Landrum & Shouse LLP

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The Chronicle

A Newsletter by Landrum & Shouse LLP

Volume 3, Issue 3 September 2013

Special Points of Interest

- Offices in Lexington and Louisville
- Statewide coverage
- 30 Attorneys
- 16 Partners
- 18 AV-rated lawyers

Inside this issue:

Firm Attorneys named to Best Lawyers of America 2014

Landrum & Shouse LLP is pleased to announce the selection of eight attorneys for inclusion in the 2014 Edition of The Best Lawyers in America© 2014 (Copyright 2013 by Woodward/ White, Inc., of Aiken, SC), the oldest and most highly-respected peer review guide to the legal profession worldwide. The following Partners were recognized: Larry C. Deener, Pierce W. Hamblin, Mark J. Hinkel, Douglas L. Hoots, John G. McNeill, Leslie P. Vose, John R. Martin Jr. and R. Kent Westberry.

Larry C. Deener has been a Best Lawyer for 8 years. His areas of practice are Personal Injury Litigation – Defendants: Product Liability and Railroad Law.

Pierce W. Hamblin was selected as a Best Lawyer for 10 years in his areas of practice: Arbitration and Mediation. He has also been named as Lexington Lawyer of the Year 2014 in Mediation.

Mark J. Hinkel was selected as a Best Lawyer for 20 years in his practice area of Workers' Compensation Law – Employers.

Douglas L. Hoots has been a Best Lawyer for 5 years in the practice area of Personal Injury Litigation – Defendants.

John G. McNeill has been a Best Lawyer for 6 years in the practice area of Personal Injury Litigation – Defendants.

Leslie P. Vose has been a Best Lawyer for two years. She was also named as Lexington Lawyer of the Year 2014 in Employment Law—Individuals and Management.

John R. Martin, Jr. was selected as a Best Lawyer for 20 years. His areas of practice include: Personal Injury Litigation – Defendants: Arbitration and Mediation, Automobile Collision, Civil Litigation, Insurance and Product Liability.

R. Kent Westberry has been a Best Lawyer for 9 years. His areas of practice include Commercial Litigation, Criminal Defense: White-Collar, Litigation Municipal and Regulatory Enforcement as well as Personal Injury Litigation – Defendants.

NON COMPETE AGREEMENTS, REVISITED

By Mark L. Moseley

Non compete agreements, or "covenants not to compete", come up frequently in the conduct of a company's business as well as in litigation, so it is useful to review the basic legal rules. Non-compete covenants are found in many types of agreements, not only in employee contracts, but also in sales of businesses; partnership, shareholder, and operating agreements; and others. While we cannot go over all the rules and court holdings in this short space, the following are the most important basics under Kentucky law. The rules vary considerably from state to state. Since employee restrictive covenants are the most common, that is the terminology used in these comments.

First, there must be consideration in order for the agreement to be enforceable. If an employer wants existing employees to sign a non compete, it must show what consideration it gave the employee in return for signing. Continued employment can, itself, be sufficient consideration, but only if the employer continues the employment for a reasonable time and can prove it would have, in fact, terminated the employee had he or she not signed. Some form of cash consideration is more definite.

Second, the scope of the restriction (i.e., the definition of what would be a violation), its time duration, and its geographic extent must all be both definite and reasonable. What is "reasonable" is always up to the court and the employer carries the burden of proof to show the terms are reasonable. The agreement should say that its time duration of the agreement is tolled (i.e., increased) for whatever period of time the employee is in violation. That way, the employer will get the full benefit of the time restriction. The agreement should also say that if any of its restrictions are found to be unreasonable, the court may enforce them to a reasonable extent.

Third, the agreement should restrict the employee from soliciting other employees or customers away from the employer during the same period of time the non-compete is in force.

Fourth, the agreement should require the employee to return all confidential materials (which should be defined) when employment is terminated.

Fifth, the covenant should be assignable, so that the employer can transfer its rights under the agreement along with other assets of the company to any buyer.

Sixth, the covenant should be enforceable by injunction. The employer should also consider including a liquidated damages provision requiring the employee to be liable for a fixed monetary amount of damages if the employee violates the covenant. However, like other provisions of the agreement, this will be unenforceable if the court finds the amount to be unreasonable.

Seventh, the covenant should allow the employer to recover its reasonable attorneys' fees incurred in enforcing the agreement.

Eighth, the covenant should include a provision designating the particular state and court in which it must be litigated ("choice of forum").

Finally, the agreement should identify the interests the employer seeks to protect, such as its investment in the employee in the form of training, access to customers, and access to trade secrets and processes.

The enforceability of any particular covenant will always depend upon the particular facts and circumstances of the case. However, our insurance clients should know that non compete agreements have several times been enforced by Kentucky courts as to insurance adjusters.

"[O]ur insurance clients should know that non compete agreements have several times been enforced by Kentucky courts as to insurance adjusters."

Kentucky Court of Appeals Finds Contract Provision for 2-year UIM Limitations Period Invalid

By: Michael E. Hammond

In its recent decision in Lonnie Dale Riggs v. State Farm Mutual Automobile Insurance Company, 2012-CA-000354-MR, 2013 WL 3778143 (Ky. App. July 19, 2013), the Kentucky Court of Appeals ruled as invalid an insurer's contract provision limiting actions for uninsured or underinsured motor vehicle coverage to those commenced two years from the date of injury or last basic reparations benefit paid (whichever is later). As the contract limitation was deemed unreasonable and unenforceable, the Court of Appeals found that the proper limitations period for a contractual UM or UIM claim is 15 years pursuant to KRS 413.090 (the statute of limitations for general actions based upon a written contract).

The Plaintiff, Lonnie Riggs was injured in an automobile accident on August 26, 2008. He did not seek or receive any basic reparations benefits. On August 5, 2010, he filed suit against the torfeasor, Phillip Riggs. Over a year later and exactly 3 years from the date of the accident, on August 26, 2011, Riggs amended his complaint to assert a claim against State Farm for UIM benefits. State Farm moved for summary judgment based upon the contractual limitation provision in the policy of insurance stating that the UIM claim must be "commenced not later than two (2) years after the injury, or death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs." Id. The Hardin Circuit Court granted the motion and this appeal resulted.

State Farm argued that its policy language must be reasonable because it mimics KRS 304.39-230, the statute establishing a 2-year limitations period for filing a personal injury action arising out of a motor vehicle accident. Its theory was that since the UIM policy (a) contained a time limitation identical to that already adopted by Kentucky statute for a motor vehicle accident and (b) did not require a claimant to seek UM/UIM benefits prior to suing a torfeasor, then the provision must be reasonable.

The Court of Appeals formed its decision based upon 3 points of law. First, the insurer and insured may agree to the time period for the insured to sue the insurer for UM or UIM benefits, so long as this limitations period is reasonable. See Gordon v. Kentucky Farm Bureau Ins. Co., 914 S.W.2d 331, 333 (Ky. 1995). Second, if there is no limitations period in the UM/UIM policy or if that limitations period is unreasonable, the 15-year limitations period established in KRS 413.090(2) is controlling. Id. at 332-33. Finally, a 1-year limitations period in the UM/UIM policy is not reasonable. See Elkins v. Kentucky Farm Bureau Mut. Ins. Co., 844 S.W.2d 424-25 (Ky. App. 1992).

The Court's decision repeatedly emphasizes that the claimant must not be forced to sue his own insurer for UIM benefits before discovering whether or not the tortfeasor is underinsured. "Until an injured party files suit against the alleged tortfeasor and engages in discovery to ascertain the limits of the tortfeasor's liability insurance, the injured party cannot determine whether the tortfeasor is indeed an underinsured motorist." See Riggs. As the 2-year limitations period that is identical to the general motor vehicle statute of limitation could require such a protective lawsuit, the Court of Appeals found that the provision could result in a "waste of legal and judicial resources." Id. For these reasons, the Kentucky Court of Appeals found the 2-year limitations period unreasonable and invalid and fell back upon the general 15-year limitations period. This decision is not yet final. State Farm has filed a motion for discretionary review with the Kentucky Supreme Court. In the meantime, the use of a longer limitation period in the UM/UIM policy could allow insurers to avoid the 15-year default period decided upon in Riggs.

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Let us ring the bell for your success.

Welcome to The Chronicle, a newsletter designed to keep you informed on current events and legal issues. Landrum & Shouse, LLP, traces its history from pre-World War II legal service. For nearly 40 years following military service, the late Weldon Shouse and Charles Landrum, Jr., together with their firms, practiced law throughout Kentucky before merging in 1984 to become what is now known as Landrum & Shouse, LLP. The resulting firm is built upon the well-deserved reputations of its founders as experienced, knowledgeable, and hard working trial lawyers.

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Congratulations and Upcoming Events

Congratulations to Lexington partner **Douglas L. Hoots** on his selection to the Million Dollar Advocates Forum. The Million Dollar Advocates Forum is recognized as one of the most prestigious groups of trial lawyers in the United States. Membership is limited to attorneys who have won million and multi-million dollar verdicts, awards and settlements. The organization was founded in 1993 and there are approximately 4000 members located throughout the country. Fewer than 1 % of U.S. lawyers are members. Forum membership acknowledges excellence in advocacy, and provides members with a national network of experienced colleagues for professional referral and information exchange in major cases. Members must have acted as principal counsel in at least one case in which their client has received a verdict, award or settlement in the amount of one million dollars or more.

Congratulations to Lexington associate **Tim Davis** on his recent election to the Kentucky Defense Counsel Board of Directors.

Lexington partner **Pierce W. Hamblin** will present on Negotiation Points at the Kentucky Law Update Section in September 2013. He will also present on Evaluation and Negotiation of Injury Claims at the Kentucky Insurance Defense Counsel annual convention in November 2013.

Insurance Institute of Kentucky and Eastern Kentucky University Risk Management and Insurance Program are pleased to announce that they will be co-sponsoring a seminar for attorneys, paralegals, in-house counsel, adjusters and other insurance claims professionals, and other interested parties called Issues in Claims Settlement: Property and Casualty Insurance. The events will take place in Louisville, KY on October 25, 2013, Lexington, KY on November 1, 2013, and Owensboro, KY on November 8, 2013. Lexington partner **Douglas L. Hoots** will present on Insurance Contracts Analysis. If you have questions please feel free to contact Mark Treesh of IIK at mark@iiky.org or (859) 543-9759.

Lexington Associate **Tim Davis** will present on Employment Law at the Kentucky Nonprofit Network annual seminar in Lexington, KY on October 23, 2013.