

Timing is (Almost) Everything: PA Supreme Court Clarifies Enforceability of Restrictive Covenants Ancillary to Employment

By: Vincent N. Barbera and George C. Morrison

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On June 16, 2020, the Pennsylvania Supreme Court clarified that, under Pennsylvania law, restrictive covenant agreements are not *per se* unenforceable when executed after the first day of employment.[1]

Rullex Company, LLC v. Tel-Stream Inc. and Yuri Karnei involved the alleged breach of a non-disclosure, non-competition agreement between Rullex and its former employee, Yuri Karnei. After spending over a year performing specialized cell tower installation, repair, and maintenance services on Rullex's behalf for its clients, Karnei began performing the same services for a competitor.[2] Rullex commenced litigation in the Philadelphia Court of Common Pleas and sought, among other things, a preliminary injunction. The trial court denied the motion for preliminary injunction because Rullex was not likely to prevail on the merits based on a lack of consideration to support the restrictive covenant.[3] The court explained that, because it was undisputed that Karnei executed the agreement containing the restrictive covenants after his first day of work, additional consideration was needed to render it enforceable.[4] Rullex appealed, and the Pennsylvania Superior Court affirmed.

The Pennsylvania Supreme Court granted allocatur to "assess the validity of the *per se* rule applied by the Superior Court whereby any time a restrictive covenant is executed after the first day of employment, it must be accompanied by fresh consideration." [5] On appeal, Rullex argued that the strict *per se* rule applied by the prior courts does not consider that "events often move faster than paper" in the business world, such that no additional consideration is necessary when a restrictive covenant was contemplated at the inception of the employment relationship.[6] The Supreme Court found this argument persuasive, noting that the intent of the parties is paramount. The court explained: "[A] bright-line rule such as that utilized by the Superior Court could subvert the expectations of parties who fully anticipate and intend the restriction to be ancillary to the taking of employment, by the employee, for whatever reason, signs the covenant shortly after the first day." [7]

Addressing the practical considerations, the court noted that for a restrictive covenant executed after the first day of employment to be ancillary to the taking of employment, the parties "must have agreed to its essential provisions as of the beginning of the employment relationship." [8] The court further clarified that, when making this assessment, "it may not be necessary to prove an actual, subjective 'meeting of the minds,' as objective manifestations of assent and/or an intent to be bound by the covenant's substance can suffice." [9]

Applying the above principles to the facts of the case before it, the Supreme Court held that Rullex did not satisfy its burden to show that there was a meeting of the minds as to the non-competition covenant at issue or that Karnei otherwise manifested his intent to abide by its terms upon commencing employment. [10] As a result, the court ultimately affirmed the lower decision.

The *Rullex* decision underscores the importance of good corporate housekeeping when commencing new employment relationships, especially where restrictive covenants are part of the equation. Employers should take care to diligently pursue and secure fully-executed restrictive covenant agreements prior to adding new employees to the fold and ensure the agreements are otherwise narrowly tailored to protect their legitimate business interests.

If you have questions, please contact Vince Barbera (barberav@whiteandwilliams.com; 215.864.7137), George Morrison (morrison@whiteandwilliams.com; 610.782.4911) or another member of our Commercial Litigation or Labor and Employment Groups.

[1] *Rullex Co., LLC v. Tel-Stream, Inc.*, 2020 Pa. LEXIS 3294 *17-18 (June 16, 2020).

[2] *Rullex*, 2020 Pa. LEXIS 3294 at *2.

[3] *Id.* at *5-6.

[4] *Id.*

[5] *Id.* at *9.

[6] *Id.* at *12.

[7] *Id.* at *16.

[8] *Id.* at *17.

[9] *Id.* at *18 (citations omitted).

[10] *Id.* at *19 (highlighting, among other things, that Karnei started working for Rullex at least two months prior to signing the subject non-competition agreement).

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