

# Technology in 2010: A Review of Georgia Cases

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# Law Affecting Technology Lawyers

- Restrictive covenants and the new law
- The business of technology
- Trade secrets and other (nonfederal) IP
- E-discovery issues
- Interesting appearances of technology in other areas of the law

# **Restrictive Covenants**

# Amendment One and HB 173: the New Law of Restrictive Covenants...

(but not quite yet)

- Effective date controversy
- Broad scope (not just “usual” covenants)
- Features
  - Equalizes employment and sale covenants
  - Presumptively reasonable time periods
  - “Safe harbors” and other approved features
  - Pleading and proof
  - Blue penciling (?)
- Litigation potential

**Meanwhile, Restrictive Covenants Live  
On...**

...But only if they're not ancillary to the sale of a business:  
*American Control Systems, Inc. v. Boyce*, 303 Ga. App.  
664 (2010)

- Finds a restrictive covenant in a separate employment agreement to be ancillary to sale of business because
  - the delivery of the employment agreement was a condition precedent to the holding company's obligations under the stock purchase
  - the employment agreement and the stock purchase agreement were contemporaneous, with ACS and Boyce parties to each contract, and
  - the stock purchase agreement vested control of ACS with Barnes when he negotiated the sale of a majority stake in ACS
- Although the noncompete was vague standing alone (prohibiting being “connected with or concerned in” competing business), construed along with stock purchase agreement to supply definition of the business
- Affirms finding of no evidence of breach of nonsolicitation where the principals of customer (a law firm) supplied affidavits stating they were displeased with defendant's former employer, and had requested defendant's services.

## How (Not) to Quit Your Job (and Get Away with It): *Fine v. Communication Trends, Inc.*, 305 Ga. App. 298 (2010)

- Corporate Vice President subject to noncompete, nonsolicit and nondisclosure
  - Met with CEO of new employer 5 months before leaving to discuss possible employment
  - Sent new employer projection of her book of business based in part on knowledge of billing histories of clients, and assumption that clients would follow her
  - Accepted offer of employment and resigned from former employer 4 days later
  - After leaving, attended event with customers, handed out new card, and informed them that she wasn't allowed to solicit, so they would have to provide a statement in writing that she had not done so.
  - Client files at old employer were wiped out, updated client contact info was missing
- Held: former employer was permitted to send letter describing TRO and explaining basis for it – not libel
- But nonsolicitation covenant was overly broad and invalid
- No breach of noncompete or nondisclosure, no tortious interference
- Evidence of client files being wiped was sufficient for jury issue on fiduciary duty

## Also notable...

- *Peachtree Fayette Women's Specialists, LLC v. Turner*, 305 Ga. App. 60 (2010). Noncompete that included location at which defendant never worked and at which employer no longer provides services is overly broad and unenforceable, even though employment agreement listed practice at location as part of duties and specified that scope of noncompete included that location.

# **The Business of Technology**

## Say What You Mean: *ChoicePoint Services, Inc. v. Graham*, 305 Ga. App. 254 (2010)

- O.C.G.A. §48-8-3(68)(A), the “high technology exemption statute,” exempts from sales tax “[t]he sale or lease of computer equipment to be incorporated into a facility or facilities in this state to any high-technology company ... where such sale of computer equipment for any calendar year exceeds \$15 million.”
- “Computer equipment” includes software, whether in tangible or intangible form.
- Held: the clear language of the statute does not require that all \$15 million in “computer equipment” purchases required to meet the threshold for exemption must have been originally subject to sales tax. So long as \$15 million in purchases were made, whatever sales tax was paid on any portion must be refunded.
- Watch the legislature for a fix.

# Other tech business cases of note

- *Fulton County v. T-Mobile South, LLC*, 305 Ga. App. 466 (2010). The \$1/month/subscriber 9-1-1 charge imposed by Fulton County on wireless service providers is a “tax” for the purpose of refund statute, and that provider could obtain refund of taxes erroneously charged on prepaid users.
- *Capitol Infrastructure, LLC v. Plaza Midtown Residential Condominium Ass’n, Inc.*, No. A10A1193, 2010 WL 4609301 (Ga. App. Nov. 16, 2010). Termination of a contract for technology infrastructure in condo development.
- *Hicks v. Heard*, 286 Ga. 864 (2010) (6-3). Daughter of company vice-president, a student who was part-time employee of company, on her way home from an exam, was not within scope of employment even though used the company-owned car for work on an “on-call as-needed basis.”

# Other tech business cases of note (ct'd)

- *Holmes v. Grubman*, 286 Ga. 636 (2010) (certified from Second Circuit re WorldCom bankruptcy). Owner of 2.1 million shares in WorldCom entitled to bring “forbearance” (“holder”) claims based on holding on to WorldCom shares that declined in value due to concealment of truth.
- *TechBios, Inc. v. Champagne*, 301 Ga. App. 592 (2009).
  - Individual placed by TechBios with client promised to identify business opportunities, but once there, refused to provide information or disclose opportunity to do business to TechBios.
  - Dismissal of complaint for fraud, breach of contract, breach of covenant of good faith and fair dealing, and breach of private duty reversed.

# **Georgia Trademark and Other (Nonfederal) IP**

# Trade Secrets

...And By the Way, the Trial Court's Order was Right: *ProNvest, Inc. v. Levy*, No. A10A1095, 2010 WL 4609294 (Ga. App. Nov. 16, 2010).

- Declines to rule on Appellants' claims due to procedural errors and res judicata
- Notes, however, in describing the trial court's ruling, that "the GTSA preempts claims where the plaintiff's tort claims rely on the same allegations as those underlying the plaintiff's claim for misappropriation of a trade secret."

# Trade Secrets, ct'd

Not So Fast: *State Road and Tollway Authority v. Electronic Transaction Consultants Corp.*, No. A10A2103, 2010 WL 4009885 (Ga. App. Oct. 14, 2010).

- Georgia Open Records Act exempts trade secrets
- But trade secrets do not include an RFP's disclosure of design/implementation of technology installation, and unit pricing of equipment (on the record before the court)

The Trademark Infringement Lottery: *Kyle v. Georgia Lottery Corp.*, 304 Ga. App. 635 (2010).

- Continues to rely on federal trademark law to hold that Georgia law requires “bona fide” use
- Undisputed that there was no likelihood of confusion
- Instrumentality of the state is immune from claims of non-contract trademark infringement

# **E-Discovery and Other Litigation Issues**

## Alston & Bird LLP v. Mellon Ventures II, L.P.

No. A10A1563, 2010 WL 4835961 (Ga. Ct. App. Nov. 30, 2010).

- *On (inadvertent?) disclosure of privileged emails:* “We note that the only authority cited by appellants on this issue is a case from federal bankruptcy court.... We rely instead on Georgia authority. ... The disclosure of these e-mails did not preclude later objection to their use by appellees.”
- *On the use of special masters:* “We caution the bench and bar, however, that there are limits to the power of a trial court to turn over allegedly complex litigation to special masters or auditors. Doing so too frequently infringes on the constitutional authority of the General Assembly and the Governor, advised by the Judicial Council, to decide how many judicial circuits Georgia should have and how many judges should staff those circuits. In the present litigation, the trial court may have already reached the limit of the proper use of a special master.”

# **Interesting Appearances of Technology**

# People are People, So Why Should It Be?

- Sending harassing emails from outside the state does not violate Georgia stalking statute. *Huggins v. Boyd*, 304 Ga. App. 563 (2010)
- Posting false statements about your stalking victim/ex-wife online is not a violation of a “no contact” provision. *Marks v. State*, No. A10A2110, 2010 WL 4609190 (Ga. App. Nov. 16, 2010).

## Reach Out And Ping Someone

- The police can “ping” your cell phone to learn your location without a warrant. *Devega v. State*, 286 Ga. 448 (2010).

## So Far Away...

- Communicating via email from Alabama to Georgia for a business transaction may subject you to personal jurisdiction. *Paxton v. Citizens Bank & Trust of West Georgia*, No. A10A1255, 2010 WL 4751753 (Ga. App. Nov. 24, 2010).
- But a Spanish hotel's advertising via internet to Georgia residents (among other US residents) does not lead to personal jurisdiction for a suit over a taxi accident in the Dominican Republic. *Sol Melia, SA v. Brown*, 301 Ga. App. 760 (2009).