Georgia Courts Cannot Toll Duration of Noncompete Agreement, Even Against Willful Violator

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Since the passage of the Georgia Restrictive Covenants Act (O.C.G.A. § 13-8-50 et seq.) in May 2011, there has been some level of uncertainty regarding the extent to which a court may “blue pencil” or modify an otherwise unenforceable covenant,
including whether a court may extend the restrictions period of a post-May 2011 noncompete agreement. With the recent decision in *Daneshgari v. Patriot Towing Services, LLC*, employers have a bit more clarity, but with some remaining uncertainty, as the Court of Appeals of Georgia held that a trial court erred in extending an injunction beyond the contractual expiration of the term of a noncompete agreement.

**Background**

Patriot Towing Services (PTS) purchased the assets of a towing company owned and operated by Khosrow Daneshgari on June 23, 2016. As part of the purchase agreement, the parties entered into a “Non-Competition, Non-Disclosure, and Non-Solicitation Agreement” containing a non-compete provision with a restrictions period of four years, which was scheduled to expire on June 22, 2020. (Georgia courts will generally presume a time period restriction of four years is reasonable when the restrictive covenant sought to be enforced is against the owner or seller of all or a material part of the assets of a business, professional practice, or another commercial enterprise.) Daneshgari began operating a competing business within one month of the execution of the agreements.

PTS filed a lawsuit against Daneshgari for his violation of the non-compete agreement, and on June 26, 2018, the trial court entered a preliminary injunction and ordered Daneshgari to cease violating the non-compete provision. Daneshgari continued violating the non-compete agreement after the injunction, and PTS then filed a motion for contempt. The trial court found that Daneshgari was in willful contempt and ordered him incarcerated until he paid PTS $20,000 in attorneys’ fees. After making the payment and being released from his incarceration, Daneshgari resumed violating the noncompete agreement. PTS filed a second motion for contempt, and on September 3, 2020, the trial court found Daneshgari in contempt, struck his answer, entered a default judgment against him, and extended the June 26, 2018, injunction, “enjoining Daneshgari from violating the non-compete provision ‘until further order of this Court.’” Daneshgari appealed the trial court’s ruling to the Court of Appeals of Georgia.

**The Court of Appeals’ Analysis**

The appellate court applied the Supreme Court of Georgia’s implicit rejection of “the idea that ‘equity permits a court to extend the period of a non-compete agreement’” and primarily relied on two pre-Restrictive Covenants Act holdings: *Coffee System of Atlanta v. Fox*, issued in 1971, and *Electronic Data Systems Corp. v. Heinemann*, issued in 1997. In *Coffee System*, the Supreme Court of Georgia rejected the employer’s argument that litigation tolled the running of a non-compete period, reasoning that “[c]ourts do not make contracts for the parties” and that “[s]uch an extension would in effect rewrite the ... agreement.” In *Heinemann*, the Supreme Court of Georgia “again rejected the argument that when a party sues to enforce a non-compete agreement, the litigation itself should toll the terms of the agreement” and reiterated that “‘[t]he courts should hesitate to rewrite private contracts’” because “‘[j]udicially providing a tolling provision would effect such a rewrite.’” Accordingly, the appellate court found that the trial court had essentially rewritten the parties’ noncompete agreement and exceeded its powers when it indefinitely
enjoined Daneshgari from violating the non-compete provision following the expiration of the restrictions period.

**Key Takeaways**

The holding in the *Daneshgari* case serves as a reminder that despite the Restrictive Covenants Act’s pro-business provisions, such as O.C.G.A. § 13-8-53(d), which authorizes a court to “modify a covenant that is otherwise void and unenforceable,” some common law holdings prior to the passage of the Restrictive Covenants Act are still very much alive. In light of *Daneshgari*, employers may want to carefully tailor restrictive covenant agreements to include thoughtfully crafted tolling provisions and review existing restrictive covenant agreements to safeguard expectations in the event of a breach. Perhaps if Daneshgari’s non-compete agreement had included an enforceable tolling provision, PTS could have argued for an extension of the restrictive covenant. But in the absence of such a tolling provision, parties seeking to enforce restrictive covenants may be at risk when the breaching party pursues a judicial challenge to the covenant’s enforceability, which often can take years to work through the courts.


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