

No. 31863 – *Mark Wood, a West Virginia resident, class representative plaintiff; Patricia Compton, a Virginia resident, class representative plaintiff; Jack Cecil, a Virginia resident, class representative plaintiff; Steve Pierce, an Ohio resident, class representative plaintiff; Sid Nash, a Virginia resident, class representative plaintiff v. Acordia of West Virginia, Inc., a West Virginia corporation, dba Acordia Mid-Atlantic, Inc.; and Acordia, Inc., a Delaware corporation*

FILED

July 13, 2005

Starcher, J., dissenting:

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OF WEST VIRGINIA

I dissent from the majority opinion because the restrictive covenant in the employment agreement unjustly restricts the petitioners from engaging in the business activities they seek to pursue.

A restrictive covenant – whether called a covenant not to compete or a non-piracy agreement – is unenforceable if, by its terms, the employee is precluded from pursuing his occupation and thus prevented from supporting himself and his family, or if the restriction imposes an undue hardship on the employee.

The majority and the circuit court are in error in concluding that the covenant “was narrowly limited in scope, . . . and most importantly, the provision had a very limited effect on the employees who were allowed to work in the insurance industry immediately and without delay.” (Circuit court order.)

By characterizing the restrictive covenant as a “non-piracy” agreement, the majority suggests that the employment contract is substantially less restrictive than a “non-compete” agreement on the employee and on the economic forces of the marketplace.

However, a “non-piracy” agreement may be very restrictive in its scope and results. That is the case here.

The record showed that Acordia has taken over every major local competitor. Acordia insurance salesmen stated in depositions that “all prospects in the [West Virginia] market were already spoken for by other Acordia salesman [sic].”

In this climate, the petitioners were restricted from contacting any *current* clients of Acordia, any *former* clients of Acordia, and any *prospective* clients that Acordia had contacted during the two-year period following the petitioners’ termination of employment.

Contrary to the majority’s assertion that “non-piracy” agreements are inherently less restrictive than “non-compete” agreements on free market forces, it seems that Acordia is, with a “non-piracy” agreement, effectively preventing all competition from former employees. This result the law will not permit.

For these reasons, I respectfully dissent.