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Restrictive Covenants Under New York Law: The Court of Appeals Weighs In on Choice of Law Provisions and Partial Enforcement

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Practitioners' Notes

RESTRICTIVE COVENANTS UNDER NEW YORK LAW: THE COURT OF APPEALS WEIGHS IN ON CHOICE OF LAW PROVISIONS AND PARTIAL ENFORCEMENT

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Employers often include non-competition and other restrictive covenant clauses in employment agreements in order to try to restrict the business activities employees may engage in after leaving employment.[1] Employers may negotiate to include such clauses in employment agreements for a variety of reasons, some legitimate and others not, and such clauses are therefore the subject of scrutiny by courts and controversy among commentators.[2]

As a result, drafting enforceable non-competition and other restrictive covenant clauses–and enforcing those contracts when the need arises–are perennial challenges. Enforceability of such clauses differs from state to state, and even in states that recognize that such clauses may be enforceable, there are no bright-line rules.[3] Whether a particular restrictive covenant clause will be upheld to prevent a former employee from engaging in a particular course of conduct can never be predicted in advance with 100% certainty.[4] In drafting such provisions, an

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1. *See Your Rights Non-Compete Agreements*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/non-compete-agreements (last visited Apr. 18, 2016).

2. *See* Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES (June 8, 2014), http://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html?_r=0; *see also Your Rights Non-Compete* Agreements, *supra* note 1.

3. *See* Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 224-25 (2007).

4. *See, e.g.*, Gelder Med. Group v. Webber, 363 N.E.2d 573, 574 (N.Y. 1977); Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp., 369 N.E.2d 4, 6 (N.Y. 1977); Karpinski v. Ingrasci,

employer and its counsel must try to strike the right balance between restricting post-employment conduct that could harm the employer's legitimate interests and unduly restricting employees' ability to earn a living.[5]

A recent decision by the New York Court of Appeals highlights the perils to employers of going too far in trying to restrict employees' post-employment conduct.[6] In *Brown & Brown, Inc. v. Johnson*, the court addressed two important issues concerning the enforcement of restrictive covenants in New York. First, the court considered whether to give force to a choice-of law provision purporting to apply the law of a state that is less favorable to employees than New York law.[7] The court held that "[w]hile parties are generally free to reach agreements on whatever terms they prefer, courts will not 'enforce agreements . . . where the chosen law violates "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."'"[8] Second, the court considered whether to allow partial enforcement of an otherwise overly broad restrictive covenant.[9] On that question, the court held that an agreement should not be partially enforced when the record indicates that the employer engaged in "overreaching, coercive use of dominant bargaining power, or other anticompetitive misconduct."[10]

The court's most recent ruling on the enforcement of restrictive covenants in *Brown & Brown, Inc. v. Johnson* warrants examination. The Court's decision in this case will have a wide-ranging impact on how parties negotiate restrictive covenant agreements and litigate such agreements in the event of a dispute.[11]

This article will explain the current state of New York law governing restrictive covenants, as informed by *Brown & Brown, Inc. v. Johnson*. Section A will briefly introduce the topic of employee restrictive covenant clauses. Section B will outline the general principles governing enforceability of such clauses under New York law. Section C will discuss in detail the New York Court of Appeals decision in *Brown & Brown, Inc. v. Johnson*. Finally, Section D will address the

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268 N.E.2d 751, 753 (N.Y. 1971).

5. *See* Brown & Brown, Inc. v. Johnson, 34 N.E.3d 357, 361 (N.Y. 2015).
6. *See id.* at 362.
7. *See id.* at 360-61.
8. *Id.* at 360.
9. *Id.* at 362.
10. *Id.*
11. *See infra* Section D.

practical implications of the *Brown & Brown, Inc.* decision, and how New York employers and employees may rely on the decision in the course of future negotiations and litigation involving restrictive covenants.

I. EMPLOYEE RESTRICTIVE COVENANTS GENERALLY

Employee restrictive covenants, including non-competition, non-solicitation, non-inducement, and confidentiality agreements, are express agreements between employers and employees that prohibit employees from engaging in certain activities during and for a specified period of time after their employment. Restrictive covenants can be found in a variety of employment-related documents, including employment agreements, stock option agreements, severance agreements, long-term compensation plans, and employee manuals. Although restrictive covenants are generally disfavored in New York due to public policy considerations, these types of contracts are permissible under New York law.[12]

While restrictive covenants are enforceable under New York law in certain circumstances, state laws governing the enforceability of restrictive covenant agreements can differ widely. For instance, many states have enacted statutes that limit the use of restrictive covenants. Some states, such as California, Florida, Nevada, and Tennessee, have adopted legislation that governs restrictive covenants for all employers in the state.[13] Other states, including New York, have implemented statutes that are targeted at specific professions.[14] In addition, the courts of certain states, including New York, are willing to partially enforce or exercise "blue pencil" authority to revise a restrictive covenant provision that a court deems overbroad and enforce it only to the extent that the court deems reasonable.[15]

12. *See, e.g.*, Purchasing Assocs., Inc. v. Weitz, 196 N.E.2d 245, 247 (N.Y. 1963) ("At one time, a covenant not to compete, basically an agreement in restraint of trade, was regarded with high disfavor by the courts and denounced as being 'against the benefit of the commonwealth.' It later became evident, however, that there were situations in which it was not only desirable but essential that such covenants not to compete be enforced.") (internal citations omitted).

13. CAL. BUS. & PROF. CODE § 16601 (West 2016); FLA. STAT. ANN. § 542.33(1)-(3) (West 2015); NEV. REV. STAT. ANN. § 613.200(1) (LexisNexis 2015); TENN. CODE ANN. § 47-25-101 (2015).

14. *See, e.g.*, COLO. REV. STAT. ANN. § 8-2-113(3) (West 2015) (covering physicians); MASS. GEN. LAWS ANN. ch. 112, § 12X (West 2016) (covering physicians); N.Y. LAB. LAW § 202-k(2) (McKinney 2015) (covering broadcast industry employees).

15. *See, e.g.*, Portware, LLC v. Barot, 2006 WL 516816, at *4-5 (N.Y. Sup. Ct. 2006); Estee Lauder Cos., Inc. v. Batra, 430 F. Supp.2d 158, 182 (S.D.N.Y. 2006); Silipos, Inc. v. Bickel, 2006

In light of the varying state laws governing restrictive covenants, parties to restrictive covenant agreements typically include choice-of-law and reformation provisions in the contract.[16] A choice-of-law provision generally allows the parties to select and designate which state's laws control the agreement, regardless of where the parties reside or a dispute arises, as long as there is a nexus to the selected state.[17] A reformation provision explicitly provides that the parties intend for a court to modify any excessive restriction to the extent such reformation or "blue penciling" of a restrictive covenant is permitted by applicable state law.[18]

II. NEW YORK LAW GOVERNING RESTRICTIVE COVENANTS

Restrictive covenants are generally judicially disfavored under New York law due to "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood."[19] Shaped by the strong public policy concerns, New York follows the majority of jurisdictions in applying a reasonableness standard when examining the validity and enforceability of restrictive covenants.[20] Specifically, as articulated in the seminal New York Court of Appeals decision in *BDO Seidman v. Hirshberg*, "[a] restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the legitimate *interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public."[21] As each of these factors reflects New York public policy considerations, "[a] violation of any prong renders the covenant invalid."[22] The employer bears the burden of establishing the elements of the test and demonstrating why enforcement of the restrictive covenant should be granted.[23]

WL 2265055, *7-8 (S.D.N.Y. 2006) (enforcing only the provision preventing solicitation of clients and not broader prohibition on competition).

16. Gillian Lester & Elizabeth Ryan, *Choice of Law and Employee Restrictive Covenants: An American Perspective*, 31 COMP. LAB. L. & POL'Y J. 389, 396-97 (2010).

17. *Id.*

18. *See* BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1227 (N.Y. 1999).

19. Columbia Ribbon & Carbon Mfg. Co., Inc. v. A-1-A Corp., 369 N.E.2d 4, 6 (N.Y. 1977) (quoting Purchasing Assocs., Inc. v. Weitz, 196 N.E.2d 245, 247 (N.Y. 1963)).

20. *BDO Seidman*, 712 N.E.2d at 1223.

21. *Id.*

22. *Id.*; *see also* Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 397 N.E.2d 358 (N.Y. 1979) (emphasizing the strong public policy considerations).

23. *See* Natural Organics, Inc. v. Kirkendall, 860 N.Y.S.2d 142, 143- 44 (N.Y. App. Div. 2008) (it is the former employer's burden to prove that a former employee's solicitation of customers would impair the goodwill of the customer relationship).

Building upon the reasonableness standard, a restrictive covenant will only be enforced in New York to the extent that it is "reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee."[24] The determination of whether the test is met is typically a fact intensive analysis, and outcomes will vary from case to case.[25]

To warrant enforceability under New York law, an employer must show that the restrictive covenant protects a legitimate interest of the employer.[26] In general, New York law has recognized four types of legitimate interests sufficient to support enforcement of a restrictive covenant agreement: protection of trade secrets; protection of confidential customer information; protection of client relationships and goodwill; and protection against irreparable harm where an employee's services are special, unique, or extraordinary.[27]

Additionally, for a restrictive covenant to be enforceable, the scope of the contractual restrictions must be reasonable as to duration, geography, and scope of business activity covered.[28] There are no bright-line rules concerning the permissible duration of contractual restrictions.[29] A court will determine whether the period of restriction is reasonable by examining the specific facts of the case and the type of information or other legitimate employer interests that are implicated.[30] New York courts have upheld relatively long periods of restriction and struck down short periods.[31] Even restrictions that extend in perpetuity have been found valid under particular circumstances.[32]

New York courts will also scrutinize whether the geographic scope of the restriction is necessary to protect the employer's legitimate

24. *BDO Seidman*, 712 N.E.2d at 1223 (quoting Reed, Roberts Assoc., Inc. v. Strauman, 353 N.E.2d 590, 593 (N.Y. 1976).

25. USI Ins. Serv. LLC v. Miner, 801 F. Supp. 2d 175, 188-89 (S.D.N.Y. 2011).

26. *See BDO Seidman*, 712 N.E.2d at 1223.

27. *See, e.g.*, 1 Model Mgmt., LLC v. Kavoussi, 918 N.Y.S.2d 431, 432 (N.Y. App. Div. 2011).

28. *See, e.g.*, *BDO Seidman*, 712 N.E.2d at 1223.

29. *See id.*

30. *See id.*

31. *See, e.g.*, Gelder Med. Group v. Webber, 363 N.E.2d 573, 577-78 (N.Y. 1977) (holding that a five-year period may be reasonable); Columbia Ribbon & Carbon Mfg. Co., Inc. v. A-1-A Corp., 369 N.E.2d 4, 6-7 (N.Y. 1977) (holding that two-year period was overbroad).

32. *See, e.g.*, Karpinski v. Ingrasci, 268 N.E.2d 751, 753-54 (N.Y. 1971) (upholding restrictive covenant with an unlimited restriction, and noting that an unlimited period is not automatically unreasonable).

interest.[33] Again, there are no bright-line rules.[34] Depending on the particular facts and circumstances of each case, a prohibition on competition in a single location may be deemed overbroad and a prohibition on competition worldwide may be deemed reasonable.[35] The scope of business activities restricted by a non-compete agreement must be only as broad as necessary to protect the legitimate interests implicated.[36]

Finally, as with all other types of contracts, there must be adequate consideration underlying the restrictive covenant agreement for it to be enforceable.[37] In New York, restrictive covenants that are ancillary to employment or entered into during the course of at-will employment are supported by adequate consideration if the employee continued to be employed by the employer for a reasonable time after signing the agreement.[38]

Even when restrictive covenants are found by a court to be overbroad under New York law, New York courts have long "expressly recognized and applied the judicial power to sever and grant partial enforcement for an overbroad employee restrictive covenant."[39] The decision of whether to exercise such " judicial blue pencil" authority is at the sole discretion of the court based on a "case specific analysis."[40] The Court of Appeals previously explained in *BDO Seidman* that blue penciling may be appropriate "if the employer demonstrates an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair

33. *See BDO Seidman*, 712 N.E.2d at 1223.

34. Marlo D. Brawer, *Switching Stations: The Battle Over Non-Compete Agreements In The Broadcasting Industry*, 27 OKLA. CITY U. L. REV. 693, 719 (2002).

35. *See, e.g.*, Bus. Intelligence Servs. v. Hudson, 580 F. Supp. 1068, 1073 (S.D.N.Y. 1984) ("the worldwide scope of the noncompetition clause [is] not unreasonable, given the international nature of [plaintiff's] business").

36. *See, e.g.*, Jay's Custom Stringing, Inc. v. Yu, No. 01 Civ. 1690, 2001 WL 761067, at *3, *5 (S.D.N.Y. 2001) (refusing to enforce non-compete agreement purporting to bar employee from working in all areas of plaintiff's business including retail and travel where employee's duties involved only stringing tennis rackets); Coolidge Co. v. Mokrynkski, 472 F. Supp. 459, 461 (S.D.N.Y. 1979) (where non-compete agreement precluded employee from working in "any mailing list business similar to that" of plaintiff and employee only had experience in the catalog business, employee only prohibited from working in catalog business).

37. *See* Zellner v. Conrad, 589 N.Y.S.2d 903, 906 (App. Div. 1992).

38. *See id.* at 907 (holding that continued employment may be sufficient consideration when at-will employee signs a restrictive covenant after employment has begun and prior to departure).

39. *BDO Seidman*, 712 N.E.2d at 1226.

40. *Id.* at 1226-27.

dealing."[41]

III. *BROWN & BROWN, INC. V. JOHNSON*

Most recently, in mid-2015, the New York Court of Appeals considered the enforceability of a restrictive covenant contained in an employment agreement that included a provision selecting Florida as the choice-of-law.[42] In *Brown & Brown, Inc. v. Johnson*, the New York Court of Appeals held that applying Florida law to the non-solicitation provision at issue would be offensive to the fundamental public policy of New York.[43] In addition, the New York Court of Appeals reversed the Fourth Department's dismissal of a breach of contract claim related to enforcement of the non-solicitation provision because there were factual circumstances under which it would be possible to partially enforce or blue pencil the restrictive covenant under New York law.[44]

A. *Background and Facts of the Brown & Brown Case*

Plaintiffs, Brown & Brown of New York, Inc. (BBNY) and Brown & Brown, Inc. (BBI), hired defendant, Theresa Johnson, in 2006 to provide underwriting services to BBNY in New York.[45] BBNY was a New York corporation licensed to conduct business as an insurance agent and broker in New York.[46] BBI was a Florida company and BBNY's parent corporation.[47]

The plaintiffs recruited Ms. Brown from Blue Cross/Blue Shield, where she had worked for over twenty years as an underwriter and actuary.[48] On her first day of employment, plaintiffs asked Ms. Johnson to sign a number of documents, including an employment agreement.[49] The employment agreement included restrictive covenants, including a non-solicitation covenant, a confidentiality agreement, and a non-

41. *Id.* at 1226.
42. Brown & Brown, Inc. v. Johnson, 34 N.E.3d 357, 359 (N.Y. 2015).
43. *Id.*
44. *Id.* at 362-63.
45. Brown & Brown, Inc. v. Johnson, 980 N.Y.S.2d 631, 635 (App. Div. 2014), *rev'd*, 34 N.E.3d 357, 359 (N.Y. 2015).
46. *Brown & Brown, Inc.*, 34 N.E.3d at 359.
47. *Id.*
48. *Id.*
49. *Id.*

-inducement covenant.[50] The non-solicitation covenant in Ms. Johnson's agreement prohibited her from soliciting or servicing any client of BBNY for two years after the termination of her employment.[51] The non-solicitation provision specifically provided:

> For a period of two (2) years following termination of employment hereunder (whether voluntary or involuntary), Employee specifically agrees not to solicit, divert, accept, nor service, directly or indirectly, as insurance solicitor, insurance agent, insurance broker, insurance wholesaler, managing general agent, or otherwise, for the Employee's account or the account of any other agent, broker, insurer or other entity . . . that is a customer or account of the New York offices of the Company during the term of this Agreement, or from any prospective customer or account to whom the Company made proposals about which Employee had particular knowledge, or in which Employee participated, during the last six months of Employee's employment with Company.[52]

The confidentiality agreement stated that Ms. Johnson would not "disclose[] plaintiffs' confidential information or use[] it for her own purpose."[53] Ms. Johnson's employment agreement included a choice-of-law provision that stated that the agreement was to be governed by Florida law.[54] It also included a provision that contemplated partial enforcement.[55]

Ms. Johnson signed the employment agreement on the same day that it was presented to her.[56] The court noted that the parties disputed the factual circumstances and whether Ms. Johnson may have been coerced into signing the agreement at the time it was presented to her.[57]

Four years later, in February 2011, plaintiffs terminated Ms. Johnson's employment.[58] Less than one month after being fired by the plaintiffs, Ms. Johnson was hired by a competitor of BBNY, defendant Lawley Benefits Group, LLC ("Lawley").[59] Ms. Johnson's work for

50. *Brown & Brown, Inc.*, 980 N.Y.S.2d at 635.

51. *Id.*

52. Brief of Plaintiff-Appellants, at 13, *Brown & Brown, Inc.*, 34 N.E.3d 357 (N.Y. 2015) (No. CA-13-00340).

53. *Brown & Brown*, 980 N.Y.S.2d at 635.

54. *Id.*

55. *Id.* at 640.

56. *Brown & Brown, Inc.*, 34 N.E.3d at 359.

57. *Id.* at 359, 362.

58. *Brown & Brown, Inc.*, 980 N.Y.S.2d at 635.

59. *Brown & Brown, Inc.*, 34 N.E.3d at 359.

Lawley included servicing some of plaintiffs' former customers.[60]

Plaintiffs filed suit against Ms. Johnson and Lawley alleging four different causes of action, and seeking to enjoin Ms. Johnson from further breaches of the non-solicitation provision of her employment agreement.[61] Plaintiffs alleged that Ms. Johnson breached the restrictive covenants in her employment agreement and misappropriated confidential information and trade secrets.[62] Plaintiffs also alleged that both Ms. Johnson and Lawley tortiously interfered with plaintiffs' business relationships.[63] Finally, plaintiffs alleged that Lawley tortiously interfered with Ms. Johnson's employment agreement and induced Ms. Johnson to breach the restrictive covenants contained in that agreement.[64]

The defendants moved for summary judgment before the parties conducted any significant discovery.[65] The defendants' summary judgment motion was premised on several arguments, including that the Florida choice-of-law provision in the employment agreement was unenforceable and New York law should instead apply.[66] The trial court granted in-part and denied in-part the defendants' motion.[67] The trial court held, among other things, that the Florida choice-of-law provision was invalid "because the agreement bore no reasonable relationship to the state of Florida. . . ."[68] The parties cross-appealed to the Appellate Division, Fourth Department.[69]

On appeal, the Fourth Department agreed that New York law should apply, but held that the trial court erred in its reasoning that the agreement had no relationship to Florida.[70] The Fourth Department instead held that the Florida choice-of-law provision was unenforceable because it was "truly obnoxious to New York public policy."[71] The court specifically noted that plaintiff BBI was a Florida corporation with its principal place of business in Florida, among other facts that establish a nexus to Florida.[72] Applying New York law instead of Florida law, the

60. *Id.*
61. *Brown & Brown, Inc.*, 980 N.Y.S.2d at 635.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Brown & Brown, Inc.*, 34 N.E.3d at 359-60.
66. *Brown & Brown, Inc.*, 980 N.Y.S.2d at 635.
67. *Id.* at 635-36.
68. *Id.* at 635.
69. *Id.* at 636.
70. *Id.* at 636-37.
71. *Id.* at 637.
72. *Id.* at 636.

appellate court went on to hold that the non-solicitation provision was overbroad because it sought to prevent Ms. Johnson from soliciting or servicing all of the plaintiffs' clients, regardless of whether Ms. Johnson had a relationship with the clients during her employment with BBNY.[73] The court dismissed the breach of contract claim in its entirety after concluding that the non-solicitation agreement could not be blue penciled under New York law since it was overreaching.[74]

As explained in Sections C.2 and C.3, the Court of Appeals affirmed the Fourth Department's decision as to the choice-of-law issue and held that the Florida choice-of-law provision in the parties' agreement violated public policy.[75] The Court, however, reversed the Fourth Department as to the issue of partial enforcement and asked the trial court to examine certain facts to determine whether partial enforcement is appropriate in this case.[76]

B. *The Court of Appeals' Choice of Law Analysis*

New York courts will not "enforce agreements . . . where the chosen law violates 'some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'"[77] A party who wishes to rely on this public policy exception to a choice-of-law provision "bears a heavy burden."[78] Using this authority as a starting point, in *Brown & Brown, Inc. v. Johnson*, the New York Court of Appeals compared the Florida statute governing restrictive covenants to New York law to determine if the Florida statute is "truly obnoxious" to a fundamental public policy of New York.[79] The court noted that the laws of the two states are similar insofar as they both require post-employment restrictive covenants to protect the legitimate interest of an employer and to be reasonable as to time, scope and geographical location.[80] However, the court went on to address several key differences between the states' respective laws.[81]

First, the burden of proof under New York and Florida law

73. *Id.* at 639-640.
74. *Id.* at 641.
75. Brown & Brown, Inc. v. Johnson, 34 N.E.3d 357, 360 (N.Y. 2015).
76. *Id.* at 362.
77. *Id.* at 360 (citing Welsbach Elec. Corp v. Mastec N. Am., Inc., 859 N.E.2d 498, 501 (N.Y. 2006)).
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 360-61.

differs.[82] The applicable Florida statute provides, in relevant part:

> (c) A person seeking enforcement of a restrictive covenant also shall plead and prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction. If a person seeking enforcement of the restrictive covenant establishes prima facie that the restraint is reasonably necessary, the person opposing enforcement has the burden of establishing that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interest or interests.[83]

Thus, under Florida law, the employer seeking to enforce the restrictive covenant must only show that the covenant is necessary to protect a legitimate interest before the burden shifts to the employee to establish that the restraint is overbroad or unnecessary.[84] On the other hand, under New York law, the employer bears the burden of proving all three prongs of the *BDO Seidman* test, which provides that a restrictive covenant is reasonable only if it: "(1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public."[85]

Second, the Florida statute is more employer-friendly than New York law insofar as the Florida statute expressly provides that "[i]n determining the enforceability of a restrictive covenant, a court . . . [s]hall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought."[86] In stark contrast, the *BDO Seidman* test expressly requires courts to consider whether enforcement would impose "undue hardship on the employee."[87]

Third, Florida and New York law apply different rules of construction in interpreting restrictive covenants. The Florida statute provides:

> (h) A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by

82. *See id.*
83. FLA. STAT. ANN. § 542.335(1)(c) (West 2015).
84. *Id.*
85. BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1223 (N.Y. 1999).
86. FLA. STAT. ANN. § 542.335(1)(g)(1) (West 2015).
87. *Brown & Brown, Inc.*, 34 N.E.3d at 361; *BDO Seidman*, 712 N.E.2d at 1223.

> the person seeking enforcement. A court shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract.[88]

While Florida law requires restrictive covenants to be construed broadly in favor of protecting an employer's interests, New York law requires strict construction against the restraint or drafter in light of the "powerful considerations of public policy which militate against sanctioning the loss of a [person's] livelihood."[89]

The Court of Appeals concluded that Florida law concerning employee restrictive covenants is "offensive to a fundamental public policy" of New York since Florida is more favorable to employers.[90] Thus, the court held that the parties' Florida choice-of-law provision was invalid and New York law should apply instead.[91]

C. *The Court of Appeals' Partial Enforcement Analysis*

In applying New York law, the Court of Appeals agreed with the Fourth Department that "the restrictive covenant was overbroad to the extent that it prohibited Johnson from working with *any* of plaintiffs' New York customers, even those Johnson had never met, did not know about and for whom she had done no work."[92] Yet, the court of appeals disagreed that the overbroad restrictive covenant could not be partially enforced, and it reversed the Fourth Department's complete dismissal of the breach of contract claim.[93] The Court of Appeals instead held that the overbroad non-solicitation covenant in question could be partially enforced depending on certain facts.[94]

In its reasoning, the Court of Appeals acknowledged the long-standing precedent supporting judicial blue penciling of overbroad restrictive covenants, stating "[t]his Court has 'expressly recognized and applied the judicial power to sever and grant partial enforcement for an overbroad employee restrictive covenant.'"[95] The Court cited the rule it articulated in *BDO Seidman* that blue penciling may be appropriate "if

88. FLA. STAT. ANN. § 542.335(1)(h) (West 2015).
89. *Brown & Brown, Inc.*, 34 N.E.3d at 361 (citations omitted).
90. *Id.*
91. *Id.*
92. *Brown & Brown, Inc.*, 34 N.E.3d at 362.
93. *Id.* at 362-63.
94. *Id.*
95. *Id.* at 362.

the employer demonstrates an absence of overreaching, coercive use of dominant bargaining power, or other anticompetitive misconduct, but has in good faith sought to protect a legitimate business interest."[96] The court went on to reference several factors that could be considered in making this determination.[97] Those factors include "whether [the employee] understood the agreement, whether [the employer] discussed or explained it to her, what such discussion entailed, whether [the employee] was required to sign it that day, or if she could have sought advice from counsel and negotiated the terms of the agreement."[98]

With respect to the specific facts of the *Brown & Brown* case, the court of appeals noted that the defendant may have felt pressure to sign the employment agreement since she had already left her employment with Blue Cross/Blue Shield when she was first presented with it.[99] However, the Court of Appeals found that the record with respect to these issues was undeveloped.[100] The Court of Appeals therefore remanded the case to the trial court for further consideration of these factors.[101]

IV. IMPLICATIONS OF THE *BROWN & BROWN DECISION*

The Court of Appeals decision in *Brown & Brown, Inc. v. Johnson* offers several lessons to employers negotiating restrictive covenant agreements and to parties litigating the enforceability of such agreements.

By now, over fifteen years after the Court of Appeals' important ruling in *BDO Seidman*, most sophisticated employers and employment law practitioners in New York are well aware of the first prong of the *BDO Seidman* test, which requires a restrictive covenant to be "*no greater* than is required for the protection of the *legitimate interest* of the employer. . . ."[102] Nonetheless, in practice, employers often wish to use the same form of restrictive covenant agreement for all employees or groups of employees.[103] As a result, boilerplate restrictive covenant

96. *Id.* (quoting *BDO Seidman*, 712 N.E.2d at 1226).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 362-63.
102. BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1223 (N.Y. 1999).
103. *See* Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 936, 977-80 (2006).

agreements are frequently written in general terms and are not narrowly tailored to the role or responsibilities of a specific employee.[104] Employers often then will include a reformation provision in the agreement or otherwise rely on the court's blue pencil authority to enforce a narrower restrictive covenant agreement.[105] In light of the factors articulated by the court of appeals in *Brown v. Brown, Inc. v. Johnson*,[106] prudent employers may need to take a more individualized approach if they wish for a court to blue pencil and otherwise enforce a broadly drafted restrictive covenant in the future.

The court of appeals' decision can be used as a roadmap for how an employer should handle presenting restrictive covenant agreements to new employees to avoid subsequent allegations that an employer's dealings were coercive. Taking the broadest reading of the case and the factors discussed by the court, employers should consider presenting a restrictive covenant agreement to new employees earlier than their first day of employment as the plaintiffs in *Brown & Brown, Inc. v. Johnson* did.[107] The restrictive covenant agreement could instead be given to the job candidate at the time the offer of employment is presented to the candidate or shortly thereafter so that the candidate has the opportunity to consider the restrictive covenant when deciding whether to accept the job. In addition, while many employers are reluctant to open the door to negotiating restrictive covenants, the employer should strongly consider advising the job candidate that he or she has the option to seek counsel to review the restrictive covenant agreement and negotiate changes before signing it. An employer may be prudent to include an acknowledgement in the restrictive covenant agreement stating that the employee acknowledges that he or she read and understood the agreement, was given time to review it before signing it, and had the opportunity to seek counsel and to negotiate the terms of the agreement.[108] At a minimum, employer representatives should not engage in any conduct that could be considered coercive when asking employees to sign a restrictive covenant agreement. For example, employer representatives could advise new employees that the package of materials they are being asked to review and sign contain restrictive covenants.

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104. *Id.*

105. *See* Barbara J. Harris, *Restrictive Covenants in the U.S.: Navigating the Quagmire of Enforceability,* PRACTICAL LAW, http://us.practicallaw.com/8-521-5478 (last visited Feb. 29, 2016).

106. Brown & Brown, Inc. v. Johnson, 34 N.E.3d 357, 361 (N.Y. 2015).

107. *Id.* at 359.

108. *See id.* at 362.

As to choice-of-law provisions, when possible, employers frequently select and include in their standard restrictive covenant agreements a state such as Florida that has applicable laws that are employer-friendly. In contrast, employers are generally disinclined to select California as their choice-of-law when New York is an option since restrictive covenant agreements are rarely enforceable under California law.[109] Under the *Brown & Brown, Inc. v. Johnson* decision, certainly Florida's choice-of-law provisions should be avoided in New York.[110] However, it is yet to be seen whether New York courts will take a similar stance with respect to other employer-friendly jurisdictions when it can be argued that the chosen state's law is inconsistent with New York public policy. After all, the Court of Appeals noted that the parties seeking to take advantage of the public policy exception to void a choice-of-law provision bear "a heavy burden" to establish that the selected law is offensive to New York policy.[111]

CONCLUSION

The Court of Appeals decision in *Brown & Brown, Inc. v. Johnson* is significant and instructive as to the enforcement of choice-of-law provisions and the partial enforcement of restrictive covenants under New York law. Moving forward, New York courts may take a more critical look at the choice-of-law selected by the parties to determine whether the selected law is "obnoxious" to New York public policy. New York courts will continue to consider whether overbroad restrictive covenant agreements can be blue penciled as the court of appeals reaffirmed this possibility under New York law. However, the *Brown & Brown, Inc. v. Johnson* decision squarely places at issue facts related to the circumstances in which the restrictive covenant was signed and to the bargaining power between an employer and an employee.[112]

109. *See* CAL. BUS. & PROF. CODE § 16601 (West 2015).
110. *See Brown & Brown, Inc.*, 34 N.E.3d at 361.
111. *Id.* at 360.
112. *See id.*