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Business Law Newsletter

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Non-Competition Agreements
By: *James V. Irving*

On March 14, 2006, Judge Jonathan C. Thacher of the Circuit Court of Fairfax County refused to dismiss a claim based upon a non-competition agreement that did not contain a geographical limitation. The case is *Market* Access International, Inc., et al. versus KMD Media, LLC.*

Virginia has a long adhered to a public policy disfavoring restraints on trade such as non-competition agreements. Established law provides a non-competition agreement is not enforceable unless it is narrowly tailored to be no more restrictive than is reasonably necessary to protect the legitimate interests of the employer. The rubric is often interpreted as requiring reasonable limitations on duration, geographic area, and scope of the restriction. *Market* Access* suggests that the reasonableness test should be applied to the covenant as a whole and that it is not necessary that all three elements - scope, geography, and duration - be specifically limited.

Market* Access and Pro-Media Sales and Consulting, Inc. had entered into an agreement which prohibited Pro-Media from competing "directly or indirectly in the sale or promotion of products that directly compete with [Market* Access's] existing publication, *Homeland Defense Journal*, for one year following the termination of this agreement..." When Market* Access sued alleging that Pro-Media had violated the covenant, Pro-Media demurred, arguing in part that the absence of a geographical limitation made the non-competition covenant unenforceable *per se*.

While Judge Thacher did not stray from the traditional by strict standard, he noted that the advent of a global economy and the internet may, in some cases, mean that a strict geographical limitation is no longer the test of reasonableness, provided the covenant, taken as a whole is no more

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Time to Start Planning for H-1B Visa Applications

By Philip M. Keating

The H-1B visa classification is the most commonly utilized and most valuable employment-based immigration category. The H-1B classification is utilized by a broad range of businesses including IT firms, medical and engineering practices, the hospitality industry, accounting firms, educational institutions, and sports enterprises. The common factors and primary requirements for the H-1B are that the job must typically require the attainment of a U.S. Bachelor's Degree for entry into the field and the prospective employee must have those credentials.

Due to the expiration of a federal law several years ago, the annual limit on H-1B classifications nationwide has been reduced to 65,000, of which approximately 7,000 are reserved for designated allocations under free trade agreements with Singapore and Chile. The limit had been over 100,000 and efforts have been underway for several years to have the limit increased. However, until that occurs, employers need to plan ahead and make decisions earlier than they otherwise would do so to avoid missing the H-1B cut off.

H-1B classifications are processed and adjudicated by U.S. Citizenship and Immigration Services ("USCIS"). USCIS receives its annual allotment of 65,000 H-1B classifications on October 1 of each year, which corresponds with the start of the federal government fiscal year. Under USCIS regulations, H-1B applications may be filed up to six months in advance of the starting date for the case, with October 1 being the earliest start date. Thus, the start date for filing is April 1 of each year. In each of the last two years the 65,000 allotment has been exhausted well before the October 1 start date, leaving employers and employees out of luck until the following October 1. In 2005, the quota was exhausted in mid-August. USCIS stopped accepting cases for the October 1, 2006 allotment on May 26. It is likely the quota will be exhausted even sooner this year.

Given this situation, employers must make decisions now if they will be sponsoring individuals for H-1B classifications in the next year. This will allow sufficient time to prepare the required applications and supporting documents in order to file with USCIS as close as possible to April 1.

Employment Discrimination Issues

By James V. Irving

Employers faced with a discrimination suit usually breathe a sigh of relief when the matter is finally resolved. But employers should know that there are certain statutory restrictions that can or might limit the effectiveness of the settlement of a federal employment discrimination claim between an employer and a former employee. In order to assure that an employee does not give up his or her rights without a full opportunity to have those rights protected, the statutory framework sets up a number of limitations and hurdles to the discharge of a claim.

In order for the release of any federal discrimination claim to be valid, the releasing party must enter the agreement knowingly and voluntarily. Because this obligation is usually met when the employee is provided a fair opportunity to review the agreement before it is signed, an employer should expressly provide an opportunity for the employee to obtain the advice of counsel prior to signature.

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Several Federal statutes contain specific additional protections. The Older Workers Benefit Protection Act provides express standards that an employer must follow to ensure validity of the waiver of a claim by an older worker. Under that Act, the waiver must not only be knowing and voluntary, but must be part of an agreement between the individual and the employer that is "written in a manner calculated to be understood by such individual or by the average individual eligible to participate."

Moreover, the waiver must specifically refer to rights or claims arising under the Act; must state that the individual does not waive rights or claims that may arise after the date the waiver is executed; provide that the individual waives rights or claims only in exchange for consideration for value in addition to anything the individual is already entitled to; and state that the individual has been advised and has consulted with an attorney prior to executing the agreement.

Any agreement of this type must give the individual at least 21 days to consider it. If a release is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual must be given a period of at least 45 days to consider the agreement. The agreement must give the individual at least 7 days following execution to revoke it, and must state that the agreement will not become effective or enforceable until the revocation period has expired.

Additionally, if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual must be informed of his rights in writing in a manner calculated to be understood by the average individual eligible to participate.
While the above standards do not apply to all settlement arrangements in employment discrimination cases, they serve as a reminder that federal regulations protecting the employee are pervasive. It is particularly important to remember that in all federal discrimination cases, a waiver or release will not be effective without a written acknowledgement that the signatory has been given 21 days to consider signing the agreement and 7 days following signature to revoke it if he or she chooses to do so.

Mechanic's Liens Standards Strictly Construed

By James V. Irving

One of the distinguishing characteristics of the Virginia Mechanic's Lien statute is its requirement of strict compliance in perfecting the lien. Because the lien is in derogation of Common Law, a Memorandum of Lien must fully comply with all of the elements of the statute. Liens are regularly invalidated when subject to this strict scrutiny. The case of *Britt Construction, Inc. v. Magazzine Clean, LLC*, decided in the Supreme Court of Virginia on January 13, 2006, reminds us again how strict these requirements are.

After Britt constructed a commercial car wash facility for Magazzine, they filed a Memorandum of Lien in an effort to secure payment of unpaid invoices. Magazzine argued that the lien was invalid because it did not comply with express language in the statute requiring the claimant to file "along with the Memorandum of Lien, a certification of mailing of a copy of the Memorandum of Lien to the owner of the property at the owner's last known address."

Britt did not dispute its failure to fully comply, but argued that the cited language was merely a non-substantive notice provision that should be liberally construed. But the Supreme Court held that the statute means exactly what it says. There is no safe harbor in arguments such as inadvertence, satisfaction of the substantive requirement by other means, or lack of prejudice to the property owner.

In affirming the ruling of the Circuit Court of Loudoun County, the Supreme Court reminds us once again that when it comes to mechanic's liens, precision is a non-waivable requirement.

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2300 Wilson Boulevard, 7th Floor
Arlington, Virginia 22201
703·525·4000 fax 703·525·2207
www.beankinney.com

Non-Competition Agreements

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restrictive than is reasonably necessary to protect legitimate interests of the employer. The Judge wrote that "[M]any non-competition agreements contain geographical provisions limiting the area where the employee is not permitted to seek competing work to the area the business can expect to 'reach.' Where a business is regional in scope this is relatively easy, but with the advent of the internet and the nationalization of everything from products to ideas, this has become substantially more difficult."

The real issue, wrote the Judge, is that "when the competition is direct and the agreements are narrowly drawn to prohibit... direct competition the non-competition agreements are more likely to be enforceable." Judge Thacher noted that the while the covenant in question "does not contain language limiting the geographic scope of the agreement, the language of the agreement does limit the duration of the non-competition agreement to one year and limits prohibited activities to those in direct competition with Homeland Defense Journal." This was enough to satisfy the Court that the agreement was sufficiently and appropriately narrow.

The reader is cautioned that *Market* Access* is a Circuit Court decision subject to appeal. While it is not the law of the Commonwealth of Virginia, it appears well-reasoned and consistent with existing case law.

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