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EMPLOYMENT CONTRACTS AGAIN BEFORE THE SUPREME COURT

Employers who want to protect their customer base and their businesses often ask their employees to sign an agreement pledging not to solicit customers or compete in the same area when they leave the employer. Two recent Court of Appeals cases demonstrate just how difficult writing an enforceable agreement on these two points can be.
In *Star Direct, Inc., v. Pra*, 2008 WI App 17, the Court of Appeals addressed whether one invalid clause in an employment agreement invalidates the whole agreement, even though the agreement explicitly provides that if a court finds one provision unenforceable, the rest of the agreement remains in place.

The Court found that one provision of the agreement, the "business clause," which restricted Mr. Dal Pra from engaging in any similar business within a fifty mile radius that was substantially similar to or in competition with the employer's business, to be both overboard and vague.

The second provision of the agreement, the "customer clause," provided that Mr. Dal Pra could not entice away any customers that Star Direct had before Dal Pra left the business for a period of twenty four months. The Court did not discuss whether this provision, on its face, was unenforceable. Instead it held that the provision governed similar types of activities and restraints and was indivisible from the business clause. Having determined that the business clause was unenforceable, the Court held that the intertwined customer clause was also unenforceable.

The employer also lost its bid to impose a penalty period for violation of an employment contract in *H and R Block E. Enter v. Swenson*, 2008 WI App 3. H and R Block's employment agreement provided that both its noncompetition and nonsolicitation covenants ran for two years after termination. However, both covenants also provided that if there were a violation of the agreement, the two year period would be extended by any period that the violation was taking place.

As in Star Direct, the Court applied four rules of legal construction in interpreting employment agreements: 1) they are prima facie suspect; 2) they must withstand strict scrutiny to pass legal muster as being reasonable; 3) they will not be construed further than the language of the contract absolutely requires; and 4) they are to be construed in favor of the employee.

In that context, the Court held that the language of H and R Block's agreement was unreasonable and hard to construe, and therefore not enforceable.

The last word has not been written, however. The Supreme Court has agreed to review the Star Direct case. H and R Block has also petitioned for Supreme Court review, but has stayed its petition until Star Direct is resolved. So, stay tuned.