Labor & Employment Law News

Atlanta Bar Association
Lawyers Who Serve

A Publication of the Atlanta Bar Association, Labor & Employment Law Section

SPECIAL EDITION WINTER 2012

A Message from the Editor

By Benjamin I. Fink, *Berman Fink Van Horn P.C.*

As many of you are aware, I am not a traditional labor or employment lawyer. Most of my practice involves litigating non-compete, trade secret and other competition-related disputes. Since many members of the Labor & Employment Law section also practice in this area, I thought it would be interesting to put together a special edition of the section newsletter to address some of the recent developments in this area of the law. If you practice in this area regularly, or even occasionally, I hope you will find this edition of the newsletter of interest.

I want to thank all the people who have contributed articles to this special edition of the newsletter. I also want to thank Brantly Watts for her help in putting together this issue.

As I requested in the last regular edition of the newsletter, please begin thinking about articles and ideas for the next regular edition of the newsletter. If you have an article you would like to have published in the next edition of the newsletter, please have it to me by the beginning of February, as I anticipate the next edition being published in mid-February.

Thank you again for the opportunity to serve you as a member of the L&E Section Board. If you have any comments, suggestions or criticisms regarding the newsletter, please feel free to give me a call or send me an email. My telephone number is 404-261-7711 and my email address is bfink@bfvlaw.com.

In This Issue

If you are interested in submitting an article or information to be included in this newsletter, contact:

Newsletter Editor
Benjamin I. Fink,
Berman Fink Van Horn P.C.
bfink@bfvlaw.com

Not So Fast! Was the Ballot Language of the November 2010 Proposal to Amend the Georgia Constitution for the Restrictive Covenant Act Unconstitutional?

By David Pardue, *Attorney at Law*

I. In the November 2010 Election the Legislature Had to Win a Vote on a Proposed Amendment in Order to Make The New Restrictive Covenant Act Enforeceable.

One of the proposals to amend the Georgia Constitution that was on the ballot in November 2010, enabled the State General Assembly to wipe from the books decades of controversial Georgia appellate court cases. Over the years, the business community felt that Georgia courts had made it too difficult to draft and enforce post-employment restrictions on competition or solicitation. Responding to concerns expressed by employers about their apparent inability to enforce restrictive covenants reliably, the General Assembly attempted to change the law in 1990 by enacting O.C.G.A. § 13-8-2.1. This statute, however, was held unconstitutional in its entirety in the case of *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371 (1991), because it called for courts to enforce restrictive covenants "to the extent reasonable and necessary to protect the interests of the party benefiting from the covenant," which would "breathe life into contracts otherwise plainly void as being impermissible" under the Constitution. *Id.* at 372.

SEE *LANGUAGE*, Page 2

***LANGUAGE*, continued from Page 1**

Jackson & Coker relied upon Ga. Const. Article III, Section VI, Par. V(c), which expressly prohibits the General Assembly from authorizing laws that hamper competition. Paragraph V(c) states, "The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void."

The general rule of the case law was that this Constitution provision prohibited only "unreasonable" limits on post-employment competition. However, many observers felt that the net effect of the complicated and Byzantine case law was that it was very difficult to enforce any post-termination noncompete or nonsolitication clause in a Georgia court. Likewise, the business community felt that Georgia had developed a stigma as unfriendly to employers because of its reputation as a difficult place to enforce noncompete clauses in contracts. As a lawyer practicing in this field, there is no question that Georgia law was a minefield that many unsuspecting drafters were unable to get through safely. Because "blue penciling" restrictive covenants was outlawed, one "mistake" in the covenants often defeated all restrictions in an agreement. In many cases, one could review a noncompete and, within minutes, tell the client that it was unenforceable. On the other hand, reasonable noncompetes were enforceable in their entirety, and a skilled lawyer could draft them.

In a recent legislative session, the General Assembly resurrected the plan to revamp the law on post-employment restrictions by enacting HB 173, a bill the General Assembly stated had a purpose to protect "legitimate business interests" as well as improving predictability in the enforceability of these contracts. The Act passed the House on March 12, 2009, passed the Senate on April 1, 2009, and Governor Perdue signed it into law on April 29, 2009. In light of the holding of the Georgia Supreme Court in the *Jackson & Coker* case, however, the General Assembly knew that it would also need to amend the Georgia Constitution in order to render the statute constitutional. The Amendment process is spelled out in the Constitution. It begins with a legislative proposal for an amendment, which, if passed, is then presented to the voters in a referendum. A "summary" of the Proposal to amend the Constitution is then required to be drafted by the Legislative Counsel, the Attorney General, and the Secretary of State, and that proposal has to be published in the legal organ of each County. Also, the Constitutional Amendments Publication Board may publish the proposal in "no more than" 20 newspapers in the state. Following this process, a proposal was written to make the necessary Amendment to the Constitution, and it was approved by the General Assembly. That proposal appeared on the November 2010 ballot and passed easily with a "Yes" vote.

II. The November Election's Troubling Ballot Language

What the voters saw on their ballot in November 2010, however, said nothing to indicate that they were voting to make restrictive covenants, noncompetes or nonsolicitation agreements easier to enforce, or indeed that they were voting on anything related to noncompetes and nonsolicitation clauses whatsoever. The ballot stated simply, "Shall the Constitution of Georgia be amended so as to make Georgia more economically competitive by authorizing legislation to uphold reasonable competitive agreements?" Of course, behind the proposal a lot more was at stake. The law the Legislature needed an amendment for was already "in the can" so to speak. So the consequence of passing the amendment to the Constitution was already apparent to a voter, but only if they already knew what was going on. The November vote was, truly, an up-or-down vote on a statute that had already been passed. One would think that a realistic ballot would let the folks in the booth know that this is what was happening.

This ballot "enabling language" allowed the proposed change to the limits in the Constitution, therefore allowing the implementation of the legislation already voted on by the General Assembly. The ballot language was clearly written by supporters of the legislation to ensure a "Yes" vote by voters so that the General Assembly could get past the referendum and assume the power that it had already invoked by voting a new law into place. Clearly, the author of the proposal seemed to feel that the proposed law was going to make Georgia "more competitive," whatever that means, though it is not clear for whom the competition would be increased. Maybe the net effect of the Restrictive Covenant Act would be good for business in Georgia.

That is not the question for this article, however. The question is whether the desire to win the election and pass the new law justified the use of comically vague and manipulative ballot language. More importantly, for a lawyer who practices in the area representing both employers and employees in negotiating, drafting, and counseling on restrictive covenants, the question is whether this new law is at risk because of poorly written ballot language, and if so, will it withstand attack. What should an attorney drafting a restrictive covenant after the effective date of the new law do to make sure the contract will be enforceable for sure? Should lawyers tell their clients to be conservative and make new covenants that would safely be enforceable under the old Georgia law, lest the new law be struck down, at least temporarily, as a result of the faulty ballot language?

The ballot language obviously was not written in an effort to be evenhanded or informative to the voters as to what exactly was at stake in their vote. It was written in manipulative language that might as well have asked voters whether the General Assembly should favor capitalism or improve health care. In an informal survey of a roomful of CFO-types after the election, the voters in the room were asked if they knew they had voted on a law to make restrictive covenants more enforceable. Only one person

SEE *LANGUAGE*, Page 3

Do you have an article suggestion for the Labor & Employment Law Section Newsletter?

We want to hear from you!

Please contact Benjamin Fink with your ideas & suggestions at bfink@bfvlaw.com.

***LANGUAGE*, continued from Page 2**

raised his hand.

For this practitioner, the answer is that the new law is at substantial risk of being overturned based on a ruling that the November 2010 ballot language was unconstitutionally vague and manipulative. There is a very good reason to believe that, based on a close reading of the Constitution and the case law, the ballot language is at risk if a good challenge is mounted by a capable attorney. I have counseled clients to be conservative and negotiate restrictive covenants that could still be enforced under the old Georgia common law, unless and until the challenges to the law work their way through the courts.

III. Georgia Courts Usually Have Limited Review of Ballot Language Due to the General Powers Delegated to the Legislature in the Constitution.

For years, the Georgia courts have been very uneasy about taking a close look at the ballot language of proposals to amend the Georgia Constitution. A line of cases culminating in 1992 with *Donaldson v. Department of Transportation*, 262 Ga. 49 (1992), holds that the courts have virtually no ability to review what the Legislature puts on the ballot with respect to a proposed amendment, based on the notion of limited judicial review and the awesome General Powers of the General Assembly. This line of cases leans heavily on the General Powers clause of the Constitution set forth in Art. III Section VI. Par. I.

Donaldson involved an amendment to the waiver of sovereign immunity, and thus did not affect a power limited under Art. III. Section VI Par. V. The *Donaldson* Court refused to question the language put on the ballot regarding the proposed amendment, stating that "the only limitation on the General Assembly in drafting ballot language is that the language be adequate to enable the voters to ascertain which amendment they are voting on." 262 Ga. at 51, citing *Sears v. State*, 232 Ga. 547 (1974). What this means is that the voters must be able to determine which of the amendments published in the manner prescribed by law is which. In other words, under *Donaldson,* the ballot drafter can be as vague and manipulative as it wants to be, and nothing will be done by the courts if the voter can pick out which proposal goes with which amendment published in the newspaper. What *Donaldson* did not say is <u>why</u> *Sears* and its predecessor cases took this unusually limited approach to reviewing the ballot language for problems.

The *Sears* court was asked to review the ballot language on a proposed amendment that had to do with the validity of certain state bonds. That court noted the limits of judicial review over the Georgia General Assembly in most cases. "The inherent powers of our State General Assembly are awesome. Unlike the United State Congress, which has only delegated power, typically the state legislatures are given by the people the full lawmaking powers." 232 Ga. at 553. *Sears* goes on, "the legislature is absolutely unrestricted in its power to legislate, so long as it does not undertake to enact measures prohibited by the State or Federal Constitution." *Id.*

Sears is right, in normal situations the General Assembly has power to make the laws it feels are necessary. The Georgia Constitution gives the Legislature General Powers in Article VI Par. I. It states: "The General Assembly shall have the power to make all laws not inconsistent with this Constitution, and not repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state."

IV. The Constitutional Provision Regarding Anticompetitive Contracts is Not Part of the General Powers of the General Assembly, and Thus the Rationale for Limited Review of the Ballot Language Based on the Case Law Is Inapplicable.

In summary, therefore, the courts have been wary of closely reviewing ballots in past elections because the General Powers clause gives mighty powers to the legislature to do as it sees fit in passing the laws of Georgia. In other words, the General Assembly has the job of passing the laws, and the courts simply make sure the Assembly follows the rules and the Constitution. The amendment that enables the Restrictive Covenant Act, however, is in a completely different ball park than the amendments at stake in *Donaldson* and *Sears*. The ballot proposal in November 2010 relates to powers totally outside the General Powers of the Georgia legislature. That is because the <u>limit</u> on the legislative powers of the legislature over anti-competitive contracts is not within the rubric of the General Powers clause. Instead, the operation of the Constitution where the anticompetitive restrictions on the General Assembly are located in Art. III. Section VI. Par. V) has the opposite effect of the General Powers. Article III, Section VI, Paragraph V(c) is the provision that expressly prohibits the General Assembly from authorizing laws that limit competition.

SEE *LANGUAGE*, Page 4

SAVE THE DATE

Section Networking Reception

Tuesday, February 21, 2012
at The Lawyer's Club

More information to be posted soon.
Check your emails or visit
www.atlantabar.org for updates.

***LANGUAGE*, continued from Page 3**

As set forth above, that part of the Constitution makes clear that the General Assembly shall not have the power to make laws that would authorize "any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition." The Paragraph itself is entitled "Specific Limitations."

Thus, the *Donaldson* case and its predecessors do not apply to the November 2010 ballot, and the subsequent amendment, because neither the *Donaldson* case, nor the cases relied upon by *Donaldson* deal with ballot language for proposed amendments to Article III, Section VI, Paragraph V, sets out five and only five powers in which the General Assembly has no power. Instead, *Donaldson* and its predecessors rely on the General Powers given to the General Assembly in all but the five areas where the General Power is taken away. Rather than an exercise of the awesome power of the legislature, the November 2010 ballot proposal to amend Art. III. Section VI. Paragraph V. of the Constitution involves the legislature attempting to take back powers that the people of the State of Georgia specifically told the General Assembly that it does not have.

There is no case law on what level of scrutiny the courts should apply to ballot language where the General Assembly is seeking to usurp the specifically limited powers set forth in Paragraph V. But one presumes that the scrutiny would be very strict because the courts would be the only guardian that the voters would have to protect the Constitution from radical power plays by the Assembly. When courts do anything to give a thumbs down on legislative behavior, the cry from the loser in that battle is that it is judicial legislation. In this case, however, there is an express role for the dourts under substantive due process. The cases set forth above acknowledge that a voter has a substantive due process right to have clear communications from the legislative body.

Certainly, *Donaldson* and its predecessors are utterly irrelevant here in seeking guidance on how closely the courts should review the ballot language. *Donaldson* has nothing to do with this amendment and this ballot. The Georgia Supreme Court not only has the ability to carefully review the language of the ballot, but it most likely has the obligation to do so. Given the fact that common sense shows that the ballot language was engineered to command a yes vote, it seems clear that the ballot language was unconstitutionally vague and a violation of the substantive due process of the voters. As much as the fans of the Restrictive Covenant Act might dislike the result, one could hardly think of a more important time for the Georgia courts to strictly review the language of the ballot and determine whether the General Assembly improperly communicated with the voters what they were doing in that election.

V. The Elected Judges in Georgia Are Part of the Political Process and Must Review Closely Any Proposal By the Legislature to Amend Their Own Specifically Limited Powers in Article III Section VI. Paragraph V.

The General Assembly's draftsmen obviously wrote the November 2010 ballot language in order to secure a "Yes" vote from uninformed voters. When the people have no idea what they are voting about, the people and the process are not trustworthy, and there is absolutely no reason the Supreme Court has to sit back and watch this happen. The very first statement in the Georgia Constitution, after the Preamble, is the due process clause, which states that "No person shall be deprived of life, liberty, or property except by due process of law." Art. I, Sec. I, Par. I. A cornerstone of due process in a free society is that elections be fair and honestly conducted.

Even more importantly, the Constitution itself gives the courts the power of judicial review. It is well settled that "our Georgia Constitution also provides: "Legislative acts in violation of this Constitution, or the Constitution of the United States, are void, and the Judiciary shall so declare them."" Art. I, Sect. II, Par. V.; *Barrett v. Hamby*, 235 Ga. 262, 267 (Ga. 1975).

The *Donaldson* court said it "must" trust the political process where the General Powers of the General Assembly are at issue. But that is not the case where the specifically limited powers of the Assembly are at issue. First, the State Supreme Court **is** a part of the political process. The Supreme Court judges in Georgia are elected and do not serve for life like federal judges. They are subject to being voted out of office just like the General Assembly.

Despite its refusal to review the proposal at issue, *Donaldson* goes on to gently chide the General Assembly, stating that it should draft clear language about the purpose and effect of each constitutional amendment. Then, however, the court states, based on simple policy reasons, why it believes that it should not review the ballot language in that particular case to determine if that happened (then it goes ahead and reviews the ballot anyway, concluding that it was not misleading). 262 Ga. at 51. The *Donaldson* court states as a reason not to undertake review that "constitutional amendments are often complex." *Id.* Not a single amendment is cited to give an example of a "complex" amendment. Yet the court hypothesizes that "any summary of the proposal may be subject to various interpretations, even the legislators who sponsor an amendment may not agree on the purpose and effect of a particular amendment." That statement may be true, and where the General Powers of legislature are under review, it makes sense. However, where the General Assembly attempts to give itself powers that the people specifically limited in the Constitution, there ought to be a more searching and careful review of the ballot. In order to fulfill due process and its other duties to the people, the General Assembly should make, as suggested by *Donaldson*, a plain and simple statement about the purpose and effect of the amendment.

Donaldson states, "Moreover, the court must trust the people and the political process to determine the contents of the Constitution. We must presume that the voters are informed on the issues and have expressed their convictions in the ballot box." *Id.* In other words, the court is saying it must assume that the reasonable voter can: (1) read the misleading language in the ballot, whatever it is; (2) refer back to a prior reading of the proposed amendment in the legal organ or newspaper; (3) remember what he or she thought about the proposal before the election; and (4) then totally ignore and discount the manipulative ballot language on election day. The *Donaldson* court was saying that its hands were tied, and that even if the General Assembly poorly drafted the ballot, it could not act. But *Donaldson's* point of view may not be relevant where the "awesome" General Powers of the legislature are not an issue and instead we are dealing with specifically limited powers. Logic

SEE *LANGUAGE*, Page 5

***LANGUAGE*, continued from Page 4**

dictates that a ballot proposed by the legislature to amend the specific restrictions placed on the legislature by the people has to be subject to the strictest review possible. To put it more bluntly, courts clearly have the right to stop the legislature from directly misleading or making false statements to the people.

There is more support in the Constitution supporting strict scrutiny. The Georgia Constitution states that "All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them." Art. I, Sect. II, Par. I. This kind of language is not contained in the federal constitution, but it cannot be overlooked here. In plain language, the people of the State of Georgia have stated that its Public Officers cannot do things that are dishonest or misleading and uphold their position as trustees of the people. They cannot mislead the people. The Supreme Court has noted this duty for public officials. "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Malcolm v. Webb*, 211 Ga. 449, 86 S.E.2d 489 (1955). This honor applies not only to individuals but to the government itself, which is specifically referred to in this Constitutional provision. Not only are the individual Public Officers trustees, but so are the bodies of government these individuals make up.

This public trust is most at risk in the process of manipulating elections. Under Georgia's system of government, the method of expressing the will of the people is by voting in a legally held election. *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946).

The road to serfdom is paved with good intentions. The General Assembly is occupying a position of trust, and an effort to mislead the people, to abuse the process of law in amending the constitution, and to cynically seize back power that was already expressly taken away from it is troubling, even if the intentions are good. The very job of the Court is not to acquiesce in such a circumstance. These are not judges appointed for life, they are Public Officers who are trustees of the people and the people's rights under the Constitution. The judicial "restraint" required of federal, unelected judges is not at issue here. There is a job to do, and that is to review these ballot provisions in light of the duties of not only the General Assembly, but also the Supreme Court, to be "trustees of the people."

The result is that the November 2010 ballot is at risk of being struck down because the language used was so vague and misleading that it violated the rights of the voters to know what they were voting for or against. The General Assembly may have to go back and do the election all over again—this timewith a more clear and simple statement of what the amendment to the Constitution actually does to the powers and rights of the General Assembly. This means the Restrictive Covenant Act may not have been properly implemented unless and until constitutionally-sound ballot language is put before the voters and they vote yes. Certainly, this might frustrate those who want the new law to be enforced. However, open and just government may require such a result.

David Pardue practices business, intellectual property and real estate litigation. He obtained his undergraduate degree from Tulane University and his law degree from Yale Law School.

Labor & Employment Law Section Board of Directors 2011-2012

Chair
Daniel M. Klein

Vice Chair/Chair-Elect
William C. (Cory) Barker

Secretary/Treasurer
Ian E. Smith

Immediate Past Chair
Mary M. (Peggy) Brockington

Members at Large

Robert W. Capobianco
Andrea Doneff
Amanda Farahany
Benjamin I. Fink
Marcia Ganz
Ellen B. Malow
Adriana Midence
A. Lee Parks Jr.

Contact the Labor & Employment Law Section Board of Directors at
sections@atlantabar.org