

ALERT

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In Virginia, Covenants Not to Compete Should Be Kept Simple

The Virginia Supreme Court recently sounded a cautionary note for employers by ruling that a non-competition agreement which contains a specific — but overly broad — description of the employer's business is unenforceable. *Motion Control Systems, Inc. v. East*, 262 Va. 33, 37 (Va. 2001).

Covenants not to compete are critically examined by the Virginia courts, and are not enforced unless the restrictions are “reasonable.” The term “reasonable” is defined as being “no greater than necessary to protect the employer’s legitimate business interests[,] . . . [not] unduly harsh or oppressive in curtailing the employee's legitimate efforts to earn a livelihood[,] and . . . reasonable in light of sound public policy.” *Motion Control Systems*, 262 Va. at 37. Virginia courts refuse to “blue-pencil” or modify overly broad non-competition agreements in order to render them enforceable. Therefore, it is important for Virginia employers to get the non-competition agreement right the first time.

The Motion Control Systems Case

In an attempt to keep the scope of non-competition agreements narrow enough to be considered reasonable, many employers routinely detail the specific characteristics of their businesses within the non-competition agreement itself. However, as the Virginia Supreme Court's decision in *Motion Control Systems* shows, this practice may backfire if the specific description is not completely

accurate. In that case, the Court ruled that the non-compete's detailed language regarding the employer's business impermissibly expanded the scope of the agreement and rendered it unenforceable.

The non-competition provision at issue in *Motion Control Systems* prohibited the employee from involving himself with:

. . . any business similar to the type of business conducted by the Company at the time of the termination of this Agreement. The term “business similar to the type of business conducted by the Company” currently includes any business that designs, manufactures, sells or distributes motors, motor drives or motor controls.

Motion Control Systems, 262 Va. at 36. The trial court held, and the Virginia Supreme Court affirmed, that the last sentence of this non-compete “imposed additional restraints which are greater than reasonably necessary to protect [the employer] in [its] legitimate business enterprise.” *Id.* The Court held that the restricted activities could very well include a wide range of enterprises that are unrelated to the business actually being protected. *Id.* at 38. For example, while the employer in this case sold a specialized type of brushless motor, the proposed non-compete unreasonably restricted the employee's employment with enterprises that sell any motor whatsoever. Such a restriction is

“greater than necessary to protect the employer’s legitimate business interests” and is “unduly harsh or oppressive in curtailing the employee’s legitimate efforts to earn a livelihood. . .” *Id.* at 37. Hence, the Court ruled that the entire covenant not to compete was unenforceable. *Id.* at 38.

What Works?

The Virginia Supreme Court did identify two examples of non-compete agreements that it found enforceable. The Court pointed to *Blue Ridge Anesthesia & Critical Care v. Gidick*, 239 Va. 369, 370-71 (Va. 1990), where a non-compete agreement was upheld that barred the employee from working:

. . . on behalf of any competitor of Employer which renders the same or similar services as Employer . . . expressly provided however, that this covenant does not preclude Employee from working in the medical industry in some role which would not compete with the business of Employer.

The Court also endorsed a non-compete where the employee agreed not to be employed by “any business similar to the type of business conducted by [Employer] at the time of the termination of this agreement.” *Roanoke Engineering Sales Co. v. Rosenbaum*, 223 Va. 548, 551 (Va. 1982).

“The Same or Similar” is Enough

The Virginia Supreme Court in *Motion Control Systems* has sent a clear signal to Virginia employers: assuming the enforceability of other elements of the non-compete, Virginia courts will uphold a prohibition limited to “the same or similar” activities as those conducted by the employer. Further elaboration of the employer’s business is both unnecessary and risky, since saying too much in a non-compete increases the likelihood of including language that will render the non-compete overly broad and unenforceable.

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