WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE May 4, 2022

TO Joint Judiciary Committee

FROM David Hopkinson, Staff Attorney

SUBJECT Topic Summary: Blue pencil rule: Hassler v. Circle C Resources

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During the 2021 interim this Committee considered legislation with respect to noncompete agreements and ultimately voted to sponsor what became 2022 House Bill 38, which failed to pass the House committee of the whole. Shortly after House Bill 38 failed, the Wyoming Supreme Court decided a case that changed how the Court treats cases involving noncompete agreements that the Court concludes are unreasonable and would typically be void as violating public policy. This summary discusses Hassler v. Circle C Resources, a case where the Court considered whether courts should continue using the "blue pencil" rule to modify noncompete agreements to excise or amend terms of the agreement that the Court concludes are unreasonable.

Approved Interim Topic

Priority No. 2: Review of Recent Court Opinions.

The Committee will study and consider recent opinions where courts interpreted Wyoming statutes, noted the absence of legislative action, or called for legislative action.

Background

Noncompete clauses, or covenants not to compete, are agreements where an employee agrees not to enter into or engage in a similar profession or trade in competition against the employer. These clauses may be limited by duration or geography (for example, specifying that an employee agrees not to compete for a set period of time, or within a certain geographic area based on the employer's location). There are not currently any statutes in Wyoming that directly address noncompete agreements. Per Wyoming case law, non-compete clauses or restrictions in employment agreements are enforceable if the clause is: "(1) in writing; (2) part of a contract of employment; (3) based on reasonable consideration; (4) reasonable in durational and geographical limitations; and (5) not against public policy."[1] For more detailed information on noncompete clauses generally please see LSO's May 17, 2021 memorandum.[2]

Contracts that are in violation of public policy are typically void.[3] When courts have found unreasonable restrictions on trade they have taken three approaches: (1) "All or nothing" which voids a restrictive covenant even if part of it is enforceable; (2) the "blue-pencil approach which allows the court to enforce reasonable terms and excise unreasonable terms; (3) "partial enforcement" (or liberal blue pencil") which allows the court to reform and enforce restrictive covenants unless there are indications of bad faith or overreaching by the employer.[4]

In Hopper v. All Pet Animal Clinic[5] the Wyoming Supreme Court adopted a "partial enforcement" or "liberal blue-pencil" approach to addressing unenforceable restrictions on trade, which includes unreasonable noncompete agreements. This rule allows the Court to modify unreasonable terms in noncompete agreements, making them reasonable, and allowing what would otherwise be a void contract to be enforceable. Essentially this rule has allowed the Court to rewrite unreasonable terms of an employment contract.

Hassler v. Circle C Resources

Circle C provides both day and residential habilitation services to disabled clients in Natrona and Converse counties.[6] It hired Charlene Hassler, a CNA, on March 17, 2015, to provide residential-habilitation care in her home in Converse County to one of its long-term adult clients (Client).[7] At the time of hire Ms. Hassler signed a confidentiality and noncompete agreement, which prohibited Ms. Hassler from engaging in any competing business or service otherwise provided by Circle C during employment or for 24 months following the end of employment, and further prohibited Ms. Hassler from soliciting Circle C's clients for the same time period.[8] The agreement prohibited competition in any

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[1] Hopper v. All Pet Animal Clinic, 861 P.2d 531 at 540.

[2] **https://wyoleg.gov/InterimCommittee/2021/01-202106148-01Summary-NoncompeteClauses.pdf**.

[3] Hassler v. Circle C Res., 2022 WY 28, ¶ 13, 505 P.3d 169, 174

[4] Id.

[5] Hopper v. All Pet Animal Clinic, 861 P.2d 531.

[6] Hassler v. Circle C Res., 2022 WY 28, ¶ 3, 505 P.3d 169, 171

[7] Id. ¶ 4, 505 P.3d 169, 171

[8] Id.

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area where Circle C markets or has marketed its services during the year prior to the end of employment which included Natrona, Converse, Fremont, Weston, Laramie, Johnson and Campbell counties.[9]

After approximately one month of training, Ms. Hassler began providing residential habilitation care in her home for Client. Client's mother became dissatisfied with Circle C's day habilitation services and sought another provider. On January 7, 2017, Client's case manager notified Circle C that Client was changing providers, and Ms. Hassler was leaving Circle C's employ.[10] Ms. Hassler continued to provide residential habilitation services to Client and was paid significantly more by a new Medicaid provider than she had been by Circle C.[11]

Circle C filed a complaint against Ms. Hassler in July 2019 for breach of the noncompete agreement. The district court ruled in favor of Circle C, finding that the noncompete agreement was reasonable and enforceable only if the geographical area subject to restriction was narrowed to include only Natrona and Converse counties and the duration of the restriction was reduced from 24 to 12 months. Using the liberal blue-pencil rule, the district court modified the contract terms accordingly and granted judgment in favor of Circle C for $94,742.10.[12]

Ms. Hassler appealed. The Wyoming Supreme Court reviewed the policy of the blue-pencil rule and whether Wyoming courts could continue using the rule to reform otherwise unreasonable noncompete agreements. The court considered several factors in making it's decision:

- Since adopting the rule in Hopper the Court hasn't used or affirmed the use of the blue-pencil rule.[13]
- The blue-pencil rule strays from typical rules of contract interpretation and enforcement. [14]
- In practice, the rule places an unfair burden on employees and creates uncertainty in business relationships.[15]
- The blue-pencil rule tips the scales even further toward employers (the scales generally favor the employer when a person starts employment and the employer

[9] Id.
[10] Id. ¶ 6, 505 P.3d 169, 172
[11] Id.
[12] Id.
[13] Id. ¶ 20, 505 P.3d 169, 176.
[14] Id. ¶ 22, 505 P.3d 169, 176.
[15] Id.

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drafts the agreement) in that the rule encourages or incentivizes employees to draft overly broad and unreasonably noncompete agreements. [16]

- If challenged the employer gets the benefit of the court redrafting the agreement to make it reasonable. An overly broad agreement dissuades employees from seeking better opportunities. The liberal blue-pencil rule means that neither party can rely with certainty on the terms of the employment agreement.[17]

The Court determined that it was not the role of the courts to redraft noncompete agreements to bring them within the bounds of reason, noting that doing so allowed employers to draft overbroad noncompete agreements trusting in the courts to narrow them if challenged.[18] The Court overruled the Hopper cases adoption of the blue-pencil rule, and found that the terms of the noncompete agreement were unreasonable on their face and thus void in violation of public policy.[19]

Committee Considerations

If the Committee wishes to further explore this issue, it may wish to consider whether it should reexamine its work on noncompete agreements from last year in light of this holding, and whether there should be any changes to statute.

Please let me know if you have any questions or would like further information.

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[16] Id. ¶ 23, 505 P.3d 169, 176.
[17] Id. ¶ 27, 505 P.3d 169, 178.
[18] Id. at ¶ 25, 505 P.3d 169, 177.
[19] Id. ¶ 31, 505 P.3d 169, 179.

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