

DOSE OF SUGAR AND SPICE: GEORGIA COURT REMINDS BUSINESSES HOW THEY CAN GUARD AGAINST UNFAIR COMPETITION

Using Restrictive Covenants and Protecting Confidential Information

Insights
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Georgia law has become somewhat notorious in the area of non-compete, non-solicit, non-recruitment, and confidentiality agreements - generally referred to as restrictive covenants. The nuisances from various court decisions over the years has made Georgia a tough, but not impossible, place to get restrictive covenants enforced.

A recent decision from the Court of Appeals serves as yet another reminder that restrictive covenants must be narrowly tailored or they will be thrown out. However, the Court also served notice that Georgia businesses have a different and powerful weapon they can use to protect against the misuse of their confidential information in the form of the Georgia Trade Secrets Act.

The case pitted tax preparation firm, H&R Block, against a former employee (Mary Squire) and a competitor, Paramount Tax and Accounting. H&R Block alleged (1) that Squire's employment with Paramount violated the non-competition agreement Squire signed with H&R Block, and (2) that Squire and Paramount violated the Georgia Trade Secrets Act by taking H&R Block's client contact information and using it to send mailers soliciting business for Paramount.

H&R Block initially hit a homerun with the trial court. The court granted a preliminary injunction enjoining Squire from violating her non-compete and enjoining Paramount from performing any work for the approximately 16,000 entities or persons in H&R Block's client database for a certain territory.

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Squire and Paramount appealed. The Georgia Court of Appeals took away the homerun, but still gave H&R Block a partial victory.

The Appeals Court rejected the enforcement of the non-compete agreement. Citing well-developed Georgia law on the subject, the Court of Appeals said that the non-compete was not enforceable because it contained an overbroad geographical provision. Specifically, the geographical restraint was written in a way that it could have been construed to prevent Squire from accepting employment virtually anywhere in the United States if her new employer also did business or advertised in the area in which she had worked for H&R Block (which was Gainesville). While H&R Block may not have ever intended the provision to be read that broadly, the Court took the language of the agreement literally and applied it to how it *could* be interpreted.

Notably, because the non-compete provision was not enforceable, the Appeals Court also noted that the non-solicitation of clients provision in Squire's agreement was likewise not enforceable. It did not matter that the non-solicitation was probably otherwise reasonable and enforceable if it had been considered alone. The non-solicitation provision was rendered invalid as a result of the unenforceability of the non-compete under what some describe as the "one for all/all for one" nature of Georgia law. That is, if you have a non-compete and a non-solicit in an agreement, they both fall if only one is unenforceable. This is just one example of the many nuisances under Georgia law with respect to restrictive covenants.

It bears noting that legislation was passed in the Georgia legislature and signed by Governor Perdue which would significantly change Georgia non-compete law and make restrictive covenants much easier to enforce. However, the legislation requires a Constitutional amendment that will be put before Georgia voters in a statewide referendum in 2010.

Back to the case - H&R Block did not suffer a total defeat. It actually secured a partial victory in regards to its trade secrets claim. First, the Court of Appeals confirmed that the information contained in H&R Block's client database, including the names and addresses of its clients, constituted a trade secret under Georgia statutory law. While the Appeals Court was not willing to enforce as broad of an injunction as the trial court had issued, the Court did make it absolutely clear that Paramount would be prevented from

using the trade secret information it had misappropriated from H&R Block. The Court also said that Paramount could not work for clients who came to the company as a result of its use of the misappropriated information.

The confirmation by the Court of Appeals that the customer information should be afforded trade secret status was a significant win for Georgia employers. In a state where it can be difficult (but again not impossible) to enforce restrictive covenants, the reminder that some protection and relief can come via the Georgia Trade Secrets Act is a positive one. The trade secret statute has real teeth, offering the possible recovery of injunctive relief, monetary damages, liquidated damages, and attorneys' fees to the prevailing party.

But it is important to remember that not all confidential information will be treated as a trade secret. In ruling that H&R Block's client information was a trade secret, the Court noted that H&R Block did not publish its client list, it established policies to protect the information from disclosure to third parties, and it limited access to the information. These steps were all necessary to finding that the client information was subjected to reasonable efforts to maintain its secrecy a critical requirement for information to qualify as a trade secret under Georgia's statute.

The referenced case is *Paramount Tax & Accounting LLC v. H&R Block E. Enters.*, No. A09A1542 (Georgia Court of Appeals August 6, 2009).