

1980

## Employee Covenants Not to Compete: Where Does Virginia Stand?

Ann R. Bergan  
*University of Richmond*

Kenneth E. Chadwick  
*University of Richmond*

Hugh T. Harrison II  
*University of Richmond*

Barrett E. Pope  
*University of Richmond*

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Contracts Commons](#), and the [Labor and Employment Law Commons](#)

---

### Recommended Citation

Ann R. Bergan, Kenneth E. Chadwick, Hugh T. Harrison II & Barrett E. Pope, *Employee Covenants Not to Compete: Where Does Virginia Stand?*, 15 U. Rich. L. Rev. 105 (1980).

Available at: <http://scholarship.richmond.edu/lawreview/vol15/iss1/5>

This Note is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

# NOTE

## EMPLOYEE COVENANTS NOT TO COMPETE: WHERE DOES VIRGINIA STAND?\*

I. Introduction .....	107
II. Reasonableness of the Covenant .....	108
A. Background .....	108
B. Consideration .....	108
1. Introduction .....	108
2. Contracts Which Directly Affect the Employee's Status .....	109
3. Contracts Which Do Not Affect Employee's Status .....	111
4. Conclusion .....	116
C. Rule of Reasonableness .....	117
1. Introduction .....	117
2. Reasonableness as to Employer .....	118
a. Legitimate Interests .....	119
i. Customer Contact Theory .....	120
ii. Confidential Business Matters and Trade Secrets .....	123
b. Correlation Between Legitimate Interest and Covenant .....	125
3. Reasonableness as to Employee .....	126
a. Introduction .....	126
b. Time .....	126
c. Area .....	129
d. Activity .....	131
e. Conclusion .....	132
4. Reasonableness as to Public .....	133
III. Modification .....	135
A. Introduction .....	135
B. The Three Views .....	136
C. The Law in Virginia .....	141
D. Conclusion .....	144

---

\* The student contributors are Ann R. Bergan, Kenneth E. Chadwick, Hugh T. Harrison, II, and Barrett E. Pope.

IV. Conflict of Laws .....	144
A. Introduction .....	144
B. Validity .....	146
1. Contract Made and Performed in Same Jurisdiction	146
2. Contracts Made in One Place and Performed in Another Place .....	146
C. Conclusion .....	150
V. Conclusion .....	150

## I. INTRODUCTION

Courts for some time now have been forced to deal with the validity of covenants not to compete as contained in employment contracts.<sup>1</sup> Considered to be a restraint against trade,<sup>2</sup> these covenants under common law were viewed with disfavor, if not hostility, both nationally and in the Commonwealth of Virginia, as being contrary to the American ideals of individual freedom, competition, and the free flow of commerce. As such they were seldom upheld. It was only after the courts recognized that employers had legitimate concerns and interests worthy of protection<sup>3</sup> that *reasonable* covenants not to compete began to be enforced by injunction following a breach.<sup>4</sup>

---

1. Cases dealing with covenants not to compete which involve the sale of a business or pension plans are not covered in this article. Covenants not to compete as found in employer-employee contracts are distinguished from covenants not to compete as found in sale of businesses and are more strongly limited as to the scope of permissible restraint. *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279, 284 (4th Cir. 1974). For a Virginia case dealing with covenants not to compete in pension plans, see *Rochester v. Rochester Corp.*, 316 F. Supp. 139 (E.D. Va. 1970), *aff'd in part, rev'd in part*, 450 F.2d 118 (4th Cir. 1971). Covenants in partnerships are within the scope of this article since courts evaluate them in the same manner as covenants in employer-employee contracts. See generally *Freudenthal v. Espey*, 45 Colo. 488, 102 P. 280 (1909); *Granger v. Craven*, 159 Minn. 296, 199 N.W. 10 (1924); *Foti v. Cook*, 220 V.R.R. 771, 263 S.E.2d 430 (1980); *Meissel v. Finley*, 198 Va. 577, 95 S.E.2d 186 (1956).

2. "Since the restraint sought to be imposed restricts the employee in the exercise of a gainful occupation, it is a restraint in trade. . . ." *Richardson v. Paxton Co.*, 203 Va. 790, 795, 127 S.E.2d 113, 117 (1962). See also *Deuerling v. City Baking Co.*, 155 Md. 280, 141 A. 542 (1928).

3. "Freedom to contract must not be unreasonably abridged. Neither must the right to protect by reasonable restrictions that which a man by industry, skill, and good judgment has built up be denied." *Worrie v. Boze*, 191 Va. 916, 928, 62 S.E.2d 876, 882 (1951) (citing *Granger v. Craven*, 159 Minn. 296, —, 199 N.W. 10, 12 (1924)). See notes 70-127 *infra* and accompanying text.

4. Injunctive relief will be granted where the employer proves that nonenforcement of the covenant will result in irreparable harm to or substantial interference with his business. *Smithereen Co. v. Renfroe*, 325 Ill. App. 229, 59 N.E.2d 545 (1945); *Stoneman v. Wilson*, 169

A comprehensive survey of the cases involving employee covenants not to compete reveals that the particular facts and circumstances in each case govern whether the covenant will be enforceable. "Precedents are of little value, because the question of reasonableness must be decided on an ad hoc basis."<sup>5</sup> As Judge Hoover observed:

[An employee's covenant not to compete] is not one of those questions on which the legal researcher cannot find enough to quench his thirst. To the contrary there is so much authority it drowns him. It is a sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long.<sup>6</sup>

It is into this "sea" that we launch in an effort to develop some general guidelines for the draftsman to consider in his quest to create a *reasonable* covenant suited to the needs of his client. While it is difficult to predict whether a court will enforce a particular covenant, a knowledge of case law is beneficial before that quest begins. Emphasis will be on Virginia case law<sup>7</sup> but not to the exclusion of important decisions in other jurisdictions, especially since Virginia apparently follows the national trend.

In addition to exploring the issues raised by courts in their investigation of the reasonableness of a covenant not to compete, this note will also analyze the various positions taken on the modification of these covenants and will discuss the conflict of laws problems which arise under

---

Va. 239, 192 S.E. 816 (1937); *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, 98 N.W.2d 415 (1959). However, an injunction should not issue where it would "operate oppressively or contrary to the real justice of the case, or where it is not the fit and appropriate method of redress under all the circumstances of the case, or when the benefit it will do the complainant is slight in comparison with the injury it will do the defendant." *Sternberg v. O'Brien*, 48 N.J. Eq. 370, —, 22 A. 348, 350 (1891).

5. 54 AM. JUR. 2d, *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 543 (1971).

6. *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 62 Abs. 17, —, 105 N.E.2d 685, 687 (Ohio 1952).

7. *Maryland Undercoating Co. v. Payne*, 603 F.2d 477 (4th Cir. 1979); *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279 (4th Cir. 1974); *National Homes Corp. v. Lester Indus., Inc.*, 293 F. Supp. 1025 (W.D. Va.); *aff'd in part, rev'd in part*, 404 F.2d 225 (4th Cir. 1968); *Davis-Robertson Agency v. Duke*, 119 F. Supp. 931 (E.D. Va. 1953); *Foti v. Cook*, 220 V.R.R. 771, 263 S.E.2d 430 (1980); *Linville v. Servisoft of Va., Inc.*, 211 Va. 53, 174 S.E.2d 785 (1970); *Richardson v. Paxton Co.*, 203 Va. 790, 127 S.E.2d 113 (1962); *Meissel v. Finley*, 198 Va. 577, 95 S.E.2d 186 (1956); *Worrie v. Boze*, 191 Va. 916, 62 S.E.2d 876 (1951); *Klaff v. Pratt*, 117 Va. 739, 86 S.E. 74 (1915). See *Sperry Rand Corp. v. A-T-O, Inc.*, 447 F.2d 1387 (4th Cir. 1971), *vacating in part Sperry Rand Corp. v. Electronic Concepts, Inc.*, 325 F. Supp. 1209 (E.D. Va. 1970), *cert. denied*, 405 U.S. 1017 (1972); *Stoneman v. Wilson*, 169 Va. 239, 192 S.E. 816 (1937). See generally 12B MICHES JURISPRUDENCE *Master and Servant* § 6 (1978).

certain circumstances.

## II. REASONABLENESS OF THE COVENANT NOT TO COMPETE

### A. Background

The covenant not to compete in employment contracts is primarily "business stability insurance" for the employer.<sup>8</sup> Generally, a former employee after termination of his employment, may compete with his former employer;<sup>9</sup> however, a contract containing a restrictive covenant restrains the employee from making "use of weapons placed by [his employer] . . . in his . . . hands during his service . . . which may be turned against" his former employer for the purposes of unfair competition.<sup>10</sup> To protect himself from unfair competition, the employer often includes a covenant in the employment contract stating that upon leaving his employ the employee will not compete with him either within a particular area or with certain customers for a certain period of time. By means of an enforceable covenant the employer not only protects himself from competition by an ex-employee but also protects himself against unfair competition from a rival firm trying to hire his employees.<sup>11</sup>

### B. Consideration

#### 1. Introduction

In order for there to be an enforceable covenant not to compete, and before the court even gets to the issue of the covenant's reasonableness, there must be adequate consideration to support the restraint in the contract. It has long been the rule at common law, that contracts in restraint of trade made independently of a sale of business or a contract of employment are void as against public policy, regardless of the value of the consideration.<sup>12</sup> While covenants not to compete that are ancillary to employ-

---

8. Note, *Covenant Not to Compete—Enforceability Under Missouri Law*, 41 Mo. L. Rev. 37, 41 (1976).

9. *Community Counselling Serv., Inc. v. Reilly*, 317 F.2d 239, 244 (4th Cir. 1963). See 12B MICHIGEN JURISPRUDENCE *Master and Servant* § 6 (1978). Note that even under the general rule, the employee even without a covenant to compete in his contract is prohibited from using confidential information or trade secrets obtained from his former employer. 317 F.2d at 244. This also applies in some jurisdictions to confidential customer lists unless the list may be readily discoverable by other means. *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944).

10. *May v. Young*, 125 Conn. 1, —, 2 A.2d 385, 388 (1938). Accord *Thomas W. Briggs Co. v. Mason*, 217 Ky. 269, 289 S.W. 295 (1926).

11. *Deuerling v. City Baking Co.*, 155 Md. 280, 141 A. 542 (1928).

12. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S.

ment contracts may be enforced if reasonable, they are "no different from other promises in requiring a consideration for enforceability."<sup>13</sup>

Generally courts will not inquire into the adequacy of consideration when determining the validity of a covenant not to compete. Hence, in order to determine whether a remedy is available "at law" the courts must merely determine whether the restraint is reasonable and consistent with the law and whether there is legal consideration to support the contract.<sup>14</sup> Therefore, in actions for damages for breach of contract, a recitation of consideration or a seal may be sufficient to support such contracts.<sup>15</sup> This discussion of consideration, however, will be concerned exclusively with the enforcement of restrictive covenants in equity as this is the area in which the great bulk of the litigation is found. Here the courts look past mere recitations of consideration in an attempt to examine the extent and character of the consideration received by the promisor, as this is one of the factors that equity courts use to determine whether covenants not to compete are reasonable and, hence, enforceable.<sup>16</sup>

## 2. Contracts Which Directly Affect the Employee's Status

To date no cases have been decided in Virginia with regard to the extent of consideration necessary to enforce a covenant not to compete contained in an employment contract. In the normal case, where a prospective employee enters into an employment contract containing a covenant not to compete before commencing employment, consideration is not an issue in the determination of the reasonableness of the restriction. In these cases, the contracts are never found devoid of consideration because the employer's agreement to hire the employee is sufficient consideration to support the employee's promise not to compete upon termination of the employment.<sup>17</sup> This principle was enunciated by the Pennsylvania Supreme Court when the court stated that where "the restrictive covenant is ancillary to a contract establishing an employment relationship, where none existed previously thereto, the employment constitutes con-

---

211 (1899); *Capital Bakers, Inc. v. Townsend*, 426 Pa. 188, 231 A.2d 292 (1967); RESTATEMENT OF CONTRACTS § 515(e) (1932).

13. 6 A. CORBIN, CONTRACTS § 1395 (1962).

14. 54 AM. JUR. 2d *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 513 (1971).

15. 1 A. CORBIN, CONTRACTS § 252 (1963).

16. 6 A. CORBIN, CONTRACTS § 1395 (1962).

17. See, e.g., *Rider v. Orkin Exterminating Co.*, 224 Ga. 145, 160 S.E.2d 381 (1968); *Wilmar, Inc. v. Corsillo*, 24 N.C. App. 271, 210 S.E.2d 427 (1974), cert. denied, 286 N.C. 421, 211 S.E.2d 802 (1975).

sideration supporting that covenant."<sup>18</sup> Virginia and federal courts applying Virginia law have had no problem enforcing such covenants which are ancillary to an initial employment contract where the terms of the covenant are not otherwise unreasonable.<sup>19</sup>

Similarly, the courts have consistently enforced restrictive covenants entered into by an employee, already employed under a pre-existing employment contract, where the employee receives new consideration when he enters into an employment contract containing a restrictive covenant. This new consideration may be in the form of any substantial change in the employee's status, whether it is a change in position or duties,<sup>20</sup> an increase in salary,<sup>21</sup> a change in the manner of compensation,<sup>22</sup> the receipt of a definite term of employment,<sup>23</sup> or the provision for an annuity upon retirement,<sup>24</sup> as long as the change in the status of the employee can be attributed directly to the employment contract containing the restrictive covenant. The Virginia Supreme Court appears to have at least impliedly accepted a change in the method of compensation for an employee from straight salary to commission as being sufficient consideration to support

---

18. *Barb-Lee Mobile Frame Co. v. Hoot*, 416 Pa. 222, \_\_\_, 206 A.2d 59, 61 (1965).

19. *See, e.g., National Homes Corp. v. Lester Indus., Inc.*, 293 F. Supp. 1025 (W.D. Va.), *aff'd*, 404 F.2d 225 (4th Cir. 1968); *Worrie v. Boze*, 191 Va. 916, 62 S.E.2d 876 (1951).

20. *See, e.g., Forrest Paschal Mach. Co. v. Milholen*, 27 N.C. App. 678, 220 S.E.2d 190 (1975) (the court held that a promotion from acting general manager to general manager coupled with a two-year employment contract was sufficient consideration to support a covenant not to compete contained in the employment contract). *See also Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961) (it was held that a change in position and duties of an employee from clerical work to sales provided the necessary consideration).

21. *See, e.g., Mail-Well Envelope Co. v. Saley*, 262 Or. 143, 497 P.2d 364 (1972). The Oregon Supreme Court held that where a salesman received a guaranteed salary above that which he had previously received, there was consideration to support the underlying covenant not to compete.

22. *See, e.g., M.S. Jacobs & Assoc., Inc. v. Duffley*, 452 Pa. 143, 303 A.2d 921 (1973) (the court found consideration in fact that defendant employee was made a salesman and put on commission plus expenses basis of remuneration); *Jacobson & Co. v. International Environment Corp.*, 427 Pa. 439, 235 A.2d 612 (1967) (employee received a reduction in salary and a profit sharing arrangement which resulted in an increase in compensation). It should be noted that, in both cases, the change in the method of compensation resulted in an increased compensation to the employee. It is unlikely that a change in the method of compensation which works to the detriment of the employee would be considered to be sufficient consideration to support a covenant not to compete.

23. *See, e.g., Forrest Paschal Mach. Co. v. Milholen*, 27 N.C. App. 678, 220 S.E.2d 190 (1975) (two-year contract of employment was sufficient consideration).

24. *See, e.g., Stover v. Gamewell Fire Alarm Tel. Co.*, 164 A.D. 155, 149 N.Y.S. 650 (1914) (the court held that an agreement to pay employee an annuity for ten years after retirement supported a covenant not to compete).

a covenant not to compete.<sup>25</sup>

It should be remembered, however, that courts of equity will look to the extent and character of the consideration and, hence, nominal monetary consideration will not support a covenant not to compete,<sup>26</sup> nor generally will the fact that the new employment contract requires notice of termination support such a covenant.<sup>27</sup>

### 3. Contracts Which Do Not Affect Employee's Status

Contracts which include covenants not to compete which are entered into between an employer and an employee after the inception of employment have been a source of confusion for the courts, especially where the employee has not received a corresponding change in status for entering into such an agreement. A problem arises as it appears that the employer receives the employee's promise not to compete while giving the employee nothing in exchange. While there is little question that these agreements are not enforceable at their inception,<sup>28</sup> there is a split of authority as to whether performance under such a contract imports the consideration necessary to support it.<sup>29</sup>

Virginia has never adjudicated this question, but there are decisions which appear to give some indication as to the course which the courts would take if the question were presented. The Virginia Supreme Court has held that a promise which is void for lack of mutuality and considera-

---

25. *Richardson v. Paxton Co.*, 203 Va. 790, 127 S.E.2d 113 (1962). In this case an employee signed a contract containing a covenant not to compete three years after being employed by the company. The employment contract did change the employee's method of compensation from a salary to a commission basis and provided for a thirty-day notice of termination, but it did not otherwise change defendant's duties or remuneration. While the court held the covenant unenforceable as its terms were unduly harsh on the employee, it was never hinted that the covenant may fail for lack of consideration.

26. *See, e.g., Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944); *George W. Kistler, Inc. v. O'Brien*, 464 Pa. 475, 347 A.2d 311 (1975). In neither case did the court consider the possibility that the recited consideration of one dollar and continued employment would import the consideration necessary to support the contract.

27. *See, e.g., Capital Bakers, Inc. v. Townsend*, 426 Pa. 188, 231 A.2d 292 (1967) (thirty-day notice in the event of termination did not supply the consideration necessary to support the contract); *Markson Bros. v. Redick*, 164 Pa. Super. Ct. 499, 66 A.2d 218 (1949) (one-week notice prior to termination was not sufficient consideration). *But see Chandler, Gardner & Williams, Inc. v. Reynolds*, 250 Mass. 309, 145 N.E. 476 (1924) (the contract reserved a power in the employer to terminate the employment for good cause and the court found consideration by reading into the contract a requirement that the employer exercise honest judgment).

28. *See Roessler v. Burwell*, 119 Conn. 289, 176 A. 126 (1934).

29. *See notes 37-67 infra* and accompanying text.

tion at its inception may secure the necessary consideration to make the contract enforceable if the parties perform under the contract.<sup>30</sup> The court clearly enunciated its position when it stated:

[W]here one makes a promise conditioned upon the doing of an act by another, and the latter does the act, the contract is not void for want of mutuality, and the promisor is liable though the promisee did not at the time of the promise engage to do the act; for upon the performance of the condition by the promisee, the contract becomes clothed with a valid consideration which renders the promise obligatory.<sup>31</sup>

While there is some authority to the contrary,<sup>32</sup> it appears that the court would be disposed to uphold a covenant not to compete entered into after the time of the initial employment if the parties subsequently perform pursuant to the contract; *i.e.*, the employee remains employed by the employer and receives the compensation normally attributable to such a relationship. The decision in *Twohy v. Harris*<sup>33</sup> must be read in light of the fact that it was not concerned with an employee covenant not to compete. In these cases the court will carefully examine and strictly construe these covenants since they are in restraint of trade,<sup>34</sup> and consequently the court places the burden of proving the validity of such a contract upon the employer.<sup>35</sup> It has been noted that although continued employment would certainly be sufficient to support an ordinary contract such conduct may not support contracts containing covenants not to compete.<sup>36</sup>

The Virginia position remains unascertainable, and a survey of other jurisdictions does little to clarify the law in this area as the courts are divided on whether continued employment constitutes sufficient consideration to support the covenants. The states of Arkansas,<sup>37</sup> Alabama,<sup>38</sup> Connecticut,<sup>39</sup> Florida,<sup>40</sup> Georgia,<sup>41</sup> Iowa,<sup>42</sup> Kentucky,<sup>43</sup> Miss-

30. *Twohy v. Harris*, 194 Va. 69, 72 S.E.2d 329 (1952) (the court upheld a promise of an employer to give an employee a ten percent interest in the corporation if the employee agreed to remain in the employ of the corporation).

31. *Id.* at 81, 72 S.E.2d at 336, citing 12 AM. JUR. *Contracts* § 14

32. *Southern Ry. v. Willcox*, 98 Va. 222, 35 S.E. 355 (1900). Here the court ruled that an agreement which is not binding at the inception is *nudum pactum*. This case appears to be at best outdated, if not overruled by implication.

33. 194 Va. 69, 72 S.E.2d 329 (1952).

34. *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279 (4th Cir. 1974); *Richardson v. Paxton Co.*, 203 Va. 790, 127 S.E.2d 113 (1962).

35. *Linville v. Servisoft of Va., Inc.*, 211 Va. 53, 174 S.E.2d 785 (1970).

36. 6 A. CORBIN, *CONTRACTS* § 1395 n.91 (1962).

37. *See, e.g.*, *Bailey v. King*, 240 Ark. 245, 398 S.W.2d 906 (1966) (actual employment for two years after signing a covenant not to compete provided the consideration to support it).

38. *See, e.g.*, *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 229 So. 2d 480 (1969) (continued

issippi,<sup>44</sup> Missouri,<sup>45</sup> New Jersey,<sup>46</sup> and Texas<sup>47</sup> generally find consideration in such an event. The courts, however, appear to proceed on a variety of theories. Some courts hold flatly that continued employment by an employee who is under no obligation to remain, and the continuance by the employer of the employment where continuance is not required, supplies adequate consideration to support a secondary contract of employment entered into after the commencement of employment.<sup>48</sup>

Other courts proceed on the theory of executed consideration.<sup>49</sup> In other words, a contract which is voidable for lack of mutuality because by its terms it does not bind one of the parties becomes obligatory if the promisee performs under such an agreement as if he were bound. As ex-

---

employment, the willingness of the company to continue to employ defendant in the future and a three month term of employment provided valid consideration for signing the contract).

39. See *Roessler v. Burwell*, 119 Conn. 289, 176 A. 126 (1934) (continued employment for five years was sufficient).

40. See, e.g., *McQuown v. Lakeland Window Cleaning Co.*, 136 So. 2d 370 (Fla. Ct. App. 1962); *Tasty Box Lunch Co. v. Kennedy*, 121 So. 2d 52 (Fla. Ct. App. 1960). Both courts held that where the employment was terminable at will by the employer, continued employment and agreement to compensate the employee was consideration for the covenant not to compete.

41. See, e.g., *Thomas v. Coastal Indus. Serv., Inc.*, 214 Ga. 832, 108 S.E.2d 328 (1959); *Breed v. National Credit Ass'n.*, 211 Ga. 629, 88 S.E.2d 15 (1955).

42. See, e.g., *Farm Bureau Serv. Co. of Maynard v. Kohls*, 203 N.W.2d 209 (Iowa 1972) (continued employment for one year was sufficient).

43. See *Louisville Cycle & Supply Co. v. Baach*, 535 S.W.2d 230 (Ky. 1976).

44. See, e.g., *Frierson v. Sheppard Bldg. Supply Co.*, 247 Miss. 157, 154 So. 2d 151 (1963) (the court held that continued employment for four years was sufficient where evidence showed that the employee would have been discharged had he not signed the covenant not to compete).

45. See, e.g., *Reed, Roberts Assocs., Inc. v. Bailenson*, 537 S.W.2d 238 (Mo. Ct. App. 1976) (court held that defendant supplied consideration by his agreement to perform services for the plaintiff and that the plaintiff likewise had supplied consideration by his agreement to employ defendant and pay him a weekly salary).

46. See *Credit Rating Serv., Inc. v. Charlesworth*, 126 N.J. Eq. 360, 8 A.2d 847 (1939) (continued employment for three years was sufficient to support covenants not to compete for three years after the termination of employment).

47. See, e.g., *McAnally v. Person*, 57 S.W.2d 945 (Tex. Civ. App. 1933) (continued employment was sufficient consideration where it appeared that employee would have been discharged had he not signed covenant not to compete).

48. See, e.g., *Bailey v. King*, 240 Ark. 245, 398 S.W.2d 906 (1966); *Tasty Box Lunch Co. v. Kennedy*, 121 So. 2d 52 (Fla. Ct. App. 1960); *Farm Bureau Serv. Co. of Maynard v. Kohls*, 203 N.W.2d 209 (Iowa 1972); *Reed, Roberts Assocs., Inc. v. Bailenson*, 537 S.W.2d 238 (Mo. Ct. App. 1976).

49. See, e.g., *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 229 So. 2d 480 (1969); *Roessler v. Burwell*, 119 Conn. 289, 176 A. 126 (1934); *Breed v. National Credit Ass'n.*, 211 Ga. 629, 88 S.E.2d 15 (1955).

plained by the Georgia court:

Performance by the parties supplied mutuality and sufficient consideration to vitalize the ancillary agreement of the defendant into an enforceable contract. . . . "Though a promise may be a nudum pactum when made because the promisee is not bound, it becomes binding when he subsequently furnishes the consideration by doing what he was expected to do."<sup>50</sup>

Still other courts will uphold contracts on the basis of continued employment where the evidence shows that if the employee had not signed the covenant not to compete he would have been discharged.<sup>51</sup> The threat of dismissal acts to terminate the original agreement, and the continued employment is sufficient to support the subsequent agreement as such continued employment can be explained only as a result of the subsequent agreement.

It must be remembered that equity courts weigh the sufficiency of the consideration;<sup>52</sup> therefore, it is unlikely that any of these courts would uphold a contract where the employee remains in the employ of the promisee for only a short time after the secondary agreement.<sup>53</sup> In every case found where the courts upheld these agreements the employee remained employed for a considerable amount of time after signing the agreement and the employee either left on his own volition or was discharged for good cause.<sup>54</sup> Similarly, it should be noted that in every case found the initial contract of employment was terminable at the will of either party.<sup>55</sup> If there is a pre-existing employment contract for a definite period of time, continued employment will not be sufficient to support a modification without some additional consideration.<sup>56</sup>

On the other hand, several states, including North Carolina,<sup>57</sup> Ohio,<sup>58</sup>

50. *Breed v. National Credit Ass'n*, 211 Ga. 629, \_\_\_, 88 S.E.2d 15, 18 (1955) (quoting *Brown v. Bowman*, 119 Ga. 153, \_\_\_, 46 S.E. 410, 410 (1903)).

51. *See, e.g.*, *Frierson v. Sheppard Bldg. Supply Co.*, 247 Miss. 157, 154 So. 2d 151 (1963); *McAnally v. Person*, 57 S.W.2d 945 (Tex. Civ. App. 1933); *Bettinger v. North Fort Worth Ice Co.*, 278 S.W. 466 (Tex. Civ. App. 1925).

52. *See* note 16 *supra* and accompanying text.

53. *Frierson v. Sheppard Bldg. Supply Co.*, 247 Miss. 157, 154 So. 2d 151 (1963), where the court noted in dictum that if the "appellant had been discharged shortly after signing the restrictive agreement, this Court would probably hold the agreement was not supported by consideration." *Id.* at \_\_\_, 154 So.2d at 154.

54. *See* notes 37-47 *supra*.

55. *Id.*

56. *Reed, Roberts Assocs., Inc. v. Bailenson*, 537 S.W.2d 238 (Mo. Ct. App. 1976).

57. *See, e.g.*, *Forrest Paschal Mach. Co. v. Milholen*, 27 N.C. App. 678, 220 S.E.2d 190 (1975) (where the court held that continuance in the plaintiff's employ for eight years was not consideration to support the contract which had bestowed no promotion or increase in

Oregon,<sup>59</sup> Pennsylvania,<sup>60</sup> and Washington,<sup>61</sup> hold that continued employment is not sufficient to support a covenant not to compete entered into after the inception of the employment. The majority of these cases stipulate that there is no consideration at the commencement of the contract because the employer has not bound himself to do anything that he was not already bound to do where he does not change the employee's status under the terms of the contract and where the employment remains terminable at will.<sup>62</sup> Furthermore, continued employment under these contracts is not considered to furnish the consideration necessary to support the contract or to provide the requisite mutuality because the continued employment relates back to the original agreement and, hence, cannot be imputed into the subsequent agreement not to compete.<sup>63</sup>

The most extreme position, with regard to restrictive covenants, was taken in *Capital Bakers, Inc. v. Townsend*,<sup>64</sup> where the Pennsylvania court held that restrictive covenants entered into by subsequent agreement were not ancillary to the taking of employment and, hence, were unenforceable as against public policy regardless of the value of the consideration exchanged. This view, however, has been tempered considerably by subsequent decisions in the same court, which now appears willing to validate contracts entered into subsequent to the taking of employ-

---

salary upon the defendant at its inception); *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944).

58. *See, e.g., Morgan Lumber Sales Co. v. Toth*, 41 Ohio Misc. 17, 321 N.E.2d 907 (1974). The court refused to find consideration on the ground that Ohio law requires covenants not to compete to be strictly construed as they are normally written by the employer and are in restraint of trade.

59. *See McCombs v. McClelland*, 223 Or. 475, 354 P.2d 311 (1960) The court found no consideration because there was no express promise of continued employment, nor could one be implied, where the employer did not require the employee to sign as a condition of employment.

60. *See, e.g., George W. Kistler, Inc. v. O'Brien*, 464 Pa. 475, 347 A.2d 311 (1975) (court said that continued employment would clearly be past consideration and that such contracts must be supported by new consideration); *Maintenance Specialties, Inc. v. Gottus*, 455 Pa. 327, 314 A.2d 279 (1974) (covenant not to compete entered into one year after inception of employment requires new consideration); *Markson Bros. v. Redick*, 164 Pa. Super. 499, 66 A.2d 218 (1949) (one-week notice of termination is not sufficient consideration to support a contract which includes a covenant not to compete).

61. *See, e.g., Schneller v. Hayes*, 176 Wash. 115, 28 P.2d 273 (1934) (contract was void for lack of mutuality where employment could be terminated at will of the employer).

62. *See, e.g., Maintenance Specialties, Inc. v. Gottus*, 455 Pa. 327, 314 A.2d 279 (1974); *Markson Bros. v. Redick*, 164 Pa. Super. 499, 66 A.2d 218 (1949); *Schneller v. Hayes*, 176 Wash. 115, 28 P.2d 273 (1934).

63. *George W. Kistler, Inc. v. O'Brien*, 464 Pa. 475, 347 A.2d 311 (1975).

64. 426 Pa. 188, 231 A.2d 292 (1967).

ment as long as the contract is supported by a new consideration.<sup>65</sup>

While at least one court has held that signing a covenant under the threat of discharge not only fails to impute the necessary consideration, but also borders upon duress,<sup>66</sup> other courts have implied that if it were determined that the signing of such an agreement was a condition of employment, then they would have found the consideration to support the agreement.<sup>67</sup>

In light of the conflicting authority, it is obvious that the Virginia Supreme Court could rule either way were it presented with the question of whether continued employment is sufficient consideration to support the enforcement of a contract in equity. It is likely, therefore, that the court's ruling would focus on the facts of the case presented. If the continued employment is extended and the terms of the covenant otherwise reasonable, it is likely that the court would adhere to its holding in *Twohy v. Harris*<sup>68</sup> and find that performance under a contract will supply the consideration and mutuality necessary to allow it to be enforced. If, on the other hand, the court is unable to imply a promise of continued employment on the part of the employer from extended employment and there is no threat of discharge for failure to sign the contract, it would appear that the court would be inclined to find no consideration because of the strict scrutiny accorded such restrictive covenants.<sup>69</sup> In either case, it is important that the court remain flexible in its ruling in order to be able to reach an equitable result should the facts swing to the other end of the spectrum.

#### 4. Conclusion

Consideration is not generally an issue raised when determining whether to enforce a covenant not to compete against a former employer. It is universally accepted that restrictive covenants entered into at the inception of employment are supported by the consideration of the em-

---

65. See, e.g., *George W. Kistler, Inc. v. O'Brien*, 464 Pa. 475, 347 A.2d 311 (1975); *Maintenance Specialties, Inc. v. Gottus*, 455 Pa. 327, 314 A.2d 279 (1974).

66. *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944). The court stated:

A consideration cannot be constituted out of something that is given and taken in the same breath—of an employment which need not last longer than the ink is dry upon the signature of the employee, and where the performance of the promise is under a definite threat of discharge. Unemployment at a future time is disturbing—its immediacy is formidable.

*Id.* at —, 29 S.E.2d at 548.

67. See, e.g., *McCombs v. McClelland*, 223 Or. 475, 354 P.2d 311 (1960).

68. 194 Va. 69, 72 S.E.2d 329 (1952).

69. See text accompanying note 33 *supra*.

ployment itself. Additionally, courts consistently enforce covenants entered into after the inception of employment if the employer rewards the employee with any significant compensation for entering into the covenant, whether it be in the form of a change in status, increase in salary or any other benefit. The most difficult situation occurs when the employee receives no change in status but remains in the employ of the promisee. Here the jurisdictions are split, and it appears that the Virginia Supreme Court could rule either way with equal justification. It is likely, therefore, that the court will be swayed by the facts involved in the particular case. It should be noted that the great majority of the jurisdictions ruling on this issue have remained receptive to arguments against their general position and have so ruled when equity dictates. Accordingly, regardless of the position initially adopted by the Virginia courts, it is likely that they would adopt an alternative approach should the facts warrant it.

### C. *Rule of Reasonableness*

#### 1. Introduction

In determining whether a restraint against trade in the form of a covenant not to compete in an employment contract is enforceable, the courts in Virginia, as in other jurisdictions, resort to the three-pronged reasonableness test.<sup>70</sup> The test examines the covenant not to compete to determine if it is reasonable with respect to the employer, the employee and the public in general.<sup>71</sup> The court, implementing this test, is required to delicately weigh and balance the interests of each of these interested parties.<sup>72</sup> It is the reasonableness of the covenant when viewed in light of all these interests that will determine its enforceability. An enforceable covenant, therefore, will be one which survives this balancing act by being: 1) no greater than necessary to protect the employer in some *legitimate* business interest, 2) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood, and 3) reasonable under the numerous public policies and considerations.<sup>73</sup>

---

70. See *Meissel v. Finley*, 198 Va. 577, 95 S.E.2d 186 (1956).

71. *Id.*

72. "In determining what is reasonable the Goddess of Justice that hovers over the American court house with scale in hand has a delicate job of weighing; and it is a three—not a two—pan scale for she must balance the conflicting interests of employer, employee, and public." *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 62 Abs. 17, 105 N.E.2d 685, 692 (Ohio 1952).

73. *Meissel v. Finley*, 198 Va. 577, 95 S.E.2d 186 (1956).

## 2. Reasonableness as to Employer

"Reasonableness, like beauty, is in the eye of the beholder."<sup>74</sup> This statement is well supported by a reading of court decisions pertaining to the validity of the covenants not to compete. It is apparent that the particular facts and circumstances of each case determine the outcome.<sup>75</sup>

Under the first prong of the tripartite test, the court looks to reasonableness of the covenant from the employer's perspective. In its review the court first determines if the employer has a legitimate interest capable of protection and in need thereof.<sup>76</sup> Whether such a legitimate interest exists depends in large part on 1) the nature of the employer's business and 2) the function of the employee within this business operation.<sup>77</sup> The employer must "show special circumstances which make it unfair for him to bear all the risk of placing the employee in a position in which a later breach of confidence might be costly."<sup>78</sup> The employer, by means of a covenant, cannot protect himself against ordinary competition from the employee after termination of his employment.<sup>79</sup> Therefore, any ordinary skill and experience obtained by the employee during his employment does not, by itself, constitute a protectible interest.<sup>80</sup> No legal wrong can

74. Comment, *Covenants Not to Compete—Enforceability Under Missouri Law*, 41 Mo. L. Rev. 37, 39 (1976).

75. "[I]n determining whether or not a contract in restraint of trade is reasonable each case must be considered in the light of its own facts and circumstances . . . in so far as they do not add to, vary, or otherwise alter the writing sued on. . . ." *Merriman v. Cover, Drayton & Leonard*, 104 Va. 428, 437, 51 S.E. 817, 819 (1905). *Accord*, *Smithereen Co. v. Renfro*, 325 Ill. App. 229, 59 N.E.2d 545 (1945). *See also* *Foti v. Cook*, 220 V.R.R. 771, 263 S.E.2d 430 (1980).

76. *Meissel v. Finley*, 198 Va. 577, 95 S.E.2d 186 (1956); *Worrie v. Boze*, 191 Va. 916, 62 S.E.2d 876 (1951). *See generally* Annot., 43 A.L.R.2d 94, 151-207 (1955) [hereinafter cited as 43 A.L.R.2d]; Annot., 41 A.L.R.2d 15, 69-130 (1955) [hereinafter cited as 41 A.L.R.2d].

77. *Stoneman v. Wilson*, 169 Va. 239, 192 S.E. 816 (1937). *Accord*, *Briggs v. Butler*, 140 Ohio St. 499, 45 N.E.2d 757 (1942), where Judge Matthias stated: "The determination of the necessity for such restrictions is dependent upon the nature and extent of the business and the nature and extent of the service of the employee in connection therewith and other pertinent conditions." *Id.* at 507, 45 N.E.2d at 761. *See also* *Foti v. Cook*, 220 V.R.R. 771, 263 S.E.2d 430 (1980) where the court seems to emphasize the defendant's position as a senior partner in the firm.

78. *Blake, Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 651 (1960).

79. "An employer is not entitled to be protected against legitimate and ordinary competition of the type that a stranger could give. There must be some additional special facts and circumstances which render the restrictive covenant reasonably necessary for the protection of the employer's business." *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, —, 98 N.W.2d 415, 419 (1959). *Accord*, *Mutual Loan Co. v. Pierce*, 245 Iowa 1051, 65 N.W.2d 405 (1954).

80. *Mutual Loan Co. v. Pierce*, 245 Iowa 1051, 65 N.W.2d 405 (1954); *Roy v. Bolduc*, 140 Me. 103, 34 A.2d 479 (1943); *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944); *Clark Paper & Mfg. Co. v. Stenacher*, 236 N.Y. 312, 140 N.E. 708 (1923).

or does occur by the use of such "know-how" by the employee.<sup>81</sup>

While not constituting a protectible interest in and of itself under most circumstances, the experience and skill acquired has a positive influence on the court in its determination of the reasonableness of the covenant, especially where *special* methods or systems are involved. Thus, in *Orkin Exterminating Co. of Arkansas v. Murrell*,<sup>82</sup> where the employee had gained skill in the use of the special methods and processes which the employer had placed in his hands and which were the results of a large number of manhours and expenditures of money, the court enforced a covenant restricting the employee from competing with Orkin for a period of one year.<sup>83</sup> The particular experience gained, therefore, seems to effect the duration of the covenant and helps determine whether it is reasonable.<sup>84</sup>

#### a. Legitimate Interests

There are two legitimate interests<sup>85</sup> which courts have allowed employers to protect by means of a covenant not to compete: 1) customers under the "customer-contact theory"<sup>86</sup> and 2) trade secrets or confidential business matters.<sup>87</sup> Both of these in a sense are considered proprietary interests that the employer over time develops and expands as a result of his efforts in business.<sup>88</sup> The goodwill of his business and any trade secrets which develop as a result of his efforts belong to the employer as a result

---

81. *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944); *Clark Paper & Mfg. Co. v. Stenacher*, 236 N.Y. 312, 140 N.E. 708 (1923).

82. 212 Ark. 449, 206 S.W.2d 185 (1947).

83. For other cases involving acquisition of special skill or experience coupled with the employee's use or contact with employer's special processes (trade secrets), see *Irvington Varnish & Insulator Co. v. Van Norde*, 138 N.J. Eq. 99, 46 A.2d 201 (1946); *Eastman Kodak Co. v. Powers Film Prod., Inc.*, 189 App. Div. 556, 179 N.Y.S. 325 (1919), *appeal denied*, 190 App. Div. 970, 179 N.Y.S. 919 (1920). *But see Grace v. Orkin Exterminating Co.*, 255 S.W.2d 279 (Tex. Civ. App. 1953) (where the court upheld covenant but not on the grounds of the special training of the employee).

84. *See generally* 41 A.L.R.2d, *supra* note 76, at 122.

85. *Renwood Food Prods., Inc. v. Schaefer*, 240 Mo. App. 939, 223 S.W.2d 144 (1949).

86. *Jewel Paint & Varnish Co. v. Walters*, 339 Ill. App. 355, 89 N.E.2d 835 (1950); *Blake*, *supra* note 78, at 653-67. *See generally* 43 A.L.R.2d, *supra* note 76, at 162-85; 41 A.L.R.2d, *supra* note 76, at 71-102.

87. *Blake*, *supra* note 78, at 667-74. *See generally* 43 A.L.R.2d, *supra* note 76, at 185-200; 41 A.L.R.2d, *supra* note 76, at 103-20.

88. *Tolman Laundry, Inc. v. Walker*, 171 Md. 7, 187 A. 836 (1936); *Renwood Food Prods., Inc. v. Schaefer*, 240 Mo. App. 939, 223 S.W.2d 144 (1949). While being a "proprietary interest," the "gravamen in a trade secrets case is a breach of confidence rather than the infringement of a property right." 18 *MICHES JURISPRUDENCE Trademarks, Tradenames & Unfair Competition* § 4.1 (1974).

of his gainful employment of a competent employee.<sup>89</sup>

i. "Customer Contact Theory"

Customers are an asset without which a person or company in the trade of selling products or services would not exist. The company's business is perpetuated by the goodwill<sup>90</sup> that is developed with customers. Creation of this goodwill with the employer's customers is often achieved by the employer's agent<sup>91</sup> in the course of the performance of his duties as an employee. In return, the agent receives compensation for the "value of the business which he produce[s]."<sup>92</sup> As a result, the "customers and patronage . . . [are] for the benefit of the employer and the increased goodwill [becomes] the property of the master however much their procurement was to be attributed to the servant's energy, personality, and skill."<sup>93</sup> Nevertheless, the "possibility is present that the customer will regard, or come to regard, the attributes of the employee as more important in his business dealings than any special qualities of the product or service of the employer, especially if the product is not greatly differentiated from others which are available."<sup>94</sup> The employee rather than employer in such cases becomes identified with the product. This creates a *grave risk* to the employer, since upon termination of employment the employee may be able to divert the customer away from the ex-employer by means of this influence.

Under the "customer contact theory," courts in equity have been willing to allow employers to protect their interest by a reasonable covenant when termination of employment creates such a risk of appropriation of "goodwill."<sup>95</sup> In determining whether an employee is in such a position, the court will look at 1) the nature and function of the employee's position, 2) the frequency of the contact with the customer and 3) where the contact took place.<sup>96</sup>

The nature of the business in which the employee is engaged aids the court in determining the amount of risk which the employer faces. Where

---

89. *Scott v. Gillis*, 197 N.C. 223, 148 S.E. 315 (1929) (citing *Granger v. Craven*, 159 Minn. 296, 199 N.W. 10 (1924)).

90. *John Roane, Inc. v. Tweed*, 33 Del. Ch. 4, 89 A.2d 548 (1952) (where the court defines goodwill).

91. *Tolman Laundry, Inc. v. Walker*, 171 Md. 7, 187 A. 836 (1936).

92. *Id.* at \_\_\_, 187 A. at 838.

93. *Id.*

94. *Blake*, *supra* note 78, at 654.

95. *Jewel Paint & Varnish Co. v. Walters*, 339 Ill. App. 335, 89 N.E.2d 835 (1950). See *Foti v. Cook*, 220 V.R.R. 771, 263 S.E.2d 430 (1980).

96. *Blake*, *supra* note 78, at 659-67.

the product or the nature of services provided requires close dealings with the customers the likelihood of the development of a "close relationship" is increased. Where an employee has any "influence" over the customer in derogation of his employer's rights as a result of this contact, the courts will be more willing to find a legitimate interest. Thus, in *Meissel v. Finley*<sup>97</sup> where a restrictive covenant was signed by a partner in an insurance firm, the court made note of the fact that in the course of his employ it was inevitable that the employee would become quite familiar with the customers. This familiarity and possible influence was a factor in the court's determination that the covenant involved was enforceable.<sup>98</sup> The means by which a business is conducted is also an important consideration. This is especially true with respect to cases involving salesmen.<sup>99</sup> In fact, the nature in which business is conducted, and the resultant employee-customer relations, prompted one court to state that the customers "might well be said to be customers of the appellant [employee] and not of the appellee [employer]."<sup>100</sup>

Professionals especially have been subjected to the enforcement of these covenants.<sup>101</sup> The nature of the services they render often brings them into a confidential personal relationship with their client-customers.<sup>102</sup> The professional is also likely to hold a tremendous amount of control over the client as a result of his position and inherent authority. It

97. 198 Va. 577, 95 S.E.2d 186 (1956). See also *Foti v. Cook*, 220 V.R.R. 771, 263 S.E.2d 430 (1980).

98. *Meissel v. Finley*, 198 Va. 577, 95 S.E.2d 186 (1956). The court also took into consideration the fact that employee had a customer list.

99. *Jewel Paint & Varnish Co. v. Walters*, 339 Ill. App. 335, 89 N.E.2d 835 (1950); *Tolman Laundry, Inc. v. Walker*, 171 Md. 7, 187 A. 836 (1936); *Deuerling v. City Baking Co.*, 155 Md. 280, 141 A. 542 (1928). See *Richardson v. Paxton Co.*, 203 Va. 790, 127 S.E.2d 113 (1962) (covenant too broad to be enforced in equity). *Contra*, *Love v. Miami Laundry Co.*, 118 Fla. 137, 160 So. 32 (1935) (court attributes goodwill solely to the ability of the employee). See generally 41 A.L.R.2d, *supra* note 76, at 74-79.

100. *Deuerling v. City Baking Co.*, 155 Md. 280, \_\_\_, 141 A. 542, 545 (1928).

101. See, e.g., *Freudenthal v. Espey*, 45 Colo. 488, 102 P. 280 (1909) (concerning a doctor); *May v. Young*, 125 Conn. 1, 2 A.2d 385 (1938) (concerning an engineer); *Granger v. Craven*, 159 Minn. 296, 199 N.W. 10 (1924) (concerning a physician); *Scott v. Gillis*, 197 N.C. 223, 148 S.E. 315 (1929) (concerning an accountant); *Foti v. Cook*, 220 V.R.R. 771, 263 S.E.2d 430 (1980) (concerning an accountant); *Racine v. Bender*, 141 Wash. 606, 252 P. 115 (1927). See also Note, *Validity of Covenants Not to Compete: Common Law Rules and Illinois Law*, 1978 U. ILL. L. F. 249, 263. [Hereinafter cited as 1978 U. ILL. L. F.].

Attorneys in the United States are prohibited from entering into restrictive covenants not to compete. Code of Professional Responsibility and Code of Judicial Conduct, DR 2-108 (1978).

102. "[C]lient relationship probably accounts for the favored treatment of covenants involving professionals." 1978 U. ILL. L. F., *supra* note 101, at 263.

follows, then, that the position which the employee holds will also be a factor in the courts' consideration of the gravity of the risk to the employer.<sup>103</sup> The courts here look to see whether such position was a superior one, evoking the confidence of the customer in the employee, or whether the position was simply incidental to the services or product provided.<sup>104</sup>

The frequency of the contact of the employee with the customer obviously is a factor which the courts must evaluate in determining the risk which the employer faces.<sup>105</sup> The duration of such contact must also be considered. This evaluation has a direct effect in the court's determination of whether the duration of a covenant is reasonable.<sup>106</sup>

Furthermore, the court must take into account where the contact between employee and customer occurred.<sup>107</sup> This factor plays a large role with respect to the customer's identification of the product or service offered with the employee. If the contact takes place at the home of the customer, naturally there will be a greater tendency to equate product and employee. As a result, the courts have tended to find a protectable interest in such cases.<sup>108</sup> Normally the covenant, if reasonable, is enforceable only to the area served by that particular employee.<sup>109</sup> If the contact, however, occurs at the employee's place of business, other employees might be linked with the product and the influence of the particular employee might be diminished. Nevertheless, the employee may still hold great persuasive influence over the customer, either because of his posi-

---

103. See *Mutual Loan Co. v. Pierce*, 245 Iowa 1051, 65 N.W.2d 405 (1954); *Renwood Food Prods., Inc. v. Schaefer*, 240 Mo. App. 939, 223 S.W.2d 144 (1949); *Foti v. Cook*, 220 V.R.R. 771, 263 S.E.2d 430 (1980); *Meissel v. Finley*, 198 Va. 577, 95 S.E.2d 186 (1956). Compare *Credit Rating Service, Inc. v. Charlesworth*, 126 N.J. Eq. 360, 8 A.2d 847 (1939) with *Sternberg v. O'Brien*, 48 N.J. Eq. 370, 22 A. 348 (1891) and *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944).

104. *Clark Paper & Mfg. Co. v. Stenacher*, 236 N.Y. 312, 140 N.E. 708 (1923).

105. See *Deuerling v. City Baking Co.*, 155 Md. 280, 141 A. 542 (1928); *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 62 Abs. 17, 105 N.E.2d 685 (Ohio 1952); *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, 98 N.W.2d 415 (1959); *Blake*, *supra* note 78, at 659-60.

106. "When an employee's contacts with the customers are regular and frequent a shorter period of time is needed by the employer than when . . . the contacts are made at relatively long intervals." *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, —, 98 N.W.2d 415, 420 (1959). The courts will normally allow that period of time which it deems it will take the employer to "obliterate in the minds of the . . . [employer's] customers the identification formed during the period of the . . . [employee's] employment." *Id.* See generally notes 140-52 *infra* and accompanying text.

107. See generally *Blake*, *supra* note 78, at 660-61; 41 A.L.R.2d, *supra* note 76, at 73-85.

108. See the numerous route cases collected in 41 A.L.R.2d, *supra* note 76, at 74-79.

109. See generally notes 153-68 *infra* and accompanying text.

tion or the nature of the business. Courts tend to limit enforceability of the restriction in these cases to particular customers or areas in which the business operates.<sup>110</sup>

Case law in Virginia concerned with this "customer-contact theory" appears to uphold the employer's right to protect the goodwill of his customers from his employee's wrongful appropriation. The courts in both *Meissel v. Finley*<sup>111</sup> and *Worrie v. Boze*<sup>112</sup> took into account the employer's contacts and familiarity with the customers in upholding the restrictive covenants in their respective contracts.<sup>113</sup>

## ii. Confidential Business Matters and Trade Secrets.

"One who invents or discovers and keeps secret a process of manufacture, . . . has a property therein which the court will protect against one who, in violation of contract and breach of confidence, undertakes to apply it to his own use or disclose it to a third person."<sup>114</sup> Thus, in *Irvington Varnish & Insulator Co. v. Van Norde*,<sup>115</sup> the court upheld a restrictive covenant not to disclose trade secrets or confidential information for 2 years *anywhere* in the United States, and thereby, showed the respect of the courts for employer's proprietary rights in matters of this kind.<sup>116</sup>

Thus, trade secrets<sup>117</sup> are another legitimate interest which the courts will allow employers to protect by means of a reasonable restrictive covenant. However, claiming a particular process to be a trade secret does not

110. See *Foti v. Cook*, 220 V.R.R. 771, 263 S.E.2d 430 (1980).

111. 198 Va. 577, 95 S.E.2d 186 (1956).

112. 191 Va. 915, 62 S.E.2d 876 (1951).

113. Trade secrets also played an integral role in the court's determination in *Meissel v. Finley* and *Worrie v. Boze*. For a recent Virginia decision which seems to rely primarily on customer contact to uphold a covenant not to compete, see *Foti v. Cook*, 220 V.R.R. 771, 263 S.E.2d 430 (1980).

114. *Irvington Varnish & Insulator Co. v. Van Norde*, 138 N.J. Eq. 99, \_\_\_, 46 A.2d 201, 202-03 (1946) (citing *Soloman v. Hertz*, 40 N.J. Eq. 400, \_\_\_, 2 A. 379, 380 (1886)).

115. 138 N.J. Eq. 99, 46 A.2d 201 (1946).

116. So important is this "proprietary interest," that even though the use of trade secrets is not mentioned in the restrictive covenant, the court may read into the covenant such a restriction. *Grace v. Orkin Exterminating Co.*, 255 S.W.2d 279 (Tex. Civ. App. 1953).

117. Trade secrets have been defined as:

[Something] known only to the particular employer and those of his employees to whom it is necessary to confide it in order to use it for what it is intended. It is something known only to one or a few and kept from others. The question is not whether it is not known to the general public. It must be a secret of the particular employer and not a general secret of the trade.

*Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 62 Abs. 17, \_\_\_, 105 N.E.2d 685, 709 (Ohio 1952). See *Kaunagraph Co. v. Stampagraph Co.*, 235 N.Y. 1, 138 N.E. 485 (1923).

control the court's determination. Thus, in both *Kaumagraph Co. v. Stampagraph Co.*<sup>118</sup> and *Victor Chemical Works v. Iliff*,<sup>119</sup> the courts held that processes claimed by the employers to be trade secrets were not and, therefore, rendered restrictive covenants void. The employer bears the burden of proving that a trade secret does indeed exist.<sup>120</sup> Determination by the court that the interest claimed is a trade secret is not of itself sufficient. The employer must then show that the employee had the opportunity to come into contact with the secret and could in fact use it in competition against his previous employer.<sup>121</sup> It is only then that the court will look to the reasonableness of the restraint as a whole under the three-part test. If it is then found to be reasonable the court will enforce the covenant by an injunction and spare the employer from irreparable damage.<sup>122</sup>

The courts have found the following to be legitimate trade secrets: 1) processes, systems and manufacturing data of a specialized nature,<sup>123</sup> 2) sales and delivery records,<sup>124</sup> 3) business methods which can not be patented,<sup>125</sup> 4) special customer lists.<sup>126</sup> While this list is not exhaustive, it is

---

118. 235 N.Y. 1, 138 N.E. 485 (1923).

119. 299 Ill. 532, 132 N.E. 806 (1921).

120. *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 62 Abs. 17, 105 N.E.2d 685 (Ohio 1952). Evidence of precautions taken by the employer to maintain secrecy with respect to it is helpful to the court in deciding whether something is a trade secret. *Eastman Kodak Co. v. Powers Film Prod., Inc.* 189 App. Div. 556, 179 N.Y.S. 325 (1919). See *Grace v. Orkin Exterminating Co.*, 255 S.W.2d 279 (Tex. Civ. App. 1953).

121. *Eastman Kodak Co. v. Powers Film Prod., Inc.*, 189 App. Div. 556, 179 N.Y.S. 325 (1919) (the court reversed and remanded the decision of the lower court in order to take evidence as to whether there was a link between the special training the employee received and the trade secrets claimed by the employers). *But see Roy v. Bolduc*, 140 Me. 103, 34 A.2d 479 (1943) (an employee had access to a customer list considered a trade secret, but the court did not enforce the covenant since at the time of the trial it was found that the employee had not used the list and, thus, the employer had not been irreparably harmed).

122. See *National Homes Corp. v. Lester Indus., Inc.*, 293 F. Supp. 1025 (W.D. Va.), *aff'd in part, rev'd in part*, 404 F.2d 225 (4th Cir. 1968) (federal court applying Virginia law); *Meissel v. Finley*, 198 Va. 577, 95 S.E.2d 186 (1956); *Worrie v. Boze*, 191 Va. 916, 62 S.E.2d 876 (1951).

123. *Orkin Exterminating Co. of Arkansas v. Murrell*, 212 Ark. 449, 206 S.W.2d 185 (1947); *Eastman Kodak Co. v. Powers Film Prod., Inc.*, 189 App. Div. 556, 179 N.Y.S. 325 (1919); *Grace v. Orkin Exterminating Co.*, 255 S.W.2d 279 (Tex. Civ. App. 1953).

124. *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, 98 N.W.2d 415 (1959).

125. *May v. Young*, 125 Conn. 1, 2 A.2d 385 (1938); *Thomas W. Briggs Co. v. Mason*, 217 Ky. 269, 289 S.W. 295 (1926).

126. *National Homes Corp. v. Lester Indus., Inc.*, 293 F. Supp. 1025 (W.D. Va.), *aff'd in part, rev'd in part*, 404 F.2d 225 (4th Cir. 1968); *Meissel v. Finley*, 198 Va. 577, 95 S.E.2d 186 (1956); *Worrie v. Boze*, 191 Va. 916, 62 S.E.2d 876 (1951).

an indication of the types of interests which are protected.<sup>127</sup>

#### b. Correlation Between Legitimate Interest and Covenant

The next step the court must take after determining the existence of a legitimate protectable interest is to decide whether the restrictive covenant *reasonably* protects the interest of the employer. In other words, there must be a "correlativity" between the legitimate interest to be protected and the extent of the protection asked for.<sup>128</sup> The covenant will be "valid and enforceable, if the restraint . . . [is] confined within limits which are no larger and wider than the protection of the party with whom the contract is made may reasonably require."<sup>129</sup> The extent to which the employee may be harmed, the area sought to be covered by the covenant and the time period for which the covenant is to last are among the pertinent factors which must be analyzed.<sup>130</sup> The courts generally will enforce a restraint only to the extent that it is a "fair protection to the interest of the party in favor of whom it is given and not so large as to interfere with the interests of the public."<sup>131</sup>

Since a "restraint that over-protects is likely to over-impinge,"<sup>132</sup> the extent of the protection afforded must only go as far as the exposure which the employee has had with the employer's protectable interest.<sup>133</sup> A *fair* protection is what the court seeks to impose. In cases involving customer contact, the courts generally will allow the employer only that amount of time which is reasonably necessary for him to "obliterate in the minds of . . . [his] *customers* the identification formed during the period of the . . . [employee's] employment,"<sup>134</sup> and normally will limit its application to the area in which the employee operated or to the customers he had contact with. In cases involving trade secrets the courts are

127. For a more comprehensive list, see 41 A.L.R.2d, *supra* note 76, at 106-14.

128. *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 62 Abs. 17, 105 N.E.2d 685 (Ohio 1952). See Constangy, *Employment Contract Covenants Not to Compete: Enforceability Under North Carolina Law*, 10 WAKE FOREST L. REV. 217, 231-33 (1974).

129. *Tolman Laundry, Inc. v. Walker*, 171 Md. 7, —, 187 A. 836, 838 (1936).

130. *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 62 Abs. 17, 105 N.E.2d 685 (Ohio 1952); *Briggs v. Butler*, 140 Ohio St. 499, 45 N.E.2d 757 (1942). See *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279 (4th Cir. 1974); *Richardson v. Paxton Co.*, 203 Va. 790, 127 S.E.2d 113 (1962). See generally 43 A.L.R.2d, *supra* note 76; 41 A.L.R.2d, *supra* note 76.

131. Constangy, *supra* note 128, at 231. *Accord*, *Sternberg v. O'Brien*, 48 N.J. Eq. 370, 22 A. 348 (1891).

132. *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 62 Abs. 17, —, 105 N.E.2d 685, 699 (Ohio 1952).

133. Constangy, *supra* note 128, at 232.

134. *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, —, 98 N.W.2d 415, 420 (1959).

generally more liberal as to their upholding of wider areas and longer time limitations.<sup>135</sup>

### 3. The Reasonableness as to Employee

#### a. Introduction

The second element of the test used to determine the enforceability of an employee's covenant not to compete is whether the conditions imposed on the former employee are unduly harsh or oppressive.<sup>136</sup> In order to measure the adverse effects the courts focus on the duration<sup>137</sup> and territorial scope<sup>138</sup> of the restraint. Additionally, the courts may consider the type of activity proscribed by the employment contract.<sup>139</sup>

#### b. Time

Courts applying Virginia law have enforced restrictive covenants running as long as ten years. The most significant case involving Virginia law in terms of the magnitude of the restrictions imposed on a former employee is *National Homes Corp. v. Lester Industries, Inc.*<sup>140</sup> The federal district court was confronted with an agreement involving a defendant who had promised not to engage in the prefabricated housing industry anywhere in the United States in competition with the plaintiff for ten years. The court found that the time limitation was not unreasonable.<sup>141</sup> According to the opinion, there was a large quantity of goodwill retained by the defendant when he terminated his employment prior to creating a new corporation. Also the length of the restraint ran no longer than the maximum duration of the original contract of employment between the

---

135. See *Sperry Rand Corp. v. A-T-O, Inc.*, 447 F.2d 1387 (4th Cir. 1971), *vacating in part*, *Sperry Rand Corp. v. Electronic Concepts, Inc.*, 325 F. Supp. 1209 (E.D. Va. 1970), *cert. denied*, 405 U.S. 1017 (1972) (injunction granted for two years without limitation as to area).

136. "Disproportionate hardship to the party against whom enforcement is sought has always been regarded as a reason for refusing equitable remedies." 6A CORBIN, CONTRACTS § 1394 (1962); "A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it . . . (b) imposes undue hardship upon the person restricted. . . ." RESTATEMENT OF CONTRACTS § 515 (1932). See generally notes 70-73 *supra* and accompanying text.

137. For a general discussion of the "time" factor, see 41 A.L.R.2d, *supra* note 76.

138. For a general discussion of the "area" factor, see 43 A.L.R.2d, *supra* note 76.

139. "The 'activity' dimension was not an issue in the earliest cases. . . . But division of labor and specialization now make it of the utmost importance that a restraint define carefully the activities in which the employee is not to engage." Blake, *supra* note 78, at 675.

140. 293 F. Supp. 1025 (W.D. Va.), *aff'd*, 404 F.2d 225 (4th Cir. 1968).

141. *Id.* at 1032.

parties.<sup>142</sup> In granting an injunction the court seemed to be influenced by the fact that the defendant was capable of earning a living in fields other than prefabricated housing.

A five-year proscription on competition was upheld by the court in *Meissel v. Finley*.<sup>143</sup> A limited partner had agreed that, upon dissolution of an insurance partnership, he would not write insurance or surety bonds within fifty miles of the City of Norfolk for five years. He then brought a declaratory judgment action to determine the covenant's validity. The court held that the duration was permissible because it was tied directly to a major aspect of the business, i.e., the volume of activity "represented by policies that would come up for renewal in either three or five years."<sup>144</sup> As the plaintiff had been responsible for these accounts, the court observed that his access to certain information could be used to the general partner's disadvantage.

In *Worrie v. Boze*,<sup>145</sup> the operators of an Arthur Murray dance studio sought to enjoin a former employee from violating an agreement prohibiting him from giving lessons to anyone within a twenty-five mile radius of the plaintiff's Richmond-based school for two years. The court noted that the features under such contracts must be "limited to a reasonable duration."<sup>146</sup> In light of the circumstances of the case, the court upheld the granting of an injunction by the lower court.<sup>147</sup>

Courts in other jurisdictions have enforced restrictive covenants running for five years and more.<sup>148</sup> Frequently, the covenantor is a profes-

---

142. The covenant was to run concurrently with the defendant's employment under the original agreement. The restraint did not become operative until the defendant and his former employer mutually terminated the contract. There were less than four and one-half years remaining on the restriction when this severance transpired. *Id.*

143. 198 Va. 577, 95 S.E.2d 186 (1956).

144. *Id.* at 583, 95 S.E.2d at 190.

145. 191 Va. 916, 62 S.E.2d 876 (1951).

146. *Id.* at 927, 62 S.E.2d at 881.

147. *Contra*, Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 62 Abs. 17, 105 N.E.2d 685 (Ohio 1952) (court denied an injunction in a dispute over an almost identically-worded covenant).

For another Virginia case wherein a two-year restraint was upheld, see *Foti v. Cook*, 220 V.R.R. 771, 263 S.E.2d 430 (1980) (partner agreed not to perform accounting services for clients of the firm for whom he worked upon voluntary withdrawal from the partnership).

148. *See, e.g.*, *Lareau v. O'Nan*, 355 S.W.2d 679 (Ky. 1962) (doctor promised he would not practice within a locality for five years); *Griffin v. Guy*, 172 Md. 510, 192 A. 359 (1937) (barber consented to *never* engage in the business within a town's corporate limits); *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 120 S.E.2d 739 (1961) (hostess promised to refrain from participating in a similar business for five years in the city wherein she was employed as well as other areas); *Conforming Matrix Corp. v. Faber*, 104 Ohio App. 8, 146

sional who is seen by the courts as one who acquires special knowledge of his former employer's practice. Moreover, the courts surmise that the professional is in a strong position to secure gainful employment elsewhere.<sup>149</sup>

There is no case applying Virginia law invalidating an employee covenant on the grounds that the duration is unreasonable.<sup>150</sup> However, there is persuasive authority for striking restrictive agreements extending for one year or less.<sup>151</sup> Other jurisdictions which have so held rely on the "economic hardship" theory. Under this rationale, the courts look to whether the employee will be deprived of the opportunity of supporting himself and his family, whether he will have to give up the work for which he is best trained, and whether he will be confronted with trying to find employment during an unhealthy state of the economy. However, Professor Blake warns that "[a]lthough such facts may occasionally be appealing, it should be kept in mind that invalidating an otherwise reasonable restraint on such grounds may jeopardize a conscientiously developed program which redounds to the benefit, generally, of employer and employee."<sup>152</sup>

While duration is only one of several factors to which a court refers when determining the reasonableness of a covenant, as a general rule, a covenant containing a narrowly drawn time restriction will be upheld by the courts. Conversely, time constraints which are more favorable to the employer may be struck due to their oppressive nature. Therefore, the draftsman should refrain from practicing "brinkmanship," *i.e.*, attempting to approximate the outermost boundary of acceptability.

---

N.E.2d 447 (1957) (engineer agreed not to compete with his former employer in nineteen states for a period of five years); *Krueger, Hutchinson & Overton Clinic v. Lewis*, 266 S.W.2d 885 (Tex. Civ. App. 1954), *aff'd*, 153 Tex. 363, 269 S.W.2d 798 (1954) (orthopedic surgeon stipulated he would *never* practice medicine in a particular county).

149. See notes 101-04 *supra* and accompanying text.

150. Generally, duration standing alone is not sufficient to render such an agreement automatically unenforceable. Most of the cases hold that this rule applies even where there is an unlimited duration. See 41 A.L.R.2d, *supra* note 76, at 33.

151. See, *e.g.*, *Mutual Loan Co. v. Pierce*, 245 Iowa 1051, 65 N.W.2d 405 (1954) (delinquent account collector of a personal loan business agreed not to engage in similar work for one year in any locality in which he had served his employer); *Crowell v. Woodruff*, 245 S.W.2d 447 (Ky. 1951) (employee was prohibited from engaging in the dry cleaning business in competition with his employer for one year); *Standard Oil Co. v. Bertelsen*, 186 Minn. 483, 243 N.W. 701 (1932) (employee was barred from selling gasoline furnished by any supplier other than the complainant for one year); *Iron City Laundry Co. v. Leyton*, 55 Pa. Super. 93 (1913) (laundry route man was not to participate in a similar business for ninety days).

152. Blake, *supra* note 78, at 686.

## c. Area

Under the law of Virginia restrictive covenants covering an area as large as the United States are enforceable. In *National Homes Corp. v. Lester Industries, Inc.*,<sup>153</sup> the court ruled that the employee was not precluded from entering the prefabricated housing field within this country as long as he did not compete with the plaintiff-former employer. Moreover, the opinion indicates that the covenantor was at liberty to engage in such activity outside of the United States. According to the majority, "[t]he area is not too vast when viewed from the facts peculiar to this case. . . ."<sup>154</sup>

The appellate court upheld the decision, concluding that even an agreement encompassing such broad constraints is valid under Virginia law.<sup>155</sup> The Fourth Circuit actually enlarged the restricted area to include a portion of the Commonwealth not found to be a competitive market of the former employer in the court below.

*Meissel v. Finley*<sup>156</sup> holds that under certain circumstances an area defined in terms of a fifty mile radius of the City of Norfolk may be included in an enforceable restrictive covenant. In preventing an insurance executive from competing in this territory, the Virginia Supreme Court found that the area in question was virtually co-extensive with the former employer's market.<sup>157</sup>

Other states have upheld agreements not to compete even though they contained territorial boundaries which, at first blush, seem unreasonable.<sup>158</sup> Usually the courts base their holdings on the overriding need to

---

153. 293 F. Supp. 1025 (W.D. Va.), *aff'd*, 404 F.2d 225 (4th Cir. 1968). See text accompanying notes 143-44 *supra* for factual setting.

154. 293 F. Supp. at 1031-32. The employee had been highly successful in this business and had sold his company to the plaintiff prior to becoming a member of plaintiff's board of directors. The agreement was not ancillary to the sale, however.

155. *National Homes Corp. v. Lester Indus., Inc.*, 404 F.2d 225 (4th Cir. 1968).

156. 198 Va. 577, 95 S.E.2d 186 (1956). See text accompanying notes 143-44 *supra* for factual setting.

157. 198 Va. at 582-83, 95 S.E.2d at 190. In *Worrie v. Boze*, 191 Va. 916, 62 S.E.2d 876 (1951), the court enforced a covenant with a territorial scope of a twenty-five mile radius from the employer's Richmond-based studio.

158. See, e.g., *Hulsenbusch v. Davidson Rubber Co.*, 344 F.2d 730 (8th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966) (employee who had learned trade secrets promised to refrain from competing with a manufacturer of padded interior parts for automobiles anywhere in the United States for two years); *Auto Club Affiliates, Inc. v. Donahay*, 281 So. 2d 239 (Fla. Ct. App. 1973) (applying Indiana law) (insurance salesman agreed to refrain from competing for five years; although the area was without a boundary, the court noted that the company's business was highly specialized and the company's market extended nationwide);

protect the employer's legitimate business interests.<sup>159</sup>

Two federal courts applying Virginia law have invalidated employee covenants upon finding no express geographical limitation.<sup>160</sup> *Davis-Robertson Agency v. Duke*<sup>161</sup> involved an advertising firm which attempted to enjoin former employees from operating another agency in defiance of a covenant prohibiting such conduct for two years. The court denied relief, citing the agreement's silence with respect to area as the fatal flaw. According to the opinion, enforcement of the covenant would mean that upon leaving plaintiff's employ, the former workers could not practice their trade anywhere in the world.<sup>162</sup> This proscription would result in undue hardship.

In *Alston Studios, Inc. v. Lloyd V. Gress & Associates*<sup>163</sup> the agreement prevented the employee from continuing in the business of photographing school children for two years. There was a conspicuous absence of any defined area. Viewed in light of the fact that the former employer could effectively bar the defendant from engaging in any aspect of the business<sup>164</sup> in any part of the world, the majority concluded that the covenant created unreasonable hardship for the employee.

Though the draftsman may feel secure in defining the territorial scope of a restrictive covenant narrowly, several jurisdictions have declined to enforce seemingly reasonable agreements.<sup>165</sup> As in the case of relatively

---

*Novelty Bias Binding Co. v. Shevrin*, 342 Mass. 714, 175 N.E.2d 374 (1961) (employee serving as both general manager and sales manager of two corporations manufacturing and distributing trimming fabrics covenanted not to compete in selling certain plastic goods for three years in a twenty-eight state area; the court found that the employer's markets actually extended to all but two of these states and that the employee exercised complete control over their competitive position); *Irvington Varnish and Insulator Co. v. Van Norde*, 138 N.J. Eq. 99, 46 A.2d 201 (1946) (plant engineer with knowledge of certain confidential information promised that he would not compete with a manufacturer of varnishes and insulation anywhere in this country for two years); *Toulmin v. Becker*, 69 Abs. 109, 124 N.E.2d 778 (1954) (patent solicitor consented to an agreement whereby he would not engage in the practice of patent law or patent solicitation in either Michigan or Ohio for five years).

159. See notes 85-127 *supra* and accompanying text.

160. The overwhelming majority of the cases, and particularly those decided in recent years, support the proposition that the mere fact that a covenant not to compete contains no limit in area or is expressly made unlimited does not, standing alone, render the covenant *ipso facto* unenforceable. See 43 A.L.R.2d, *supra* note 76, at 130.

161. 119 F. Supp. 931 (E.D. Va. 1953).

162. *Id.* at 935-36.

163. 492 F.2d 279 (4th Cir. 1974).

164. The Fourth Circuit was also critical of the covenant because it precluded activities in which the worker did not participate while in the plaintiff's employ. *Id.* See notes 69-76 *infra* and accompanying text for a discussion of limitation of an employee's activities.

165. *Tawney v. Mutual Sys. of Md., Inc.*, 186 Md. 508, 47 A.2d 372 (1946) (covenant

brief durational constraints,<sup>166</sup> the courts hesitate to grant relief to the employer when the employee will be deprived of an opportunity to earn a living. This appears to be particularly true during a depressed economy.

To reduce the likelihood of a successful challenge to the enforceability of a restrictive covenant, the practitioner should be careful to tailor the restricted area so as to afford no more protection to the employer than necessary. In particular, the draftsman in Virginia should avoid relying upon an indefinite or limitless boundary.<sup>167</sup>

#### d. Activity

One of the key considerations in determining whether the restriction is overbroad is the position the worker held while in the employ of the covenantee.<sup>168</sup> The scope of the restrictive covenant may be no greater than the area of activity in which the covenantor engaged.<sup>169</sup> A Virginia case, *Richardson v. Paxton Co.*,<sup>170</sup> clearly illustrates this point. Here the employee, a former salesman, promised not to engage in any branch of activities relating to any kind of marine or industrial supplies, equipment, or services in a four-state area (including Virginia) for three years. Upon termination of his employment, the defendant began working as a sales representative for one of his former employer's suppliers. The court determined that if the covenant was enforced, not only would the employee be prohibited from working as a salesman, but he would also be precluded from participating in *any* activity in the fields outlined in the agreement.<sup>171</sup> It was felt that this afforded the employer greater protection

---

prevented a bank manager and a cashier from engaging in services similar to those offered by their employer in the Baltimore trading area for two years); *Lantieri Beauty Salon, Inc. v. Yale*, 169 Misc. 547, 7 N.Y.S.2d 984 (1938) (manicurist agreed to refrain from competing with her employer for a certain period of time within twenty blocks of the covenantee's establishment); *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944) (deliveryman-bill collector agreed not to compete in the retail clothing market for two years in a particular county and contiguous counties; the court previously determined that the restrictive covenant must fail for want of consideration because it was executed subsequent to obtaining employment without a change in the employee's position—see notes 28-69 *supra* and accompanying text); *Byers v. Trans-Pecos Abstract Co.*, 18 S.W.2d 1096 (Tex. Civ. App. 1929) (abstractor was precluded from competing within a particular county for two years; covenant was not enforced where the employer failed to prove actual injury).

166. See text following note 152 *supra*.

167. *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279 (4th Cir. 1974); *Davis-Robertson Agency v. Duke*, 119 F. Supp. 931 (E.D. Va. 1953).

168. *Blake*, *supra* note 78, at 675-76.

169. *Id.* at 680.

170. 203 Va. 790, 127 S.E.2d 113 (1962).

171. *Id.* at 795, 127 S.E.2d at 117.

than necessary, and thus worked undue hardship on the covenantor. A similar result was reached in *Alston Studios, Inc. v. Lloyd V. Gress & Associates*.<sup>172</sup>

As a general rule the employer should confine the proscription concerning activities to only those aspects of the business in which the former employee engages while working for the covenantee. Specificity in the drafting of restricted activities is particularly vital when the employee holds what would normally be considered a lower-level position.<sup>173</sup>

Closely related to the question of proscribed activities is the worker's status upon entering and leaving the employment relationship with the covenantee. The courts are inclined to look more favorably upon a restraint when the individual acquires new skills during the course of his work. In *Freudenthal v. Espey*,<sup>174</sup> a Colorado court underscored this position when it examined the situation wherein a professional hires an assistant with the understanding that in return for valuable experience in the field, the employee will not solicit his employer's patients or clients at a later time. However, if the employee brings with him a wealth of knowledge, the courts place a heavy burden on the employer to demonstrate that his legitimate interests would be adversely affected were the covenant to be declared unenforceable.<sup>175</sup>

#### e. Conclusion

As mentioned before, there are no *specific* rules which, if followed, will guarantee that the courts in Virginia or elsewhere will enforce a restrictive covenant. Variables such as time, area, and activity, when viewed together, are but a part of the analysis to determine whether the agreement is fair to both parties. The practitioner should observe the *general* guidelines set forth herein, however, when drafting such an agreement.

---

172. 492 F.2d 279 (4th Cir. 1974). *See also*, *Maryland Undercoating Co. v. Payne*, 603 F.2d 477 (4th Cir. 1979) (court refused to enjoin a former employee of a company engaged in processing motor vehicles for importers, distributors, and dealers when the employee went to work for Ford Motor Company, a former customer, upon Ford's decision to service its own imports; the court determined that Ford was not a competitor of the employer in that Ford serviced no other automobiles and that the covenant only concerned working in competition with the covenantee).

173. Most cases on point seem to share the common belief that as an employee rises higher in the organization he acquires greater inside knowledge which in turn justifies a broader constraint on subsequent activity. *See, e.g.*, *Hulsenbusch v. Davidson Rubber Co.*, 344 F.2d 730 (8th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966); *Novelty Bias Binding Co. v. Shevrin*, 342 Mass. 714, 175 N.E.2d 374 (1961).

174. 45 Colo. 488, 102 P. 280 (1909).

175. *Blake*, *supra* note 78, at 684.

Since this area of the law is not well-settled, it is probably in the employer's best long-term interests to shield the restrictive covenant from the critical eyes of the courts. This result can be achieved through exercising self-restraint. If the employer is not overly demanding and views the restrictions from the worker's vantage point, he is more likely to execute an agreement which will be honored by the covenantor, or readily upheld by the courts in the event of breach.

#### 4. Reasonableness and Public Policy

As a third criterion in determining the reasonableness and enforceability of the covenant, courts look at the covenant's relationship to the interests of the public.<sup>176</sup> If the covenant is too broad in its limitations it may interfere with these interests. This is an integral and indispensable part of the court's evaluation since the concerns of the public surround the covenant from the day the parties contract for it, primarily due to the underlying philosophy of the covenant and its nature.

The foundation and *raison d'être* for restrictive covenants is the policy of freedom to contract.<sup>177</sup> The public has a tremendous interest in the protection of this freedom, namely the orderly conduct of affairs in the business, industrial, and financial world.<sup>178</sup> It falls on the court to protect this interest whenever the situation so merits. Diametrically opposed to the freedom of contract, in this context, is the freedom of trade. Courts place great stock in the virtues of competition and advancement through hard work.<sup>179</sup> In fact, "the right . . . to use one's skill, talents, or experience for one's own benefit is a natural and inherent right of the individual. . . ."<sup>180</sup> Therefore any abridgement of this right tends to violate public policy. Courts as a result must balance both of these "inherent" rights, and hence, they weigh very carefully the interests of the employee in being free from restraint and the right of both the employee and the em-

---

176. *Meissel v. Finley*, 198 Va. 577, 95 S.E.2d 186 (1956).

177. Freedom of contract is a "well recognized principle . . . which in its essence is . . . natural and inherent in the individual, and which in innumerable cases the courts have recognized and enforced." *Deuerling v. City Baking Co.*, 155 Md. 280, \_\_\_, 141 A. 542, 544 (1928).

178. *Id. Accord*, *Granger v. Craven*, 159 Minn. 296, 199 N.W. 10 (1924); *Worrie v. Boze*, 191 Va. 916, 62 S.E.2d 876 (1951).

179. "It has long been recognized by courts and economists that it is just as essential that men's services be freely for sale as that property should not be allowed to be withdrawn from the market for an indefinite length of time." *Deuerling v. City Baking Co.*, 155 Md. 280, \_\_\_, 141 A. 542, 544 (1928).

180. *Id.* at \_\_\_, 141 A. at 543.

ployer to enter freely into a contract.<sup>181</sup>

Aside from these underlying policy concerns, the court must also look at several practical considerations, including the direct effect that the covenant might have on the public if enforced. Normally, the deprivation of the employee's services by means of a restrictive covenant is considered to be expected by the public.<sup>182</sup> Courts, in enforcing covenants not to compete, generally presume that the service rendered by the party breaching the covenant can adequately be performed by someone else.<sup>183</sup> However, where the services of the employee are unique or where there is a shortage of such services, the courts, by inference from the cases, might not enforce a restrictive covenant.<sup>184</sup> Likewise, where the enforcement of a covenant would tend to create or promote a monopoly, the court would likely find it to be unreasonable.<sup>185</sup>

Secondly, by depriving the employee of his livelihood within a given area for a certain amount of time, the court also runs the risk of the employee and his family becoming public charges. If such a possibility exists, it would more than likely render the covenant unreasonable. In *Love v. Miami Laundry Co.*,<sup>186</sup> the court, in invalidating the covenant, reasoned that "enforcement of the provision of the contract may, and in all probability will mean that the contracting employee cannot procure other employment and that he, together with his family, will become a charge on the public."<sup>187</sup>

Finally, the court must remember that such covenants provide positive aspects in light of other public interests; specifically the protection of an established trade or profession.<sup>188</sup> If such covenants are allowed, the employer, because he is assured of some protection as a result of a covenant not to compete, will be more likely to create new positions resulting in an increase in the number of people employed. Additionally, assurance of protection will tend to promote the free dissemination of ideas and knowledge between the employer and employee, leading to improvements

---

181. The restrictive covenants are "carefully scrutinized, looked upon with disfavor, strictly interpreted, and reluctantly upheld." Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 62 Abs. 17, \_\_\_, 105 N.E.2d 685, 693 (Ohio 1952).

182. Blake, *supra* note 78, at 686-87.

183. Racine v. Bender, 141 Wash. 606, 252 P. 115 (1927).

184. See *id.*; Lakeside Oil Co. v. Slutsky, 8 Wis. 2d 157, 98 N.W.2d 415 (1959).

185. See Klaff v. Pratt, 117 Va. 737, 86 S.E. 74 (1915); Lakeside Oil Co. v. Slutsky, 8 Wis. 2d 157, 98 N.W.2d 415 (1959).

186. 118 Fla. 137, 160 So. 32 (1935).

187. *Id.* at \_\_\_, 160 So. at 334.

188. Granger v. Craven, 159 Minn. 296, 199 N.W. 10 (1924); Worrie v. Boze, 191 Va. 916, 62 S.E.2d 876 (1951).

and changes which might not have resulted otherwise.<sup>189</sup>

It is important to re-emphasize that public policy considerations are not analyzed by the court separately and distinct from the other interests involved. Restrictive covenants by their nature revolve around public policy concerns which affect the employer, employee, and the public at large. In fact, Professor Blake suggests that the courts never reach this third step of the test since the balancing process "engaged in [between employer and employee] will almost always result in maximizing the social values as well as . . . [the interests] of the parties."<sup>190</sup> Whether or not the court ever separately considers this third step, the public's interest in restrictive covenants is an integral consideration of every court decision involving covenants not to compete.

### III. MODIFICATION OF UNREASONABLE COVENANTS

#### A. Introduction

With most courts today the inquiry does not end with a determination of whether or not a covenant not to compete ancillary to an employment contract is reasonable. Although some courts will declare the entire covenant void if portions thereof are unreasonable,<sup>191</sup> a majority of jurisdictions in the United States will study the agreement further to determine whether it can be modified and enforced, either by application of the "blue-pencil theory of severability"<sup>192</sup> or the "rule of 'reasonableness.'"<sup>193</sup> This discussion will survey the three views that various courts have adopted and their reasons for preferring one to the others.<sup>194</sup> In addition,

---

189. See *Freudenthal v. Espey*, 45 Colo. 488, 102 P. 280 (1909).

190. Blake, *supra* note 78, at 686-87.

191. See, e.g., *Delta Corp. of Am. v. Sebrite Corp.*, 391 F. Supp. 638 (E.D. Tenn. 1974); *Rector-Phillips-Morse, Inc. v. Vroman*, 253 Ark. 750, 489 S.W.2d 1 (1973); *Richard P. Rita Personnel Servs. Int'l, Inc. v. Kot*, 229 Ga. 314, 191 S.E.2d 79 (1972).

192. *Richard P. Rita Personnel Servs. Int'l, Inc. v. Kot*, 229 Ga. 314, —, 191 S.E.2d 79, 81 (1972).

193. *Raimonde v. Van Vlerah*, 42 Ohio St. 2d 21, —, 325 N.E.2d 544, 546-47 (1975).

194. A related issue is whether a court will modify a *reasonable* non-competition covenant such that its restrictive time period will start to run from the date of final judgment rather than from the date of termination of the employment relationship. Although this question is outside the scope of this article, it is worthy of mention in view of the amount of time which litigation can consume. An employer who was denied an injunction while his case was pending may later find that although he drafted a reasonable and enforceable agreement he has, in effect, lost his case because the restrictive period expired before final disposition of his case, thus rendering his prayer for an injunction moot. See, e.g., *Meeker v. Stuart*, 188 F. Supp. 272 (D.D.C. 1960); *Tull v. Turek*, 38 Del. Ch. 182, 147 A.2d 658 (1958); *Hayes v. Altman*, 438 Pa. 451, 266 A.2d 269 (1970). At least two courts, however, have held that once the covenant is determined to be reasonable it would be unfair not to restrain the

decisions applying Virginia law will be examined in an attempt to ascertain the Supreme Court of Virginia's position with respect to modification of non-competition agreements ancillary to employment contracts.

### B. *The Three Views*

Some courts refuse entirely to modify unreasonable covenants not to compete, arguing that to do so would encourage employers to purposely draft broad non-competition agreements with the knowledge that most employees will respect them as written, while the proportionally few covenants which are not respected will find their way into court and be pared down until reasonable.<sup>195</sup> A few courts, without addressing the issue of whether this all-or-nothing policy will best protect employees from unreasonable restraints, will not modify on the ground that a court may not rewrite the parties' contract for them because to do so is "not within the

---

former employee from competing if he has been allowed to do so during the pendency of the dispute. *Capelouto v. Orkin Exterminating Co.*, 183 So. 2d 532 (Fla. 1966); *Fullerton Lumber Co. v. Torborg*, 270 Wis. 133, 70 N.W.2d 585 (1955). *See also* *Cook v. Walker Chem. & Extermination Co.*, 199 So. 2d 126 (Fla. 1967); *Uni-Chem Corp. v. Maret*, 338 So. 2d 885 (Fla. App. 1976). And some courts, without explanation, enjoin the defendant for the restrictive period beginning with the final decree. *See, e.g.*, *Maimone v. Wackenhut Corp.*, 329 So. 2d 332 (Fla. App. 1976); *Piercing Pagoda, Inc. v. Hoffner*, 465 Pa. 500, 351 A.2d 207 (1976); *Morgan's Home Equipment Corp. v. Martucci*, 390 Pa. 618, 136 A.2d 838 (1957).

In *Hallmark Personnel Agency, Inc. v. Jones*, 207 Va. 968, 154 S.E.2d 5 (1967), the Virginia Supreme Court held that it could not enjoin a former employee from working for a competing business since the eighteen month restrictive period had already passed. The question was deemed moot and the appeal was dismissed. *Id.* at 970-71. However, the *Hallmark* decision may not necessarily prohibit the court from making the non-competition period begin to run from the time of the court's final decree, even though at first glance the case seems to stand for that proposition. In neither *Hallmark* nor the decisions relied upon by the *Hallmark* court did the plaintiffs request that the injunctive relief begin to run from the date of final judgment. *See* Brief for Appellant at 10, *Hallmark Personnel Agency, Inc. v. Jones*, 207 Va. 968 (1967). *See also* *Cumberland Bank & Trust Co. v. French*, 186 Va. 53, 41 S.E.2d 499 (1947); *Hankins v. Town of Virginia Beach*, 182 Va. 642, 29 S.E.2d 831 (1944); *Franklin v. Peers*, 95 Va. 602, 29 S.E. 321 (1898). In addition, there are persuasive policy arguments favoring the view that the court should modify the contract such that the restrictive period begins to run on the date of final decree, including the possibility that former employees need only litigate the controversy until it becomes moot, thus avoiding enforcement of a reasonable covenant not to compete. The Supreme Court of Virginia recently granted *certiorari* in *Roanoke Engineering Sales, Inc. v. Rosenbaum*, a case which places this very issue before the court. *Roanoke Engineering Sales, Inc. v. Rosenbaum*, No. 79-153 (Va., cert. granted Mar. 14, 1980).

195. *Richard P. Rita Personnel Servs. Int'l., Inc. v. Kot*, 229 Ga. 314, 191 S.E.2d 79 (1972); *Blake, supra* note 78, at 683. (According to Professor Blake, a court's willingness to modify the proportionally few covenants which come to trial "smacks of having one's employee's cake, and eating it too." *Id.*)

judicial province as it has been traditionally understood in our law."<sup>196</sup> In addition, a court may refuse to modify covenants not to compete pursuant to a state restraint of trade statute prohibiting such covenants.<sup>197</sup>

Most courts, however, will modify the covenant within the parameters of reasonableness, which depends upon the facts and circumstances of each case.<sup>198</sup> One popular approach<sup>199</sup> to modifying non-competition covenants in employment contracts has been by application of the "blue-pencil" test<sup>200</sup> which allows the court to enforce the reasonable portions of the covenant if the unreasonably broad language restricting the former employee's behavior can be stricken in such a way as to leave the reasonable restrictions grammatically intact.<sup>201</sup> For example, a covenant listing four distinct geographical areas as off limits to the former employee was partially enforced by the Supreme Court of North Carolina because the geographical areas encompassed by the unreasonable restrictions could be penciled through with the reasonable restriction prohibiting competition in the town of former employment still comprising part of a valid contract.<sup>202</sup>

Courts utilizing the blue-pencil doctrine do so on the theory that they are not rewriting the parties' contract because the remaining language to which effect is given is that of the parties.<sup>203</sup> In *Eldridge v. Johnston*,<sup>204</sup>

---

196. *Rector-Phillips-Morse, Inc. v. Vroman*, 253 Ark. 750, —, 489 S.W.2d 1, 4 (1973).

197. *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, 98 N.W.2d 415 (1959) (noting that subsequent statute had overruled the "reasonableness" test adopted in *Fullerton Lumber Co. v. Torborg*, 270 Wis. 133, 70 N.W.2d 585 (1955)).

198. See *Blake, supra* note 78, at 629-51 for a discussion of the reasonableness test as historically applied in restraint of trade cases.

199. It appears that adoption of or adherence to the blue-pencil doctrine is on the decline, and that the current trend, and perhaps a majority of jurisdictions, clearly favors modification without reference to severability. *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368 (Iowa), *modified on other grounds*, 190 N.W.2d 413 (Iowa 1971); *Blake, supra* note 78, at 682 n.193.

200. *Extine v. Williamson Midwest, Inc.*, 176 Ohio St. 403, —, 200 N.E.2d 297, 299 (1964). The term "blue-pencil" is widely used with reference to this test based on severability, and is also referred to as "the doctrine of partial validity," *Id.*, the "[b]lue-pencil theory of severability," *Richard P. Rita Personnel Servs. Int'l, Inc. v. Kot*, 229 Ga. 314, —, 191 S.E.2d 79, 81 (1972), and "the rule of . . . selective construction," *Solari Indus., Inc. v. Malady*, 55 N.J. 571, —, 264 A.2d 53, 60 (1970).

201. See generally 6A A. CORBIN, CORBIN ON CONTRACTS § 1390 at 67-69 (1962); 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1647B (3d ed. 1972).

202. *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 120 S.E.2d 739 (1961) (clauses prohibiting competition anywhere in the United States where employer does or intends to do business held unreasonable).

203. See generally 6A A. CORBIN, *supra* note 201. "By some occult process, the courts adopting this rule convinced themselves that partial enforcement without the aid of a 'blue-

the Oregon Supreme Court utilized notions of sanctity of contract in order to justify its partial enforcement of an agreement containing illegal provisions.<sup>205</sup>

With respect to the blue-pencil test, the issue arises as to what language is, in fact, divisible. According to Professor Corbin, "[d]ivisibility is a term that has no general and invariable definition; instead the term varies so much with the subject-matter involved and the purposes in view that its use either as an aid to decision or in the statement of results tends to befog the real issue."<sup>206</sup> In *Eastern Business Forms, Inc. v. Kistler*, the Supreme Court of South Carolina said it would not "'artificially split up [a single covenant] in order to pick out some part of it that [could] be upheld.'"<sup>207</sup> Instead, the blue-pencil test allows partial enforcement "'only in the case of a covenant which is in effect a combination of several distinct covenants.'"<sup>208</sup>

In Massachusetts, the courts apparently apply a more lax rule for determining whether the requirement of divisibility has been met.<sup>209</sup> For instance, in *Edgecomb v. Edmonston*,<sup>210</sup> the following covenant was at issue:

3. The said Edmonston further agrees that upon the termination of this agreement he will not, without the consent of the said Edgecomb, in writing thereto first obtained, engage in any line of business similar to the said Edgecomb's within the commonwealth of Massachusetts, for a period of five years thereafter.<sup>211</sup>

According to most courts this language would not be divisible because it fails to list specific geographical areas within the state. Nevertheless, it

pencil' would be 'making a new contract for the parties' while partial enforcement in the wake of a 'blue-pencil' is not." *Id.* at 68.

204. 195 Or. 379, 245 P.2d 239 (1952).

205. See Williston & Corbin, *On the Doctrine of Beit v. Beit*, 23 CONN. B.J. 40 (1949) for an analysis of the various types of "illegal" bargains and clarification of their respective treatments, particularly with reference to unreasonable, and therefore illegal, covenants not to compete.

206. 6A A. CORBIN, *supra* note 201, at 66-67.

207. 258 S.C. 429, \_\_\_, 189 S.E.2d 22, 24 (1972) (quoting *Somerset v. Reyner*, 233 S.C. 324, \_\_\_, 104 S.E.2d 344, 347 (1958)) (where it would have been reasonable to restrict the former employee from competing in three counties, the court would not do so when the covenant prohibited competition within 100 miles of one of two named cities, an area which encompassed more than the three counties).

208. *Id.*

209. See *generally* Annot., 61 A.L.R.3d 397, 413-14 (1975).

210. 257 Mass. 12, 153 N.E. 99 (1926).

211. *Id.* at \_\_\_, 153 N.E. at 100.

was held divisible and was enforced with respect to the city of Boston and to the former employer's customers in Massachusetts. The court noted that:

the theory of the divisibility of space as applied to this contract is consonant with public policy and is more consistent with the intent of the contract than is the contention that the . . . covenant is not enforceable . . . because the unit of space is not so described as to indicate its component territorial parts and divisions.<sup>212</sup>

Later Massachusetts cases following *Edgecomb* articulate the question in terms of whether the covenant is "reasonably divisible."<sup>213</sup>

The Restatement of Contracts adopted the blue-pencil doctrine, allowing severance of terms which were divisible, but in any event disallowing partial enforcement of even reasonable restrictions if "the entire agreement [was] part of a plan to obtain a monopoly."<sup>214</sup> This latter qualification insured that covenants which seriously oppose public policy would not be enforced, even divisible portions thereof which would otherwise be reasonable.<sup>215</sup>

Although some courts still follow the blue-pencil doctrine,<sup>216</sup> most courts which have addressed the issue have abandoned or rejected it and its notions of divisibility in favor of enforcing unreasonable covenants not

---

212. *Id.* at \_\_\_, 153 N.E. at 102.

213. *Abramson v. Blackman*, 340 Mass. 714, \_\_\_, 166 N.E.2d 729, 730 (1960) (emphasis added) (covenant restraining real estate salesman from using any information gotten verbally or from the broker's files held not reasonably divisible).

214. RESTATEMENT OF CONTRACTS § 518 (1932). *But see* S. Williston & A. Corbin, *supra* note 205 in which both professors renounced their former Restatement position in favor of the more modern rule of reasonableness, at least with respect to covenants ancillary to the sale of a business and arguably with respect to employment contracts. *See also* Blake, *supra* note 78, at 646 n.70, 682 n.193.

215. RESTATEMENT OF CONTRACTS § 518, Comment a (1932).

216. *See, e.g.,* *Lassen v. Benton*, 87 Ariz. 72, 347 P.2d 1012 (1959) (covenant unenforceable because not divisible); *Timenterial, Inc. v. Dagata*, 29 Conn. Supp. 180, 277 A.2d 512 (1971) (covenant unenforceable because not divisible); *Central Keystone Plating, Inc. v. Hutchinson*, 62 Ill. App. 2d 188, 210 N.E.2d 239 (1965) (covenant held divisible and remanded with instructions to determine what area is reasonable); *Donahue v. Permacel Safe Corp.*, 234 Ind. 398, 127 N.E.2d 235 (1955) (covenant unenforceable because not divisible); *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 120 S.E.2d 739 (1961) (covenant held divisible and partially enforceable); *Eldridge v. Johnson*, 195 Or. 379, 245 P.2d 239 (1952) (covenant held divisible and partially enforceable); *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22 (1972) (covenant unenforceable because not divisible); *O. Hommel Co. v. Fink*, 115 W.Va. 686, 177 S.E. 619 (1934) (covenant enforced as to some of the terms, although court did not speak in terms of the blue-pencil test) (Later West Virginia courts speak in terms of "shaving" the contract's terms. *See, e.g.,* *Pancake Realty, Co. v. Harber*, 137 W.Va. 605, 73 S.E.2d 438, 442 (1952)).

to compete to the extent that they are reasonable.<sup>217</sup> Thus, in *Redd Pest Control Company v. Heatherly*,<sup>218</sup> the former employee was enjoined from engaging in the exterminating business in or within a fifty mile radius of Tupelo, Mississippi, the territory determined to be that where he could use contacts from his job to take away his former employer's customers. The restrictive covenant prohibited him from competing anywhere in the state. The court reasoned that "the legality of contracts in restraint of trade should not turn upon the mere form of wording but rather upon the reasonableness of giving effect to the indivisible promise to the extent that it would be lawful."<sup>219</sup>

It is said that this "rule of 'reasonableness'"<sup>220</sup> is "more consistent with the inherent concerns of a court of equity—fairness and reasonableness,"<sup>221</sup> whereas the blue-pencil doctrine is said to "emphasize form over substance"<sup>222</sup> and result in both arbitrariness and inconsistency.<sup>223</sup> The basic principle supporting the modern rule "is that equity should not per-

217. *Mason Corp. v. Kennedy*, 286 Ala. 639, 244 So.2d 585 (1971); *Whittenberg v. Williams*, 110 Colo. 418, 135 P.2d 228 (1943); *John Roane, Inc. v. Tweed*, 33 Del. Ch. 4, 89 A.2d 548 (1952) (applying Maryland law); *Flammer v. Patton*, 245 So.2d 854 (Fla. 1971) (rule of reasonableness applied to restrictive covenant encompassed in a pension plan by virtue of enactment of statute); *Technicolor, Inc. v. Traeger*, 57 Hawaii 113, 551 P.2d 163 (1976) (rule of reason test applied to determine the validity of restrictive covenants which are not per se violations of the applicable statute); *Insurance Center, Inc. v. Taylor*, 94 Idaho 896, 499 P.2d 1252 (1972); *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, *modified on other grounds*, 190 N.W.2d 413 (Iowa 1971); *Foltz v. Struzness*, 168 Kan. 714, 215 P.2d 133 (1950); *Ceresia v. Mitchell*, 242 S.W.2d 359 (Ky. 1951) (covenant ancillary to the sale of a business; however, dicta indicates adoption of the rule with respect to employment contracts as well); *Bess v. Bothman*, 257 N.W.2d 791 (Minn. 1977) (covenant ancillary to the sale of a business; however, dicta indicates adoption of the rule with respect to employment contracts as well); *Redd Pest Control Co. v. Heatherly*, 248 Miss. 34, 157 So. 2d 133 (1963); *R. E. Harrington, Inc. v. Frick*, 428 S.W.2d 945 (Mo. App. 1968) (covenant held reasonable yet dicta rejects the blue-pencil doctrine and favors modification for "reasons of equity and common sense"); *Hansen v. Edwards*, 83 Nev. 189, 426 P.2d 792 (1967); *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 264 A.2d 53 (1970); *Raimonde v. Van Vlerah*, 45 Ohio St. 2d 21, 325 N.E.2d 544 (1975) (overruling *Extine v. Williamson Midwest, Inc.*, 176 Ohio St. 403, 200 N.E.2d 297 (1964)); *Sidco Paper Co. v. Aaron*, 465 Pa. 586, 351 A.2d 250 (1976); *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950 (1960); *Wood v. May*, 73 Wash. 2d 307, 438 P.2d 587 (1968).

218. 248 Miss. 34, 157 So. 2d 133 (1963).

219. *Id.* at \_\_\_, 157 So. 2d at 136.

220. *Raimonde v. Van Vlerah*, 45 Ohio St. 2d 21, \_\_\_, 325 N.E.2d 544, 546-47 (1975).

221. *Insurance Center, Inc. v. Taylor*, 94 Idaho 896, \_\_\_, 499 P.2d 1252, 1255 (1972).

222. *Bess v. Bothman*, 257 N.W.2d 791, 795 (Minn. 1977).

223. *Raimonde v. Van Vlerah*, 45 Ohio St. 2d 21, 325 N.E.2d 544 (1975). The Ohio court noted that blue-penciling can make a contract useless. "Because employers seek to insure that provisions are not unreasonable, and therefore severed, employees may gain the benefit of overly-lenient employment restrictions." *Id.* at \_\_\_, 325 N.E.2d at 546.

mit an injustice which might result from total rejection of the covenant merely because the court disagrees with an employer's judgment as to what restriction is necessary to protect his business."<sup>224</sup>

Courts following the modern trend are not persuaded by the assertion that the reasonableness rule encourages "*in terrorem* tactics by employers."<sup>225</sup> They argue instead that a limitation is imposed upon the court which is willing to modify without reference to divisibility by virtue of the fact that partial enforcement of even reasonable restrictions is not allowed "[w]henver evidence of conscious overreaching, bad faith, monopolization or deliberate oppression is shown."<sup>226</sup>

### C. *The Law in Virginia*

The Virginia Supreme Court has not specifically addressed the issue of whether it will modify, either via the blue-pencil test or the rule of reasonableness, unreasonable covenants not to compete in employment contracts so that they may be partially enforced.

In *National Homes Corp. v. Lester Industries, Inc.*,<sup>227</sup> the Fourth Circuit Court of Appeals, applying Virginia law, enjoined a former employee from competing with his former employer in the state of Virginia, even though the restrictive covenant broadly stated that the employee would not engage "*anywhere* in the United States, *in any* enterprise in competition with the business of National Homes Corporation."<sup>228</sup> Although at first glance the decision seems to indicate that Virginia will modify employment covenants not to compete, this is not the case. *National Homes* dealt with an agreement for the sale of a business as well as an employment contract and was later distinguished for this reason in *Alston Studios, Inc. v. Lloyd V. Gress & Associates*.<sup>229</sup>

---

224. *Eastern Distributing Co. v. Flynn*, 222 Kan. 666, \_\_\_, 567 P.2d 1371, 1379 (1977).

225. *Insurance Center, Inc. v. Taylor*, 94 Idaho 896, \_\_\_, 499 P.2d 1252, 1255 (1972).

226. *Id.* (though the court would nevertheless modify the agreement if there were a "compelling public interest"). *Accord*, *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368 (Iowa 1971) (agreement enforceable as long as no undue hardship on employee and no public interest affected); *Sidco Paper Co. v. Aaron*, 465 Pa. 586, 351 A.2d 250 (1976) (distinguishing covenants held void because of "an intent to oppress the employee and/or foster a monopoly").

227. 404 F.2d 225 (4th Cir. 1968).

228. *Id.* at 226 n.1 (emphasis added).

229. 492 F.2d 279 (4th Cir. 1974) (applying Va. law). Nor does *National Homes* stand for the proposition that unreasonable restrictive covenants ancillary to the sale of a business may be modified and partially enforced. The covenant in *National Homes* was assumed to be reasonable because the injunction was issued pursuant to a default judgment. *Alston Studios*, 492 F.2d at 284. It prohibited competition in any place in the United States where

Consequently, *National Homes* cannot be looked to for guidance in determining whether Virginia courts may modify unreasonable non-competition covenants ancillary only to the employer-employee relationship. However, two other opinions are particularly relevant—*Richardson v. Paxton Co.*,<sup>230</sup> a Virginia Supreme Court decision, and *Alston Studios*, the aforementioned Fourth Circuit opinion.

*Richardson* was an action seeking to enjoin a former employee from “entering or engaging in any branch of marine or industrial supplies, equipment, services, business” in the states of Virginia, North Carolina, South Carolina and Maryland for a period of three years,<sup>231</sup> pursuant to an agreement to the same effect entered into between the employer and employee. The lower court awarded the injunction, but only with respect to Virginia.<sup>232</sup> The Supreme Court of Virginia reversed because the covenant was unreasonable and unenforceable.

In light of *Richardson*, it appears that Virginia courts may not modify, by either method, employment covenants not to compete. However, further study indicates that the issue has not been fully addressed. The employer in *Richardson* asked the court to apply the blue-pencil test and thus uphold the trial courts’ injunction with respect to Virginia.<sup>233</sup> However, it is unclear whether the court reversed on the ground that employment non-competition covenants must stand or fall as a whole, or because the covenant was not divisible and therefore not partially enforceable.

The *Richardson* covenant would appear to be a prime candidate for divisibility since the territory to which it refers distinctly lists four states. However, even if Virginia alone were a reasonable territory, the opinion indicates that the activities restrained were likewise unreasonable.<sup>234</sup> The language of the covenant regarding activities appears less susceptible of divisibility since it speaks in terms of preventing the employees from “engag[ing] in any branch of marine or industrial supplies,”<sup>235</sup> which would

---

*the employer was in competition*, as distinguished from throughout the United States generally. *Id.* In fact, the district court’s decision to enforce the covenant in Virginia except for fifteen counties, *National Homes Corp. v. Lester Industries, Inc.*, 293 F. Supp. 1025, 1033 (W.D. Va. 1968), was modified to include all of Virginia because the employer’s “competitive sphere of influence” extended throughout Virginia. *National Homes*, 404 F.2d at 227; *Alston Studios*, 492 F.2d at 284.

230. 203 Va. 790, 127 S.E.2d 113 (1962).

231. *Id.* at 791, 127 S.E.2d at 114.

232. *Id.*

233. Brief for Appellee at 29-31, *Richardson v. Paxton Co.*, 203 Va. 790, 127 S.E.2d 113 (1962).

234. 203 Va. 790, 795, 127 S.E.2d 113, 117 (1962).

235. *Id.*

include "activities in which [the employer itself] is not engaged."<sup>236</sup> In light of these facts, the basis for the court's decision is unclear.<sup>237</sup>

In addition, the employer in *Richardson* did not raise the issue of whether the covenant could be partially enforced as to activity by application of the reasonableness rule; thus, it also remains uncertain whether the Virginia Supreme Court would be inclined to allow modification via this method.

There is authority, however, which indicates that, if faced with the issue, the Virginia Supreme Court might reject notions of modification by any method and apply instead the all-or-nothing rule. In *Alston Studios*, the Fourth Circuit Court of Appeals was asked to enjoin a former employee from competing in the city where he had previously worked. The covenant was held to be unreasonable because it had no geographic limitation whatsoever,<sup>238</sup> and the activities restricted were too broadly defined.<sup>239</sup> The court would not partially enforce the agreement, saying, "we think the restrictive covenant must be judged as a whole and must stand or fall when so judged."<sup>240</sup>

Recognizing that the Virginia Supreme Court had not specifically addressed the issue of whether modification would be allowed, the Fourth Circuit based its decision not to modify on two grounds. First, it stressed that in *Richardson* the Virginia Supreme Court said that a non-competition agreement ancillary to an employment agreement "is carefully examined and strictly construed before the covenant will be enforced."<sup>241</sup> Second, the *Alston Studios* court followed *Welcome Wagon v. Morris*,<sup>242</sup> where the Fourth Circuit Court of Appeals applying North Carolina law refused to modify a covenant not to compete. It justified its reliance on *Welcome Wagon* by noting that the Virginia Supreme Court had relied thereon in *Meissel v. Finley*.<sup>243</sup>

Nevertheless, *Alston Studios* is not without criticism. Its reliance on *Richardson* is problematical since, as discussed above, it is unclear what

---

236. *Id.*

237. The court merely states: "Having reached this conclusion [that the restraint is unreasonable and unenforceable], we do not consider it necessary to discuss other questions raised." *Id.*

238. 492 F.2d at 281.

239. *Id.* at 283.

240. *Id.* at 284 (quoting *Welcome Wagon Int'l, Inc. v. Morris*, 224 F.2d 693, 701 (4th Cir. 1955)).

241. *Id.* at 283 (quoting *Richardson v. Paxton Co.*, 203 Va. at 795, 127 S.E.2d at 117).

242. 224 F.2d 693 (4th Cir. 1955) (applying N.C. law).

243. 198 Va. 577, 95 S.E.2d 186 (1956).

issues were decided in *Richardson*.<sup>244</sup> Likewise its reliance on *Welcome Wagon* is somewhat speculative since the covenant not to compete in *Meissel* was found to be reasonable and the court therefore never reached the issue of modification. In *Meissel*, the court looked to North Carolina law for the purpose of adopting three criteria to be used in determining whether a non-competition covenant is reasonable.<sup>245</sup> Furthermore, as *Welcome Wagon* has been overruled insofar as the disallowance of modification,<sup>246</sup> it does not follow that the Virginia Supreme Court would adopt its rule regarding modification.

#### D. Conclusion

Whether Virginia courts may modify unreasonable covenants not to compete remains unanswered, and even if modification is to be permitted, the issue is raised as to which, if either, method of partial enforcement is better—the blue-pencil test or the reasonableness test. Generally, the scope of courts' discretion has expanded tremendously, from policies entirely prohibiting modification to policies allowing modification via the rule of reasonableness. The conflict is clear, for both the reasonableness test and the blue-pencil test are on the one hand more in keeping with notions of freedom of contract, while on the other they foster judicial re-writing of private contracts. Which direction the Virginia Supreme Court will take remains to be seen.

### IV. CONFLICT OF LAWS

#### A. Introduction

It has frequently been noted that the confusion which exists in the area of conflict of laws involving contracts is unsurpassed.<sup>247</sup> However, it is especially necessary to be able to ascertain the applicable law in determining the enforceability of employee covenants not to compete, as it has been seen that virtually every state has set its own standards as to when such covenants will be enforced. This section will be concerned with the

---

244. See text accompanying notes 231-37 *supra*.

245. 198 Va. at 577, 95 S.E.2d at 186.

246. *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 120 S.E.2d 739 (1961).

Courts which permit modification use more or less the same criteria as used in *Welcome Wagon* for determining whether a covenant is reasonable. See, e.g., *Pancake Realty Co. v. Harber*, 137 W.Va. 605, 73 S.E.2d 438 (1952). See generally Blake, *supra* note 78, at 629-51 for a discussion of the reasonableness test and the evolution of these criteria.

247. Morris, *The Eclipse of the Lex Loci Solutionis—A Fallacy Exploded*, 6 VAND. L. REV. 505 (1953).

area of conflict of laws which involves the general validity<sup>248</sup> of restrictive covenants ancillary to an employment contract, since this is where both the confusion and the majority of the litigation lie.

With regard to general validity of contracts, three different theories have traditionally been applied to resolve the conflict of laws questions. Some courts rule that the law of the place of the making of the contract governs the contract, its validity, nature, interpretation and effect.<sup>249</sup> Other courts have ruled that the law of the place of performance governs the validity of the contract,<sup>250</sup> and still other courts look to the intent of the parties to determine the applicable law.<sup>251</sup> It has been noted that the courts "have almost always been willing to rely on another appropriate law to escape a holding of invalidity,"<sup>252</sup> and, hence, the cases dealing with this subject have been irreconcilable as the courts have applied varying laws in order to validate contracts. The situation has been further confused as courts dealing with certain issues which are against public policy, including the issue of employee covenants not to compete, have held contracts invalid by applying "either the *lex fori* or a foreign law notwithstanding the existence of a validating law having substantial contact with the contract."<sup>253</sup>

The following material attempts to elucidate the Virginia position on conflict of laws in contracts which in turn indicates where the court would stand if presented with a question regarding conflict of laws in the context of an employee covenant not to compete.

---

248. Questions involving general validity of a contract arise when the contract is enforceable in one jurisdiction in which the parties are involved but unenforceable in another. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 263 (1971).

249. See, e.g., *Minnesota Amusement Co. v. Larkin*, 299 F.2d 142 (8th Cir. 1962); *Richland Dev. Co. v. Staples*, 295 F.2d 122 (5th Cir. 1961). See generally R. LEFLAR, AMERICAN CONFLICTS LAW § 145 (3d ed. 1977).

It should be noted that the law of the place where the contract is made is also referred to as *lex loci contractus* or *lex loci celebrationis*. 2 J. BEALE, THE CONFLICT OF LAWS § 311.1 (1935).

250. See, e.g., *J.H. Horne & Sons Co. v. Bath Fibre Co.*, 272 F.2d 8 (1st Cir. 1959); *Turner Constr. Co. v. W.J. Halloran Steel Erection Co.*, 240 F.2d 441 (1st Cir. 1957). See generally R. LEFLAR, *supra* note 249, at § 146.

It should be noted that the law of the place fixed for performance of the contract is also referred to as *lex loci solutionis*. 2 J. BEALE, *supra* note 249, at § 311.1

251. See, e.g., *Boseman v. Connecticut Gen. Life Ins. Co.*, 301 U.S. 196 (1937); *Mullaly v. Carlisle Chemical Works, Inc.*, 177 F. Supp. 588 (D.N.J. 1959). See generally, R. LEFLAR, *supra* note 249, at § 147.

252. Ehrenzweiz, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 974 (1959).

253. *Id.* at 1011.

## B. *Validity*

### 1. Contract Made and Performed in Same Jurisdiction

It is frequently the situation that employment contracts are executed and performed in the same state. In such cases, it appears obvious that the Virginia courts will apply the law of the state of both the execution and the performance.<sup>254</sup>

It should be noted, however, that the Virginia courts have consistently honored the intentions of the contracting parties<sup>255</sup> and, hence, will apply the law of a jurisdiction other than that of the execution and performance if it is manifest that the parties intend that such other law should apply. Since the court implies that the parties intended to be governed by the law of the making of the contract if it is also to be performed in that state, it appears that the parties must expressly state that the law of another jurisdiction is to govern the contract if they expect the courts to honor this intention. Even in this situation, it is possible that the courts will refuse to enforce the intent of the parties if there appear to be "exceptional circumstances evincing a purpose in making the contract to commit a fraud on the law."<sup>256</sup> Hence, if it appears that the parties have intentionally chosen the law of another state in order to circumvent the Virginia law regarding employee covenants not to compete, it is likely that the court will refuse to enforce the stipulated law and, consequently, will resort to the law of the state of execution and performance. This reasoning is especially applicable in situations regarding employee covenants not to compete as the courts will construe the contracts strictly, placing the burden upon the employer to prove their validity.<sup>257</sup> Therefore, it is probable that such provisions, being written by the employer to benefit himself, will be disfavored by the courts and, as such, will be disregarded.

### 2. Contracts Made in One Place and Performed in Another

The situations that have proved to be the most confusing to the courts have been situations where contracts have been executed in one jurisdiction and performance under these contracts has been in another. As will

---

254. *Poole v. Perkins*, 126 Va. 331, 101 S.E. 240 (1919). The court stated that the contract is to be governed by the law of the state of execution unless it is to be performed elsewhere. Therefore, it necessarily follows that if performed and executed in the same jurisdiction then the law of that jurisdiction applies.

255. *See, e.g., Tate v. Hain*, 181 Va. 402, 25 S.E.2d 321 (1943); *Peoples Bldg., Loan & Sav. Ass'n v. Tinsley*, 96 Va. 322, 31 S.E. 508 (1898).

256. *Tate v. Hain*, 181 Va. 402, 410, 25 S.E.2d 321, 324 (1943).

257. *Linville v. Servisoft of Va., Inc.*, 211 Va. 53, 174 S.E.2d 785 (1970).

be seen, in these situations a variety of factors, including the place of performance, the place of execution of the contract, the intent of the parties to the contract and the public policy of the forum, are weighed in order to determine the appropriate law.

In Virginia, the courts place paramount importance upon the intent of the parties to the contract<sup>258</sup> and, therefore, the courts have made concerted efforts to discern the intent of the parties by implication where it is not ascertainable from the express provisions of the contract. In cases involving contracts which are performed and executed in different jurisdictions, the Virginia courts have consistently presumed that the parties intended the law of the state of performance to apply.<sup>259</sup> From this presumption of intent the Virginia Supreme Court took the natural step when it stated:

It is a general rule that every contract as to its validity, nature, interpretation and effect, or, as they may be called, the right, in contradistinction to the remedy, is governed by the law of the place where it is made, unless it is to be performed in another place, and then it is governed by the law of the place where it is to be performed.<sup>260</sup>

Hence, in spite of considerable authority to the contrary in cases involving employee covenants not to compete,<sup>261</sup> the courts, when applying Virginia conflict of laws rules to a situation involving a covenant not to compete, apparently will apply the law of the place of performance.<sup>262</sup>

An entirely different position must be taken if a contract which includes a covenant not to compete is to be performed in several states. Here the presumption that the place of performance is intended to be the governing law would lead to hopeless confusion. Therefore, the courts

---

258. See note 255 *supra* and accompanying text.

259. *Poole v. Perkins*, 126 Va. 331, 101 S.E. 240 (1919); *Peoples Bldg., Loan & Sav. Ass'n v. Tinsley*, 96 Va. 322, 31 S.E. 508 (1898).

260. *Poole v. Perkins*, 126 Va. 331, 334, 101 S.E. 240, 241 (1919).

261. See, e.g., *Koehler v. Cummings*, 380 F. Supp. 1294 (M.D. Tenn. 1974); *Dailey v. Transitron Overseas Corp.*, 349 F. Supp. 797 (S.D. Tex. 1972), *aff'd sub nom.*, *Dailey v. Transitron Elec. Corp.*, 475 F.2d 12 (5th Cir. 1973); *Seaboard Indus., Inc. v. Blair*, 10 N.C. App. 323, 178 S.E.2d 781 (1971). In these cases, the courts held that the law of the place of the making of the contract should control with respect to its validity.

262. See *Rochester v. Rochester Corp.*, 316 F. Supp. 139 (E.D. Va. 1970), *modified*, 450 F.2d 118 (4th Cir. 1971). The court followed the guidelines set down in *Poole v. Perkins*, 126 Va. 331, 101 S.E. 240 (1919), and held that the law of the place of performance should apply. It should be noted, however, that while the original employment contract had been executed in New York, the amended contract that was in question was executed in Virginia. Hence it appears that the application of the rule from *Poole* was unnecessary as both the execution and the performance were in Virginia.

generally hold that the presumed intent of the parties is that the law of the place of execution should govern the contract.<sup>263</sup> This concept has even been extended in at least one jurisdiction to include cases where the contract is capable of being performed in more than one jurisdiction.<sup>264</sup> The court in this case held that where a corporation has branch offices in several states and there exists a possibility that the employee may be transferred to an office in a state other than the one in which he is performing, then the court will presume that the parties intended that the place of the execution of the contract govern the contract.<sup>265</sup> While it is unlikely that the Virginia courts would go to this extreme, it is probable that they would follow the view that the place of execution is intended to be the governing law in situations where the contract is actually performed in several jurisdictions.

An underlying principle of the doctrine of freedom of contract is that parties should be able to choose the law that is to govern the contract.<sup>266</sup> Hence, courts generally have indicated that a provision in a contract stating that the law of a state in which one party is domiciled shall govern its interpretation will be enforced if its enforcement is not a violation of public policy of the forum state and if such provision was not adopted with the object of evading the otherwise applicable law.<sup>267</sup> With only minor exceptions,<sup>268</sup> courts when dealing with employee covenants not to compete have followed the law stipulated by the parties to a contract even

---

263. *See, e.g.*, *Larx Co. v. Nicol*, 224 Minn. 1, 28 N.W.2d 705 (1947). The court stated: "Where the place of performance covers several states or countries, the courts generally have held, in the absence of evidence to the contrary, that the parties to a contract have intended that the law of the place of contracting should govern as to questions of validity and legal effect." *Id.* at —, 28 N.W.2d at 710. While this case involved a covenant not to compete which was contained in a contract by which an employee transferred his shares of stock to the corporation when terminating his employment, this rule undoubtedly would apply where an employee was to perform under employment contract in several states.

264. *Credit Bureau Management Co. v. Huie*, 254 F. Supp. 547 (E.D. Ark. 1966). The court held Texas law was applicable to determine the validity of a contract which was performed strictly in Arkansas. However, the underlying basis of the court's decision appears to have been to uphold the practice of the Arkansas courts of choosing the law which would validate the contract, unless such law is contrary to strong public policy.

265. *Id.* at 554. Since plaintiff corporation maintained branches in Texas, then Texas law governed the validity of the contract.

266. R. MINOR, CONFLICT OF LAW § 159 (1901).

267. *Palmer v. Chamberlin*, 191 F.2d 532 (5th Cir. 1951); *Duskin v. Pennsylvania-Central Airlines Corp.*, 167 F.2d 727 (6th Cir. 1948).

268. *See, e.g.*, *H.B. Fuller Co. v. Hagen*, 363 F. Supp. 1325 (D.C.N.Y. 1973) (An employment contract stipulated that Minnesota law should apply; however, the court applied New York law because the employee was hired in New York, performed in New York and was supervised in New York).

though the contract was being performed in another jurisdiction.<sup>269</sup> It appears likely that the Virginia courts, with their concern with carrying out the intent of the contracting parties, would honor stipulations by the contracting parties as to the law which is to govern the validity of the contract.

It is of paramount importance to remember that, as employee covenants not to compete are a direct restraint on trade, they are inescapably intertwined with the public policy of the state. Therefore, a set of conflict of laws rules unique to such situations are applied when the contracting parties seek to have a contract enforced which is more liberal than those contracts normally allowed by the state of the forum. Without exception, the courts have refused to apply the law stipulated by the parties, where such application would be contrary to the forum state's policy regarding the admissible scope of employee covenants not to compete.<sup>270</sup> This same principle applies to cases where, in the absence of a stipulation, the conflict of laws rules of the forum state dictate that the controlling law is that of another jurisdiction, and application of that law would lead to a result contrary to the public policy of the forum state. Once again the courts uniformly refuse to enforce such covenants.<sup>271</sup>

While no cases of this nature have been addressed by the Virginia Supreme Court, it is apparent that the court would refuse to enforce a contract which is in violation of its public policy. The court noted its position in such cases when it stated:

[A] State may not prohibit one of its citizens or residents from making a contract—that is, from doing an act—in another State, nevertheless the forum State could decline to lend the aid of its courts in enforcing such contract where the terms of the contract were obnoxious to its law.<sup>272</sup>

Therefore it appears when dealing with contracts which contain employee

---

269. See, e.g., *Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc.*, 410 F. Supp. 967 (D.S.C. 1976); *National Chemsearch Corp. of N.Y., Inc. v. Bogatin*, 233 F. Supp. 802 (E.D. Pa. 1964), *vacated on other grounds*, 349 F.2d 363 (3d Cir. 1965).

270. See, e.g., *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1971) (agreement that New York law would control was not given effect when contrary to California public policy); *Auto Club Affiliates, Inc. v. Donahey*, 281 So. 2d 239 (Fla. Ct. App. 1973) (court would not enforce contract under Indiana law when enforcement would be contrary to public policy of Florida); *Sonotone Corp. v. Ellis*, 2 N.J. Super. 419, 64 A.2d 255, *aff'd*, 4 N.J. Super. 331, 67 A.2d 186 (1949) (New Jersey refused to honor stipulation that New York law apply when contrary to public policy).

271. See, e.g., *May v. Mulligan*, 36 F. Supp. 596 (W.D. Mich. 1937), *aff'd per curiam*, 117 F.2d 259 (6th Cir. 1940) (court refused to apply Illinois law to validate contract because to do so would be in violation of Michigan public policy).

272. *Isaac Fass, Inc. v. Pink*, 178 Va. 357, 363, 17 S.E.2d 379, 381 (1941).

covenants against competition, the Virginia courts will defer to the intentions of the contracting parties, whether such intentions are express or implied, in determining the applicable law as long as the law intended is not contrary to the position taken by the Virginia courts. Consequently, if the law intended to be applied is more restrictive than the Virginia position on the issue, the Virginia courts will apply the intended law in determining the validity of such a contract. On the other hand, if the law to be applied is more liberal, and the covenant sought to be enforced is broader than that allowed under Virginia law, then there appears to be little doubt that the courts will refuse to uphold the contract on the basis that to do so would be contrary to public policy.

### C. *Conclusion*

Conflict of laws questions in Virginia dealing with the validity of contracts are resolved in favor of the law intended by the parties. If a contract is to be executed and performed in the same jurisdiction, the courts will imply that the parties intended the law of the place of execution to apply. If the contract is executed in one jurisdiction and is to be performed in another, the courts will presume that the parties contracted with reference to the place of performance and apply that state's law. While the presumption may be overcome by a showing of contrary intent in the form of a stipulation of the contracting parties, the courts nevertheless will only enforce the law of another jurisdiction to the extent that it is not contrary to the public policy of Virginia. Therefore, each case must be determined upon its own facts, and with the knowledge of the law of both jurisdictions, in order to determine which is the applicable law.

## V. CONCLUSION

It is apparent that the enforceability of a covenant not to compete ancillary to an employment contract depends in large measure on the facts and circumstances of each particular case. Although the courts generally recognize that employers often have certain business interests worthy of protection, these interests must be balanced against the ultimate effect of a non-competition agreement on the former employee since it restricts his opportunity to earn a livelihood. Because of these competing interests, the tripartite test, which focuses on the needs of the employer, employee, and the public, has found widespread approval. However, the test does not foster predictability; it necessarily involves a close analysis of each particular employment relationship about which a dispute has arisen.

Initially, it must be established that there was consideration supporting

the non-competition agreement. Otherwise, the tripartite test will never be invoked to determine whether the scope of the covenant is reasonable. Usually consideration is not an issue of much concern where the agreement preceded the commencement of the employment relationship or where the employee's status is changed upon execution of the agreement. However, there are differing views with respect to covenants executed during the course of employment for which the employee receives nothing in exchange.

A court applying the tripartite test will require that the employer show both that he has a legitimate interest capable of and in need of protection and that the covenant in fact reasonably protects that interest. This involves an inquiry into the nature of the business and the duties performed by the former employee. To restrict the employee from contacting the employer's customers, the court will place great emphasis on whether and to what extent the employee ever dealt with customers in the course of his employment relationship. To restrict the employee from using trade secrets, the court will consider whether he ever came in contact with the secrets and whether they could in fact be used in competition. Thus, the activity in which the employee engaged is important. Furthermore, the length of time and geographic area encompassed by the restrictive covenant can only be long and large enough to protect the employer's legitimate interest.

The restraint must be reasonable with respect to the employee as well, and again, the scope of the activity restrained, the duration of the restraint and the geographical limitations are the focus of the inquiry. Yet this second part of the three-part test pays homage to the disfavor which restraints on trade have traditionally encountered. Thus, covenants which would significantly deprive a former employee of the opportunity to earn a livelihood would most likely fail the test.

Finally, the covenant is evaluated in light of its effect on the public, which has an interest in both freedom of contract and freedom of trade. Therefore, a balancing of these competing interests is necessary. Where the effect on the public of enforcement of the covenant would violate public policy, the covenant is unreasonable. Such things as a shortage of the type of services rendered by the employee or the likelihood of his becoming a public charge would probably persuade a court that the covenant is unreasonable with respect to the public.

Yet, even though the covenant may be unreasonable, an increasing number of courts are willing to modify it such that it is reasonable and enforceable. Some courts adhere to the blue-pencil doctrine which requires that the language of the covenant be divisible, thus permitting the

elimination of the offensive or overbroad portions and leaving the reasonable portions of the restriction coherent and intact. The trend, however, has been to apply the rule of reasonableness test, allowing modification regardless of divisibility. Both views are based on notions of sanctity of contract and the desire to give effect to the intent of the parties insofar as would be reasonable. Nevertheless, a small number of jurisdictions hold that an unreasonable covenant in restraint of trade is void, primarily because of the prohibition against judicial rewriting of contracts.

The area of conflicts of laws may pose special problems with respect to covenants not to compete since such covenants inherently involve the public policy of the forum state. Therefore, the usual conflict of laws rules may not be applied if it appears that the parties have stipulated that the laws of a more liberal jurisdiction should be controlling, especially if their stipulation was for the purpose of circumventing the forum's public policy.

In most areas of the law regarding covenants not to compete ancillary to the employment contract, courts have devised a workable test which takes into consideration all of the competing interests at stake. But because of these competing interests, each case will necessarily turn on its own facts. As a result, it is difficult to predict the likelihood that a particular covenant will be enforced. This difficulty makes the drafting of such covenants problematic indeed. However, a knowledge of the cases decided in a particular jurisdiction should give the drafter some insight into the factual issues on which his court will focus. And the clear lesson to be gleaned from a review of the majority of the cases is that the more narrowly tailored the covenant is to the particular facts involved, the more likely it will pass judicial scrutiny.