



## **You're Fired!! And Don't Forget Your Non-Compete!**

Insights

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Many people believe that an employer cannot enforce a non-compete agreement against an employee whom it has fired without cause. For years, many have cited two Pennsylvania Superior Court decisions to support this contention. But the Pennsylvania Superior Court just weighed in with a new opinion stating that courts must consider factors extending beyond whether and why the employee was fired. In short, Pennsylvania courts can no longer reflexively find non-competes unenforceable simply because an employee was terminated.

On Thursday, September 23, 2010, in *Missett v. Hub International Pennsylvania, LLC*, the Pennsylvania Superior Court explained that “the circumstances of termination are, alone, not determinative of whether the restrictive covenant is enforceable...” (A copy of the opinion is available in pdf format at the bottom of this post.)

### **Facts of *Missett v. Hub International Pennsylvania, LLC***

In 2000, Christopher Missett began employment with the Clair Odell Insurance Agency, and he signed a customer non-solicitation agreement. Clair Odell was subsequently purchased by Citizens Financial Group, and Missett was paid \$300,000 to sign an additional non-solicitation agreement that covered a larger variety of clients. In 2006, Hub U.S. Holdings purchased the outstanding equity interests of Clair Odell from Citizens and eventually terminated Missett in April of 2008. After Hub fired Missett, it sent him a letter reminding him of his post-employment restrictive covenants. Missett filed suit in the Montgomery County Court of Common Pleas seeking a declaration that Hub could not enforce his agreements in part because he had been terminated. The trial court relied heavily on two previous decisions from the Pennsylvania Superior Court noting that when an employer fires an employee, it “deems the employee worthless” and thereby acknowledges that it lacks a legitimate interest in enforcing a restrictive covenant. Accordingly, the Common Pleas court found the restrictive covenant unenforceable against Missett.

Hub appealed to the Pennsylvania Superior Court, which took the opportunity to expand upon its prior opinions. The Superior Court explained that “the circumstances of termination are but one of many factors to be considered by the court” when determining whether to enforce a restrictive covenant, and “that the issue of enforceability is one to be determined on a case-by-case basis.” It noted other important factors include, for example: “What effect will the restraint have on the

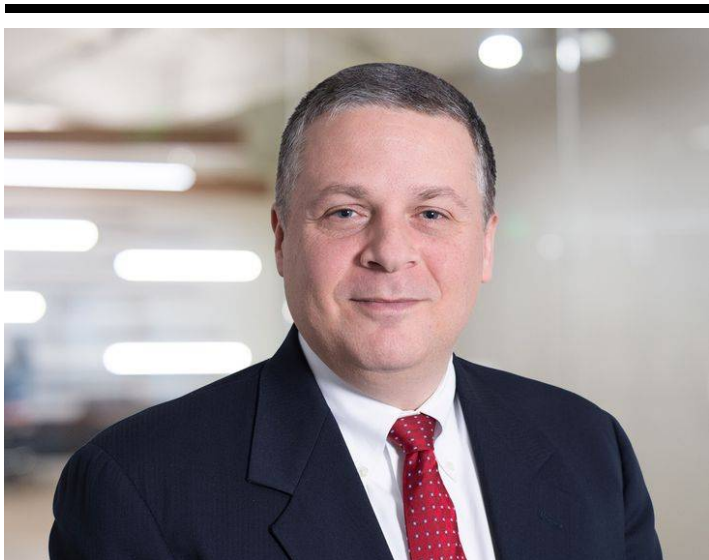
noted other important factors include, for example, “what effect will the restraint have on the employee’s life? Will it deprive him of the opportunity [to support] himself and his family in reasonable comfort? Will it tend strongly to impoverish him?” Clearly, the Court was influenced by the fact that Missett had received \$300,000 in exchange for signing one of his agreements. It also emphasized that Missett “had access to a great deal of confidential and proprietary information belonging to HubPa” and that he had repeatedly signed non-solicitation agreements. In sum, the Superior Court stated that the lower court took an unreasonably “myopic” view of prior case law, and it ordered the lower court to reexamine the case and consider the broader facts and circumstances.

The Pennsylvania Superior Court’s ruling in Missett is a reminder that courts will not reflexively adhere to prior precedent. Rather, judges often try to reach what they believe is the “right result” for the case before them. As Supreme Court Justice Antonin Scalia recognized, many judges “will be disposed to change the law to accord with their ‘moral sense’”. See *Making Your Case: The Art of Persuading Judges*, at page 27, by Antonin Scalia and Bryan A. Garner. To support this observation, Justice Scalia and Mr. Garner quoted a renowned 20th century British judge who said: “My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law [that] impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule – or even to change it – so as to do justice in the instant case before him.”

From this point forward, it is clear that Pennsylvania courts must look at the facts and circumstances of each non-compete case they decide. Bright line rules precluding enforcement of restrictive covenants no longer exist (if they ever did).

[Missett v. Hub.pdf \(72.27 kb\)](#)

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