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Have You Double-Checked The Language Of Your Non-Compete Lately? If Not, You Need To...

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A recent decision of the Indiana Court of Appeals could drive a stake through the heart of many non-compete agreements. The case, *Clark's Sales and Service, Inc. v. Smith and Ferguson Enterprises* , involved a long-time salesman for an appliance retailer. Mid-way through his 14-year employment tenure (and after a key colleague went to go work for one of the company's competitors), his employer required him to sign a non-compete agreement. The key provisions of the non-compete should be familiar to most employers.

For two years after the employee's termination from employment, he was prohibited from the following activity, *in any capacity:*

- Soliciting or providing services competitive to those offered by his employer to any business account or customer who was a business account or customer at *any point in time* during his employment;

- Working in a competitive capacity with a named competitor of the employer in the state of Indiana, in any city or state in which the competitor conducts business, or to work for any business that provides services similar or competitive to those offered by the employer during the term of his employment, including but not limited to within the State of Indiana, Marion County, the counties surrounding Marion County, or within a 50 mile radius of his principal office with the employer.

After the employee resigned and went to go work for one of its competitors, the employer filed suit to enforce the non-compete and sought injunctive relief. The trial court, however, struck down the non-compete as overly broad and unreasonable. The decision was affirmed by the Indiana Court of Appeals. The Court of Appeals took issue with several parts of the agreement. First, the Court said the restriction on soliciting or providing services to customers was overbroad because it prohibited the employee from servicing anyone who had been a customer *at any point in time during his 14 years of employment* – including customers with whom he may not have had any recent contact. Second, the Court viewed the range of restricted activities as too broad because it went beyond the sales job he had with his employer and prohibited him from engaging in *any service* that the company offered, but which he personally never performed during his employment (*i.e.* performing maintenance or repair). The Court found that preventing the former employee from competing with portions of the business in which he never worked was invalid. Third, the Court viewed the geographic restriction as unreasonable. Although the Court noted that a 50-mile radius

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might be reasonable given the nature of the sales services the employee provided, the way the provision was written resulted in the restriction being something *in addition to* (instead of a limitation) of the much more expansive geographic restrictions (the entire state and counties within the state) that preceded it. As such, the entire paragraph was overbroad and unenforceable. Perhaps more troubling for employers is that the Court refused to apply the "blue pencil doctrine." Where a covenant is clearly separated into parts, some of which are unreasonable and some which are not, the doctrine allows Indiana courts to strike out the offending provisions to salvage the agreement. Here, the Court determined that blue-penciling the agreement would be too extensive and elaborate – necessitating changes to the entire meaning of certain paragraphs. Because the Court could apparently not easily redact the challenged language, the Court refused to enforce the non-compete agreement. The case poses *yet another* stark reminder of the need for employers – in Indiana and elsewhere – to carefully *and* narrowly craft the language of their restrictive covenants. All employers also should take a minute to examine their current non-competes (and any future agreements) to see if the language needs to be revised or updated consistent with the terms of this decision.