Case 1:11-cv-01175-RWS, Document 51, at p. 10, Filed 10/17/11 ("*Boone III*"). Judge Story also rejected some of the arguments identified in this article regarding why *Bunker Hill*, *Gordon Document Products*, and *Cox* did not necessarily require him to come to the conclusion he reached. *Id.,* at pp. 10-14.

39 2011 WL 4102816.

40 *Id.*, at *1.

41 *Id.*

42 *Id.*

43 *Id.*, at *1-2.

44 *Id.*, at *2.

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*, at *4-6.

50 *Id.*, at *4.

51 *Id.*, at *6.

52 *Id.*, at *7.

53 In *Hix v. Aon Risk Services South, Inc.*, Civil Action No. 11-CV-3141-RWS, 2011 WL 5870059 (N.D. Ga. Nov. 22, 2011), Judge Story applied Georgia law to analyze the enforceability of covenants in an agreement containing a choice-of-law provision that called for the application of Illinois law. The parties in *Hix*, however, do not appear to have re-argued the issues decided in *Boone I* and *Boone II* and instead appear to have agreed that Georgia law governed the enforceability of the covenants. *Id.*, at *3.

54 As discussed above, Judge Story concluded in *Boone III* that the Georgia Court of Appeals has already answered this question. *See supra* note 38. However, this issue will undoubtedly come before the Georgia Court of Appeals again and in a more direct fashion.

55 Judge Story rejected this argument in denying the request by the defendants in *Boone* that he certify a question to the Supreme Court of Georgia: "... the Court finds it incongruous that a Georgia court would apply old Georgia law, which disfavors restrictive covenants, in deciding whether to enforce a restrictive covenant entered into before passage of the new law, but would consult new public policy, which favors restrictive covenants, in deciding whether to enforce a choice-of-law provision governing the same restrictive covenant and that would give effect to that covenant." *Boone III*, at p. 13.

56 *See generally Donaldson v. Dept. of Transp.*, 262 Ga. 49, 53, 414 S.E.2d 638, 641 (1992) ("It is a well settled principle of law that acts of the legislature are ordinarily given prospective effect unless the language of the act imperatively requires retroactive application...(cits. omitted)... The amendment at issue here is silent on the issue of retroactive application. We conclude therefore that the legislature intended prospective application only").