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"Blue-penciling" Saves The Day In Noncompete Cases – Sometimes, But Not Always

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In the sue-or-be-sued world of post-employment restrictive covenants, the outcome ultimately hinges on which side can convince a judge that it is entitled to have its way. To enforce, or not to enforce – that is the question that judges are called upon to decide. And sometimes the answer is to enforce but with limitations. A recent case from the U.S. Seventh Circuit Court of Appeals is a reminder that in some jurisdictions a judge can exercise discretion to narrow an overly broad covenant and allow it to be enforced only as to the more limited scope. This approach, commonly known as "blue-penciling," is not allowed in all states, but where applicable it does provide judges with discretion to instill a sense of fairness in what are often hotly contested disputes. In *Turnell v. CentiMark Corp.* the appellate court affirmed a lower court's decision to enter a preliminary injunction to enforce a covenant-not-to-compete after making it considerably more narrow than the original language in the employment agreement. In particular, the Seventh Circuit found that "blue penciling" the agreement to enforce more narrow restrictions was acceptable where the overly broad provisions were not "gratuitously" or "oppressively" overbroad. The employee had worked for Centimark, a nationwide roofing company, since he was 18 years old. He regularly received promotions and increased compensation, and as he rose through the ranks he eventually was required to sign an employment agreement that included post-employment restrictive covenants. Ultimately he reached the level of a senior vice president with responsibility for one of the company's largest territories, but his employment came to an end in 2013. Immediately after his termination, he sought employment with a smaller company in the roofing business. When CentiMark learned of his plans, the company let him know they wanted him to call off his plans for competing employment. The employee testified that while he was aware of his obligations, he continued to pursue employment with the competitor because he "needed a job." Rather than service his new employer's existing accounts, he set about developing new business, including calling upon businesses he had served under his prior employer. When the case reached court, the judge, applying Pennsylvania law under the choice-of-law provision in the agreement, determined that the two-year non-competition clause could be enforced as to commercial roofing products the employee sold and the places he sold them, in effect adding a geographic restriction where the agreement had not specified one. In addition, the court determined that the non-solicitation provision was enforceable as to actual customers but not prospective customers of his former employer, narrowing the agreement's terms. The Seventh Circuit opinion, which upheld the judge's preliminary injunction, offered some observations on improvements that could have been made to the agreement. Thus the court provided some useful tips for those who are drafting or revising employment agreements with an eye toward avoiding a court dispute even in a jurisdiction where "blue penciling" might save the day.

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