The Dearth of Restrictive Covenant Case Law in Georgia

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It was five years ago this week (May 11, 2011, to be precise) that Georgia's new restrictive covenant statute went into effect. Prior to the effective date of the statute, Georgia was (surprisingly for many out-of-state lawyers and businesses) one of the hardest states in which to enforce a restrictive covenant. As the Georgia Supreme Court stated in a a self-deprecating manner in *Fuller v. Kolb*, "Ten Philadelphia lawyers could not draft an employer-employee restrictive covenant agreement that would pass muster under the recent rulings of this court." (No one knows why Justice Ingram selected Philadelphia as the home of the most astute lawyers in the country, but I'm sure that the lawyers in our Philadelphia office would whole-heartedly agree.) The Georgia Supreme Court made this comment in 1977, well before the case law on restrictive covenants proliferated and became difficult for all but the most experienced practitioners to navigate.

One of the selling points of the new restrictive covenant statute is that it is simpler. As opposed to having to take a machete to the undergrowth of dozens of cases on non-compete and non-solicitation provisions (with hidden gems like the cases on tolling provisions or in-term covenants), businesses and lawyers would now be able to look at one statute to know the rules for restrictive covenants. Indeed, this has been the case.

However, just because the statute is clearer than the old case law does not mean that it can answer all questions. For instance, the statute authorizes courts to modify otherwise unenforceable covenants. O.C.G.A. § 13-8-53(d). However, the statute does not provide guidance for judges as to when and how they should exercise this discretion.

And oddly enough for appellate courts that issued decisions on restrictive covenant matters with great frequency, there is almost no case law from the Georgia Court of Appeals or Supreme Court to answer questions like this, despite the fact that the statute has been in effect for five years. For instance, Westlaw's annotations to the statute cover only one case: *In re Pervis,* 512 B.R. 348 (2014). The statute coming online most likely produced a spate of employers having their key employees sign new agreements, as employers now had a host of options that they did not have before. Thus, one would expect that the spate of agreements would then trigger a spate of restrictive covenant cases (and thus appeals) as employees and their new employers then test those agreements. That has not happened. Why have we seen so little case law on the statute? Here are a few guesses:

1. **Cases are more fact specific and therefore take a longer time to wind through the court system.** Under the old law, agreements usually rose or fell on their faces. Under the new law

System. Under the old law, agreements usually rose or fell on their faces. Under the new law, the underlying facts of the situation are more likely to be determinative, which means a lengthy discovery process, followed by a trial. We do not have instances where a trial court makes an early decision on the enforceability of the agreement and then it gets certified for appeal. Thus, we may have cases on the new statute, but they will take a long time to wind through the process.

2. **Non-compete litigation is less likely.** Long, fact-intensive cases tend to be expensive, which deters litigants from taking them the distance. Under the old law, parties could move to enforce or challenge agreements knowing that they would get a relatively early ruling from a judge as to enforceability. Now, it takes a lot more time and money to get that ruling, which would reduce the amount and duration of non-compete litigation and leave the appellate courts with fewer issues to address.
3. **Reduced employee mobility?** This is entirely speculative and would be appropriately addressed by qualified researchers in the fields of business and economics (i.e not me), but part of the argument advanced by the White House in its recent pronouncements on restrictive covenants is that the use of such covenants reduces employee mobility and leverage. If key employees are changing jobs less because of the increased use of restrictive covenants (and especially non-compete restrictions) after the effective date of the new statute, then we would expect less non-compete litigation and thus fewer cases reaching the appellate courts.

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