In Search of Whales, Not Minnows:

Casting the Noncompete Net After *Omniplex*

by Gregory J. Haley[1] and Scott C. Ford

No area of business disputes has generated more litigation, judicial attention and stress to participants than the enforceability of covenants not to compete in employment agreements. In *Omniplex World Services Corp. v. US Investigations Services*, 270 Va. 246, 618 S.E.2d 340 (2005), a sharply divided Supreme Court of Virginia held a narrowly drafted noncompetition provision with a duration of less than a year to be overbroad and unenforceable based on the restriction's hypothetical application to a person delivering materials to a government agency.

Recent History

In *Omniplex,* the Court restated the well-established standard applied in reviewing a covenant not to compete:

> A noncompetition agreement between an employer and an employee will be enforced if the contract is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy. Because such restrictive covenants are disfavored restraints on trade, the employer bears the burden of proof and any ambiguities in the contract will be construed in favor of the employee. Each non-competition agreement must be evaluated on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved. Whether the covenant not to compete is enforceable is a question of law which we review *de novo*. (citations omitted).

270 Va. at 249, 618 S.E.2d at 342.

The disputes from which these standards arise have bedeviled the Supreme Court and other courts for decades. The Court's decisions have swung between reluctant enforcement of restrictive covenants according to their plain meaning, on one hand, to outright judicial hostility to enforcement efforts on the other.

In 1989 and 1990, the Court decided three cases enforcing restrictive covenants in varying circumstances. *See Blue Ridge Anesthesia and Critical Care Inc. v. Gidick*, 239 Va. 369, 389 S.E.2d 467 (1990) (holding a three-year noncompetition agreement enforceable against a salesman and two servicemen formerly employed by a medical equipment vendor); *Therapy Services Inc. v. Crystal City Nursing Center Inc.*, 239 Va. 385, 389 S.E.2d 710 (1990) (holding a provision in a contract between a rehabilitation services company and a nursing center that restricted the ability of the nursing center to hire employees of the rehabilitation services provider for six months after termination of the contract protected a legitimate interest of the rehabilitation services company and was not against public policy); *Paramount Termite Control Co. v. Rector*, 238 Va. 171, 380 S.E.2d 922 (1989) (holding a two-year

noncompetition provision and nonsolicitation of customer provision was valid and enforceable against five employees who began working for a competing pest control business based on the limited geographical scope of the restriction). Cumulatively, these decisions resulted in a higher level of certainty and predictability in suits brought to enforce noncompetition agreements.

This judicial receptivity to the enforcement of covenants not to compete continued through 1998. *See New River Meda Group Inc. v. Knighton,* 245 Va. 367, 429 S.E.2d 25 (1993) (holding that a twelve-month noncompetition agreement entered into after the termination of employment with a payment was enforceable against a radio station disc jockey and operations manager who accepted employment with a directly competing radio station within the sixty-mile radius specified in the agreement); *Rash v. Hilb, Rogal & Hamilton Co.*, 251 Va. 281, 467 S.E.2d 791 (1996) (affirming a judgment in a case involving a breach of a covenant not to compete in the insurance benefits business when the employee indirectly engaged in a business owned by his wife that competed with his former employer and took customers from the former employer); *Advanced Marine Enterprises Inc. v. PRC Inc.*, 256 Va. 106, 501 S.E.2d 148 (1998) (affirming a judgment based on a violation of a noncompetition provision where employees implemented a secret plan involving the mass resignation of an entire department's employees and the transfer of the department's business to the new employer). *But see Clinch Valley Physicians v. Garcia*, 243 Va. 286, 414 S.E.2d 599 (1992) (holding a noncompetition provision in an employment contract inapplicable by its terms when the contract was not "renewed"; plain meaning rule applied; strict construction to favor the employee adopted).

The Dawning of the New Millennium

After the decision in *Advanced Marine Engineering,* the Supreme Court's receptivity to enforce covenants not to compete turned frosty. In four decisions between 2001 and 2004, the Court held noncompetition provisions unenforceable. *See Simmons v. Miller*, 261 Va. 561, 544 S.E.2d 666 (2001) (holding that a noncompetition clause was unenforceable because the three year duration, the expansive scope of the restricted activities, and the lack of a geographic limitation made the restriction greater than necessary to protect the employer's interests and unduly oppressive to the employee); *Motion Control Systems Inc. v. East*, 262 Va. 33, 546 S.E.2d 424 (2001) (affirming the trial court's holding that a covenant not to compete was unenforceable because it imposed restraints that exceeded those necessary to protect the employer's legitimate business interests in a case involving an integral member of the employer's management team when the restricted activities could include enterprises unrelated to the employer's business of the specialized manufacture of brushless motors); *Modern Environments Inc. v. Stinnett*, 263 Va. 491, 561 S.E.2d 694 (2002) (affirming the circuit court's holding that a covenant not to compete was unenforceable when the covenant prohibited a former furniture sales person from employment in any capacity with a competitor); *Parr v. Alderwoods Group Inc.*, 268 Va. 461, 604 S.E.2d 432 (2004) (holding that a buyer's breach of payment obligations under an asset purchase agreement involving a funeral home business relieved the seller from any obligation under restrictive covenants in a management agreement and a lease agreement when the various agreements were part of an integrated transaction).

The Court's opinions in these cases implemented four analytical points. First, the examination of a covenant not to compete presents a question of law that will be reviewed *de novo*. *Motion Control*, 262 Va. at 37, 546 S.E.2d at 426. Second, the Court will determine the validity of a covenant not to compete by applying the legal principles specifically applicable to such covenants and not the standard principles of contract construction. *Motion Control, Id.* at 37, 546 S.E.2d at 425.

Third, the Court will not limit its review to considering whether the restrictive covenants are facially reasonable. Rather, the Court will examine the nature of the employer's interests, the nature of the employee's former and subsequent employment, whether the employee's actions actually violated the terms of the noncompetition agreement, and the nature of the restrictions in light of all of the circumstances of the case. *See Modern Environments*, 263 Va. at 494-495, 561 S.E.2d at 696.

Finally, a restrictive covenant cannot simply prohibit employment in any capacity with a competitor. Rather, the scope of the restrictive activity must be shown to serve a legitimate business interest of the employer. *Modern Environments*, 263 Va. at 495-496, 561 S.E.2d at 696. A covenant not to compete will be overly broad if it restricts activities that could include enterprises unrelated to the employer's business. *See Motion Control*, 262 Va. at 38, 546 S.E.2d at 426 (holding the covenant unenforceable because it prohibited employment in any business that sold motors, regardless of whether the motors were the specialized types of brushless motors sold by the employer).

The Rise of "Omniplexity"

In *Omniplex*, a divided Court held that a noncompetition provision was overly broad and unenforceable. Justice Elizabeth B. Lacy wrote for the four-justice majority and Justice G. Steven Agee wrote a vigorous dissent joined by two justices. The Court refused a postdecision petition for rehearing.

In *Omniplex*, the employer (Omniplex World Services) hired Kathleen Schaffer in August 2003 to work in a support role at an overt location of a sensitive government agency customer. Ms. Schaffer was a relatively low-level administrative employee with modest pay whose duties included monitoring alarms. Ms. Schaffer also had a coveted security clearance she had obtained while working for another company. In October 2003 Ms. Schaffer

accepted a job with a new employer (The Smith Company), also a staffing company, at a different location with different job duties. Ms. Schaffer had applied for employment with The Smith Company before going to work with Omniplex.

The Omniplex covenant not to compete covered only the one-year period after her employment began. If her employment was terminated, the restriction was in effect only for the remainder of that year. The employee agreed not to accept employment, become employed by, or perform any services for any other employer in a position supporting Omniplex's government customer if the employment required that the employee possess the same level of security clearance the employee relied on during employment with Omniplex. Omniplex paid Ms. Schaffer a two thousand-dollar signing bonus as part of the one-year agreement. The noncompetition provision, therefore, was for the short duration of less than one year, restricted employment activities with respect to a single government agency customer, and was triggered only if the same level of security clearance was required for the new employment. On the other hand, the noncompetition provision did not include a geographic limitation, nor did it require that the employee be engaged in activities in direct competition with Omniplex.

The majority reasoned that covenants not to compete prevented employees from engaging in activities that actually or potentially competed with the employee's former employer and, thus, covenants not to compete had been upheld only when employees were prohibited from competing directly with the former employer or through employment with a direct competitor. 270 Va. at 249, 618 S.E.2d at 342.

In a striking analysis, the Court concluded that the covenant was overly broad because it prohibited an employee from working with any business that provided support (of any kind) to Omniplex's government customer and was not limited to security staffing businesses that competed with Omniplex. *Id.* at 250, 618 S.E.2d at 342. The majority articulated a hypothetical example where the provision prohibited an employee from working as a delivery person for a vendor that delivered materials to the government customer even if the vendor was not a staffing service that competed with Omniplex. *Id.* at 250, 618 S.E.2d at 341-343. In this analysis, the majority did not examine the interrelated factors or the surrounding circumstances. Rather, the Court concluded that the noncompetition provision was overly broad based on a hypothetical situation in which it was theoretically possible that the restriction could apply to a fact situation that did not involve direct competition with Omniplex.

Omniplex sought to protect its workforce from "poaching" by other security staffing companies that needed employees who already had government security clearances. The Court's holding suggests an emerging requirement that a restrictive covenant may not be enforceable if it is directed at protecting a business interest other than restricting direct competition.

The dissenting justices, relying on the Court's decisions in *Modern Environments* and *Simmons*, emphasized the necessity of a fact-specific analysis. The dissent analyzed the Omniplex noncompetition provision and the related facts and concluded that the majority failed to give due weight to the narrow aspects of the restriction. 270 Va. at 255, 618 S.E.2d at 346.

The dissent also concluded that Omniplex had a legitimate business interest in protecting its workforce from "poaching" by competitors. *Id.* at 257, 618 S.E.2d at 347. Finally, the dissent dismissed the significance of the hypothetical delivery person posited by the majority as being an "unlikely" scenario and, in any event, such an effect would not render the restriction overly broad under the specific facts presented. *Id.* at 246, 618 S.E.2d at 346.

Primacy of the Intangibles

Some nuances in the recent decisions suggest possible trends in the Court's thinking and how the case law may develop in the future. The Court's approach will continue to be affected by intangible factors including "victim/villain" elements. For example, in *Omniplex*, Ms. Schaffer was a relatively low-level employee, her security clearance predated her employment with Omniplex, she applied for her job with The Smith Company before beginning work at Omniplex, and her new job involved different duties at a different location. Ms. Schaffer was not much of a villain. In addition, Omniplex's interest as an employer involved preventing the poaching of its staff, rather than directly protecting the customer relationship. Omniplex, therefore, was not much of a victim.

Although the employee in *Motion Control* was a senior manager, the new employer (Litton) was not directly competing with Motion Control in the manufacture of custom ordered brushless motors. The opinion notes the employer's concern that Litton could become a competitor in its main product line, but only in the future. Also, there was nothing in the record suggesting that the departing manager took any records or intended to disclose any trade secrets to his new employer. On these facts, the employer did not seem to be unduly victimized.

In *Omniplex, Motion Control* and *Modern Environments*, there was no suggestion of employees "sneaking around" such as secret meetings, purloined records, or concerted action by groups of employees, all as existed in *Advance Marine Engineering*. A key variable seems to be the existence (or absence) of facts establishing the departing employee "sneaking around."

Tips

With the rise of "Omniplexity," it is important that attorneys not have tunnel vision. The analysis must take into account the language of the agreement, the business of the employer and the specific conduct of both the employer and the employee. *Omniplex* highlights important considerations when litigating, drafting and counseling clients with noncompetition agreements.

Tips for the Litigator

The first step to enforce the noncompetition agreement generally will be a cease-and-desist letter to both the departing employee and new employer. If the letter does not resolve the dispute, you will then need to determine whether to file in state or federal court. The relief sought will generally be a request for temporary or preliminary injunction. An employer should promptly initiate this action, since failure to do so will run counter to any claim of irreparable injury.

The availability of injunctive relief in federal court typically is controlled by the court's diversity jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiffs, therefore, may have no choice but to pursue their claims in state court in the absence of diversity. Where a choice does exist, some of the factors influencing whether to file in state or federal court will include the speed in which a decision is required and the anticipated reaction by the court to noncompetition agreements.

Next, you will need to draft your complaint, preliminary injunction motion and supporting materials. The lawyer must consider other potential causes of action often available, including tortious interference with contract and/or business expectancy; misappropriation of trade secrets; statutory and/or common law conspiracy; conversion; and breach of fiduciary duty. A significant benefit to the statutory claims for misappropriation of trade secrets and statutory conspiracy is the availability of attorney's fees. Punitive or treble damages may also be available for these claims.

The lawyer must consider whether to include other defendants, such as the new employer, in addition to the departing employee. If the client's goal is recovery of money damages, it may be wise to bring in the new employer. However, if the client's goal is simply enforcement of the noncompetition agreement, bringing in a "deep pocket" that may vigorously defend the action may be counterproductive.

These cases are often won or lost at the preliminary injunction stage. The lawyer's time and energy, therefore, must be focused on the preliminary injunction issues from the first moment. In seeking enforcement, the employer must be able to articulate how the restriction directly protects its customer relationships or other competitive interests. The employer must go beyond "we used the form prepared by our lawyer."

If you represent the employer, investigate whether the employee took villainous actions that will negate any judicial sympathy. Few employees entering a new job can resist the temptation to improve their prospects by taking customer lists and company documents or otherwise exposing themselves to legal retribution.

If you represent the departing employee, collect facts to break open the weak spots in the covenant. The areas of investigation include:

- Does the covenant prohibit the employee from working for companies that are not direct competitors?
- Does the covenant prohibit the employee from working for a competitor "in any capacity"?
- What is the purported competitive interest protected by the restriction?
- Is the geographical restriction broader than the employer's actual customer base?
- What is the logic underlying the geographic and time restrictions in the covenant?
- Does the employer use a "one size fits all" form for employees at all levels?
- Does the employee require that all employees sign employment agreements?
- Has the employer consistently enforced noncompetition agreements signed by departed employees?

Litigation results in a winner and a loser only after each side has spent considerable money and time. Lawyers should consider a settlement that may permit the employee to compete in the market with restrictions that are narrower than those contained in the employment agreement. The parties in these disputes are often emotional and committed to their positions and initiating meaningful settlement discussions can be difficult.

Tips for the Drafter

Unlike most contracts, where the court will simply enforce the plain language of a lawful contract between competent parties, a court will not automatically enforce a covenant not to compete. For example, is the employee a high-level executive with access to substantial confidential information who has left to work with the largest competitor performing the same job? Or is the employee (like Kathleen Schaffer in *Omniplex*) a low-level worker with little access to confidential information who has gone to work with a competitor in an entirely different job?

Drafters must be aware that one size definitely does not fit all. Using a boilerplate noncompetition provision for all clients is never a good practice. A strategy to maximize the chances of enforceability is to catch the whales and forget the minnows. This may involve a new way of looking at the drafting of these agreements.

Drafting a noncompetition provision that has a reasonable chance of enforcement is a maddening task. The client, of course, sees the task as simple scrivening. The lawyer must sit down with the client to learn the business and competition.

Once that is done, the drafter should put together an agreement that ensures a legitimate interest of the employer is protected and that is reasonable from the standpoint of the employee.

The courts primarily examine the following factors when evaluating the enforceability of a restraint:

- **Time Restriction**. Virginia courts have permitted time restrictions up to three years; however, up to two years is more likely to withstand scrutiny.[2]

- **Geographic Restriction**. Geographic restrictions should not reach any further than the market area that the employer actually competes in.[3] There must be some logical nexus between the location of the employer's business activity and the restricted geographic area. To maximize chances of enforceability, it is a good practice to only include geographic restrictions that cover the area that the employee actually works in.[4] Language used to define the geographic scope should be clear and unambiguous.

- **Activities Restricted**. Drafters should be certain that the activities restricted are limited to the actual work performed by the employee with only the employer's actual direct competitors.[5] Many covenants not to compete contain language barring former employees from working for "competitors" in any capacity whatsoever, including, for example, as a janitor. These are not likely to be enforceable. The defense asserted in opposition to such a broad restriction is referred to as the "janitor defense."[6] The employer's direct competitors should be identified by name, if practical, and only include the actual major competitors of the employer. Language that the restrictive covenant does not bar the employee from work in some other role which does not compete with the business of the employer is also advisable.[7]

The cases reflect a sort of sliding scale as to time, geography and activities restricted. For example, a court is more likely to enforce a longer period of noncompetition where the geographic scope and restricted activities are tightly drawn.

A well-drawn employment agreement should also include the following terms, preferably in separately numbered paragraphs:

- **Non-solicitation of customers**. These should be limited to prohibiting solicitation of the employer's actual customers (preferably identified by name) for a discrete period and a limited geographic region.

- **Confidentiality**. Requires return and prohibits disclosure of employer's confidential information upon termination. Confidential information should include all records of the employer, including those maintained on noncompany computers used by the employee or personally created by the employee.

- **Choice of law and forum selection**. Requires any dispute over the employment agreement to be heard in the court where the employer is located and provides a choice of law. Virginia courts recognize the enforceability of forum selection clauses unless they are "unfair or unreasonable or are affected by fraud or unequal bargaining power."[8] An employer can gain a significant advantage in presenting its case in a local court.

- **Severability**. States that if any separate provision of the agreement is declared unenforceable, the remaining terms of the agreement will be enforced. Virginia courts will not blue-pencil noncompetition or nonsolicitation provisions to make them enforceable, but courts may sever invalid provisions from an agreement and enforce the balance.[9]

- **Attorney's fees and costs**. Provides for attorney's fees and costs should the employer be required to seek enforcement of the contractual provisions. If possible, the employee should bargain to delete the provision or change it to a prevailing party provision.

- **Mutual agreement**. States that the terms have been mutually agreed upon by the parties and should not be construed in favor of any one party.

- **Injunctive relief**. Expressly authorizes the enforcement of the agreement by temporary, preliminary and permanent injunction. This provision should state that the parties recognize a breach of the agreement will irreparably injure the employer's business interests.

- **Integration**. Excludes claims of prior oral statements.

- **Entirety provision**. States that the agreement constitutes the entire agreement of the parties.

- **No avoidance for first breach by employer**. Provides that the terms of the employment agreement will be enforced against the employee even if the employer breaches first.[10]

- **Right to disclose terms of employment agreement to third parties**. This may prove helpful in avoiding any counterclaim by the departing employee.

- **Nonsolicitation of employees**. Prohibits solicitation of the employer's employees.

Tips for Advising the Client

Attorneys providing counsel should be careful not to have tunnel vision by merely reviewing the language of the agreement. Instead, any inquiry as to enforceability must include an examination of the circumstances of the particular employer and employee with a clear understanding that courts disfavor these covenants. *Omniplex* and other recent decisions of the Supreme Court illustrate this disfavored status.

A tendency by employers to cast the noncompetition net too broadly should be avoided. Employers must be advised to focus on catching whales and forget the minnows. Concentrate on preparing agreements for high-level employees whose access to confidential information and customer relationships will harm the organization should they leave to work for the competition. Noncompetition provisions

should be narrowly tailored and customized to reflect the nature of the particular employer-employee relationship.

Employees should be advised that their conduct might determine whether the agreement they have signed will be enforced. If the employee presents an agreement that appears unenforceable on its face, it may be a good strategy to seek a declaratory judgment that the agreement is unenforceable before the employee starts competing.

Also, employees should be counseled to carefully consider whether to sign a noncompetition provision in the first place. Many employees mistakenly believe such agreements are per se unenforceable in Virginia and sign them thinking they will never be enforced. It may be proper advice to suggest that employees simply refuse to sign such agreements, negotiate narrower terms, and/or require greater consideration when signing them.

Conclusion

Time will tell whether the majority's decision in *Omniplex* will harden into doctrine or turn out to be the high-water mark of a tide of judicial hostility to enforcement of postemployment restrictions. The Court's decision in *Omniplex* may represent a movement in the law to further limit the circumstances in which a court will enforce a covenant not to compete. ⚖

Endnotes:

1 The authors thank W. David Paxton and others for their help and ideas.

2 *Blue Ridge Anethesia & Critical Care* (holding that three-year prohibition on employment with competitive firms was reasonable where the geographic scope included only the territories serviced by former salesmen and only those activities were prohibited that would compete with the plaintiff's business); *Paramount Termite Control* (holding that a two-year time restriction and a geographic limitation based upon the counties "in which the Employee was assigned" was reasonable"); *Roanoke Engineering Sales Co. v. Rosenbaum*, 223 Va. 548, 290 S.E.2d 882 (1982) (finding a period of three years and a geographic limit defined by the "territory covered by Roanoke [Engineering Sales Company] to be reasonable); *Fisb v. Collins*, 9 Va. Cir. 64 (Frederick Cty. Cir. Ct. 1987 (permitting five-year restriction where geographic and restricted activity were narrow). *But see Simmons v. Miller*, 261 Va. 561, 544 S.E.2d 666 (2001) (declining to enforce three-year restriction where the activities restricted were deemed to be broader than the plaintiff's business activity and the geographic scope was not limited).

3 *See Advanced Marine Enterprises* (upholding a noncompetition and nonsolicitation restriction on marine engineers within fifty miles of any of the employer's three hundred offices located worldwide where the time period was limited to eight months and the activities were narrowly defined); *New River Media Group* (upholding twelve-month restriction on radio disc jockey from engaging in competing business within sixty air miles of former employer's radio station where the radius of the station's signal strength was sixty air miles); *Blue Ridge Anesthesia* (upholding three-year restriction of performing same or similar services within any of the territories serviced by agent of employer providing, however, that employee able to work in medical industry in same role which would not compete with business of employer). *But see, John J. Wilson Associates, Inc. v. Smith*, 2000 WL 1915928 (Va. Cir. Ct. Oct. 20, 2000) (noncompetition agreement that prohibited employee from working in a similar business anywhere Gress & Associates within Virginia was held geographically overbroad).

4 *Alston Studios Inc. v. Lloyd V. Gress & Associates*, 492 F.2d 279 (4th Cir. 1974) (held covenant not to compete was overbroad both as to geography and the activities of future employment in that it encompassed activities in which defendant was not engaged); *Pais v. Automation Products Inc.*, 36 Va. Cir. 230 (Newport News Cir. Ct. 1995) (geographic restriction held too broad and unenforceable that prohibited competition within 125 miles of any office of the employer or workplace of an employee of employer).

5 Compare *Motion Control* (covenant not to compete restricting employment with motor manufacturers that did not manufacture motors similar to employer overbroad because covenant did not protect against competition), and *Richardson v. Paxton Co.*, 203 Va. 790, 795, 127 S.E.2d 113, 117 (1962) (covenant not to compete restricted from employee, who sold specific supplies and services, from working for any employer involved with any kind of supplies, equipment, or services in the same industry overbroad because covenant encompassed business for which employer did not compete), with *Blue Ridge Anesthesia* (noncompetition agreement reasonable because restriction protected against direct competition by prohibiting former employees from employment with another company in a position selling similar medical equipment to that sold by former employee), and *Roanoke Engineering Sales Co. v. Rosenbaum*, 223 Va. 548, 553, 290 S.E.2d 882, 885 (1982) (noncompetition covenant reasonable because employment restriction limited to activities similar to business conducted by former employee).

6 In *Modern Environments* the Court addressed head-in the so-called "janitor defense" finding a provision that prohibited employment in any capacity with a competitor as overbroad and unenforceable.

7 *See Blue Ridge,* supra, 389 S.E.2d at 469.

8 *Paul Business Systems Inc. v. Canon U.S.A. Inc.*, 240 Va. 337, 397 S.E.2d 804 (1990).

9 *Roto-Die Inc. v. Lesser,* 899 F. Supp. 1515, 1518 (W.D. Va. 1995) (severing overbroad portions of employment agreement and enforcing those not overbroad, but refusing to "blue-pencil agreement"). *But see, No. Va. Psychiatric Group, P.C. v. Halpern,* 19 Va. Cir. 279 (1990) (declining to sever or blue-pencil offending terms and sustaining defendant's motion to dismiss).

10 *Wiess v. EVMS Academic Physicians and Surgeons Health Services Foundation,* Chancery No. CH05-1362, Circuit Court of the City of Norfolk (August 30, 2005) (holding that parties to an employment contract may agree that a covenant not to compete will be enforceable even if the employer breaches other provisions of the contract).

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