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Trouble No More: Employers Breathing Easier As Court Clarifies The Enforceability Of Restrictive Covenants

By William S. Gyves

Rare is the management-side employment lawyer who has not questioned the wisdom of a blanket corporate policy requiring all but low-level employees to sign onerous noncompete agreements when the reality is that, should the employer ultimately need to enforce such provisions through litigation, it no doubt will face stiff resistance from a judiciary that historically has viewed such provisions with disfavor if not outright hostility.

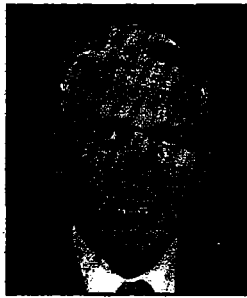
Perhaps nowhere has there been more hand-wringing over the efficacy of noncompete agreements in recent months than among counsel who are routinely called upon to enforce restrictive covenants in the New Jersey courts. In April 2003, an intermediate New Jersey appellate court placed employers and their counsel on notice that the potential downside to an overly aggressive noncompete policy is far more grave than the prospect of simply having a restrictive covenant rejected as an unlawful restraint on trade. In the wake of the Appellate Division's decision in *Maw v. Advanced Clinical Communications, Inc.*,¹ the more immediate question became whether an employer could face civil liability for attempting to require an employee to sign a noncompete deemed contrary to public policy. In *Maw*, the Appellate Division held that a former at-will employee stated a cognizable claim under the state's whistleblower statute based on the allegation that she was fired for refusing to accept the terms of a noncompete provision as a condition to continued employment.

The prospect of potentially crushing civil liability for pressing too aggressively in this context triggered a much-welcomed period of re-evaluation regarding the role restrictive covenants can and should play in a company's attempts to protect itself in a competitive marketplace. During this period of reassessment, the *Maw* decision was appealed to the New Jersey Supreme Court. After a year-long wait, employers and their counsel can breathe somewhat easier now that the Supreme Court has squarely rejected the lower appellate court's holding.²

The Facts

In *Maw*, plaintiff Karol Maw asserted a claim under New Jersey's Conscientious Employee Protection Act ("CEPA")³ against her former employer, Advanced Clinical Communications, Inc. ("ACCI"). Maw claimed that her at-will employment was improperly terminated because she refused to execute an employment agreement containing a noncompete provision. CEPA prohibits an employer from retaliating against an employee who "objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes . . . is incompatible with a clear mandate of public policy concerning public health, safety or welfare or protection of the environment."⁴

ACCI was in the business of providing marketing and educational services to the pharmaceuticals and healthcare industries. It



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hired Maw in November 1997 as a graphic designer responsible for designing the written materials used in ACCI's marketing and education programs. In January 2001, ACCI decided to require all employees at the "coordinator" level and above to sign employment agreements containing a noncompete provision. In implementing the new policy, ACCI did not distinguish between employees based on their job responsibilities, nor did it articulate the nature of the business interest the noncompete provision was intended to protect.

The provision would have precluded Maw from accepting employment with any of ACCI's customers or competitors for a period of two years following the termination of her employment. ACCI fired Maw in March 2001 when she refused to sign an employment agreement containing that noncompete provision. Maw commenced litigation, alleging that ACCI engaged in impermissible retaliatory conduct by firing her when she refused to commit to the noncompete provision. Maw perceived the noncompete to be contrary to public policy in that it would restrict her ability to find employment in her field without any legitimate business reason to justify that restriction. Maw further alleged that the noncompete clause violated public policy because it was not designed to protect any legitimate business interest. Maw insisted that she had no greater access to ACCI's confidential business information than did the company's administrative and clerical workers who were not required to sign the noncompete. Maw claimed that, in reality, the noncompete provision was intended solely to stifle competition.

The Lower Courts' Decisions

In February 2002, the trial court dismissed the CEPA claim as a matter of law. The court concluded that the claim arose out of a purely private contractual dispute and thus implicated none of the public policy concerns at the heart of the CEPA statutory scheme. The trial court reasoned that as an at-will employee, Maw "enjoys no right to dictate the terms and conditions of her employment to the extent that she claims that the particular restrictive covenant is a violation of public policy."

A divided Appellate Division panel reinstated the claim in April 2003. The majority held that the noncompete agreement, as alleged, "may, depending on the surround-

ing circumstances, violate the public policy necessary to support a cause of action under CEPA and at common law." The majority concluded that "New Jersey's strong prohibition against restraint of trade, and against unduly burdening employees by restricting their right to engage in their chosen field of employment, establishes the public policy necessary to support" such claims. Accordingly, the majority concluded, the lower court's pre-discovery dismissal of the claims as a matter of law was premature.

The Supreme Court's Analysis

To the considerable dismay of employers and their counsel, the Appellate Division's decision in *Maw* took CEPA — already touted by some as being among the nation's most far-reaching whistleblower statutes⁵ — and expanded its reach considerably. They could almost hear the floodgates opening. On appeal, the *Maw* case became one of the most closely watched cases on the Supreme Court's docket. Not surprisingly, the Supreme Court's decision, issued on May 4, has garnered considerable attention — and for good reason.

For a majority of the Supreme Court, the viability of Maw's CEPA claim hinged on the meaning of the phrase "clear mandate of public policy" as used in the statutory scheme. The majority concluded that this phrase "conveys a legislative preference for a readily discernible course of action that is recognized to be in the public interest." To constitute a clear mandate of public policy, the court reasoned, "there should be high degree of public certitude" as to whether the conduct at issue is acceptable or unacceptable. To give rise to a CEPA claim, the court instructed, the allegedly retaliatory conduct in question "must have public ramifications . . ." Further, the court emphasized, the legislature's use of the term "clear mandate of public policy" in the statute "bespeaks a desire not to have CEPA actions devolve into arguments between employees and employers over what is, and is not, correct public policy."

The court concluded that Maw's dispute with her former employer over the noncompete provision was, in the end, nothing more and nothing less than a "private dispute" falling far short of implicating any clear mandate of public policy with respect to restrictive covenants in the workplace. The court rejected the notion that the long-standing disfavor with which the judiciary has viewed restrictive covenants constitutes a sufficiently clear mandate of public policy to support a CEPA claim.

The legality of restrictive covenants, the court observed, simply is not so cut and dry. To the contrary, the court wrote, the enforceability of a restrictive covenant depends on a "multi-part, fact-intensive inquiry" in which a court will enforce the provision upon concluding that it "simply protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public."⁶ In the end, the legality of a restrictive covenant must be decided on a case-by-case basis rather than by reference to any well-settled matter of public policy. The court observed:

Not only must multiple interests of differing parties and entities be identified, but also, those interests must be gauged for reasonableness and legitimacy. The application of that test here, and as a

general matter, simply does not evoke the type of a "clear mandate of public policy" that was contemplated [under CEPA].

Not Entirely Out Of The Woods

The Supreme Court's decision no doubt is a welcome relief for employers and counsel engaged in the delicate balancing act of providing adequate protection to a business's important assets and relationships without incurring the wrath of a frequently hostile judiciary. Employers would be well advised, however, to guard against allowing complacency to take hold amidst all the euphoria. Even if the immediate threat of liability under CEPA has been lifted, continued vigilance remains the most prudent course.

If they have not already done so, employers must take a cold, hard look at their noncompete policies generally and the terms of the restrictive covenants specifically. Reflexive policies should be jettisoned. Boilerplate forms should be permanently retired. In their stead, consideration must be given to developing policies that narrow the use of noncompetes to situations in which they are critical to protecting a legitimate business interest. Employers also must commit to developing noncompete provisions narrowly tailored to achieve that objective rather than simply hammer a departing employee deemed to have been disloyal or perhaps merely ungrateful.

If a legitimate business interest is at stake, the employer needs to be pragmatic and objectively reasonable in terms of the categories of employees it needs to have bound by noncompetes in order to safeguard that interest. Ideally, a policy requiring those employees to sign noncompetes should be part and parcel of an overall framework designed to protect the business interest in question.

Finally, the employer must subject its noncompete provisions to a review no less exacting than that which a skeptical judiciary will apply if called upon to enforce it. Restrictive covenants of the one-size-fits-all variety simply do not pass the straight-face test. They must be dropped in favor of agreements that are custom tailored to ensure that the restrictions imposed upon a specific employee or category of employees are no more onerous temporally and geographically than is reasonably necessary to protect the company's business interests.

Carefully crafted noncompetes will bolster an employer's credibility before the courts and increase the odds that the restrictive terms will be enforced. Precisely the opposite result will flow from the reflexive use of generic, patently overreaching provisions that fail to take into account the specific facts and circumstances unique to the employee at issue — a prospect employers can ill afford given the disfavor with which the courts view restrictive covenants, under even the very best of circumstances.

¹ See 359 N.J. Super. 420, 820 A.2d 105, 2003 N.J. Super. LEXIS 139, 2003 WL 1883457 (Apr. 16, 2003).

² See *Maw v. Advanced Clinical Communications, Inc.*, 179 N.J. 439, 846 A.2d 830, 2004 N.J. LEXIS 461, 2004 WL 943023 (May 4, 2004).

³ See N.J.S.A. 34:19-1 to 34:19-8.

⁴ See N.J.S.A. 34:19-3(c)(3).

⁵ See Stephen Mayer, N.J.'s Whistleblower Act, 110 N.J.L.J. 353 (1987).

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