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Industrial Sandblasting, Inc. v. Samuel Morgan

## Argument in Support of Voiding the Non-Compete Covenant

## Facts and Issue Before the Court

Samuel Morgan (Morgan) is a sandblaster and bid manager for Columbia Coatings Corporation. Three months ago, Morgan was employed by Plaintiff Industrial Sandblasting, Inc. (Industrial). While employed with Industrial, a contract with Industrial contained a covenant not to compete if Morgan ever left Industrial. Industrial has sued Morgan for breach of contract. The parties agreed to a bench trial, and a hearing was held. The issue for the court to decide is whether the non-compete covenant should be void. We present to the court this argument in support of voiding the non-compete covenant provision between Industrial and Morgan.

## Overview of the Law and Procedure

As applied to contracts between employers and employees, enforcement of contracts that restrict competition during the term of a restrictive covenant, so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities, shall be permitted. (Col. Stat. Ann. Sect. 24-6 53(a)).

## Argument

*Restriction on Geographic scope is overbroad and unreasonable*

In Fawcett, the court of appeals accepted as prima facie valid a restriction that covers the territory where the employee worked and the employer does business. In Fawcett, an employer was prohibiting an ex-employee from providing services in a total of 7 states. The ex-employee performed work "only in a limited area of some of the states listed in the restrictive covenant." (*Id.*) As such, the court of appeals in Fawcett contends that a restriction that extends that territory to areas in which the employee did not work is overly broad on its face. (Id.) Without a strong justification other than the desire not to compete with the former employee, this restriction would not be upheld. (Id.)

In the case at hand, the non-compete covenant that Morgan is bound by is similarly overly broad and unreasonable. The employment contract between Industrial and Morgan restricts Morgan in

that he "will not own, operate, or work at any business in direct competition with Employer ... anywhere in the State of Columbia." (Employment Contract). Here, this concludes that Morgan is not allowed to provide similar services *anywhere* in the State of Columbia. Similar to the ex-employee in Fawcett, Morgan's work with Industrial was limited to "work in Columbia City" with a few "one job" projects in other areas surrounding Columbia City. The restriction that Industrial wants to place on Morgan, restricting him to perform services *anywhere* in Columbia is unreasonable.

This court should consider the findings in Fawcett to apply to this case, in that a restriction that covers a geographic area in which the employer never had contact with customers is overbroad and unreasonable. Industrial did not show a finding during the hearing that they had significant contacts with the entire state of Columbia, in that restricting Morgan to that degree is unreasonable.

*Limitation on Scope of Activity unreasonably broad*

In Fawcett, the court recognizes that a former employer may validly restrict an employee from performing services for a competitor that are identical to those performed for the former employer. The court in Fawcett states that language similar to "in any capacity" does not protect a legitimate interest of the employer and imposes greater limitation on the employee than is necessary.

In this case, the language in the Employment Contract states: "after the termination of Employee's employment for any reason, Employee will not own, operate, or work...". This language similarly imposes greater limitations and this section in the provision is unreasonably broad.

*The Duration of Restriction is unreasonable*

In Fawcett, the court does not recognize a specific time period past which a given time restriction is per se unreasonable.

In Knox, the court weighs the interest the employer seeks to protect against the impact the covenant will have on the employee.

Applying these two cases to the case at hand, this court should find that "for a period of one (1) year" duration in the Employment Contract is unreasonable in light of Industrial's current situation. Industrial asserts, that at a minimum, the court should keep Morgan out of Columbia City, at least for long enough for Industrial to train someone to replace Morgan. This is already done and there is no need for the one year duration that is implicated in the contract.

*No need for "Blue Penciling"*

Industrial may argue that this court's should consider "blue penciling" the covenant by modifying it to a more reasonable form instead of invalidating it in its entirety. However, this is not the best course because changing the language would not rid the covenant of its unreasonable and overbroad terms.

*"Transit plan"*

In Knox, the employer instituted a "transition plan" to reduce the impact of their ex-employee's departure. The impact was deemed significant because the ex-employee, through its employment with the employer, became one of the most recognized television personalities. In Knox, the employee spent time and effort in promoting the ex-employee's name, voice, and image.

By contrast to Knox, Industrial did not even pay for Morgan's training to improve his skills and knowledge. Industrial cannot assert that they were a primary factor in Morgan's growth in the profession.

In this case, a transition plan is not needed. Industrial claims that the restriction on Morgan to not work anywhere in the state of Columbia is due to the fact that Industrial needs time to find a replacement. This is similar to the transition plan in Knox, however, it fails in the current case because Industrial already found a replacement "a week before [Morgan] left" and that the replacement "knew pretty much what [Morgan] knew" (Transcript at July 6 hearing). Thus, this court should not consider whether this is a means of validating the restrictive covenant.

## Conclusion

As discussed above, the court should invalidate the non-compete covenant provision and allow Morgan to work within the District of Columbia. The court was presented with strong precedent that non-compete covenants such as the one at issue is unconscionable, and deprives an individual their right to utilize their skills and knowledge in their profession.

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**END OF EXAM**