

CLIENT ALERT

January 26, 2021

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Nevada Supreme Court Rules in Favor of Dickinson Wright Client, Applying the “Savings Clause” in Enforcing Non-Competition Agreements

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Many practitioners in Nevada had been operating under the assumption that the Nevada Supreme Court’s 2016 opinion in *Golden Road Motor Inn, Inc. v. Islam*, 132 Nev. 476, 376 P.3d 151 (2016) automatically rendered void and unsalvageable any non-competition agreement entered into prior to the enactment of NRS 613.195(5)¹ in June 2017 – an enactment that contained a single unreasonable geographic or temporal restriction. On December 31, 2020, however, the Nevada Supreme Court remedied this misconception by clarifying that parties may contractually consent to blue-penciling² of unreasonable or unenforceable non-competition clauses.

Background

Fielden Hanson Isaacs Miyada Robison Yeh, Ltd. (the “Employer”) is a provider of anesthesia and pain management services in Nevada who entered into employment agreements with two anesthesiologists (the “Employees”) in November 2016. The employment agreements contained non-competition clauses and the following provision regarding blue-penciling of the non-competition clauses:

If any provision or subdivision of this Agreement, including, but not limited to, the time or limitations specified in or any other aspect of the restraints imposed under [the non-competition clauses] is found by a court of competent jurisdiction to be unreasonable or otherwise unenforceable, any such portion shall nevertheless be enforceable to the extent such court shall deem reasonable, and, in such event, it is the parties’ intention, desire and request that the court reform such portion in order to make it enforceable. In the event of such judicial reformation, the parties agree to be bound by [the non-competition clauses] as reformed in the same manner and to the same extent as if they had agreed to such reformed Sections in the first instance.

The Employees terminated their employment with the Employer in late 2018 and immediately began performing anesthesia services at certain medical facilities in violation of the non-competition clauses in their Employment Agreements. As a result, Dickinson Wright, on behalf of the Employer, filed a complaint against the Employees and sought injunctive relief precluding the Employees from further violating the Employment Agreements’ non-competition clauses.

The district court concluded that the non-competition clauses were unreasonable as contained in the Employment Agreements, but blue-penciled the offending clauses pursuant to NRS 613.195(5)³ and entered a preliminary injunction enforcing the modified version of the non-competition clauses. The Employees

appealed, claiming that the district court erred because: (1) NRS 613.195(5) did not become effective until months after the Employees executed their Employment Agreements and (2) *Golden Road* precluded the district court from blue-penciling the Employment Agreements once it determined that the non-competition clauses contained an unreasonable restriction.

Nevada Supreme Court Ruling

On appeal, the Nevada Supreme Court affirmed the district court’s decision to blue-pencil the non-competition clauses and enforce the modified agreement. See *Duong v. Fielden Hanson Isaacs Miyada Robison Yeh, Ltd.*, 136 Nev. Adv. Op. 87 (2020). In doing so, the Nevada Supreme Court explained that *Golden Road* only precluded district courts from blue-penciling unreasonable non-competition clauses where the underlying non-competition agreement lacked specific consent authorizing blue-penciling (often referred to as a “savings clause”). Since the Employment Agreements at issue contained explicit language whereby the parties consented to any reviewing court blue-penciling the non-competition clauses, the Nevada Supreme Court concluded they were subject to modification and enforceable as modified.⁴

As a result of the Nevada Supreme Court’s decision, employment agreements predating the enactment of NRS 613.195(5) that contain a “savings clause” are now subject to mandatory blue-penciling by a district court and are enforceable as modified.

¹ NRS 613.195(5) requires district courts to blue-pencil unreasonable non-compete agreements and enforce the agreement as revised as long as certain requirements are satisfied.

² Blue-penciling refers to the process whereby a court modifies any unreasonable provision in a non-competition agreement and enforces the resulting modified non-competition agreement rather than wholly voiding the non-competition agreement.

³ The district court determined that NRS 613.195(5) applied retroactively to the Employment Agreements.

⁴ The Nevada Supreme Court declined to address whether the district court properly applied NRS 613.195(5) to the Employment Agreements because its ruling regarding the parties’ consent to blue-penciling was outcome determinative.

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