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September 25, 2013

Virginia Supreme Court Reverses Dismissal of Non-Compete Case, Emphasizing Need for Case-by-Case Analysis

By Thomas Flaherty, Linda Jackson, Paul Kennedy, and Rebecca Signer Roche

In *Assurance Data, Inc. v. John Malyevac*, No. 121989 (Sept. 12, 2013), the Supreme Court of Virginia held that the Fairfax County Circuit Court had been too quick to rule on the enforceability of a covenant not to compete, reversing the court's dismissal of the employer's complaint and remanding the case to the trial court. This ruling signals an important shift in the procedural and strategic landscape surrounding non-compete agreements in the Commonwealth, as the court has effectively limited a frequently used device for challenging and disposing of non-compete claims early in litigation.

Facts

While employed by Assurance Data, Inc., the employee entered into an employment agreement (the Agreement) prohibiting him from soliciting, providing, promoting or selling products or services that competed with the company within a 50 mile radius of its Virginia office for six months after termination. The Agreement also prohibited the employee from soliciting customers of the company for any business which is competitive with the company "for a period of twelve (12) [sic] after the date of termination . . . ."

After resigning, the employee went to work for another company, where he engaged in competing activities. His former employer filed suit to enforce the Agreement, to request the return of all confidential information, and to recover compensatory damages.

The former employee filed a demurrer to the complaint,[1] claiming that the allegations failed to state a claim upon which relief could be granted. Specifically, he argued that the non-compete and non-solicitation provisions in the Agreement were overbroad and unenforceable. By way of example, he pointed to the provision prohibiting him from soliciting customers for "twelve (12) [sic] after the date of termination" with no indication whether the duration was days, weeks, months or years. His former company argued that the court could not decide the enforceability issue on demurrer, because doing so would deny it the opportunity to present evidence that the restraints are reasonable and no greater than necessary to protect its legitimate business interests. The Fairfax County Circuit Court disagreed with his former company, and sustained the demurrer without leave to amend, holding "as a matter of law the provision is unenforceable."

1 A demurrer is the state court equivalent of a federal motion to dismiss.

Supreme Court Ruling

On appeal, the Supreme Court of Virginia restated that the purpose of a demurrer is to determine whether a complaint states a cause of action upon which relief may be granted and that, unlike its role in deciding a motion for summary judgment, the court does not evaluate the merits of a claim on demurrer.

Further, the court reiterated the rule that a non-compete agreement must be evaluated on its own merits, "balancing the provisions of the contract with the circumstances of the businesses and employees involved."[2] It also revived the principle that each case involving the enforceability of non-competes "must be determined on its own facts."[3] The court then restated that the employer bears the burden of showing that the scope of the non-compete is no greater than necessary to protect a legitimate business interest. And it is during that analysis that the courts consider the function, geographic scope and duration elements of the non-compete restriction.

The court stated that "restraints on competition are neither enforceable nor unenforceable in a factual vacuum."[4] Importantly, where restrictions appear unenforceable on their face, the court noted that employers may be able to prove that the restraint is actually reasonable under the particular circumstances of the case.[5] In this context, the court ruled that the trial court had inappropriately dismissed the case before the former employer had the opportunity to present evidence as to the reasonableness of the non-compete.

Significance for Employers

In *Malyevac*, the court moved away from a trend, evident in the last several years, where non-compete restrictions were summarily invalidated. Employers now have a greater opportunity to establish that the contested restrictions are necessary, truly embracing a "case-by-case" factual analysis, rather than a truncated focus primarily confined to the words used in the non-compete clause. To that point, it will be much more difficult for defendants to dispose of non-compete claims prior to discovery and an evidentiary hearing of some sort (such as a plea in bar). That said, *Malyevac* is not without limitations. The court was careful to state that its holding was based on the fact that the former employer opposed the demurrer specifically on the ground that it sought to present evidence to prove the reasonableness of the restraint. By way of comparison, in *Modern Environments*, the employer did not offer an argument or evidence proving its legitimate business interests were served by the restraint at issue.

The significance of this ruling for employers in the Commonwealth cannot be overstated. Going forward, recognizing that disputes concerning non-competes are likely to be more fully litigated, employers should carefully draft such agreements to ensure full compliance with Virginia law, and consult counsel as appropriate. Employers should take care to review the scope of their non-compete agreements to ensure they are narrowly tailored to protect a legitimate business interest and that they reflect the realities of the employer's competitive environment, taking the employee's position into consideration as well other factors such as (1) the nature of the information the employer seeks to protect, and (2) the efforts it has taken to safeguard its competitive position with respect to this information. As part of this process, employers should consider what facts they would assert either in a complaint or an evidentiary hearing to justify the scope of the non-compete elements and demonstrate their relationship to the business interest they are intended to protect.

Thomas Flaherty is the Office Managing Shareholder of Littler Mendelson's Northern Virginia office, Linda Jackson and Paul Kennedy are Shareholders in the Washington D.C. and Northern Virginia offices, and Rebecca Roche is an Associate in the Northern Virginia office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Flaherty at tflaherty@littler.com, Ms. Jackson at ljackson@littler.com, Mr. Kennedy at pkennedy@littler.com, or Ms. Roche at rroche@littler.com.

2 *Quoting Omniplex World Servs. Corp. v. U.S. Investigs. Servs.*, 270 Va. 246, 249 (2005).

3 *Quoting Modern Env'ts., Inc. v. Stinnet*, 263 Va. 491, 493 (2002).

4 Citing its rulings in *Simmons v. Miller*, 261 Va. 561 (2001), Modern Env'ts, 263 Va. at 491 and *Home Paramount Pest Control Cos. v. Shaffer*, 282 Va. 412 (2011).

5 *See* Thomas Flaherty and Rebecca Roche, *Virginia Supreme Court Further Narrows Non-Compete Covenant Enforceability*, Littler ASAP (Dec. 16, 2011).