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### ***THE COURTHOUSE PERSONNEL DEPARTMENT***

#### THE IMPORTANCE OF CHOICE OF LAW AND FORUM SELECTION CLAUSES IN EMPLOYMENT AGREEMENTS CONTAINING RESTRICTIVE COVENANTS

John Martin ("Martin") sold insurance for Stassen Insurance in its Woodstock, Illinois, office. Martin signed an employment agreement in July of 1997. The employment agreement had the following choice-of-law and forum-selection clauses:

#### **17. GOVERNING LAW:**

This Agreement shall be governed in all respects, whether as to validity, construction, capacity, performance, or otherwise, by the laws of the State of Illinois.

#### **19. CONSENT TO JURISDICTION:**

Any suit or proceeding arising out of or related to this Agreement shall be commenced only in a state court located in McHenry County, Illinois or a federal court located in Rockford, Illinois, and each party to this Agreement hereby consents to the exclusive jurisdiction of such courts.

The employment agreement also had a covenant not to compete and a restrictive covenant governing confidential customer information (collectively referred to herein as "restrictive covenant").

Rieck and Crotty, P.C. publishes *THE COURTHOUSE PERSONNEL DEPARTMENT* bi-monthly to keep employers and employees advised of current issues and decisions throughout the United States relating to discrimination, civil rights and other employment law matters which may impact future employment decisions. If you desire additional information concerning any of the articles, please telephone us. Your comments concerning this publication are welcome.

In September of 2007, Martin resigned his employment with Stassen Insurance and started an insurance agency in Lake Geneva, Wisconsin. This spawned two legal actions, one in Wisconsin and one in Illinois.

On October 23, 2007, Martin sued Stassen Insurance in the Circuit Court for Walworth County, Wisconsin, seeking declarations including whether the restrictive covenant was valid and enforceable under Wisconsin law. Martin was reasonably confident that the restrictive covenant would not be enforceable under Wisconsin law. Unlike Illinois law, which allows a court to modify - to "blue pencil" - an unreasonable restrictive covenant to make it reasonable, when a restrictive covenant is found by a Wisconsin court to be unreasonable in any respect, the entire covenant is nullified.

On December 5, 2007, Stassen Insurance sued Martin in the Circuit Court for McHenry County, Illinois, seeking to enforce the restrictive covenant so as to prevent unfair competition. On December 6, 2007, the Illinois circuit court issued a temporary restraining order prohibiting Martin from "engaging in any competitive act which involves any existing or former client" of Stassen Insurance.

On January 10, 2008, Stassen Insurance moved to dismiss the Wisconsin case under the choice-of-law and forum-selection clauses, or in the alternative, to stay it pending the outcome of the Illinois case. In support of its motion, Stassen Insurance submitted an affidavit from John Stassen, the president of Stassen Insurance, in which he claimed that Stassen Insurance was founded in 1967, was organized as an Illinois corporation, and had "always" been located in Woodstock, Illinois; Martin lived in Harvard, Illinois when he signed the employment agreement; Martin moved to Wisconsin in May of 1999; and Martin "always" worked out of the Woodstock, Illinois office.

Martin did not dispute any of Stassen's statements, but contended that Wisconsin law applied because: (1) he now lived in Wisconsin; and (2) his business was in Wisconsin.

On February 19, 2008, the Illinois circuit court issued a preliminary injunction prohibiting Martin from "soliciting or accepting any form of insurance business from any customer as of 9/26/07 of [Stassen Insurance] or from using the confidential information of [Stassen Insurance] regarding its customers."

On March 10, 2008, Stassen Insurance's lawyer informed the Wisconsin circuit court that the Illinois circuit court had entered a preliminary injunction enforcing the employment agreement, representing that "[t]hroughout proceedings in the Illinois Litigation, the parties have proceeded under Illinois law. Martin has never contested that, or taken the position that Wisconsin law applies to the contract." The lawyer also submitted Martin's deposition testimony that he lived in Harvard, Illinois "at the time [he] executed the Employment Agreement."

The Wisconsin circuit court granted Stassen Insurance's motion to dismiss, concluding that Illinois law applied. Martin then appealed the decision of the Wisconsin court.

The issue on appeal was whether the choice-of-law and forum-selection clauses in Martin's employment agreement were valid.

The general rule in Wisconsin is the same as the Illinois rule: parties to a contract may agree that the law of a particular jurisdiction will control their contractual relationship. Martin claimed, however, that the choice-of-law and forum-selection clauses in his employment agreement were invalid because Illinois law, as previously stated, is contrary to Wisconsin's law on covenants not to compete.

The Wisconsin Appellate Court disagreed with Martin and ruled, "In contract cases, we must apply the law of the state with which the contract has its 'most significant relationship.'"... Relevant contacts for the choice-of-law analysis include: (1) the place where the contract was executed; (2) the place where the contract was negotiated; (3) the place where the contract was performed; (4) the place most relevant to the subject matter of the contract; and (5) the respective domiciles, residences, places of incorporation, and places of business of the parties. Further, the "justified expectations" of the parties to the contract are entitled to deference.

In this case, the undisputed facts showed significant contacts with Illinois: (1) Stassen Insurance was an Illinois corporation with its office in Illinois; (2) Martin was an Illinois resident when he signed the employment agreement; and (3) Martin worked out of Stassen Insurance's office in Illinois. In contrast, the only contacts with Wisconsin were that: (1) Martin moved to Wisconsin in 1999; and (2) Martin started an insurance agency in Wisconsin after he quit working for Stassen Insurance in Illinois. These contacts with Wisconsin were, in the context of the parties' relationship, minimal compared to the parties' contacts with Illinois.

The Wisconsin Appellate Court affirmed the dismissal of Martin's Wisconsin action. The Court opined that it would be contrary to the public-policy interests to require the nullification of otherwise valid contract clauses merely because the party seeking their nullification moved to Wisconsin after the contract was negotiated, signed, and largely performed; and both Stassen Insurance and Martin relied on the employment agreement until Martin started his own agency in Wisconsin.

This case highlights the significance of choice of law and forum selection clauses in employment agreements containing restrictive covenants. Clients engaged in a multi-state business should consider the laws in other jurisdictions relating to restrictive covenants before finalizing their agreements. Please do not hesitate to contact us if you have any questions about the Stassen Insurance case or any employment issue that could result in a claim of unfair competition.

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