

# CLIENT ALERTS

## *Feeling Blue:* Federal Court Blue-Pencils Non-Compete Agreement and Enforces Modified Version

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Non-compete agreements are generally valid and enforceable in most states. However, drafters of non-compete agreements must exercise caution to ensure the restrictions imposed are reasonable and narrowly tailored. Failure to carefully craft a reasonable, narrowly tailored non-compete agreement can have devastating consequences. A court may find the overbroad agreement to be unenforceable, or the court may elect to blue-pencil overbroad language and enforce a modified agreement. In the recent case of *Konica Minolta Bus. Sols., U.S.A., Inc. v. Lowery Corp.*, No. 15-11254, 2020 WL 3791601, (E.D. Mich. July 7, 2020), the court blue-penciled Plaintiff's non-compete agreement and enforced a modified version, serving as a cautionary tale for businesses, non-compete drafters, and litigators alike.

In *Konica*, Plaintiff, Konica Minolta Business Solutions, ("Konica"), and Defendant Applied Imaging Systems ("AI") were direct competitors in the copier industry. Each company engaged in the sale of printing devices in Michigan. When AI expanded its business into the Detroit market in 2011, it hired Konica's director of sales for the Detroit area, along with five other Konica sales employees. In the years that followed, AI hired additional employees from Konica. Many of those employees were subject to a Confidential Information and Employment Agreement ("Agreement"), which prevented them from soliciting Konica customers, disclosing confidential information, or performing certain tasks on behalf of a Konica competitor.

In 2015, Konica filed suit against several of its former employees for breach of contract, tortious interference with contractual relationship, misappropriation of trade secrets, and civil conspiracy. The claims largely stemmed from the Agreement, which contained a choice of law provision making New York law govern the contractual claims. The Court issued several rulings

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in the opinion, but of particular significance is the Court's decision to blue-pencil portions of Konica's non-compete agreement and enforce a modified agreement.

In reviewing the Agreement, the Court ultimately decided to forgo an "all or nothing" approach in the ruling. Instead, the Court selected to "blue-pencil" the non-compete language, making the Agreement enforceable *as modified*. Under New York law, "where courts find restrictions to be unreasonable... they may 'blue pencil the covenant to restrict the term to a reasonable limitation, and grant partial enforcement for the overly broad restrictive covenant.'" *Id.* at 5 (citations omitted).

Portions of Konica's non-compete provision were deemed overbroad, prompting the Court to only partially enforce the provision. The Court specifically held as follows: (1) the Agreement was overbroad to the extent that it prohibited solicitation of prospective or potential clients of Konica; (2) the Court refused to enforce the non-solicitation of potential customers provision because the non-disclosure of confidential information provision made this provision unnecessary; and (3) the Court removed language that prohibited Defendants from "communicating with" customers, noting that such language was unreasonable because it prohibited *any* communication—even non-work-related communication.

The Court also blue-penciled the phrase "or whose identity I have learned" from the non-solicitation provision, which limited enforcement of the provision to customers whom the Defendants dealt with while employed by Konica, i.e. customers the Defendants had some type of relationship with while at Konica. Such phrases are overbroad to the extent they prohibit solicitation of prospective or potential customers of Konica. The Court ruled that "case law is clear that 'protection of client relationships' does not justify prohibiting former employees from soliciting *potential or prospective* customers." *Id.* at 8 (citations omitted). The Court ultimately held that the Agreement was only valid and enforceable as modified.

The *Konica* case serves as a cautionary tale for all involved in the drafting and enforcement of a non-compete agreement. Do not count on a judge to do the job for you—draft a non-compete agreement to be reasonable and narrowly tailored to avoid a ruling that the agreement is overbroad, and therefore, unenforceable or modifiable. Moreover, while a judge may have the power to partially enforce, or even modify, a non-compete agreement, he/she does not have to do so. The judge may simply rule that the agreement is unenforceable as written. Exercise caution in drafting and enforcing non-compete agreements; the failure to do so may result in a judge deciding the fate of your case – and business.

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