A Few Recent Local[1] Cases on Noncompete Agreements

[This is provided for general information only. It is not intended to provide legal advice, and does not create an attorney-client relationship. Attorney-client relationships arise only from signed and accepted retainer forms and the receipt of agreed retainer fees. Legal advice is only given to clients and depends on the specific facts and circumstances of their positions. In particular, the results of past cases may not predict what will happen in future cases because of changes in facts and circumstances and changes in the law. Copyright © Law Office of Richard T. Seymour, P.L.L.C., 900 Brawner Building, 888 17th Street N.W., Washington, D.C. 20006-3307, Telephone: (202) 785-2145, e-mail Rick@RickSeymourLaw.net, web site www.RickSeymourLaw.com, 2013.]

Click **here** for FAQ on Noncompete Agreements.

A. The Supreme Court

No Short-Cuts Overriding an Arbitration Clause: The Supreme Court held in *Nitro-Lift Technologies, L.L.C. v. Howard*, __ U.S. __, 133 S.Ct. 500, 184 L.Ed.2d 328 (2012), that even though it seems very clear to a court whether a noncompete agreement is or is not valid, it cannot decide the issue by itself instead of compelling arbitration of the question pursuant to the agreement of the parties.

B. The District of Columbia

Former Employee Does Not Have Libel Claim Against Former Employer for Telling Current Employer that He Breached a Noncompete Agreement: In *Murphy v. LivingSocial*, 931 F.Supp.2d 21 (D.D.C. 2013), Wendy Murphy worked at LivingSocial and signed a noncompete agreement, which stated among other things that she "agrees that following [plaintiff's] employment with the Company, the Company shall have the right to communicate the terms of this Agreement to any prospective or current employer of Employee. Employee waives the right to assert any claim for damages against Company or any officer, employee or agent of the Company arising from such disclosure of the terms of this Agreement." The parties had agreed by contract that D.C. law applied, although Ms. Murphy lived in Illinois. LivingSocial believed that Ms. Murphy was about to work for a direct competitor and thought she might have helped the

[1] I am admitted to the bars of the District of Columbia and Maryland, but not to the Virginia Bar.

competitor by helping it solicit employees and customers. In-house counsel sent her warnings not to violate the agreement, and the court described what happened next:

> Also on March 21, 2012, Brown sent a letter to Travelzoo's Human Resources Director, Kaity Benedicto, regarding the solicitation of the LivingSocial sales representative. Compl. ¶ 70 & Ex. 4 ("Travelzoo Letter"). The Travelzoo Letter outlined plaintiff's continuing obligations under the Non–Compete Agreement and demanded that Travelzoo cease and desist further solicitation of LivingSocial employees, customers, or prospective customers. The Travelzoo Letter is the subject of Count IV and defendants' motion to dismiss.

931 F.Supp.2d at 24. Ms. Murphy sued LivingSocial and the attorney, claiming libel *per se* in that her integrity was questioned. The court held that D.C. law did apply because of the agreement, and rejected the libel claim because the letter to Travelzoo was privileged, both under the privilege for attorneys' communications sent in anticipation of litigation and under the privilege of consent. The court's discussion of the limits of these privileges are useful reminders:

> Here, the Travelzoo Letter was written by LivingSocial's attorney, advised Travelzoo of plaintiff's contractual obligations, explained that plaintiff's actions appeared to have been taken in violation of the contract, stated that LivingSocial reserved its rights "to take all legal and equitable action to protect its business interests," and demanded that Travelzoo "immediately cease and desist from any further solicitation of LivingSocial employees, customers, or prospective customers." Compl., Ex. 4. The Court finds that the statements in the letter indicate that litigation was under serious consideration. Furthermore, the statements in the letter bear a clear relationship to the dispute because they defined the nature of the dispute. Accordingly, the Court finds that the Travelzoo Letter is protected by the judicial proceedings privilege.FN3
>
> FN3. Indeed, plaintiff's argument that the letter was not sent in anticipation of litigation is belied by the fact that she filed this lawsuit on March 26, 2012, only five days after the date of the letter.
>
> Plaintiff's claim also fails because the statements in the letter are protected by the privilege of consent. See Farrington v. Bureau of Nat'l Affairs, Inc., 596 A.2d 58, 59 (D.C.1991) ("Consent is an absolute defense to a claim of defamation."). The publication of a defamatory statement is

> privileged if "(1) there was either express or implied consent to the publication; (2) the statements were relevant to the purpose for which consent was given; and (3) the publication of those statements was limited to those with a legitimate interest in their content." Id.
>
> The Non–Compete Agreement contains an express provision by which plaintiff consented to LivingSocial's communicating the terms of the Non– Compete Agreement "to a prospective or current employer" of plaintiff. Non–Compete Agreement at ¶ 6(b). The statements made in the letter, alleging plaintiff had violated the restrictive covenants of the Non–Compete Agreement, were directly relevant to the purpose for which consent was given. Finally, the publication of the statement was limited to Travelzoo's human resources director, who had a legitimate interest in the content of the statements. Accordingly, the letter is protected by the privilege of consent, and plaintiff's claim fails.

931 F.Supp.2d at 26-27.

C. Maryland

Two-Year, Twenty-Mile Noncompete for a Specialized Physician is Enforceable: On July 24, 2013, the Maryland Court of Special Appeals—the second-highest court in Maryland—decided that a two-year, twenty-mile noncompetition clause in an employment agreement for a specialized physician was reasonable and enforceable:

> We conclude that the Non–Competition Provision was reasonable on its face. There is no prohibition against non-competition agreements between physicians. . . . Moreover, the geographical scope of the Non–Competition Provision, twenty miles, is quite limited, and its duration, two years, is not unreasonable. . . .

Fortunately for the former employee, the court also held that the former employee was relieved of the obligation to comply with the noncompete clause where the employer had materially breached the agreement. *Maternal-Fetal Medicine Associates of Md., LLC v. Stanley-Christian*, 2013 WL 3941970 (Md.App. 2013) (not officially reported).

Fee-Shifting Clauses May Inadvertently Bite the Employers Drafting Them: Employers drafting non-solicitation or noncompete clauses in severance agreements sometimes try to raise the stakes—and thus deter violations—by requiring the loser in a proceeding to enforce the clause to pay the winner's

attorney's fees. If the employee violates the agreement, the employee has to face a hefty financial sanction as well as an injunction, even if the employer cannot prove damages. Any attorney advising the employee has to point out the seriousness of the risks the employee will face for violating such clauses. However, employers also face substantial financial risk if they make claims of violations but their proof falls short. *Weichert Co. of Maryland, Inc. v. Faust*, 419 Md. 306, 312-13, 19 A.3d 393, 397 (Md. 2011), is a case in point. The court described the issues:

> In this case, Petitioner, Weichert Co. of Maryland, Inc. ("Weichert"), instituted a breach of contract claim against its former employee, Respondent, Dorothy Crago Faust ("Faust"). Weichert claimed that Faust violated the terms of her employment agreement by breaching the duty of loyalty, and by breaching a non-solicitation clause which was included in the contract. Under the terms of the contract, if Weichert brought a claim under the non-solicitation clause, and did not succeed on that claim, Faust would be entitled to recover attorney's fees incurred in defending against the claim. A jury determined that Faust breached the duty of loyalty, but did not violate the non-solicitation clause. After the trial, Faust petitioned for attorney's fees under the terms of the non-solicitation clause. Faust was awarded attorney's fees by the Circuit Court, and the Court of Special Appeals affirmed. We shall affirm the intermediate appellate court and hold that Faust's breach of the duty of loyalty did not result in a forfeiture of her rights under the non-solicitation clause, and thus Faust was entitled to recover attorney's fees.

Faust was awarded $946,014.50 in attorney's fees, and the Court upheld the award. The Court stated that Weichert could have treated Faust's breach of the duty of loyalty as a material breach, rescinded the contract, and cut off Faust's ability to claim fees. Instead, it chose to treat the contract as continuing in effect and sued for damages under the non-solicitation clause. The court held that Faust's right to fees for winning on that issue was not destroyed or undermined by the finding that Faust breached his duty of loyalty. There was no fee-shifting agreement on that claim because the fee-shifting provision only applied to the non-solicitation clause. Judge Adkins, joined by Judge Murphy, sharply disagreed with the majority on these issues, and concluded:

> Therefore, contrary to the majority's assertion, Weichert's pursuit of damages under the contract and its disavowal of the attorney's fees obligation are not mutually exclusive. See Williston on Contracts, § 63:31 (4th Ed.2002) ("[W]here the contract has merely been breached, in other words, where one party has failed or refused to perform some obligation

> under it, ... the wronged party may be excused from further performance and recover for loss occasioned to him.") (emphasis added).
>
> D. Conclusion
>
> In this case, an employee engaged in a sophisticated scheme to deprive her employer of a large portion of its work force, dealing a stunning blow to the employer's business. In doing so, she violated the "fundamental" duty of loyalty and materially breached her employment contract. Accordingly, as the injured party, Weichert is excused from any remaining contractual obligations, and Faust, as the materially breaching party, is not entitled to the contractual benefit of attorney's fees. The jury's finding that she did not breach her non-solicitation clause does not mitigate her disloyal scheme to decimate her employer's workforce. Indeed, Faust had no need to solicit after she left Weichert, as she had already filched the other employees while still on the payroll herself. For these reasons, I cannot accede to the majority's decision to re-ward Faust's underhanded actions, and I respectfully dissent.

419 Md. at 342-43, 19 A.3d at 415.

- **Take-Away from *Weichert Co. of Maryland, Inc. v. Faust*:** In light of the strong disagreement between the majority and minority, and in light of the fact that this happened to an extremely capable defense attorney, it is critical to obtain sound legal advice about how to proceed in similar situations in light of this decision. It may also be a good idea to insert into the severance or employment agreement provisions governing options for the injured party in the event of breach, and the survival of claims for pre-rescission breach of the contract.

The Period of Limitations for Enforcing a Noncompete Clause in Maryland Does Not Stop Running While Going through a Required Arbitration Proceeding: Employers drafting noncompete, nonsolicitation, and severance agreements often include ADR (alternative dispute resolution) clauses in the agreements to try to save the time and expense of litigation. A recent case in the Maryland Court of Special Appeals reminds innocent parties that it is important not to sleep on their rights when such contracts are breached. In *Kumar v. Dhanda*, 198 Md.App. 337, 17 A.3d 744 (Md.App. 2011), the contract between these physicians contained an agreement to nonbinding arbitration and allowed them to go to court if either did not like the decision of the arbitrator. This can be a useful device to let the parties how a qualified impartial outsider views the rights

and wrongs of their dispute, so that they can re-evaluate their decisions on settlement before proceeding in court. Here, however, there were unusually lengthy delays. Drs. Kumar and Dhanda severed their professional relationship on August 31, 2003. Dr. Dhanda sued Dr. Kumar in 2003, and on April 3, 2003 Dr. Kumar won a motion to compel arbitration. The court stated that nothing happened for more than two years, and then Dr. Kumar sued Dr. Dhanda in April 2005 and again asked for an order compelling arbitration. That order was granted on November 20, 2006. A year and a half later—on March 28, 2008—the arbitration was held. The June 20, 2008 arbitration award denied all relief to Dr. Kumar and gave a small award to Dr. Dhanda on his counter-claim. Almost nine months later, Dr. Kumar sued Dr. Dhanda in court again. The court held that the period of limitations can be suspended by private agreement, but will keep running during a mandatory nonbinding arbitration where the parties did not reach such an agreement. 198 Md.App. at 350, 17 A.3d at 752. On a petition for review by the Maryland Court of Appeals, *Shailendra Kumar, P.A. v. Dhanda*, 426 Md. 185, 43 A.3d 1029 (Md. 2012), the Supreme Court of Maryland affirmed.

D. Virginia

Employers' Lawsuits to Enforce Noncompete Agreements Are Now Harder to Dismiss Before Trial: On September 12, 2013, the Supreme Court of Virginia handed down its decision in *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 747 S.E.2d 804 (Va. 2013). That case made it easier for employers to sue former employees for violating noncompetes, and made it harder for former employees to get a quick dismissal of the claims, by holding that it is not necessary for the employer to plead the detailed facts on which it relies. All that is necessary is enough detail to put the former employee on fair notice of the claim. The Court described the considerations used in Virginia to decide if a noncompete agreement is enforceable:

> An agreement that restrains competition "must be evaluated on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved." . . . Each case involving the enforceability of a restraint on competition "must be determined on its own facts." . . . The employer bears the "burden to show that the restraint is no greater than necessary to protect a legitimate business interest, is not unduly harsh or oppressive in curtailing an employee's ability to earn a livelihood, and is reasonable in light of sound public policy." . . . In determining whether an employer has carried that burden, "we consider the 'function, geographic scope, and duration' elements of the restriction." . . . "We assess

> these elements together rather than as distinct inquiries," and to be enforceable the agreement must be found reasonable as a whole. . . .
>
> The premise running through . . . and our other decisions is that restraints on competition are neither enforceable nor unenforceable in a factual vacuum. Based on evidence presented, a trial court must ascertain whether a restraint "'is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy.'" . . . An employer may prove a seemingly overbroad restraint to be reasonable under the particular circumstances of the case. . . .

286 Va. at 144-45, 747 S.E.2d at 808 (the court's citations to cases and its footnote omitted).

$640,000 in Damages Upheld for 64 Violations of a Noncompete Agreement Providing for $10,000 in Liquidated Damages per Violation: A provider of trained and licensed therapy personnel to nursing homes sued several Virginia nursing homes to enforce its contractual provision stating that for a year after termination of its contract with the nursing homes, they would not directly or indirectly, themselves or through a third party, hire the personnel it had provided to them under the contract. Under the contract, Florida law applied. The nursing homes terminated the contract, and assisted a competitor in signing up the plaintiff's former employees to provide the same services at the same nursing homes. The U.S. Court of Appeals for the Fourth Circuit held that these actions violated the agreement, the agreement was valid and enforceable under Florida law, and that the $10,000 per person liquidated damages provision was reasonable because it cost the plaintiff more than that in training expenses and lost profits. *ProTherapy Associates, LLC v. AFS of Bastian, Inc.*, 492 Fed.Appx. 360 (4th Cir. 2012). Under Fourth Circuit rules, the decision does not have precedential value, but it is still a good indication of how the court might rule in another case with similar facts.

$172,395.96 in Damages Upheld for Violation of a Noncompete Agreement: On September 14, 2012, the Supreme Court of Virginia handed down its decision in a case involving a noncompete agreement between two companies, a contractor and a subcontractor. The case was *Preferred Systems Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 732 S.E.2d 676 (Va. 2012). GP Consulting agreed to work as a subcontractor for Preferred Systems Solutions, and signed the following noncompete agreement:

> During the term of this Agreement and for twelve (12) months thereafter, [GP] hereby covenants and agrees that they will not, either directly or indirectly:
>
> (a) enter into a contract as a subcontractor with Accenture, LLP and or [sic] DLA to provide the same or similar support that PSS is providing to Accenture, LLP and/or DLA and in support of the DLA Business Systems Modernization (BSM) program.
>
> (b) enter into an agreement with a competing business and provide the same or similar support that PSS is providing to Accenture, LLP and/or DLA and in support of the DLA Business Systems Modernization (BSM) program.

GP ultimately provided notice of its termination of the agreement and became a subcontractor with Accenture, a direct competitor. The Court rejected all of GP's arguments that the noncompete agreement was unenforceable. It held the agreement was valid and reasonable, stating:

> Here, the duration element is narrowly drawn to a period of only twelve months. We have also established that the function element is narrowly drawn to work in support of a particular program run under the auspices of a particular government agency, limited to the same or similar type of information technology support offered by PSS on the BSM program.

284 Va. at 393, 732 S.E.2d at 681. The Court held that the lack of a geographic restriction was not a problem because the scope of the agreement was so narrow. Finally, the Court upheld the Circuit Court's award of $172,395.96 in damages. The Court explained the standards:

> In order to prove lost profits, as claimed here, PSS had to show: (1) that Accenture billed the work in question; (2) that PSS would have continued to bill for the work had the work not moved to Accenture; and (3) the amount that PSS would have made from billing the work.

284 Va. at 398, 732 S.E.2d at 685.

The More Extreme the Noncompete Agreement, the Harder it is to Defend: An example of an overly broad and unenforceable noncompete agreement was contained in *Home Paramount Pest Control Companies, Inc. v. Shaffer*, 282

Va. 412, 718 S.E.2d 762 (Va. 2011). Shaffer, a former employee of the plaintiff pest control company, signed an agreement that said:

> The Employee will not engage directly or indirectly or concern himself/herself in any manner whatsoever in the carrying on or conducting the business of exterminating, pest control, termite control and/or fumigation services as an owner, agent, servant, representative, or employee, and/or as a member of a partnership and/or as an officer, director or stockholder of any corporation, or in any manner whatsoever, in any city, cities, county or counties in the state(s) in which the Employee works and/or in which the Employee was assigned during the two (2) years next preceding the termination of the Employment Agreement and for a period of two (2) years from and after the date upon which he/she shall cease for any reason whatsoever to be an employee of [Home Paramount].

282 Va. at 414-15, 718 S.E.2d at 763. Shaffer ultimately resigned and went to work for a competing pest control company. Home Paramount then sued both Shaffer and his new employer. The Court held the provision unenforceable because the "function" element of the noncompete barred Shaffer from engaging in noncompeting *activities* for a competitor of Home Paramount, and that intruded too closely on Shaffer's right to earn a living and on the public interest of not stifling competition. The Court held that the function provision was so overbroad that it could not be saved by the narrowness of the time period and geographic limitation.

Applying Georgia Law, a Virginia Federal Court Held that a Nonsolicitation Agreement Without a Time Limit is Unenforceable: *General Assur. of America, Inc. v. Overby-Seawell Co.*, 893 F.Supp.2d 761 (E.D.Va. 2012). Enough said.

Click **here** for FAQ on Noncompete Agreements.