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**KEY DEVELOPMENT IN ENFORCEMENT OF  
RESTRICTIVE COVENANTS UNDER WISCONSIN LAW**

On January 11, 2011, the Wisconsin Supreme Court denied a request to review an important lower court decision on the law of employee-signed non-solicitation of customer provisions in Wisconsin. In a very important case not getting much attention, the Wisconsin Court of Appeals held that restrictive covenants contained in a stock option agreement were not subject to the strict scrutiny of Wisconsin's restrictive covenant statute, Wis. Stat. § 103.465, where the agreement was not inextricably tied to the employment relationship. Selmer Co. v. Rinn, 328 Wis. 2d 263, 269, 789 N.W.2d 621, 624 (Wis. Ct. App. 2010) (“We conclude the agreement’s restrictive covenant is not subject to the exacting scrutiny demanded by *WIS. STAT. § 103.465*, but must instead be evaluated according to the common law’s rule of reason.”) (Wisconsin Supreme Court denied request for review, Appeal No. 2009AP1353, Jan. 11, 2011).

Because the stock option agreement was not agreed to at the inception of employment, was not a condition of continued employment and did not provide the employer with an unfair bargaining advantage over the employee, the Court viewed the agreement as similar to a sale of business covenant not to compete, which is “subject neither to the ‘exacting scrutiny’ mandated by *WIS. STAT. § 103.465*, nor the statute’s prohibition on partial enforcement.” *Id.* at 279. Importantly, Selmer Co. opens the door for employers to argue that restrictive covenants outside the context of typical employment agreements are not subject to *WIS. STAT. § 103.465*, and significantly, may be blue penciled or partially enforced if necessary.

**Key Facts and Points of Law**

During his employment at the Selmer Company, Timothy Rinn, the vice president of sales and marketing, agreed to a stock option agreement that contained restrictive covenants. Soon after leaving Selmer and joining a competitor, Rinn began soliciting Selmer’s customers in violation of the confidentiality and non-solicitation of customers restrictions. Selmer sued to enforce the restrictive covenants.

The Court held that the restrictive covenants in the stock option agreement did not trigger the concerns associated with restrictive covenants in typical employment agreements:

[U]nlike typical restrictive covenants, upon which a prospective employee’s position may depend, there were no consequences attached to Rinn’s refusal to accept the agreement . . . Rinn was not pressured to sign the stock option agreement, nor was his employment conditioned upon his doing so . . . Rinn’s refusal would not have affected his employment in any way. Accordingly, Selmer held no bargaining advantage over Rinn. Rinn was free to walk away from the transaction; instead, he seized the opportunity.

Applying the more lenient “rule of reason” analysis, the Court enforced the broad customer non-solicitation provision as drafted, which had no geographic limitation and prohibited Rinn (a high-level management employee with access to confidential business information) from soliciting “any past, present, or future Customer of the Company or any person with whom the Company is conducting negotiations, or to whom the Company has submitted a bid.” *Id.* at 270-71. The Court also enforced the confidentiality provision, which likely would have been unenforceable under the strict analysis of Wis. Stat. § 103.465 due to its lack of a time or geographic limitation.

The Court reasoned that enforcing the restrictive covenants did not offend any public interest and resulted in only de minimus hardship to Rinn: “[T]he covenant permits [competitor] to utilize Rinn’s skills, knowledge, and abilities to compete with Selmer, but does not allow [competitor] to gain a competitive advantage by using Rinn’s knowledge of, and relationships with, Selmer’s customers.” *Id.* at 283.

### **Implications for Employers**

- Selmer Co. was decided shortly after the Wisconsin Supreme Court’s decision in Star Direct v. Dal Pra, 319 Wis. 2d 274 (Wis. 2009) (holding enforceable provisions in restrictive covenants separate and divisible from unenforceable provisions may be independently enforced), suggesting a pro-employer shift towards greater enforceability of restrictive covenants.
- Wis. Stat. § 103.465 does not govern all restrictive covenants and applies only to restrictive covenants that are inextricably linked to, or conditions of, employment or that otherwise impact employment status or create an unfair bargaining advantage for employers.
- Restrictive covenants falling outside the scope of Wis. Stat. § 103.465 are subject to the “rule of reason” inquiry in Wisconsin. This considerably lower standard requires the restriction to be reasonably necessary for the protection of the employer, not oppressive and harsh on the employee, nor injurious to the interests of the public.
- Finally, employers may argue that restrictive covenants not subject to Wis. Stat. § 103.465 can be modified and blue penciled by the court, if necessary, to enforce such restrictions.

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