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EMPLOYEE COVENANTS NOT TO COMPETE

Ronald M. Gates

As a general rule, covenants not to compete in employment contracts are not favored in Virginia and are always strictly construed against the employer. Does this mean that all such covenants are not enforceable? No. It does mean, however, that the employer has the burden of proving that their restraint is reasonable. Generally, courts in Virginia look at three questions regarding the reasonableness of a restrictive covenant:

1. Is the restraint from the standpoint of the employer reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest?
2. From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood?
3. Is the restraint reasonable from the standpoint of a sound public policy?

In answering the first question, i.e., is the restraint no greater than necessary to protect the employer in some legitimate business interest, the courts generally look at several factors. The first is the nature of the employment. If the employee is someone who has

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NEW HOME BUYERS BEWARE!

Marshall A. Winslow, Jr.

Many new home buyers receive a written warranty on the home that is either provided by the seller directly or purchased by the seller from a new home warranty company. The written warranty issued by sellers to many new home buyers is ordinarily "limited" in the sense that there are only a few defects that are covered, and for each of those defects there are strict written requirements that must be met. Most new home buyers assume that their rights with regard to the correction of defects found in their home are limited by the warranty documents issued to them. This is a mistaken assumption because Section 55-70.1 of the Virginia Code contains an implied warranty for new homes (not including condominiums) that is often much broader than the limited written warranty issued by the seller. Unfortunately, it is possible to lose the protection of the Virginia Code warranty on new homes by agreeing to a

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The attorneys of Wolcott Rivers Gates concentrate in various practice areas, including, but not limited to:

Banking

Bankruptcy

Commercial/Business

Construction

Creditor Representation

Criminal

Divorce, Custody & Support

Entertainment

Franchising

Guardianships and Conservatorships

Health Care

Labor and Employment

Leasing

Litigation

Mergers, Acquisitions & Divestitures

Non-Profit and Charitable Organizations

Patents, Copyrights & Trademarks

Personal Injury

Real Estate – Financing and Sales

Religious Institutions

Securities

Taxation

Wills, Trusts and Estates

EMPLOYEE COVENANTS NOT TO COMPETE

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contact with customers or confidential information such that if the employee went to work for a competing business it could harm the employer, this would generally be deemed a legitimate business interest. If on the other hand the employment was that of a clerk who had no contact with customers and had no confidential information, there would not be a legitimate business interest.

The second factor considered by the court is the geographic area involved. This is where employers often overreach either by not specifying a specific area or by specifying an area larger than is necessary for the employer's protection. In some situations, a mere restriction against soliciting existing customers may suffice to protect the employer and the employer will not need to have an actual geographic restriction. In other cases, the geographic restriction may be necessary. In any event, when designating geographic areas, it is essential that time be spent to determine the reasonableness of the area itself. It may seem like a good idea to restrict a salesperson for a radius of 50 miles around your business, but if in fact all of your business is done within a 25 mile radius of your office, you will have a difficult time convincing a court that the additional distance is warranted for your protection.

The third factor is that the duration of the restriction be reasonable. If one year will provide adequate protection, don't push your luck with two or three years.

Every case depends on its own facts and is analyzed by looking at the restrictions on business activities, the geographic limitation and the duration as a combined package. Therefore the more conservative each of the elements is the more likely the overall combination will be enforced.

The second question is whether the restraint is unduly harsh and oppressive on the employee. For example, does the restriction effectively prevent the employee from practicing his vocation for which he is trained? Whether it is enforceable depends on all of the facts and circumstances including the nature of the job of the employee, the geographical area encompassed in the restriction and the duration. It always enhances an employer's argument in court if the employer can point to areas within commuting distance that an employee can work even with the restrictive covenant being enforced.

The third question is whether the restraint is reasonable from the standpoint of a sound public policy. The question often asked is whether the public interest is served or disserved or not implicated if the particular covenant is enforced. For example, does a particular employee offer a service that is unique or so important that the public interest prohibits the restraint such as being the only physician in the area in a particular specialty so that the entire area would be deprived of an essential service.

It is important from an employer's perspective to realize that the actual words used in a restrictive covenant are critical. If the covenant is deemed to be ambiguous, it will be construed strictly against the employer and may not be enforced. Also, if the restrictions are too broad, a court may deem them unreasonable and therefore unenforceable. Contrary to some states, Virginia courts will not rewrite the covenant and make it reasonable. Therefore, obtaining the service of an attorney familiar with the intricacies of drafting restrictive covenants for employees is critical. W|R|G

NEW HOME BUYERS BEWARE!

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written waiver. However, if the contract for sale and/or the limited warranty issued by the seller do not include an express waiver of the Virginia Code warranty on new homes or state that the home is being sold "as is", as required by Section 55-70.1, then the Virginia Code warranty remains in effect. The Virginia Code warranty is often superior to the seller's limited warranty for construction defects in the home. In many cases, the differences between the two warranties are alarming.

For example, with regard to structural defects, many new home limited warranties provide coverage only if the defect involves a load bearing wall and renders the house unsafe, unsanitary or otherwise unlivable. In addition, there is ordinarily an exclusion of coverage if the structural defect amounts to a municipal or state construction code violation. Exterior brick is often not included within the limited warranty definition of a "load bearing wall". By comparison, the Virginia Code warranty for new homes is much more comprehensive and requires that "the dwelling with all its fixtures be free from structural defects, so as to pass without objection within the trade". A structural defect is defined as one that "reduces the stability or safety of the structure below accepted standards" or that restricts the normal use of the structure. The Virginia Code structural warranty is in effect for five years from the date the buyer obtains title or takes possession of the property, whichever date is earlier.

Another example of the differences between the two warranties involves the overall quality of construction. The limited written warranty often provides coverage for the exterior of the dwelling, but only under certain circumstances. Many times, interior cracks in the walls and exterior cracks in the brickwork due to excessive settlement or otherwise will be covered only if the crack itself reaches a certain large size gap. This may well leave unsightly cracks excluded. On the other hand, the Virginia Code warranty requires that the house be constructed "in a workmanlike manner, so as to pass without objection within the trade". That warranty lasts for one year from the date the buyer obtains title or takes possession of the property, whichever date is earlier. This is what is generally known as the new home buyers' "punch list" warranty.

Pursuant to the Virginia Code implied warranty, once a defect is discovered, the buyer must give the seller of the new home written notice of the defect by registered or certified mail at the seller's last known address. After the notice is given, the seller must cure the defect within a reasonable period of time, not to exceed six months. Any action for breach of the Virginia Code warranty must be brought within two years after the breach of warranty occurs.

There may be instances where the limited warranty issued by the seller will provide more coverage for the buyer, such as to remedy defects in mechanical systems in the new home. The important thing for new home buyers to remember is that the Virginia Code provides a warranty on new homes that should be compared to any limited warranty offered by the seller. Before signing the purchase agreement for a new home, the potential buyer should carefully review any limited warranty offered by the seller. New home buyers should not wait until the day of closing on the purchase of the new home, or some time thereafter, to review the seller's limited warranty for the first time. The new home buyer should determine what construction defects are covered or excluded and look for any waivers contained in the limited warranty document and the purchase agreement. If there is a waiver or "as is" provision, the buyer should consult with an attorney to determine if the language of the waiver effectively eliminates the Virginia Code warranty on new homes. The legal options available to the buyer to remedy construction defects will vary depending upon the particular facts and circumstances involved with each new home purchase and the new home buyer may or may not wish to accept the limited warranty offered by the seller. W|R|G

PREMARITAL AGREEMENTS

PREPARING AT THE BEGINNING TO SAVE AT THE END

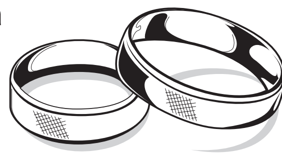
Cheshire I'Anson Eveleigh **John F. Sawyer**

Often we receive inquiries from clients regarding premarital agreements and their validity and effect in Virginia. Previously divorced persons and persons marrying for the first time may wish to protect their property in the event of divorce, and a premarital agreement is a contract that allows them to do so. However, poorly crafted premarital agreements and those that do not meet the requirements of the Virginia Code may be deemed voidable. Therefore, it is important to carefully plan and prepare the premarital agreement in order for it to be effective in the event of divorce.

Premarital agreements in Virginia are governed by the Premarital Agreement Act ("Act"), codified at VA Code §20-147, *et seq*, which is Virginia's version of the Uniform Premarital Agreement Act adopted by several other states. Uniform acts provide increased uniformity and certainty in the law and similar interpretation and enforcement of premarital agreements in those states that adopted the uniform act. The Act applies to all premarital agreements executed on or after July 1, 1986, and has no effect on agreements entered into prior to that date. The parties to a premarital agreement, the prospective spouses, may tailor their agreement to cover only specific rights, obligations and property interests or have their agreement cast a wide net over them in the event of divorce. Premarital agreements must be in writing and signed by both parties.

There are two grounds for voiding premarital agreements: 1) If the agreement was not executed voluntarily; and 2) if it is unconscionable and (i) a party was not provided a "fair and reasonable disclosure of the property or financial obligations" of the other party and (ii) the party did not voluntarily and expressly waive, in writing, any right to disclosure.

The agreement must be entered into voluntarily. Counsel may argue that a prospective spouse signed the agreement due to duress or undue influence. These arguments often arise as a result of a last minute signing of the agreement, such as on the night before the wedding or on the wedding day itself. Also, agreements are sometimes signed after a meal or other occasion where alcohol has been consumed. To avoid contests over voluntariness, or at least overcome them, it is best to enter into the agreement at least several days in advance of the wedding in a professional environment, such as an attorney's office. Both parties ought to be represented by their



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The attorneys of Wolcott Rivers Gates provide a full range of legal services to those who demand exceptional representation.

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PREMARITAL AGREEMENTS: Prepare at the Beginning to Save at the End

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own, independent counsel, have the premarital agreement explained to them, and not have consumed any alcohol.

The second grounds for voidance, unconscionability and lack of disclosure, may also be prevented by planning. The rationale here is, the parties must know what one another has in order to waive their rights to that property. Therefore, it is important to provide a full and frank disclosure of one another's property. Property is defined in the Act to include real and personal property, earnings and income. It is best to err on the side of disclosure. To be unconscionable, the agreement has been defined as "one that no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other." It has also been defined as "shocking to the conscience of the court." While it is difficult to prove unconscionability, it is advisable that the parties treat one another fairly in the premarital agreement. If one party is treated harshly, then the possibility that the agreement is unconscionable exists.

Premarital agreements can be effective tools to provide certainty regarding the disposition of property in the event of divorce. Both parties should be represented by their own counsel, carefully craft and discuss the terms of the agreement, and enter into the agreement at least several days before the wedding in a professional forum. These simple measures taken before the marriage should provide the parties with security and certainty in the event of divorce. W|R|G

VIRGINIA'S LEGAL ELITE

Wolcott Rivers Gates offers well-deserved congratulations to these partners who were selected by their peers to be recognized as Virginia's *Legal Elite* by Virginia Business magazine.

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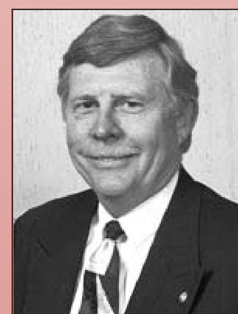

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FACSIMILE TRANSMISSIONS FROM BUSINESSES

C. Arthur Robinson, II

Did you know that there are new delivery restrictions with respect to telemarketing and telephone solicitation? If not, you should become aware of them. The new rules prohibit telephone and facsimile solicitation and are very broad in their application. There is, however, an exception that everyone needs to be aware of. It is perfectly permissible where there is an established business relationship to use a telephone facsimile machine to send broadcast faxes to such business contacts. An established business relationship only requires that there be a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber within the last 18 months. For many businesses this means that broadcast faxes to their existing customers is both permissible and an efficient means of communication. W|R|G