

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Advocate's VIEW

# Court of Appeals addresses 'BDO Seidman' analysis

### Enforceability of restrictive covenants in employment agreements

On June 11, the New York State Court of Appeals addressed two meaningful issues in the enforceability of restrictive covenants in a decision rendered in the case of *Brown & Brown, Inc. v. Johnson*, 2015 N.Y. Lexis 1396.

Reversing a Fourth Department decision granting summary judgment in favor of a former employee, the Court of Appeals held that material issues of fact remained in dispute regarding the circumstances surrounding the execution of her employment agreement. The decision emphasizes the burdens facing an employer seeking to enforce a restrictive covenant in New York but at the same time holds that the analysis of enforceability is quite fact-specific.

In *Brown & Brown*, the Court of Appeals refused to enforce a Florida choice-of-law provision as "offensive to a fundamental public policy of this state," affirming the Fourth Department on that issue. However, the former employee's victory was forestalled by the existence of disputed issues of material fact regarding whether the employer had engaged in overreaching and coercive conduct in requiring execution of the restrictive covenant.

The restrictive covenant at issue was overbroad on its face because it purported to prohibit the employee from soliciting, accepting, or servicing any person or entity that is a customer or account of the New York office of Brown & Brown. Under the Court of Appeals' 1999 decision in *BDO Seidman v. Hirshberg*, the restrictions were invalid because they extended to customers that the employee had not met, did not know about, and for whom she had done no work. The employer therefore sought partial enforcement of the restrictive covenant, limiting the prohibition to only those customers with whom she interacted

or whose files she encountered while employed.

The Court of Appeals first addressed the employment agreement's Florida choice-of-law provision. The Appellate Division had invalidated that provision because Florida's law regarding enforcement of restrictive covenants was "truly obnoxious" to New York public policy.

The Court of Appeals affirmed this part of the decision, emphasizing that many of the burdens placed on an employer to demonstrate the reasonableness of the restriction in New York, were shifted to the employee under Florida law. Further, by Florida statute the contract could not be strictly construed against the employer and a court cannot consider the hardship to the former employee.

Analyzing the restrictions under New York law, the Appellate Division refused to partially enforce the agreement. To obtain partial enforcement of an overbroad restrictive covenant, an employer must demonstrate an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, and show that it sought in good faith to protect a legitimate business interest, consistent with reasonable standards of fair dealing.

The Appellate Division noted that it had been executed seven years after the *BDO Seidman* decision, and that the employer was on notice that the restrictions were overbroad when the employee was required to sign the agreement. Furthermore, execution of the agreement was required as a condition of employment, and the employee received no additional benefit as a result. The Appellate Division held that the employer had not, as a matter of law, met its burden of establishing entitlement to partial enforcement of the covenant.

The Court of Appeals reversed, noting the conflicting affidavits submitted by the parties concerning the execution of the



By **STEVEN E. COLE**

Daily Record  
Columnist

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agreement and the early stages of the proceeding. Under those circumstances, the Court of Appeals held that dismissal of the employer's request for partial enforcement was inappropriate. Reciting several factors relevant to the partial enforcement analysis, the court seemed to focus on whether the employee understood the restrictions and believed that she had the power to negotiate the terms of the restrictions with the employer.

The Court of Appeals left open the possibility that a motion for summary judgment might be appropriate after more extensive discovery. If material factual disputes remain after discovery, then the trial court must resolve factual disputes before deciding whether to partially enforce an overly broad restrictive covenant. This sounds simple enough, but contract interpretation (and possible partial enforcement) is determined by the court, and not a

jury.

Since the Court of Appeals seems to have left in place all meaningful prior precedent regarding the burdens placed upon an employer when seeking partial enforcement of a restrictive covenant, one could read the opinion as primarily addressing summary judgment standards in that area of the law.

When may a court properly grant summary judgment to a former employee who is subject to a facially overbroad restrictive covenant? What factual disputes are truly material to the issue of partial enforcement? How much discovery must be allowed before a motion will be considered? The questions will be only answered over the course of time as the lower courts take the *Brown & Brown* decision into consideration.

*Steven E. Cole is a partner in the law firm of Leclair Korona Giordano Cole LLP. He concentrates his practice in the area of commercial and securities litigation.*