GEORGE MASON AMERICAN INN OF COURT

RESTRICTIVE COVENANTS IN VIRGINIA: WINNER TAKE ALL

MARCH 26, 2019

Panel Members:

- **Wendy Alexander, Esq., Walsh Colucci Lubeley Walsh**
- **Danny Alvarado, Antonin Scalia School of Law**
- **Catalina Del Valle, Antonin Scalia School of Law**
- **The Honorable Richard E. Gardiner, Fairfax County Circuit Court**
- **Nick Gehrig, Esq., Redmon, Peyton & Braswell**
- **Nicholas Johnson, Esq., Berenzweig Leonard**
- **Kathryn Lipp, Esq., Berenzweig Leonard**
- **The Honorable Liam O'Grady, United States District Court for the Eastern District of Virginia, Alexandria Division**
- **The Honorable John M. Tran, Fairfax County Circuit Court**
- **Lauren Weiss, Antonin Scalia School of Law**

Table of Contents

1. Introduction

    a. Strategic Decisions to Make in Restrictive Covenant Litigation
        i. For parties seeking to enforce a restrictive covenant considerations include:
            1. whether to attempt negotiations with the opposing party;
            2. whether to risk an adverse finding and incur the significant cost of litigation;
            3. in what forum to pursue the claims; and
            4. whether to seek a preliminary injunction or temporary restraining order.
        ii. For a client who might be bound by a noncompete agreement considerations include:
            1. whether to make the first outreach to the party who has the ostensible right to enforce the agreement in hopes of seeking a negotiated resolution;
            2. whether to risk breach of an enforceable covenant; and
            3. whether to file for declaratory relief under Va. Code §8.01-184 et seq.
        iii. Obviously, these decisions are made with a view toward the specific Restrictive Covenants in play and the potential for damages based on the language of the agreements themselves and the specific facts at issue.
        iv. Causes of action can also exist against the new employer for breach of fiduciary duty and tortious interference among others.
        v. Pre-litigation/cease and desist efforts
            1. If you are trying to enforce a restrictive covenant, often, the first effort is notice to the offending party, requesting them to stop the complained of behavior. This is done through what is called a "Cease and Desist" letter.
            2. Such a letter should provide notice to the former employee and a separate letter should be sent to the new employer about the violation, outline the specific terms that you allege are being violated, demand a cessation from any further action that violates the agreement and advise of legal enforcement activity if they do not comply.
            3. These letters can lead to the termination of the offender by their new employer, who may not have known about the existence of the restrictive covenant agreement. Additionally, these letters to the new employer can prompt remedial and/or preemptive action from the new employer to avoid placing the employee in a position that may violate the agreement.

4. Such a letter can be sent, even without an agreement in place with respect to continuing confidentiality obligations post-employment.
5. These letters are going to become an exhibit in any resulting litigation so keep a potential judicial audience in mind when drafting.

b. Injunctive and Declaratory Relief
   i. When representing a party seeking to enforce a restrictive covenant, once it is determined that litigation should be filed, an early determination is whether to pursue injunctive relief. Generally, such orders are hard to obtain and failed attempts to obtain them can rob the party seeking enforcement of the restrictive covenant of momentum and negotiating leverage. However, they can be very effective if obtained. [1] *See Western Insulation, LP v. Moore*, 316 Fed. Appx. 291(4th Cir. 2009); *STaSIS v. Schurtz*, 2012 WL 242892 (W.D. Va. 2012).

   ii. Availability of Declaratory Relief
      1. Parties concerned that they may be subjected to the terms of a restrictive covenant may seek a determination of the covenant's enforceability under the Virginia Declaratory Judgment Act.[2]
      2. The statute specifically permits adjudication of disputes regarding interpretation of "instruments of writing". This has been interpreted to include covenants not to compete.[3]
      3. For the Act to apply, a dispute must involve a justiciable case or controversy.
         a. In *Graves v. Ciraden, Inc*., a justiciable controversy was found to exist where a dentist entered a noncompete provision with a dental management company that ostensibly prohibited him from working within six miles of the company's dental offices for 20 years after signing the agreement.[4]
         b. The agreement also contained a provision requiring the dentist to pay $200,000 in liquidated damages to the dental management company within 12 months of any breach of the agreement. The dentist desired to commence practice in an area that would have violated the agreement, and filed a complaint for declaratory relief. The court found the controversy to be justiciable and declaratory relief

[1] Virginia Bar Association 127th Meeting: *Handling Non-Compete, Restrictive Covenant, and Breach of Fiduciary Duty Claims*
[2] Virginia Code §8.01-184 *et seq.*
[3] Virginia CLE 2012-*Covenants not to Compete and the Duty of Loyalty in Virginia*
[4] *Graves v. Ciraden, Inc.*, 65 Va. Cir. 127 (Fairfax 2004).

appropriate. In reaching this decision, the court stated as follows:

> The Complainant has also pled that he wishes to compete within the restricted area in contravention of the Non-Competition and Confidentiality Agreement. Finally, the complainant alleges that [the] Non-Competition and Confidentiality Agreement is overbroad and unenforceable. By implication, the Respondent has shown an unwillingness to release the Complainant from the restrictions of the Non-Competition and Confidentiality Agreement by filing this Demurrer. The pleadings suggest that an actual controversy exists and that the Respondent has every intention of enforcing the restrictions if the Complainant begins to compete in contravention of the Non-Competition and Confidentiality Agreement. Further, at oral argument on this Demurrer, the Court asked counsel for the Respondent if they would seek to enforce the restriction and counsel responded in the affirmative. Everything that has come before this Court suggests that an actual controversy exists.[5]

c. The court held that the complainant had standing to challenge the restrictions of the Non-Competition and Confidentiality Agreement through a Declaratory Judgment Action and overruled Respondent's Demurrer.

4. In *Meissel v. Finley*,[6] a partner in an insurance agency sought declaratory relief on the question of whether a restrictive covenant in a limited partnership agreement was enforceable.
   a. The circuit court had dismissed the plaintiff's Bill of Complaint and, by means of a Cross-Bill filed by the defendant, had entered an injunction for the insurance agency. The circuit court's decision was affirmed on appeal.[7]
   b. The Virginia Supreme Court held that the restrictive covenant contained in this limited partnership agreement restricting the right of limited partners to write insurance for a period of five years from dissolution of the

[5] *Id.*
[6] 198 Va. 577, 95 S.E.2d 186 (1956).
[7] *Id.*

partnership, within 50 miles of Norfolk, was valid as it was limited to a reasonable duration and area.

5. Practice tip: Employers should file counterclaim for enforcement of the covenant, in response to an employee claim seeking declaratory judgment that the covenant is invalid.

c. In state court, the strategies to consider in litigation include whether to respond to the claim with a demurrer or a plea in bar, and whether to pursue injunctive relief.

i. Demurrer

1. In *Assurance Data, Inc. v. Malyevac*, the Virginia Supreme Court issued an opinion militating against the use of demurrers to test a restrictive covenant's enforceability. The court held that the circuit court erred in using a demurrer to decide whether the noncompete and non-solicitation provisions were enforceable "because a demurrer does not permit the trial court to evaluate and decide the merits of the claim set forth in a complaint." [8]
2. The use of a demurrer may still be possible in cases where an employer fails to allege a legitimate business interest.[9]

ii. Plea in Bar

1. Pleas in bar let parties introduce evidence to prove facts that bar a plaintiff's right of recovery. [10] In *Home Paramount v. Shaffer*, the defendant was able to use a plea in bar to assert that the unenforceability of the restrictive covenant barred the plaintiff's breach of contract claim (and put forth evidence) to block the enforcement of a noncompete agreement. [11]

iii. In assessing any strategies for restrictive covenant litigation, it is important to keep in mind that the five-year statute of limitations in Virginia also applies to written restrictive covenants.

---

[8] *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 747 S.E.2d 804 (2013).

[9] https://www.virginiabusinesslitigationlawyer.com/determining-validity-noncompete-requires-evidence/

[10] *Hawthorne v. Van Marter*, 279 Va. 566, 577 (2010).

[11] Virginia Bar Association 127th Meeting: *Handling Non-Compete, Restrictive Covenant, and Breach of Fiduciary Duty Claims*

d. Choice of Law/Forum Selection Clauses
    i. Employment agreements and other agreements containing restrictive covenants will often include a choice of law provision. The issue of whether these provisions are enforceable is a matter of state law. While the Virginia Supreme Court has not addressed whether choice of law provisions in noncompete agreements are valid, Virginia, generally recognizes choice of law provisions.[12]
    ii. Virginia courts will uphold choice of law provisions in contracts only if there is a reasonable basis for the choice, and the law chosen is not contrary to the public policy of the state with the greater interest and whose law would otherwise govern.[13]
    iii. Choice of law provisions can be key to an employer getting a good result for its litigation because, the employer can insert choice of law clauses for a jurisdiction that permits blue-penciling, or that otherwise may be more favorable to employers.[14]
    iv. *Edwards Moving & Rigging, Inc. v. W.O. Grubb Steel Erection, Inc.,*[15] the U.S. District Court for the Eastern District of Virginia considered the argument based on a noncompete agreement that selected Kentucky law to govern its interpretation. While observing that Virginia will not apply another state's law that offends Virginia public policy, the court noted that "[a]pplying the law of a state that allows 'blue penciling' is not so repugnant to Virginia public policy as to overcome Virginia's preference for enforcing choice-of-law and forum-selection clauses." In the end, the court applied Kentucky law, notwithstanding its more liberal approach, to allow reformation of overbroad noncompete restrictions.
    v. This only makes sense if the company, or its employees have some significant connection with the selected state.[16] At least one court has held that incorporation within another state provides a sufficient connection to that state to support applying its laws to the terms of a noncompete agreement.[17]

---

[12] *Paul Bus. Sys. Inc. v. Canon U.S.A., Inc.*, 397 S.E.2d 804 (1990).
[13] *Wellmore Coal Corp. v. Gates Learjet Corp.*, 475 F. Supp. 1140, 1144 (W.D. Va. 1979); *Hooper v. Musolino,* 234 Va. 558, 566, 364 S.E.2d 207, 211, *cert. denied*, 488 U.S. 823 (1988).

[14] In *Western Industries-North, LLP v. Lessard, et al.*, 2012 U.S. Dist. LEXIS 33683 (E.D. Va. 2012), Judge James Cacheris, granted plaintiff's motion for a temporary restraining order based on a noncompete and non-solicitation agreement containing a New Jersey choice of law provision, which allowed blue-penciling to limit the application of an overbroad noncompete.
[15] 2012 U.S. Dist. LEXIS 56818 (E.D. Va. 2012).
[16] *Malpractice Research, Inc. v. Norman,* 24 Va. Cir. 118, 119 (Fairfax 1991).
[17] *Global One Communications v. Ansaldi,* 2000, Va. Cir. LEXIS 181, 2000 WL 1210511, at 2 (Fairfax 2000).

vi. Similarly, by not including forum selection clauses in these agreements, employer's risk that employees relocate to another jurisdiction, and their claims get adjudicated under another state's less favorable laws.[18]

2. Background

Virginia courts generally apply three standards when evaluating the reasonableness of restrictive covenants

a. Whether the restraint is reasonable and is not greater than necessary to protect an employer's legitimate business interests
    - Courts assess whether the employer had a legitimate business interest in requiring the covenant and if the restrictive covenant is sufficiently limited in purpose to protect that business interest.

b. Whether the restraint is reasonable and not unduly harsh or oppressive in limiting the employee's efforts to earn a living
    - Courts assess the geographic scope and duration of the restrictive covenant
    - However, these issues are not dispositive but factors in determining whether the scope is overly broad

c. Whether the restraint is reasonable from a sound public policy standpoint
    - Courts assess the positions of the parties involved and whether the language was overbroad or unclear and therefore against public policy[19]

d. Courts interpret ambiguities in covenants not to compete against enforcement of the agreement. The employer bears the burden of showing the covenant is reasonable in relation to scope and the legitimate business interest the covenant seeks to protect.

3. Sources

i. Virginia Civil Procedure (2018)
ii. ARTICLE: DRAFTING EFFECTIVE NONCOMPETE CLAUSES AND OTHER RESTRICTIVE COVENANTS: CONSIDERATIONS ACROSS THE UNITED STATES, 14 Fl. Coastal L. Rev. 365
iii. Virginia Bar Association 127th Meeting: *Handling Non-Compete, Restrictive Covenant, and Breach of Fiduciary Duty Claims*
iv. https://www.rickseymourlaw.com/noncompete-agreements-and-severance-agreements/what-local-courts-are-saying-about-noncompete-agreements/
v. https://www.virginiabusinesslitigationlawyer.com/determining-validity-noncompete-requires-evidence/

[18] *Palmer & O Cay, Inc. v. Marsh & McLennan Cos.,* 404 F.3d 1297 (11th Cir. 2005).
[19] *See Modern Env'ts v. Stinnett*, 263 Va. 491, 493 (2002)

4. Federal vs. State practice

    a. Federal practice
        i. Motion to dismiss based on FRCP 12(b)(6) – Failure to state a claim upon which relief can be granted
        ii. Restrictive Covenant standard under Virginia case law
            1. Under Virginia case law, a non-compete agreement must be reasonable. A reasonable non-compete is:
                a. No more restrictive than necessary to protect the employer's legitimate business interest.
                b. Not unduly burdensome on the employee's legitimate efforts to earn a livelihood.
                c. Consistent with sound public policy. *Omniplex World Servs. v. U.S. Investigative Servs.,* 270 Va. 246 (2008); *Simmons v. Miller*, 261 Va. 561, 581 (2001).
            2. To assess the reasonableness of a non-compete provision, courts look at the following factors:
                a. The duration of the restraint.
                b. The geographic scope of the restraint.
                c. The scope and extent of the restricted activity. *Simmons v. Miller*, 261 Va. 561, 581 (2001).
            3. Whether a restrictive covenant is enforceable is a matter of law. *Omniplex World Servs. v. U.S. Investigative Servs*., 270 Va. 246, 249 (2008).
        iii. Motion to Dismiss standard - *Cantol, Inc. v. McDaniel*, 2006 U.S. Dist. Lexis 24648, 2006 WL 1213992, at *8-9 (E.D. Va. Apr. 28, 2006).
            1. The purpose of a Rule 12(b)(6) motion to dismiss is to challenge the legal sufficiency of the Complaint. *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994) (citing *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir.1991)).
            2. In evaluating motions made pursuant to Rule 12(b)(6), "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).
        iv. Notable Federal Cases Addressing Restrictive Covenants on a 12(b)(6) Motion
            1. *Cantol, Inc. v. McDaniel*, 2006 U.S. Dist. Lexis 24648, 2006 WL 1213992 (E.D. Va. Apr. 28, 2006)
                a. FACTS: Larry McDaniel and Rebecca Liebig ("Defendants") were employed by Cantol, Inc. ("Cantol"), a company which primarily sold chemical products.

Defendants entered into covenants not to compete and signed employment agreements. Both were given sales territories in the Tidewater area of Virginia.

i. Defendants' were terminated from their employment in 2004. It was alleged that defendants formed a partnership together, named Laser Chemicals, and sold products to Cantol's customers that defendants worked with while employed by Cantol.

b. DISCUSSION: Restrictive covenants are disfavored in Virginia because they are restraints on trade, so any ambiguities in the contract will be construed in favor of the employee

i. In Virginia, restrictive covenants are enforceable when (1) it is narrowly drawn to protect the employer's legitimate business interest, (2) is not unduly burdensome on the employee's ability to earn a living, and (3) is not against public policy. *Simmons v. Miller*, 261 Va. 561, 581 (2001).

ii. This analysis requires the court to consider the restrictive covenants function, geographic scope and duration.

c. ARGUMENT: Plaintiff asserted that Defendants violated certain paragraphs of their Employment Agreements. Defendants filed a 12(b)(6) motion to dismiss challenging the legal sufficiency of the restrictive covenant.

d. ANALYSIS: The Supreme Court of Virginia would have invalidated the paragraphs in Defendants' employment agreements.

i. Cantol overstepped the limits of restrictive covenants by defining competition to include employment functions that Defendant McDaniel did not engage in. This restriction was not narrowly drawn to protect Cantol's legitimate business interests and was unduly burdensome on McDaniel.

ii. The other two paragraphs that Cantol alleged Defendants violated was invalid because, while it did define duration, it did not define a geographic scope.

iii. This expansive application of restrictive covenants was "unduly burdensome on the employee's ability to earn a living" and therefore was deemed against public policy.

e. HOLDING: Granted Defendants' motions to dismiss.

2. *Tax Int'l, LLC v. Kilburn & Assocs., LLC,* 157 F. Supp. 3d 471 (E.D. Va. Jan. 5, 2016).

a. FACTS: Plaintiff Tax International, LLC ("Tax International") is a Florida company that provides business consultation and tax preparation services and maintains a business in Newport News, Virginia. Tax International's consultants were primarily responsible for soliciting new customers for business
    i. Defendant Lance Taylor was a consultant for Tax International and entered into a Confidentiality and Non-Compete/Non-Disclosure Agreement in 2014.
    ii. Defendant Rasheme Kilburn was also a consultant for Tax International and entered into a similar agreement in 2014.
    iii. Under the agreements, they both agreed "(1) they would not use any Tax International client's confidential information in any effort to divert any Tax International client's business away from Tax International; (2) they would not solicit any tax services regarding any of Tax International's clients upon termination of their consultancy with Tax International; and (3) they would not act as a tax consultant or preparer or use any of Tax International's strategies at any time in the future following termination of their consultancy with Tax International."
b. ARGUMENT: Tax International alleged that Defendants were currently engaged in the business of tax preparation in competition with Tax International and in violation of the Agreements
    i. Defendant Taylor argued that the Agreement was overbroad and unenforceable on its face.
c. ANALYSIS: Tax International sufficiently pled facts to plausibly state a claim of breach of contract because it alleged the existence of a legitimate business interest and Defendant Taylor is operating a tax preparation business in direct competition with Tax International.
    i. The court found that Defendant Kilburn moved to dismiss for the same basic reason that the Agreement was overly broad and unenforceable.
d. HOLDING: Defendants' motions to dismiss were denied.

b. Other Notable Federal Cases
    i. *Capital One Financial Corp. v. Kanas*, 871 F. Supp. 2d 520 (E.D. Va. 2012).
        1. FACTS: Defendants John Kanas and John Bolsen were executives of North Fork Bancorporation ("North Fork"). After Capital One

Financial Corporation ("Capital One") acquired North Fork, defendants entered into a Restricted Shares Agreement ("RSA"). In exchange for compensation, defendants agreed to a restrictive covenant not to engage in competitive business for five years after ending employment with Capital One.

   a. The geographic area differed based on the business involved, but most were national in scope. Also, defendants had to remain employees for three years after the closing date of the merger.
   b. One year after the merger, defendants and Capital One agreed to end their employment relationship. They entered into a Separation Agreement that superseded the RSA's non-compete covenant and stated that defendants could not engage in "competitive business" in New York, New Jersey or Connecticut until August 2012.
   c. In 2009, defendants and other investors formed BankUnited, which went public in 2011 and only had branches in Florida, where Capital One had none.
   d. In February 2012, BankUnited acquired Herald National, a commercial bank with all of its offices in New York. After this acquisition, BankUnited created a ring-fencing structure to "fence out" Defendants from providing services to Herald National until the non-compete covenants expired in August 2012.

2. ARGUMENT: Capital One sued Defendants for breach of the non-compete covenants.
   a. Capital One argued that there was an employment relationship and therefore the restriction should be analyzed under the employer/employee framework, not the sale-of-business framework.
      i. The frameworks differ in that "[t]he scope of permissible restraint is more limited between employer and employee than between seller and buyer, and the covenant is construed favorably to the employee."
3. ANALYSIS: The court found that the sale-of-business framework did not apply here because the Separation Agreement stated that it was a termination of an employment relationship. Next, the court found that the non-compete covenants were enforceable.
   a. The court found that the agreements did not hamper the employees' ability to earn a livelihood because there were three exceptions carved out in the Separation Agreement that allowed them to find work at a private equity firm, investment bank, or hedge fund.

b. The court stated that there was no imbalance in bargaining power and noted that the Defendants drafted the Separation Agreement
c. The employees received sufficient consideration, mainly because of the large amount of compensation they received through the merger and the Separation Agreement, nearly $200 million.
d. The agreements were narrowly tailored, protected a legitimate business interest due to Defendants' knowledge of confidential information about Capital One's business, were reasonably limited to the Tri-State area, and reasonable in function because it restricted engaging in competitive business, which was defined and unambiguous.

4. HOLDING: Denied defendants' motion for summary judgment

ii. *Brainware, Inc. v. Mahan*, 808 F. Supp.2d. 821 (E.D. Va. 2011)

1. FACTS: Plaintiff Brainware, Inc. ("Brainware") is a Virginia corporation that markets and sells enterprise software applications in the Intelligent Data Capture market. Defendant Michael Mahan was a senior account executive in the sales department at Brainware until he voluntarily resigned in 2010.
    a. Mahan's Employment Agreement contained a non-compete clause, a non-solicitation clause, and a non-disclosure clause. The duration of the non-compete clause was one year after termination or cessation of employment.
    b. After ending his employment with Brainware, Mahan began working in sales at Kofax, Inc., a Brainware competitor.
2. ARGUMENT: Brainware alleges that Mahan is marketing and selling products that are in direct competition with those marketed and sold by Brainware while he was employed there.
    a. Brainware also alleges that Mahan is soliciting business to prospective Brainware customers that Mahan contacted, solicited, or served while working at Brainware.
    b. Mahan argued that the Agreement's provisions were overbroad and unenforceable under Virginia law because it restricts him from engaging in work that is not in competition with Brainware and the absence of a geographical limitation prevented him from obtaining employment anywhere in the world.
3. ANALYSIS: The employer bears the burden of showing that the provision is necessary to protect the employer's legitimate business interests, is not unduly burdensome on the employee's ability to earn a living, and does not offend sound public policy
    a. The court also examines the nature of the employee's past and present employment, whether the employee violated

the actual terms of the agreement, and the nature of the restraint in light of the circumstances

b. Brainware had a limited product line and Mahan had access to Brainware's business strategy. Therefore, one could conclude that the restrictive covenant only covered Brainware's legitimate business interests.
c. The non-compete did not prevent Mahan from working at specific companies, even Kofax, and because Brainware had a limited product line, there were plenty of Kofax products that Mahan could have sold and not violated the non-compete provision.
d. The lack of a geographic limitation does not render the non-compete unenforceable because it is only one of the factors considered. The legitimate business interest outweighs the lack of a geographical limitation.
e. Non-solicitation provisions are a type of non-compete. The one at issue was unambiguous and the one-year limitation was reasonable.
f. Lastly, the non-disclosure agreement was reasonable because it was limited to actual confidential information that Mahan obtained during his employment. The indefinite duration was not unreasonable because Brainware had a limited product line and it was a legitimate business interest to keep this information out of the hands of competitors.

4. HOLDING: Defendant's Motion to Dismiss was denied.

iii. *Omniplex World Servs. v. U.S. Investigative Servs.*, 270 Va. 246 (2008).

1. FACTS: Omniplex World Services Corporation ("Omniplex") is a highly specialized employment agency that provides security services to public and private sector customers. Kathleen Schaffer was hired to work on a government project for Omniplex.
    a. Schaffer signed a one-year employment contract that contained a non-compete provision that prohibited her from performing any services for any other employer in a position supporting Omniplex's customers.
    b. Before becoming employed at Omniplex, Schaffer sent out an application to The Smith Corporation. Defendant U.S. Investigative Services ("USIS") is the parent company of The Smith Corporation. The Smith Corporation later offered Schaffer employment after she became employed at Omniplex. Schaffer accepted and left Omniplex.
2. PROCEDURAL HISTORY: The trial court struck Omniplex's evidence, concluded that the non-compete provision was overbroad, and dismissed all three counts of Omniplex's motion for judgment. Omniplex appealed

3. ARGUMENT: Schaffer breached her covenant not to compete by accepting employment at The Smith Corporation before the covenant expired.
    a. USIS argued that the non-compete was overbroad because it covered any employer and any business that provided services to a Sensitive Government Customer, meaning Schaffer could not gain employment even in non-security staffing businesses.
4. ANALYSIS: The non-compete provision was not limited to Schaffer's employment at Omniplex, the provision was overbroad and unenforceable.
    a. The court noted that Schaffer could not even work as a delivery person for a vendor if that position required a security clearance, even though delivery is not in competition with Omniplex's staffing service.
5. HOLDING: Affirmed the trial court's ruling dismissing Omniplex's claims.
6. DISSENT: The trial court held the non-compete unenforceable because it lacked geographic limitation and the majority held it was unenforceable because it was not limited to prohibited positions in direct competition with Omniplex. The dissent disagreed with both positions.
    a. The dissent argues that the majority did not evaluate the non-compete under the proper standard. The majority never discussed Omniplex's legitimate business interest. Also, the lack of a geographic limitation was exaggerated by the trial court and the majority. The fact that the restrictive covenant did not contain a geographic limitation or a list of prohibited competitive positions did not make it overly broad.

iv. *Update Inc. v. Samilow*, 311 F. Supp. 3d. 784 (2008).
1. FACTS: Plaintiff Update, Inc. ("Update") sued Lawrence Samilow ("Samilow"), a former top sales executive for breach of contract, alleging Samilow breached non-compete and non-solicitation clauses in his employment agreement. Update sought a preliminary injunction pursuant to those clauses.
    a. Update is a nationwide provider of eDiscovery and legal staffing services.
    b. A year after Samilow was promoted as Chief Customer Officer, the company's top sales executive position, he was offered a new compensation plan in exchange for signing an employment agreement that included non-compete and non-solicitation clauses.
    c. After resigning, Samilow formed Samilow Harvest Group LLC ("SHG") in New Jersey, within 50 miles of Update's

headquarters. SHG offered similar services to those provided by Update.

2. DISCUSSION: The Court focused on Update's likelihood to succeed on the merits and used Virginia's three-part test for determining the enforceability of a restrictive covenant.
    a. Three-part test
        i. (1) narrowly drawn to protect the employer's legitimate business interest;
        ii. (2) not unduly burdensome on the employee's ability to earn a living; and
        iii. (3) not against sound public policy.
    b. In analyzing the first element, the Court stated that the non-solicitation clause was used to prevent Samilow from using Update's client contact list to compete against them.
    c. The clauses must also be reasonable. In Virginia, courts must consider duration, geographic scope, and function.
    d. In this case, the one-year duration was reasonable because it allowed Update time to keep its clients without Samilow interfering, especially with his previously high position in the company.
    e. Also, the court found that the 50-mile restriction was reasonable and noted a Virginia Supreme Court case that upheld a similar restriction. Samilow provided personal service in New York and New Jersey for Update, so he knew which territories were covered by the clause.
    f. Lastly, the court held that the clauses did not violate public policy because it was narrowly tailored to protect legitimate business interests and did not prevent Samilow from providing services outside of those provided by Update.
3. HOLDING: Granted preliminary injunction.

c. State practice
    i. Challenging a restrictive covenant
        1. Demurrer standard
            a. The purpose of a demurrer is for the court to determine whether a complaint states a cause of action upon which the requested relief may be granted by looking at legal sufficiency of alleged facts.
            b. A Demurrer does not allow court to evaluate and decide the merits of a claim.
            c. The Court has to find the existence of a sufficient legal basis for a pleading to survive a demurrer.
            d. *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 142 (2013)

ii. Plea-in-Bar standard
    a. A pleading that alleges a single, distinct issue of fact, which if proven, creates a bar to plaintiff's recovery. *Reading & Language Learning Center v. Sturgill*, 94 Va. Cir. 94 (Fairfax Cir. Ct. 2016)
    b. Crucially, parties can introduce evidence in a Plea-in-Bar (which may not be allowed in a Demurrer), in addition to the facts in the pleadings to prove facts that bar the right of recovery.
    c. A Plea-in Bar can be sustained even if it bars recovery to some, but not all of the claims.
    d. If facts are in dispute and no demand for jury is made, the court can decide the "whole matter of law and fact."
    e. In restrictive covenant cases, the plea in bar will generally assert the unenforceability of the contract provision.

d. Can a restrictive covenant can be challenged by Demurrer given the 2013 decision of *Assurance Data v. Malyevac*, 286 Va. 137 (2013).
    i. FACTS: Assurance Data entered into an agreement with John Malyevac that required the Malyevac to sell the ADI's products and services. This agreement contained non-competition, non-solicitation, non-disclosure provisions (the nonsolicitation clause said it would be in force for a period of "twelve (12)" but did not specify days, weeks months etc.
        1. A few months after the agreement was signed, Malyeyac resigned. Subsequently AD filed suit alleging breach of the noncompete and nonsolicitation clauses.
        2. Malyevac filed a demurrer asserting that the AD didn't state a cognizable claim because the clauses were "overbroad and unenforceable"
        3. The Circuit Court sustained the demurrer without leave to amend, holding the provisions were unenforceable as a matter of law and dismissed the entire claim.
        4. AD appealed claiming it did not get to present evidence for a decision on the merits.
    ii. HOLDING: A demurrer cannot be used to evaluate and decide the merits of a claim.
    iii. ANALYSIS: "Restraints on competition are neither enforceable nor unenforceable in factual vacuum."
        1. Courts have to evaluate the facts to determine if an employer's business interest is not unduly burdensome on the employee's ability to earn a living.
        2. Clauses that may be overbroad in one situation may be reasonable in another situation

3. ADI did not have an opportunity to present evidence to show whether the restraints were necessary to protect its legitimate business interests and do not curtail Malyavec's ability to earn a living
    a. The Employer will bear the burden to demonstrate the competition is no greater than necessary and is not unduly harsh or oppressive in limiting the employee's ability to earn a living, but the Employer needs to present evidence to allow the Court to make these determinations.

e. In *Assurance Data*, the Virginia Supreme Court did not expressly overrule *Modern Environments, Inc. v. Stinnett*, 263 Va. 491 (2002).
    i. In *Modern Environments*, the Virginia Supreme Court affirmed the dismissal of a restrictive covenant under a Demurrer.
        1. FACTS: Modern Environments, an office furniture company, entered into an agreement with Johnetta R. Stinnett which contained a noncompete clause
            a. The clause prohibited Stinnet from "*directly or indirectly, own, manage, operate, control, be employed by, participate in or be associated in any manner with the ownership, management, operation, or control of any business similar to the type of business conducted by Modern*" for a period of 1 year.
            b. Within a year of leaving work at Modern, Stinnett began working for a competitor. Modern informed Stinnett of her breach of the noncompete clause.
            c. Stinnett filed for declaratory judgment seeking declaration that the noncompete clauses were unenforceable because they were overbroad and contrary to public policy
            d. Modern filed a Demurrer and after counsel briefed and argued for the trial court, the court held that the noncompete clause was overbroad as a matter of law.
        2. HOLDING: Modern did not meet its burden to prove that it had a legitimate business interest in prohibiting Stinnett from being employed in any capacity by a competing company
        3. ANALYSIS:
            a. The provisions were overbroad on their face and therefore were unenforceable and could not sustain a cause of action
            b. It seems this case is distinguished from *Assurance Data* because the demurrer was brought by the employer trying to uphold the contract and it had an opportunity to present evidence that its noncompete clauses were not overbroad and did not meet that burden.

f. Judge Gardiner: believes a challenge to a restrictive covenant cannot be made by Demurrer under *Assurance Data*.
    i. secondary sources/articles on Assurance Data impact on Virginia noncompete litigation
        1. https://www.virginiabusinesslitigationlawyer.com/determining-validity-noncompete-requires-evidence/
        2. https://www.virginiabusinesslitigationlawyer.com/independent-contractors-may-able-escape-noncompete-restrictions/
    ii. 2016 case showing a circumstance where a restrictive covenant may be challenged by Demurrer in light of *Assurance Data*: *The Reading and Language Learning Center. v. Charlotte Sturgill*, 94 Va. Cir. 94 (2016).
        1. *Reading & Language Learning Center v. Sturgill*, 94 Va. Cir. 94 (Fairfax Cir. Ct. 2016).
        2. FACTS: Reading and Language Learning Center ("RLLC") is a speech therapy practice that provides services to people with speech, language, or reading disorders. Charlotte Sturgill, a recent graduate of a speech pathology Master's program, was required to complete a supervised clinical fellowship to obtain her license. In 2014, she arranged to do her fellowship with RLLC. RLLC hired her with an agreement titled "Agreement between Private Practitioner and Independent Practitioner" which classified Sturgill as an independent contractor.
            a. The contract included language that Sturgill would not work for any of RLLC's clients for a period of 2 years after the expiration of the contract.
            b. RLLC assigned Sturgill to work at a DC school. The school offered Sturgill an in-house position at which point RLLC terminated Sturgill and sued her for violation of the noncompete clause.
            c. Sturgill filed a Plea-in-Bar arguing that the clause is unenforceable because it was overly broad and void because it misclassified her as an independent contractor
            d. She also filed a Demurrer which alleged that RLLC did not have a business interest in restricting her employment
            e. No jury trial was requested and arguments were heard for both motions
        3. HOLDING:
            a. The noncompete was void for being overbroad and violating Virginia public policy.
        4. REASONING:
            a. The Plea-in-Bar was sustained because RLLC was unable to establish that it had a legitimate business interest in restricting Sturgill's employment in such broad terms. The

Court cited Modern Environments in holding that the restrictive covenant was overly broad on its face.

b. The Court distinguished this case from *Assurance Data* because RLLC tried to restrict Sturgill from contracting in any capacity, whereas in *Assurance* the restriction was more limited and required further fact finding.

c. Taking this business interest as true, the noncompete is facially overly broad and unenforceable.

iii. Other Notable Cases

1. *O'Sullivan Films, Inc. v. Neaves*, No. 5:17-cv-00031, 2018 U.S. Dist. LEXIS 180167 (W.D. Va. Oct. 18, 2018)

a. FACTS:

i. Defendant David Neaves agreed to a limited noncompete agreement with Plaintiff O'Sullivan Films, Inc. Neaves conceded that he willfully violated the terms of the Noncompete and insisted that the Noncompete was invalid under Virginia law. O'Sullivan asked the court to enforce the Noncompete. O'Sullivan filed a Motion for Summary Judgment and Neaves filed a Motion for Summary Judgment Regarding the Enforceability of the Non-Compete.

1. Noncompete: "For one year after my employment with O'Sullivan ends, either voluntarily or for cause, I agree that I will not (a) sell, attempt to sell, or assist others in selling or providing products or services in competition with the Business of O'Sullivan at the Restricted Contacts; or (b) help, financially or otherwise, any person or entity to compete with the Business of O'Sullivan by using or contacting the Restricted Contacts."

b. ANALYSIS:

- The court stated that the Supreme Court of Virginia had instructed courts to enforce noncompete agreements if they met the three-part test of legitimate business interests, not being unduly burdensome, and were not against public policy.
- The court relied on *Assurance Data, Inc. v. Malyevac* and stated that it could not adjudicate enforceability "in a factual vacuum" and had to consider "the function, geographic scope, and duration' elements of the restriction."

- The court held that the functional limitations of the Noncompete were narrowly tailored so that Neaves was only precluded from engaging in employment that was directly competitive with O'Sullivan, and furthered that employment by using O'Sullivan's clients. The Noncompete was narrowly tailored to protect O'Sullivan's legitimate business interests.
- The court held that the lack of geographic scope in the Noncompete was not fatal given the limited functional limitations. The court ordered the parties to confer and submit a joint proposed permanent injunction.

c. HOLDING:

i. The Noncompete comported with Virginia law and was fully enforceable, Neaves breached the Noncompete and O'Sullivan was entitled to an injunction preventing Neaves from continued violations of the Noncompete.

2. *Fame v. Allergy & Immunology, PLC*, 91 Va. Cir. 66 (Roanoke City Cir. Ct. 2015)

a. FACTS: The Plaintiff, Dr. Thomas Fame entered into a Nonmember Employment Agreement ("NEA") with Allergy & Immunology, PLC ("A&I"). The NEA defined the employment relationship and contained a "Nonsoliciation and Non-Competition" restrictive covenant. It stated that at the termination of his employment, Dr. Fame was prohibited from competing with A&I for two years within a geographic range. Dr. Fame's employment was terminated in 2015 and Dr. Fame later brought suit in the Court seeking a declaratory judgment holding the NEA's restrictive covenant was unenforceable and injunctive relief preventing A&I from enforcing the covenant

b. ANALYSIS:

- The court stated that like the Supreme Court had held, "a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, and the balance of equities tips in his favor, and that an injunction is in the public interest."
- The court found that Dr. Fame was unable to establish that he was likely to succeed on the merits and that even if he were to ultimately prevail on the enforceability of the non-compete clause, "the issue presently [was] in equipoise as between the parties…"

- Since Dr. Fame was unable to demonstrate a likelihood of success on the merits, the Court did not have to discuss the threat to irreparable harm, balance the equities, or discuss the public interest.
- The court urged the parties to "seriously discuss mutual resolution" of the issue.

c. HOLDING:

i. The plaintiff could not establish the likelihood of success on the merits and was not entitled to a temporary injunction.

g. Other considerations when considering federal v. state practice

i. Restrictive covenants are contracts most often governed by state law instead of federal law. If diversity jurisdiction exists, parties may choose federal court if they want to be heard quickly on the merits, even though state law will still be applied. Other considerations may be if a Federal Court is more willing to issue injunctive relief.

ii. There are some related laws that can provide federal jurisdiction in these types of cases, such as the Defense of Trade Secrets Act (DTSA),[20] and the Computer Fraud and Abuse Act (CFAA).[21]

iii. The DTSA creates a new federal cause of action for employers and others for trade secrets misappropriation. The DTSA allows for injunctive relief, damages, double damages for willful and malicious appropriation, and attorney's fees.

iv. The CFAA, provides a civil cause of action for individuals and entities that have suffered a loss of at least $5,000 because of another's unauthorized access to computer or computer network. This can come into play when an employee steals any electronic data from the employer. The CFAA can provide a claim even if a restrictive covenant does not protect stolen information and/or the data does not qualify as a trade secret.

5. Perspectives from the Bench

Judges Gardiner, O'Grady and Tran

a. Historical Perspective of Assurance Data

b. Avoiding citing a Circuit Court opinion to a Circuit Court judge (especially if that judge is a colleague on the same bench)

[20] 18 U.S.C.§ 1831
[21] 18 U.S.C. § 1030

c. Avoiding citing federal opinion to a state judge?

d. Are Pleas in Bar for Restrictive Covenants the equivalent as to a defense to the Entire Case. In contract cases, aren't Plaintiffs required to prove an enforceable contract?

e. Federal Court's receptiveness to 12(b)(6) motion

f. Federal Court's receptiveness to Summary Judgment