DISTRICT COURT

NON-COMPETE COVENANT: 2-year non-compete period for insurance agent reasonable, covenant reasonable . . . arbitration provision valid. . . Plaintiff not judicially estopped from pleading alternative claims. . . Todd.

Debra Larsen began working for Western States Ins. Agency in 5/00 as a "personal lines" agent. She was given an existing book of business consisting of clients that she had not retained through her own efforts, and executed annual Producer's Employment Agreements. The first page of her PEA which she entered into in 2/05 spells out that "THIS AGREEMENT IS SUBJECT TO ARBITRATION." It also included a "Covenant Not to Compete." She quit in 7/05 and started Ins. Agency of Montana, claiming that she could not meet the new validation criteria in the 2/05 PEA. She also claims that she had no chance to negotiate the agreement, and requests a declaratory judgment that the arbitration, non-compete, and liquidated damages clauses are unenforceable under Montana law. She pled in the alternative that the entire PEA is unenforceable under Montana law. Western argues that because she pled these alternative claims she has pled herself out of court for playing "fast and loose" with the Court. However, "the rules of civil procedure expressly permit alternative pleadings, both in a complaint, and in an answer." Matthews (Mont. 1979); Rule 8(e)(2).

"A reasonable and limited covenant restraining trade will be considered valid. Three things are essential to such a covenant: 1) it must be partial or restricted in its operation in respect either to time or place; 2) it must be on some good consideration; and 3) it must be reasonable, that is, it should afford only a fair protection to the interests of the party in whose favor it is made, and must not be so large in its operation as to interfere with the interests of the public." Curl (Mont. 2005).

Larsen does not dispute the first 2 elements. The covenant is limited to 24 months and to only Western clients that she continues to keep as her own customers. She was given an existing book of business when beginning her employment, which gave her access to an income 3 times the average county wage.

She does dispute element 3, arguing that duration of the restriction is unreasonable, the amount of liquidated damages is unreasonable, and Western's actions render the entire covenant unreasonable. She argues that because the PEAs were only 1-year contracts the non-compete covenant should be 1 year as well. She argues that this affords Western greater protection than under contract law. However, she offers no supporting case law. Parties are free to contract to whatever they want as long as the contract is not illegal or for an illegal purpose. Larsen was given an opportunity to obtain a good position with potential to make a large amount of money if she increased her existing book of business. She had been in the insurance business for 20 years and signed a similar agreement in her prior job, so the argument that she was not in a position to fully comprehend what she was getting into does not hold water with this Court. "Although contracts in restraint of trade are generally void by statute, § 28-2-703, covenants not to compete extending beyond one year are enforceable when they are in writing, § 28-2-903(1), and the terms are explicit and reasonable in time and place." Individual Nursing Staff (Mont. 2003). Because Montana courts recognize non-compete covenants that extend beyond 1 year that are reasonable, the 24-month fixed duration in the PEA is enforceable. Larsen entered into 5 consecutive PEAs and was fully aware of the terms. She cannot now claim that the 24-month period is unreasonable and against Montana law.

Larsen claims that Western's actions make the entire covenant unreasonable. She claims that it broke its promise to provide additional resources and at the same time asked her to increase her book of business to an unreasonable level. She claims that it informed customers that she was on a "leave of absence" months after she had quit, made no attempt to retain her customers and should have known that they would want to follow her to her new position, and referred customers to her and then expected to reap the benefits by receiving money owed to it under the PEA. However, she is a veteran agent. Western cannot be assumed to have made her take any referrals. She obviously has a mind of her own and can make her own informed decisions. Whether she could have attained a higher level on her book of business is not a factor which makes a non-compete covenant unreasonable. This perhaps would make the part of the agreement specifically relating to job performance unattainable, but has absolutely no effect on a non-compete covenant. She cites no case law other than Curl that discusses that the covenants must be reasonable. Therefore this argument also does not hold water. The covenant was reasonable.

Larsen argues that the PEA arbitration clause is unenforceable. It is clear from Kloss (Mont. 2002) that the PEA was a contract of adhesion. It was a standardized form and Larsen was left to either accept or reject it on a take-it-or-leave-it basis. However, this does not mean that it is unenforceable. It was within her reasonable expectations. Id. Because of her industry experience she knew that when entering into the PEA she would be accepting some benefits as well as some burdens. But the most defining fact is the bold large-font notice of arbitration on the 1st page. In her 20 years of insurance work she had signed many employment agreements, and in fact had signed one at Beartooth before she came to Western that had some of the same anti-piracy language that Western included in its PEA. She was a sophisticated agent who had signed 4 other PEAs with Western. She presented no evidence that she did not read the standardized contract before entering it. Her actions and the facts do not add up to the assertion that the arbitration provision was not within her reasonable expectations.

Larsen does not address any of the 8 factors in Kloss (dealing with arbitrators and the arbitration process) before this Court can look at the "unconscionability, unduly oppressive or against public policy" factors outlined in Iwen (Mont. 1999). Therefore the Court need go no further regarding the arbitration provision not being enforceable. She cites Justice Nelson's special concurrence in Kloss to show which factors the Court must consider when determining whether a waiver was voluntary, knowing, and intelligent in an arbitration clause in an adhesive contract. However, Justice Trieweiler's majority opinion mandates that the 8 factors listed must first be addressed before even considering the Iwen policy factors. Therefore, Larsen has not met her burden of proving whether or not the contract was unduly oppressive, unconscionable, or against public policy. The PEA is enforceable and specifically, the arbitration provision is enforceable. All issues of damages or fees must be submitted to arbitration.

Larsen v. Western States Ins. Agency, Yellowstone DV 06-56, 11/8/06.

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