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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LARRY A. LAWSON,

Plaintiff - Appellee

v.

SPIRIT AEROSYSTEMS, INC.,

Defendant - Appellant.

No. 21-3213

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 6:18-cv-01100-EFM)

Joseph T. Baio, Willkie Farr & Gallagher LLP, New York, New York (James C. Dugan, Willkie Farr & Gallagher LLP, New York, New York, and F. James Robinson, Jr., Hite Fanning & Honeyman LLP, Wichita, Kansas, with him on the briefs), on behalf of the Plaintiff - Appellee.

Jeffrey B. Wall, Sullivan & Cromwell LLP, Washington, D.C. (Morgan L. Ratner and Zoe A. Jacoby, Sullivan & Cromwell LLP, Washington, D.C., and Gary L. Ayers and Clayton J. Kaiser, Foulston Siefkin LLP, Wichita, Kansas, with him on the briefs), on behalf of the Defendant - Appellant.

Before **BACHARACH**, **PHILLIPS**, and **EID**, Circuit Judges.

BACHARACH, Circuit Judge.

Larry Lawson thrived as the chief executive officer of Spirit AeroSystems, Inc., a manufacturer of aerostructures and aircraft components. As the chief executive officer, Mr. Lawson obtained not only a salary but also stock awards worth millions of dollars. But these awards vested year-to-year, and Mr. Lawson was ready to step down as the chief executive officer.

Staying another few years at Spirit would result in the vesting of Mr. Lawson's lucrative stock awards. So Spirit entered a consulting agreement with Mr. Lawson. The agreement allowed Mr. Lawson to transition from his position as the CEO to a highly-paid consultant. As a consultant, Mr. Lawson would get a salary and his stock awards would continue to vest. In exchange, Mr. Lawson agreed not to assist or obtain an interest in other entities investing in companies engaging in the same business as Spirit.

While consulting for Spirit, Mr. Lawson explored other opportunities and found one in a hedge fund, Elliott Associates. Elliott had invested in another manufacturer of aircraft components (Arconic). But Elliott was unhappy with Arconic's performance and set out to install Mr. Lawson as Arconic's new CEO.

Elliott wasn't able to make Mr. Lawson the new CEO. But Spirit treated these activities as a forfeiture of Mr. Lawson's right to additional payments and vesting of stock awards.

Mr. Lawson sued. In the suit, he denied assisting Elliott with its investments in Arconic or assuming a role in Arconic itself. But Spirit pointed out that the covenant went beyond most traditional covenants not to compete. This covenant not only prevented Mr. Lawson from working for a competitor, but also prevented him from obtaining an interest in a company—like Elliott—that invested in the business of another manufacturer of aircraft components (Arconic).

The district court sided with Mr. Lawson, and Spirit appealed. We reverse. With or without Mr. Lawson's assistance, he obtained an interest in Elliott and it invested in a manufacturer of aircraft components. In light of Mr. Lawson's interest in Elliott, its investment in Arconic triggered a forfeiture of Mr. Lawson's right to continued benefits from Spirit.[1] So we conclude that Mr. Lawson breached the covenant not to compete. But we remand for the district court to determine the enforceability of the covenant.

1. The consulting contract conditioned Mr. Lawson's benefits on his compliance with the covenant.

Under the consulting contract, Mr. Lawson could obtain payments and the vesting of stock awards only as long as he complied with the

[1] Spirit also appeals the district court's denial of an offset based on Elliott's indemnification of Mr. Lawson for his lost benefits. Because we reverse the award to Mr. Lawson, we need not decide whether the district court should have allowed an offset.

covenant not to compete.[2] Appellant's App'x vol. 1, at 84 (the consulting contract stating that Mr. Lawson's "continuing entitlement to payments and/or vesting . . . shall be conditioned upon . . . his continuing compliance with" the covenant not to compete). If Mr. Lawson were to violate the covenant, Spirit would stop paying him and allowing his stock awards to vest. *Id.*

The parties disagree in their interpretations of this contract. But the parties agree that we must interpret the contract based on Kansas law. Under Kansas law, the consulting contract created a condition precedent by requiring Mr. Lawson's compliance before Spirit would need to continue the payments and vesting of stock awards. *See Wallerius v. Hare*, 399 P.2d 543, 547 (Kan. 1965) (defining a condition precedent as "something that . . . is agreed must happen or be performed before a right can accrue to enforce the main contract"); *see also Mirrow v. Barreto*, 80 F. App'x 616, 617–18 (10th Cir. 2003) (unpublished) (stating that the terms "Conditioned upon" creates a condition precedent).[3]

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[2] The consulting contract conditioned Mr. Lawson's entitlement to benefits on compliance with Paragraph 7. Appellant's App'x vol. 1, at 84. Paragraph 7, in turn, incorporated Paragraph 4 of the employment agreement (the covenant not to compete). *Id.* at 86.

[3] Spirit argues that the condition precedent required Mr. Lawson to prove compliance. For this argument, Spirit relies on Kansas law, which requires a party subject to a condition to "show compliance." *Kalina & Cizek v. Union Pac. R. Co.*, 76 P. 438, 439 (Kan. 1904). But the historical

2. Mr. Lawson failed to comply with the condition.

After conducting a bench trial, the district court found that Mr. Lawson had not violated the covenant. Our review of this finding entails a mixed question of law and fact. We would generally review the factual finding for clear error. *Sw. Stainless, LP v. Sappington*, 582 F.3d 1176, 1183 (10th Cir. 2009). But here, the historical facts are largely undisputed. In applying those historical facts, we conduct de novo review over the district court's legal conclusions. *Id.*

These legal conclusions entail interpretation of the covenant. *See Penncro Assocs., Inc. v. Sprint Spectrum, L.P.*, 499 F.3d 1151, 1155 (10th Cir. 2007) ("The proper construction of a contract is a question of law we review *de novo*."). The interpretive disagreements involved three questions:

1. Which actors were covered?
2. What actions by the covered actors were prohibited?
3. Did the prohibited conduct involve a company engaged in the same business as Spirit?

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facts are undisputed; the only question is whether Mr. Lawson's arrangement with Elliott had required forfeiture of his payments. So the burden of proof does not affect the outcome. *See* Appellant's Opening Br. at 28 n.3 (Spirit acknowledging that it does not matter who bears the burden).

In addressing these questions, we focus on the ordinary meaning of the contract terms. *Cent. Nat. Res., Inc. v. Davis Operating Co.*, 201 P.3d 680, 687 (Kan. 2009). When the terms are clear, we need not resort to rules of construction.[4] *Carrothers Constr. Co. v. City of S. Hutchinson*, 207 P.3d 231, 239 (Kan. 2009).

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[4] Kansas law generally requires strict construction against the employer when assessing the enforceability of covenants not to compete in employment agreements. *See Weber v. Tillman*, 913 P.2d 84, 89 (Kan. 1996) (determining enforceability); *H & R Block, Inc. v. Lovelace*, 493 P.2d 205, 211 (Kan. 1972) (stating that "courts have construed [employment contracts] more strictly against the employer-promisee in determining their reasonableness"). So Mr. Lawson urges strict construction against Spirit.

But Kansas law also provides that when "the terms of the contract are clear, the parties' intent should be determined from the language of the contract itself without applying the rules of construction." *Wichita Clinic, P.A. v. Louis*, 185 P.3d 946, 951 (Kan. Ct. App. 2008) (reviewing a restrictive covenant); *Weber*, 913 P.2d at 96 (interpreting a noncompetition covenant and concluding that "there is no room for rules of construction" when "the language of a written instrument is clear"). The terms of the covenant are clear, so we do not strictly construe the covenant against Spirit. The consulting contract also stated that

- "no rule of construction shall apply against any party or in favor of any party" and
- "any uncertainty or ambiguity shall not be interpreted against one party and in favor of the other."

Appellant's App'x vol. 1, at 89. We thus have not strictly construed the consulting agreement against Spirit.

A. The covenant covers conduct by Elliott.

The first question involves identification of actors covered under the covenant. The covenant identifies these actors: "[N]either you nor any individual, corporation, partnership, limited liability company, trust, estate, joint venture or other organization or association [] with your assistance nor any Person in which you directly or indirectly have an interest of any kind (without limitation) will [commit a prohibited act]." Appellant's App'x vol. 1, at 108. Through this language, the covenant covers three persons or entities:

1. Mr. Lawson himself ("you"),

2. a person or entity that Mr. Lawson assists ("any individual, corporation, partnership, limited liability company, trust, estate, joint venture or other organization or association [] with your assistance"), and

3. a person or entity in which Mr. Lawson has a direct or indirect interest ("any Person[5] in which you directly or indirectly have any interest of any kind (without limitation)").

For the sake of argument, we can focus solely on the third of these provisions, assuming that Mr. Lawson didn't commit or help to commit a prohibited act. Regardless of any help from Mr. Lawson, Elliott was a partnership, so Elliott was covered if it was an entity in which Mr. Lawson

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[5] The term *Person* is defined in the covenant as "any individual, corporation, partnership, limited liability company, trust, estate, joint venture, or other organization or association." Appellant's App'x vol. 1, at 108.

had "directly or indirectly" obtained "any interest of any kind (without limitation)." *Id.*

In applying this contractual language, we consider two facts that no one disputes:

1. Mr. Lawson had a contract with Elliott, creating rights and responsibilities for both contracting parties.

2. Mr. Lawson had a separate indemnification agreement with Elliott, entitling him to indemnification if the contract between Mr. Lawson and Elliott were to end Spirit's payments and vesting of stock awards.

To apply these terms, we consider the meaning of two of the contractual terms: *interest* and *in*.

The district court acknowledged that the term *interest* is considered "[t]he most general term" denoting "a right, claim, title or legal share in something." Appellant's App'x vol. 2, at 167 (quoting *Russello v. United States*, 464 U.S. 16, 21 (1983) (quoting Black's Law Dictionary 729 (5th ed., 1979))). Spirit thus argues that Mr. Lawson obtained an interest through his contracts with Elliott, and Mr. Lawson does not suggest otherwise. *See Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 275 (2008) (referring to a "contractual right" as a "financial interest"); *In re South*, 689 F.2d 162, 165 (10th Cir. 1982) (referring to "contractual rights" as "economic interests").

Though Mr. Lawson doesn't question the presence of an interest, he suggests that it lay in his contracts with Elliott rather than in Elliott itself.

Mr. Lawson hadn't made this suggestion before the appeal, and the district court didn't suggest that an interest would have been limited to the Elliott contracts.

An interest could lay in a business, in a contract with that business, or in both the business and the contract. *See* 1 *Bouvier Law Dict.* 1362 (Sheppard ed. 2012) ("Interest is a relationship between a person or entity and any person, entity, or thing—including a piece of property, corporation, contract, cause in law, trust, estate of a decedent, partner, family member, or a subsidiary corporation, or even a criminal enterprise, or an election campaign."). So Mr. Lawson might have had an interest not only in his contracts but also in Elliott itself. The district court hadn't addressed this possibility because Mr. Lawson waited until this appeal to argue that his interest lay solely in his contracts with Elliott rather than in Elliott itself.

Though Mr. Lawson waited until the appeal to make this argument, we have discretion to consider it. *Brown v. Perez*, 835 F.3d 1223, 1236 (10th Cir. 2016); *see* p. 14, below. In determining whether to exercise this discretion, we consider three factors:

1. whether the ground was fully briefed here and in district court,

2. whether the parties had a fair opportunity to develop the factual record, and

3. whether our decision would involve only questions of law.

Harvey v. United States, 685 F.3d 939, 950 n.5 (10th Cir. 2012); *see* pp. 13–14, below. Two of the factors weigh against consideration.

Though the issue is briefed here, the discussion is cursory. Mr. Lawson spends about a page on the issue, citing no authority. Spirit responds with less than a page, calling Mr. Lawson's argument "tautological" but failing also to cite any authority. Neither side has addressed the possibility that Mr. Lawson had an interest in both the contracts and in Elliott itself.

This interpretation is at least reasonable, for the term *interest* is broad and the provision contains two modifiers emphasizing the breadth:

1. The interest can be either direct or indirect.

2. The interest can be "of any kind (without limitation)."

Appellant's App'x vol. 1, at 108.

And in district court, Mr. Lawson hadn't argued that his interest lay in the contracts rather than in Elliott itself. The failure to brief the issue in district court would ordinarily lead us to weigh this factor against consideration. *See Brown v. Perez*, 835 F.3d 1223, 1236 (10th Cir. 2016) (weighing this factor against consideration when the parties briefed the issue on appeal but not in district court); *see also United States v. Black*, 25 F.4th 766, 777 (10th Cir. 2002) (same in a criminal case).

Though two of the three factors weigh against consideration, we'd reject the argument even if we considered it. The covenant was triggered

by Mr. Lawson's acquisition of an indirect interest of any kind. Appellant's App'x vol. 1, at 108. So even if the preposition *in* had limited Mr. Lawson's direct interest to the contract itself (and not Elliott), his contractual rights against Elliott created at least an indirect interest in Elliott.

Although the district court found that Mr. Lawson had no interest in Elliott, the district court also found that Mr. Lawson was an employee of Elliott. Appellant's App'x vol. 2, at 18, 167. The court appeared to downplay Mr. Lawson's employment with Elliott because it was not engaged in Spirit's business. *See id.* at 167 ("Lawson was employed by Elliott, but Elliott was not in the Business."). But if Mr. Lawson had even an indirect interest in Elliott, Elliott's actions could have triggered a forfeiture of future payments and vesting of stock benefits.

In light of the breadth of the provision and the contractual term *interest*, Mr. Lawson had at least an indirect interest in Elliott itself.

B. Elliott committed a prohibited act.

Because Mr. Lawson had an interest, Elliott's actions could forfeit his right to future payments and vesting of stock awards. The covenant prohibited a broad range of actions; one of these was the direct or indirect investment in another entity engaged in the same business as Spirit. Appellant's App'x vol. 1, at 108.

Elliott committed such an act by investing in Arconic. When Mr. Lawson entered into a contract with Elliott, it had roughly an 11% share in Arconic. Elliott then increased its investment. So Lawson doesn't deny that Elliott committed the act of investing in Arconic.[6]

The district court acknowledged that Elliott had invested in Arconic, but disregarded this prohibition because Mr. Lawson hadn't assisted Elliott in its investment. Appellant's App'x vol. 2, at 169. This reasoning reflects a misinterpretation of the covenant. The covenant creates a list of prohibited actions, including investment in another company engaged in Spirit's business.[7] These prohibitions apply when Mr. Lawson either

- assists another company in committing the act *or*
- obtains an interest in that company.

See p. 7, above. Because Mr. Lawson obtained an interest in Elliott, its unilateral investment in Arconic constituted a prohibited act despite Mr. Lawson's lack of assistance.

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[6] The covenant provides a 2% safe harbor: "[A covered actor] will not be deemed to have breached the provisions of this Section 4(c) solely by holding, directly or indirectly, not greater than 2% of the outstanding securities of a company listed on a national securities exchange." Appellant's App'x vol. 1, at 108. But Elliott exceeded the safe harbor.

[7] Spirit argues that Mr. Lawson also forfeited his benefits by (1) his creation of a connection with Arconic's ownership or management and (2) Elliott's control of Arconic and creation of a connection with Arconic's ownership or management. But we need not consider these arguments because the covenant was breached by Mr. Lawson's acquisition of an interest in Elliott and its investment in Arconic.

C. Arconic is engaged in the "Business."

Elliott's act of investing would be prohibited only if Arconic had been a covered entity. The covenant covers entities only if they engage in the *Business*—a term defined in Mr. Lawson's employment agreement and incorporated into the covenant.

The employment agreement had defined the term in a recital, stating that Spirit was "engaged in the manufacture, fabrication, maintenance, repair, overhaul, and modification of aerostructures and aircraft components, and market and sell [Spirit's] products and services to customers throughout the world (together with any other businesses in which Spirit may in the future engage, by acquisition or otherwise, the '*Business*')." Appellant's App'x vol. 1, at 102. We must determine whether Arconic's activities fell within this definition of Spirit's business.

The district court didn't reach this issue. Appellant's App'x vol. 2, at 171 ("Because the facts fail to show a Prohibited Act by a Prohibited Actor, it is irrelevant whether Arconic was a Prohibited Object."). But Mr. Lawson argues that we can affirm on the ground that Arconic wasn't a covered entity.

We have discretion to consider this as an alternative ground to affirm. *Brown v. Perez*, 835 F.3d 1223, 1236 (10th Cir. 2016); *see* p. 9, above. In determining whether to affirm on an alternative ground, we consider three factors:

1. whether the ground was fully briefed here and in district court,

2. whether the parties had a fair opportunity to develop the factual record, and

3. whether our decision would involve only questions of law.

Harvey v. United States, 685 F.3d 939, 950 n.5 (10th Cir. 2012); *see* pp. 9–10, above.

These factors support consideration. In both district court and our court, the parties have briefed consideration of Arconic as a covered entity. And both sides presented evidence on the issue. That evidence allowed the district court to make factual findings on the business activities of both Arconic and Spirit. We must apply these factual findings to the meaning of the contract, which is primarily a legal inquiry. *See Hollern v. Wachovia Sec., Inc.*, 458 F.3d 1169, 1175 n.4 (10th Cir. 2006) (stating that the application of legal principles to undisputed facts involves primarily a legal inquiry).

Because each factor supports consideration, we will address Mr. Lawson's argument to affirm on the ground that Arconic isn't a covered entity. But we reject that argument on the merits.

The parties largely agree on what Arconic and Spirit did; the parties' disagreement turns on the scope of the term *Business* as used in the covenant not to compete. The employment agreement defines the term *Business* by putting it in parentheses, which follows the definition given in

the preceding recital. *See* Kenneth A. Adams, *A Manual of Style for Contract Drafting* § 5.34, at 116–17 (2d ed. 2008) ("[A]n integrated definition constitutes part of the substantive provisions of a contract, and the defined term is defined by tucking it at the end of the definition, in parentheses."); *see also* Bryan A. Garner, *The Chicago Guide to Grammar, Usage, and Punctuation* § 490, at 366 (2016) ("Use parentheses to introduce shorthand or familiar names."); *cf. Novacor Chems., Inc. v. United States*, 171 F.3d 1376, 1381 (Fed. Cir. 1999) (stating that "general principles of construction support the view that a parenthetical is the definition of the term which it follows").

Given this use of *Business* as a defined term, we consider whether Arconic engaged in

- the manufacture of aerostructures or aircraft components or
- the sale of products or services that Spirit had also sold.

The parties largely agree on the meaning of *aerostructures* and *aircraft components*. The term *aerostructure* refers to an airplane's body or frame, and the term *aircraft components* refers to the parts making up the body or frame.[8]

[8] The parties provide similar definitions of *aerostructures* and *aircraft components*:

- *Aerostructures*: Mr. Lawson defined "aerostructures" as "large, complex components of an aircraft's frame." Appellant's App'x

The district court found that Arconic had manufactured and sold "hundreds of . . . aircraft components, including nearly 300 components, some of which Spirit also sells in the aftermarket." Appellant's App'x vol. 1, at 192. This finding meant that Arconic had engaged in the manufacture and sale of aircraft components, which constituted part of Spirit's business.[9] This was enough to render Arconic a covered entity, for the covenant applied to "any business that is engaged, in whole or in part, in

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vol. 1, at 121 (stating Mr. Lawson's definition for "aerostructures" as described in the complaint). Spirit similarly defined "aerostructures" as "the physical body of the plane, but not its systems, engines, or interiors." Appellant's Opening Br. at 38.

- *Aircraft components*: Mr. Lawson defined "aircraft components" as "individual structural components that comprise the aerostructures." Appellant's App'x vol. 2, at 15–16 (Mr. Lawson's Proposed Findings of Fact). And Spirit defined "aircraft components" as "the physical parts used to construct an aerostructure or the plane's body." Appellant's Opening Br. at 38.

The district court similarly defined the terms, regarding *aerostructures* as "large aircraft structures . . . , such as fuselages, nacelles, pylons, and flight control surfaces such as flaps and slats," and *aircraft components* as "individual structural parts that make up the aerostructures." Appellant's App'x vol. 2, at 137.

[9] Arconic also marketed aircraft components. For example, Arconic distributed a brochure highlighting its capacity to sell aircraft components such as wing ribs, window frames, and seat tracks. Appellant's App'x vol. 5, at 64–65.

the Business" (as defined in the recital of the employment agreement). *Id.* at 108.

Arconic not only engaged in part of Spirit's business, but also manufactured some of the same aerostructures and aircraft components that Spirit was manufacturing (like seat tracks, spoilers, flaps, ailerons, wing ribs, and skins). Appellant's App'x vol. 1, at 190–92. The district court pointed out that Arconic had often customized these aerostructures and aircraft components. That customization led the district court to distinguish between the aerostructures and aircraft components that Arconic and Spirit had made. This distinction suggests that manufacturers engage in their own unique businesses whenever they make customized parts. Under this view, for example, two builders aren't in the same business when they customize houses for their buyers. This view would prevent anyone who customizes parts from engaging in the same business as Spirit, rendering the covenant useless.[10]

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[10] Mr. Lawson argues that a general construction of *Business* renders the covenant superfluous. He points out that the covenant covers businesses that are either "engaged in" or "competitive" with the "Business," arguing that a general construction would render the "competitive" clause superfluous. *See* Appellant's App'x vol. 1, at 108. But Mr. Lawson's approach would render the "engaged in" clause superfluous: If the term *Business* applied only to the manufacture of aircraft components with identical specifications, every company "engaged in" the *Business* would also be considered "competitive" with Spirit's *Business*. So the language is superfluous under either approach. In these circumstances, we apply the contractual language "with judgment and discretion . . . and with careful regard to context." *Id.* at 176.

The district court also relied on the term *We* in the recitals of the employment agreement. Appellant's App'x vol. 1, at 102 ("We are engaged in the . . . '*Business*'."). To the district court, the pronoun *We* suggests that Spirit narrowed the covenant to include only the specific aerostructures and aircraft components that Spirit had manufactured. *See id.* at 133. This approach overlooks the defined term (*Business*) at the end. The recital uses the shorthand *Business* to describe the work of Spirit, which is "the manufacture . . . of aerostructures and aircraft components." *Id.* at 102. And the covenant uses that shorthand term (*Business*) when identifying the entities covered by the covenant. *Id.* at 108.

The district court focused not only on the pronoun *We* but also on the reference to other businesses that Spirit might adopt in the future. Appellant's App'x vol. 1, at 102 (the recital defining *Business* to include "any other businesses in which Spirit may in the future engage, by acquisition or otherwise"). To the district court, this broad category would have been superfluous if the other language had already encompassed every business in the aerospace industry.

But the term *Business* covers only aerostructures and aircraft components—not the entire aerospace industry. *Compare Aerospace*, *Oxford English Dictionary* (online ed.), https://www.oed.com/view/Entry/3205 ("Of or relating to aviation and space flight considered together, esp. as a branch of technology and

industry.") *with Aerostructure*, *Oxford English Dictionary* (online ed.), https://www.oed.com/view/ Entry/269829 ("A component or subsystem of the airframe of an aircraft."). The term *aerostructures* refers to part of the broader industry of aerospace. For example, the term *aerospace* encompasses other segments like avionics, engines, and maintenance. Appellant's App'x vol. 4, at 22 (Spirit's expert witness testifying that "Aerostructures . . . is really just one of about five or six different major industry segments in the business" and does not include the systems, avionics, engines, interiors, or maintenance). So the covenant would apply if Spirit were to expand into other segments of the aerospace industry, such as avionics, engines, and maintenance.

In interpreting the covenant as a whole, we interpret the term *Business* to include the manufacture of aerostructures and aircraft components. Given this interpretation, the district court's findings show that Arconic had engaged in the manufacture of aircraft components. So Arconic was a covered entity.

* * *

Mr. Lawson obtained an interest in Elliott, which invested in Arconic. That investment triggered a forfeiture of Mr. Lawson's right to future benefits because Arconic and Spirit had engaged in the same business.

3. The district court should determine the enforceability of the covenant not to compete.

Mr. Lawson argues that even if he had violated the covenant, it would have been unenforceable. The district court didn't reach this argument, but Mr. Lawson reurges it as an alternative basis to affirm. We exercise our discretion to address the argument because (1) it was fully briefed in district court and on appeal and (2) the record is adequately developed. *See* pp. 9–10, above.

Like many states, Kansas restricts the enforceability of covenants not to compete. States commonly ground these restrictions on public policies favoring competition. *See* Restatement (Second) of the Law of Contracts § 188(1) (1981) (stating the circumstances in which a promise to refrain from competition is considered unreasonably in restraint of trade); *see also* *Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*, 818 S.E.2d 724, 729 (S.C. 2018) ("The reason why [covenants not to compete] are held to be unenforceable is that unless they meet certain criteria, they constitute a restraint upon trade which is against public policy." (quoting *Somerset v. Reyner*, 104 S.E.2d 344, 347 (S.C. 1958))). Given this purpose behind the restrictions, the parties disagree on the applicability of Kansas's restrictions.

This disagreement stems from an anomaly in the covenant itself. The covenant first appeared in Mr. Lawson's employment agreement. But that

agreement expired when Mr. Lawson transitioned from serving as a CEO to serving as a consultant. When Mr. Lawson became a consultant, he entered into a new contract with Spirit. That contract incorporated the covenant from the employment agreement. Appellant's App'x vol. 1, at 86.

As Spirit points out, the consulting contract unambiguously made Mr. Lawson's compliance with the covenant a condition to his future payments and vesting of stock awards: "[Mr. Lawson] acknowledges that his continuing entitlement to payments and/or vesting . . . shall be conditioned upon . . . his continued compliance with Paragraph[] . . . 7," and that paragraph incorporated the employment contract's covenant not to compete. *Id.* at 84, 86, 108. But that covenant also subjected Mr. Lawson to remedies such as damages, accounting, disgorgement of profits, and an injunction. *Id.* at 109.

Spirit seeks to enforce the covenant only as a condition to future payments—Spirit doesn't suggest that it can prevent Mr. Lawson from working for competitors. But the covenant itself prohibits Mr. Lawson from working for competitors even though Spirit doesn't seek to enforce these prohibitions. Given the covenant's dual function, a court would need to consider how to approach the issue of enforceability.

For traditional covenants not to compete, Kansas law provides a fact-intensive inquiry involving consideration of four factors:

1. the legitimacy of the employer's business interest,

2. the existence of an undue burden on the employee,

3. the potential injury to the public welfare, and

4. the reasonableness of the time and territorial limitations.

Weber v. Tillman, 913 P.2d 84, 90 (Kan. 1996); *see Victaulic Co. v. Tieman*, 499 F.3d 227, 230 (3d Cir. 2007) (stating that the reasonableness of a covenant not to compete "is a fact-intensive inquiry"). But if the covenant serves only as a condition to future payments, rather than as a restraint against competition, there may be no public policy to inhibit enforcement. *See, e.g.*, *Allegis Grp., Inc. v. Jordan*, 951 F.3d 203, 210–11 (4th Cir. 2020) (stating that the general test for restricting enforceability of covenants not to compete doesn't apply when the covenant conditions future benefits on compliance rather than restrict where the employee can work); *Morris v. Schroder Cap. Mgmt. Int'l*, 859 N.E.2d 503, 506 (N.Y. 2006) (stating that the general disfavor of noncompete provisions doesn't apply when an employer conditions receipt of postemployment benefits upon compliance with a restrictive covenant). To the contrary, public policy could support the enforceability of contracts in which employers compensate highly paid executives to avoid working for competitors. *See Allegis Grp.*, 961 F.3d at 212.[11]

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[11] There the Fourth Circuit Court of Appeals explained:

The applicability of the four-factor test thus turns on interpretation of the covenant's dual functions. Here both functions appear on the face of the covenant. But Spirit disavows the function of restraining competition, acknowledging that Mr. Lawson could have worked for anyone and stating that work for a competitor would serve only to stop future benefits from Spirit. In light of Spirit's disavowal of a restraint against competition, a court must determine whether the covenant's dual functions are severable.

The parties haven't briefed the severability of the covenant as a condition for future benefits and as a restraint against competition. And resolution of this issue could directly affect the enforceability of the covenant. We thus remand for the district court to conduct this inquiry in the first instance. *See Harvey Barnett, Inc. v. Shidler*, 338 F.3d 1125, 1133 n.11 (10th Cir. 2003) (remanding because the district court hadn't resolved

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> [P]ublic policy favors the freedom to contract for such a plan. Unlike traditional restrictive covenants, which may benefit the employer at the expense of the former employee's ability to earn a livelihood, both employers and employees benefit under agreements such as the Incentive Plan. Highly compensated employees like the defendants might well prefer to refrain from competing temporarily in exchange for post-employment payments—payments which they would not otherwise be owed and which do not constitute general benefits of employment. But companies in highly competitive industries might not offer these plans if they were themselves unable to fully benefit from such contractual arrangements.

951 F.3d at 212.

the defendants' challenge to the reasonableness of a covenant not to compete).

4. Conclusion

Mr. Lawson's consulting contract conditioned his payments and vesting of stock awards on his compliance with a covenant not to compete. This covenant covered not only Mr. Lawson but also entities in which he obtained an interest. He obtained an interest in Elliott by contracting with it. Elliott then committed the prohibited act of investing in Arconic, which had been engaged in Spirit's business.

Mr. Lawson argues that the condition fell within a provision that was itself unenforceable. But this argument entails a fact-intensive inquiry, which the district court should decide in the first instance. We thus reverse and remand for further proceedings to determine the enforceability of the covenant.