

## INDIANA SUPREME COURT ERASES COURTS' ABILITY TO ADD REASONABLE TERMS TO AGREEMENTS

Recently, the Indiana Supreme Court clarified the judiciary's inability to add terms to an impermissibly broad nonsolicitation agreement, even if specifically requested in the agreement itself.

### BACKGROUND

When the terms of a noncompetition or nonsolicitation agreement are disputed, parties often ask courts to determine whether the terms are reasonable. Indiana courts administer this task by employing the "blue pencil doctrine." The blue pencil doctrine allows courts to alter impermissibly broad covenants by deleting language. It does not allow courts to rearrange or add language.<sup>[1]</sup> The Court's recent decision affirmed this principle and held that parties to restrictive covenants cannot rely on a court to add reasonable terms to an unreasonable agreement, even if the parties' agreement contains a reformation clause asking the court to do so.

### SUPREME COURT'S RULING

In the case, a former employee of Zimmer, Inc. left his position to work for a competitor—Heraeus Medical, LLC.<sup>[2]</sup> In the weeks following his transition, the employee solicited other Zimmer employees to come work for his new employer.<sup>[3]</sup> Zimmer sued and requested a preliminary injunction because of its noncompetition agreement with the former employee.<sup>[4]</sup> Zimmer relied on a nonsolicitation clause in that agreement that stated the employee could not solicit or employ "any individual employed" by Zimmer to work for a competitor.<sup>[5]</sup> The agreement also contained a "reformation clause" specifically allowing a court to revise unreasonable terms. The trial court granted the injunction. On appeal, the Indiana Court of Appeals found the nonsolicitation language too broad and, relying on the reformation clause, added language limiting its scope to "those employees in which Zimmer has a legitimate protectable interest."<sup>[6]</sup>

Heraeus Medical appealed both the granting of the preliminary injunction and the Indiana Court of Appeals' decision, arguing that the appellate court's addition of limiting language violated the blue pencil doctrine.<sup>[7]</sup> The Indiana Supreme Court agreed. In the Court's opinion, Chief Justice Rush reiterated that noncompetition agreements are a restraint on trade that courts enforce only if the terms are reasonable.<sup>[8]</sup> If a court finds the terms unreasonable, the blue pencil doctrine only allows the court to remove unreasonable terms—not to draft new, reasonable terms: "[t]he doctrine also protects parties' expectations by not subjecting them to an agreement they didn't make."<sup>[9]</sup>

The Court instructed that the "blue pencil doctrine" really functions as an eraser because the doctrine "may delete, but not add, language to revise unreasonable restrictive covenants."<sup>[10]</sup> Even if an agreement specifically allows for a court to narrow impermissibly broad terms, courts are prohibited from adding such language under the blue pencil doctrine.<sup>[11]</sup> The Court reasoned that to hold otherwise would encourage parties to draft overbroad or unreasonable restrictive covenants and lazily rely on a court to determine reasonableness should the terms be challenged.

After clarifying that the blue pencil doctrine only allows a court to delete terms from an unreasonable nonsolicitation agreement, the Indiana Supreme Court found that Zimmer's nonsolicitation agreement was overbroad because it applied to "any individual employed" by Zimmer—"not just those who 'have access to or possess any knowledge that would give a competitor an unfair advantage.'"<sup>[12]</sup> Without a way to turn the unreasonable into reasonable, the Indiana Supreme Court found the nonsolicitation clause unenforceable and vacated the trial court's preliminary injunction order.<sup>[13]</sup>

### PRACTICAL TAKEAWAYS

The Indiana Supreme Court made it clear that courts will not amend unenforceable restrictions on trade with new, reasonable terms. Parties entering into nonsolicitation or noncompetition agreements must ensure that the agreed-upon restrictions are specific and reasonable, otherwise, they face the possibility of having a court strike the entire restrictive covenant.

If you have any questions or would like additional information about this topic, please contact:

- **Drew Howk** at (317) 429-3607 or [ahowk@hallrender.com](mailto:ahowk@hallrender.com);

- Matt Schappa at (317) 429-3604 or [mschappa@hallrender.com](mailto:mschappa@hallrender.com);
- Jake Kolisek at (317) 977-1428 or [jkolisek@hallrender.com](mailto:jkolisek@hallrender.com);
- Jon Bumgarner at (317) 977-1474 or [jbumgarner@hallrender.com](mailto:jbumgarner@hallrender.com); or
- Your regular Hall Render attorney.

For more information on Hall Render's Litigation services, click [here](#).

[references]

[1] *Heraeus Med., LLC v. Zimmer, Inc.*, No. 19S-PL-471, 2019 WL 6485087, at \*2 (Ind. Dec. 3, 2019)

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* at \*8.

[6] *Id.* at \*3.

[7] *Id.* at \*4.

[8] *Id.*

[9] *Id.* at \*5.

[10] *Id.* at \*9.

[11] *Id.* at \*8.

[12] *Id.*

[13] *Id.* at \*9.

[/references]