Postponing The Noncompete Fight

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Settlement of lawsuits is almost universally considered a good thing. Among the many benefits is the notion that the conflict ends immediately and the parties can go on with their lives with the comfort of certainty. Right? Well, maybe. In noncompete cases, an employer might consider settling because it fears an unfavorable determination by the court that the geographical, temporal or substantive scope of the noncompete agreement at issue may be overly broad.

But some cases suggest that settlement might simply postpone this determination until another day. According to these courts, this is true because restrictive covenants in settlement agreements are subject to the same strict judicial scrutiny applied to employment agreement covenants.

The thought that a restrictive covenant set forth in a settlement agreement may be unenforceable may be hard to swallow. After all, a widely recognized incentive for settling cases is the opportunity to achieve finality while at the same time eliminating the risks inherently intertwined with litigation.

For this reason, an employer who fears that its three-year, nationwide noncompete agreement may be overly broad may seek the seemingly safe harbor of settlement. It may seem like a good deal. From the employer's perspective, voluntarily reducing the scope of the covenant through settlement might seem akin to taking sleeves off a vest: If the restrictive covenant is overly broad, it is likely to be judicially modified or blue penciled to some virtually unpredictable extent; and settlement may bring side benefits such as certainty and mutual releases.

But what happens if the former employee violates the settlement? At first glance, you might think that enforcement is a certainty because the employee consented to the reduced covenant in place of the previous covenant. Not so fast. Some courts see it differently.

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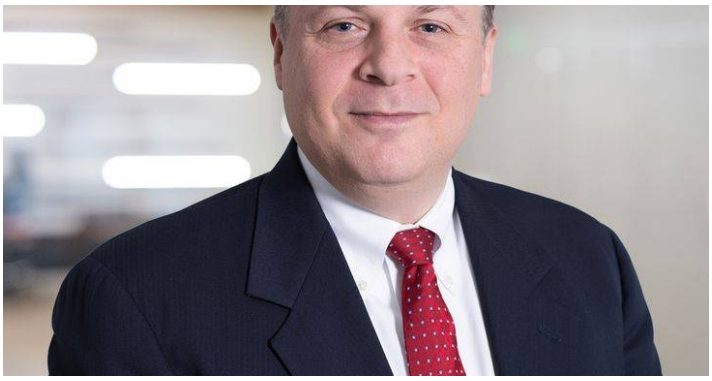

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