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## Annual Survey of Virginia Law: Employment Law

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## EMPLOYMENT LAW

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This survey article covers judicial developments in Virginia employment law between June 1989 and June 1990. The survey does not address developments in the areas of workers' compensation or unemployment compensation.

During the period covered by this survey, the case law in the employment arena broke little new ground. Rather, the courts refined and elaborated upon established principles. In the wrongful discharge area, the courts were presented with several opportunities to address the parameters of the public policy exceptions to the employment-at-will doctrine, the applicability of the statute of frauds to employment contracts, and the contractual rights, if any, arising from employment handbooks or manuals. In the covenant not to compete area, the medical profession and allied services figured prominently as the courts wrestled with issues of public policy and applied traditional criteria to the evaluation of such covenants.

### I. WRONGFUL DISCHARGE LITIGATION

Since its strong reaffirmation of the employment-at-will doctrine in 1987,<sup>1</sup> the Supreme Court of Virginia has been relatively quiet in the area of wrongful discharge litigation. During the period between June 1989 and June 1990, most of the significant battles in this area were fought, instead, in the circuit courts of the Commonwealth.

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1. See *Miller v. SEVAMP, Inc.*, 234 Va. 462, 468, 362 S.E.2d 915, 919 (1987). The court stated that "[p]arties negotiating contracts for the rendition of services are entitled to rely on [the employment-at-will doctrine's] continued stability." *Id.*

In a series of cases, the circuit courts explored the parameters of the "public policy" exception to the employment-at-will doctrine first recognized by the Supreme Court of Virginia in *Bowman v. State Bank of Keysville*<sup>2</sup> in 1985. In *Shaw v. Golding*,<sup>3</sup> an at-will employee alleged that his employment as a truck driver had been terminated unlawfully because of his refusal to falsify trip logs and to take trips without the rest periods mandated by the federal Motor Carrier Safety Act of 1984.<sup>4</sup> Even though the employee's claim was predicated upon federal law, the Circuit Court of the City of Richmond held that the employee had stated "an actionable claim for tortious retaliatory discharge in violation of Virginia public policy."<sup>5</sup>

In *Roland v. Bon Air Cleaners, Inc.*,<sup>6</sup> the Circuit Court of the City of Richmond, also citing *Bowman*, refused to dismiss a wrongful discharge claim brought by an employee who claimed she had been discharged for filing a claim for partial unemployment compensation benefits under the Virginia Unemployment Compensation Act.<sup>7</sup> Similarly, the Circuit Court of the County of Fairfax, in *Millsap v. Synon, Inc.*,<sup>8</sup> ruled that an employee had stated an actionable claim by alleging that he had been fired for filing a wage claim with the Virginia Employment Commission pursuant to section 40.1-29 of the Code of Virginia (the "Code"). On the other hand, the Circuit Court of the City of Norfolk, in *Roch v. S.C.O.V., Inc.*,<sup>9</sup> rejected a wrongful termination claim brought by the employee of a small software retailer who claimed she had been fired for becoming pregnant. In rejecting the employee's claim, the court

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2. 229 Va. 534, 331 S.E.2d 797 (1985). In *Bowman*, the court recognized a "narrow exception" to the employment-at-will doctrine for discharges in violation of public policy. *Id.* Relying on *Bowman*, the employee in *Miller* characterized her dismissal as a retaliatory discharge for her appearance as a witness at a fellow employee's grievance hearing and urged the court to allow such claim to proceed on public policy grounds. The Supreme Court of Virginia, however, rejected the invitation, stating that the "narrow exception" to the employment-at-will doctrine recognized in *Bowman* was limited to discharges that violate public policy. The court declined to expand the public policy exception so as to provide redress for discharges violative of purely private rights or interests. *Miller*, 234 Va. at 462, 362 S.E.2d at 915.

3. No. LR-1333-4 (City of Richmond Cir. Ct. Feb. 13, 1990)(order overruling demurrer). Copies of all opinions cited herein are available from the authors.

4. 49 U.S.C. §§ 2501-2520 (Supp. IV 1986).

5. No. LR-1333-4, slip op. at 1 (City of Richmond Cir. Ct. Feb. 13, 1990) (order overruling demurrer).

6. No. LR-2980-2 (City of Richmond Cir. Ct. Mar. 16, 1990) (order overruling demurrer).

7. VA. CODE ANN. §§ 60.2-100 to -635 (Repl. Vol. 1987).

8. No. 95023 (Fairfax County Cir. Ct. Apr. 11, 1990)(order overruling demurrer).

9. No. L88-2825 (Norfolk Cir. Ct. Feb. 23, 1990).

noted that a discharge for pregnancy "does not fit within the narrow exception permitting tort actions for discharge of at-will employees in violation of public policy underlying existing laws."<sup>10</sup>

As the decisions above illustrate, Virginia courts have been unwilling to apply the "public policy" exception to the at-will employment doctrine except in cases where the discharge was in response to the employee's refusal to commit an unlawful act or in response to the employee's exercise of a statutory right.<sup>11</sup>

With its decision last year in *Windsor v. Aegis Services, Ltd.*,<sup>12</sup> the United States Court of Appeals for the Fourth Circuit resolved a split of authority within the Eastern District of Virginia as to the applicability of the statute of frauds<sup>13</sup> to an oral employment contract providing for "just cause" dismissal. In *Windsor*, the court affirmed the trial court's holding that an oral "just cause" contract is unenforceable under the statute of frauds because it cannot be performed fully within a year.

Although most Virginia circuit courts appear to be following the holding in *Windsor*,<sup>14</sup> a debate continues among Virginia employment law specialists as to whether the decision was correct. The debate may soon end, however, with the Supreme Court of Virginia's decision, made during its April 1990 session, to consider the appeal in *Falls v. Virginia State Bar*.<sup>15</sup> In *Falls*, a former director of administration for the Virginia State Bar is appealing the dis-

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10. *Id.*, slip op. at 2. The court also dismissed the employee's Title VII claim, because the employer did not employ the 15 employees necessary for Title VII coverage, and it dismissed the employee's claim under the Virginia Human Rights Act, VA. CODE ANN. §§ 2.1-714 to -725 (Repl. Vol. 1987), because the Act provides that it "shall not be construed to allow tort actions to be instituted instead of or in addition to statutory actions for unlawful discrimination and further provides nothing in the Act shall be construed to create an independent or private cause of action to enforce its provisions." *Roch*, No. L88-2825, slip op. at 2.

11. The reluctance of Virginia courts to allow employees to sue their employers in tort for wrongful discharge is further evidenced by *Giordano v. Rosecan*, No. 94153 (Fairfax County Cir. Ct. Feb. 28, 1990), in which the Circuit Court of Fairfax County rejected an employee's claims against his employer for breach of a duty of good faith and fair dealing and breach of a fiduciary duty.

12. 869 F.2d 796 (4th Cir. 1989) (per curiam), *aff'g* 691 F. Supp. 956 (E.D. Va. 1988).

13. The Virginia statute of frauds provides, in pertinent part, that no action shall be brought "[u]pon any agreement that is not to be performed within a year. . . [u]nless the promise, contract, agreement, representation, assurance or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged. . . ." VA. CODE ANN. § 11-2(7) (Repl. Vol. 1989).

14. *See, e.g., Masini v. ICAFS, Inc.*, 16 Va. Cir. 153 (City of Richmond 1989); *Hahn v. Virginia Farm Bureau Mut. Ins. Co.*, 15 Va. Cir. 168 (City of Richmond 1988).

15. Record No. 900212.

missal of his wrongful discharge claim, which he bases, in part, upon allegations that he received oral assurances that he would not be terminated so long as he performed his job in a satisfactory manner.

Some employees' counsel claim support for their view that an oral "just cause" contract is enforceable under Virginia law from the Supreme Court of Virginia's recent decision in *Elliott v. Shore Stop, Inc.*<sup>16</sup> In *Elliott*, a convenience store employee, when ordered by her employer to take a polygraph examination, sent an imposter to take the test instead. When the employee subsequently was discharged by her employer on the grounds that she had failed the examination, she filed suit against her employer and the company that had administered the polygraph examination, asserting various theories of recovery. The trial court, pointing to the employee's "deceptive" and "dishonest" action in sending an impersonator to take her polygraph examination, rejected all of the employee's claims and dismissed her motion for judgment without leave to amend.

On appeal, the Supreme Court of Virginia reinstated the employee's claims against her employer for fraud and breach of contract,<sup>17</sup> as well as her claims against her employer and the polygraph company for tortious interference with contractual relations. Although the employee's contract claim was predicated upon the existence of an oral "just cause" employment contract, at least one court has opined that *Elliott* should not be viewed as an endorsement of the enforceability of such a contract under Virginia law.<sup>18</sup>

A discharged employee without a formal, written employment agreement frequently will attempt to overcome the statute of frauds by claiming that the terms and policies contained in an em-

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16. 238 Va. 237, 384 S.E.2d 752 (1989).

17. Although the employee also had asserted a claim against her employer for "wrongful discharge," claiming that her discharge was against public policy because it was fraudulent, *id.* at 242, 384 S.E.2d at 754, the employee did not pursue this claim on appeal and thus it was not addressed by the Supreme Court of Virginia in its decision. *Id.* at 243, 384 S.E.2d at 755.

18. In *Sullivan v. Snap-On Tools Corp.*, No. 89-2065 (4th Cir. Jan. 26, 1990), the court of appeals observed that

*Elliott* . . . is a pleading-sufficiency decision holding only that the fact-specific oral contract as pleaded in that case did suffice by its terms to overcome Virginia's at-will contract presumption. *It does not hold, nor does it stand implicitly for the proposition that such an oral contract is enforceable against a properly raised statute of frauds defense.*

*Id.*, slip op. at 7 (emphasis added).

ployment manual issued by the employer constitute a binding employment contract. Of course, to succeed in this endeavor, the employee must first show that he, in fact, received the manual.<sup>19</sup> In addition, he must be able to show that the policies as set forth in the manual were intended by both parties to become part of a binding employment contract.<sup>20</sup> In *Sullivan v. Snap-On Tools Corp.*,<sup>21</sup> the Court of Appeals for the Fourth Circuit held that an employment manual that contains a less than all-inclusive list of "infractions which *may* subject an employee to discipline" and that contains "suggested disciplinary procedures, when no limit is placed on an employer's discretion in their application, does not imply that an employer may discharge an employee only for just cause."<sup>22</sup>

## II. RESTRICTIVE COVENANTS

During the period covered by this survey, a significant number of the decisions reported in Virginia dealt with employees in the medical profession and allied services. The courts addressed restrictive covenants which limited the ability of physicians and salesmen of medical equipment to compete with their prior employers. Additionally, the Supreme Court of Virginia addressed the enforceability of a covenant not to solicit employees contained in a contract between a nursing home and a supplier of physical, occupational and speech rehabilitation therapy services.

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19. In *Cunningham v. Ashland Chem. Co.*, No. 89-3289 (4th Cir. Apr. 4, 1990), the court of appeals affirmed the district court's dismissal of an employee's claim of breach of contract because the employee had not shown that he had received the employment manual and handbooks upon which his contract claim was based. Moreover, the court observed that the manual contained a "conspicuous disclaimer" that expressly stated, in part: "*THE COMPANY RESERVES THE RIGHT . . . TO TERMINATE EMPLOYEES AT ANY TIME FOR ANY REASON. . .*"

20. See, e.g., *Bradley v. Colonial Mental Health & Retardation Servs.*, 856 F.2d 703 (4th Cir. 1988). The court held that a personnel manual that intricately detailed "the offenses that may subject an employee to discipline" and that described with particularity "the discipline that may be administered for the enumerated offenses" formed a contract limiting the employer's ability to discharge an employee without cause. *Id.* at 708.

21. No. 89-2065 (4th Cir. Jan. 26, 1990).

22. *Id.*, slip op. at 5. The court also affirmed the district court's dismissal of the employee's claim that the employer had breached an oral "just cause" contract between the parties. In affirming this aspect of the district court's ruling, the court of appeals cited its earlier holding in *Windsor v. Aegis Servs., Ltd.*, 869 F.2d 796 (4th Cir. 1989), but also observed: "Oral assurances of job security predicated on satisfactory performance reflect the employer's present intent to continue an employment relationship, as opposed to its assumption of an obligation to do so. Such expressions are insufficient to rebut the strong Virginia presumption that employment is at-will." *Sullivan*, slip op. at 6.

### A. *Employment Covenants not to Compete*

The Supreme Court of Virginia has applied settled criteria to the evaluation of employment non-competition covenants for some time. In a leading decision, *Roanoke Engineering Sales Co. v. Rosenbaum*,<sup>23</sup> these criteria were stated as follows:

(1) Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest?

(2) From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood?

(3) Is the restraint reasonable from the standpoint of a sound public policy?<sup>24</sup>

In a decision announced March 2, 1990, the Supreme Court of Virginia continued its trend of enforcing employment covenants not to compete.<sup>25</sup> In *Blue Ridge Anesthesia & Critical Care, Inc. v. Gidick*,<sup>26</sup> the court addressed the enforceability of a covenant not to compete found in an employment contract between a salesman and two servicemen, and their employer, a seller and servicer of critical care and anesthesia equipment to hospitals and other medical facilities in the District of Columbia, Maryland, North Carolina, Virginia, and West Virginia. The covenant, entered into by the parties at the time of each employee's employment,<sup>27</sup> provided that:

In consideration of the covenants made herein by Employer, Employee agrees that if his employment terminates for any cause after he has been employed for ninety (90) days, he will not, for a period of three years thereafter, open or be employed by or act on behalf of

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23. 223 Va. 548, 290 S.E.2d 882 (1982).

24. *Id.* at 552, 290 S.E.2d at 884 (citations omitted).

25. The Supreme Court of Virginia last refused to enforce a covenant not to compete in *Richardson v. Paxton Co.*, 203 Va. 790, 127 S.E.2d 113 (1962). Of course, the court decides each case on the facts presented and no conclusion should be drawn that the court is predisposed to uphold employment covenants not to compete in all circumstances.

26. 239 Va. 369, 389 S.E.2d 467 (1990).

27. In *Paramount Termite Control Co. v. Rector*, 238 Va. 171, 380 S.E.2d 922 (1989), the Supreme Court of Virginia enforced a covenant not to compete entered into by the parties after commencement of the employment relationship.

any competitor of Employer which renders the same or similar services as Employer, within any of the territories serviced by agent of Employer, expressly provided however, that this covenant does not preclude Employee from working in the medical industry in some role which would not compete with the business of Employer.<sup>28</sup>

Each of the employees had contact with the employer's customers.<sup>29</sup>

The salesman was fired by the employer after being employed for more than a year. The servicemen resigned their employment after being employed for more than two years. Following his termination, the salesman established a competing business and the two servicemen joined that company as salesmen.<sup>30</sup>

The employer instituted suit seeking damages and an injunction almost six months after the first violation of the covenant by the salesman, the first to leave. The trial court, in a decision rendered almost nine months after the commencement of the litigation, held the non-competition agreement invalid.<sup>31</sup> The Supreme Court of Virginia reversed.<sup>32</sup>

Applying the criteria set forth above, the supreme court first determined that the employer had a legitimate business interest deserving of protection. In *Blue Ridge Anesthesia*, the legitimate business interest was satisfied by evidence that the employees had personal contact with the employer's customers.<sup>33</sup> Next, the court addressed whether the restrictive covenant was no greater than necessary to protect the identified legitimate business interest and was not unduly harsh and oppressive in curtailing the employee's legitimate efforts to earn a livelihood. The court examined the geographic area encompassed by the covenant and the scope of activities proscribed.<sup>34</sup>

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28. *Blue Ridge Anesthesia*, 239 Va. at 370-71, 389 S.E.2d at 468.

29. *Id.* at 371, 389 S.E.2d at 468.

30. *Id.*

31. *Id.*

32. *Id.* at 374, 389 S.E.2d at 470.

33. *Id.* at 372, 389 S.E.2d at 469. In *Paramount*, the Supreme Court of Virginia held that non-competition agreements were justified where the employee comes into contact with the employer's customers as well as in the case where the employee actually acquired or possessed confidential information or trade secrets. *Paramount*, 238 Va. at 175, 380 S.E.2d at 925. *Accord* *Meissel v. Finley*, 198 Va. 577, 582, 95 S.E.2d 186, 190 (1956).

34. In addition to evaluating the territory and the scope of activities encompassed by a restrictive covenant, Virginia courts will evaluate the length of the proscription in determining whether the covenant is no greater than necessary to protect the legitimate interest of



With respect to the territory encompassed by the covenant, the court noted that "the restriction . . . applies only in the 'territories serviced by' the former employees, not [the employer's] entire market area at the time the employees left [the employer's] employ, or later."<sup>35</sup> In addressing the scope of activities proscribed by the covenant, the court observed that the employees were "only prohibited 'from working in the medical industry in some role which would . . . compete with the business of [the employer].'"<sup>36</sup> Therefore, the Supreme Court of Virginia concluded that the restriction was reasonable in terms of the scope of activities proscribed and the territory encompassed because "[t]he restriction does not prohibit the former employees from selling critical care and anesthesia equipment outside their respective former territories or from selling any other goods and medical equipment within their former territories."<sup>37</sup>

The supreme court rejected the employees' argument that the non-competition covenant was unreasonable from the standpoint of sound public policy because it restrained trade and promoted a monopoly. Observing that, by definition, a restrictive covenant restrains trade to some extent, the court stated that the issue in the public policy area was whether that restraint was unreasonable. Finding that there was heavy competition in the field for the sale and servicing of anesthesia and critical care equipment, the court concluded that the restraint did not offend public policy.<sup>38</sup>

Finally, the employer asked the supreme court to award a prospective injunction, enforcing the covenant for a three-year period running from the court's entry of an injunction against the employees. The court, noting that it had authorized the prospective

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the employer. *Worrie v. Boze*, 191 Va. 916, 927, 62 S.E.2d 876, 881 (1951). The employees in *Blue Ridge Anesthesia*, 239 Va. at 369, 389 S.E.2d at 467, however, did not attack the length of the proscription contained in the covenant and, therefore, the court's opinion is silent on that point.

35. *Blue Ridge Anesthesia*, 239 Va. at 373, 389 S.E.2d at 469. *Accord Paramount*, 238 Va. at 175, 380 S.E.2d at 925. The Supreme Court of Virginia, on appropriate facts, has upheld non-competition covenants which were coterminous with the territory in which the employer did business. *E.g.*, *Roanoke Eng'g.*, 223 Va. at 553, 290 S.E.2d at 885; *Meissel*, 198 Va. at 582-83, 95 S.E.2d at 190.

36. *Blue Ridge Anesthesia*, 239 Va. at 373, 389 S.E.2d at 469.

37. *Id.* at 372, 389 S.E.2d at 469. For comparison, see the supreme court's decision in *Richardson v. Paxton Co.*, in which the court refused to enforce a restrictive covenant which encompassed activities in which the employer was not engaged. 203 Va. at 795, 127 S.E.2d at 117.

38. *Blue Ridge Anesthesia*, 239 Va. at 373-74, 389 S.E.2d at 470.

enforcement of such a covenant previously, remanded for further proceedings.<sup>39</sup>

Three circuit courts also issued opinions of note during the period covered by this survey with respect to employer covenants not to compete. In *Lifeforce Institute of Fertility and Endocrinology v. Gianfortoni*,<sup>40</sup> the Circuit Court of Henrico County enforced a non-competition covenant against a physician. The non-competition covenant was carefully and thoroughly negotiated by the employer-physician and the employee-physician, both of whom were advised by individuals with experience in the area of restrictive covenants in the medical field.<sup>41</sup> The restrictive covenant precluded competition by the employee-physician within one hundred miles of Richmond, excluding the City of Norfolk and northern Virginia.<sup>42</sup> The covenant was narrowly drawn in terms of the scope of activity proscribed precluding the employee-physician from performing four specialized medical procedures, but permitting him to practice conventional forms of gynecology and obstetrics as well as

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39. *Id.* at 374, 389 S.E.2d at 470. The Supreme Court of Virginia first ordered an extension of the duration of a covenant beyond the period specified in the covenant in *Roanoke Eng'g.*, 223 Va. at 548, 290 S.E.2d at 882. In *Roanoke Eng'g.*, the employee argued that such prospective relief should only be granted where the employer "protected itself against the consequences of delayed enforcement by providing for it expressly in the contract. . . ." The court rejected this argument noting that "[a]lthough some such language might well be prudent in an era of increasing litigation delay, we do not think it to be a prerequisite to relief on the facts of this case." *Roanoke Eng'g.*, 223 Va. at 555, 290 S.E.2d at 886 (emphasis added). The court emphasized that the contractual language used in *Roanoke Eng'g.* was agreed upon by four brothers and was part of a mutual scheme binding each of them equally. The language had been used for eight years. Because the employee was equally responsible for the selection and retention of the language, the court opined that he should not be heard to complain of its insufficiency for its intended purposes.

The Supreme Court of Virginia next addressed the issue of prospective enforcement in *Paramount*, 238 Va. at 171, 380 S.E.2d at 922. In *Paramount*, the court did not have a factual situation analogous to *Roanoke Eng'g.* in that the employee was not a co-equal in the drafting of the covenant and the covenant was not part of a mutual scheme among the owners of the company. In fact, unlike in *Roanoke Eng'g.*, the employer in *Paramount* did not specifically request prospective enforcement in connection with its appeal. Nevertheless, the court extended the duration of the covenant by providing that it would be enforced for a period commencing with the granting of the injunction. *Paramount*, 238 Va. at 177, 380 S.E.2d at 926.

Despite the Court's prospective enforcement of covenants in *Blue Ridge Anesthesia* and *Paramount* without the unique facts presented in *Roanoke Eng'g.*, counsel drafting restrictive covenants still would be prudent to include language in the covenant protecting the employer against the consequences of delayed enforcement not contributed to by the employer.

40. 18 Va. Cir. 330 (Henrico County 1989).

41. *Id.* at 331.

42. *Id.* at 332.

infertility and endocrinology medicine in Richmond as well as elsewhere.<sup>43</sup>

*Gianfortoni* is significant for two reasons. First, the court addressed whether a non-competition covenant applicable to an employee-physician violates public policy. The employee-physician argued that such covenants were unethical and ill served the public.<sup>44</sup> The court noted that it was not bound by the private ethical pronouncements of groups such as the American Medical Association and that the employee-physician had voluntarily entered into the covenant, such covenants were common within the medical profession, and the employee-physician had voluntarily terminated his employment.<sup>45</sup> The court held that the covenant was not against public policy and further stated that "it would be against public policy to allow a person to accept the benefits of an agreement but to disregard the terms of the agreement when it suits his purpose."<sup>46</sup>

Second, the employee-physician argued that the covenant should not be enforced because the employer did not perform the four proscribed procedures now that he had left, so that he would not be in competition.<sup>47</sup> Noting that the employer-physician had an application pending for privileges to perform the proscribed procedures and was recruiting another physician to perform the procedures, the court found that it was anomalous for the employee-physician who "precipitated" the situation to attempt to benefit from it.<sup>48</sup> Observing that the covenant was for the protection of the employer, the court rejected this argument.<sup>49</sup>

The Fairfax Circuit Court addressed covenants not to compete in two cases involving physicians. In *P.M. Palumbo, Jr., Inc. v. Bennett*,<sup>50</sup> Dr. Palumbo terminated Dr. Bennett's services as an orthopedic surgeon approximately four years after contracting for such services. The court never reached the analysis of the covenant, holding instead that the contract itself was made in violation

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43. *Id.* at 332-34.

44. *Id.* at 334. The employee-physician cited an opinion from the Council on Ethical and Judicial Affairs of the American Medical Association which "discouraged" such covenants.

45. *Id.* at 335.

46. *Id.*

47. *Id.* at 336.

48. *Id.*

49. *Id.* at 336-37.

50. No. 112943 (Fairfax County Cir. Ct. Jan. 22, 1990).

of a police statute.<sup>51</sup> Section 13.1-546 of the Code provides that a professional corporation may render its professional services only through its officers, employers and agents who are licensed or legally authorized to render such services in Virginia.<sup>52</sup> In *Bennett*, the court concluded that Dr. Palumbo retained Bennett as an independent contractor and not as an officer, employee or agent.<sup>53</sup> Therefore, the contract, being made "in violation of a police statute enacted for the public protection," was declared void and unenforceable.<sup>54</sup>

In *Northern Virginia Psychiatric Group, P.C. v. Halpern*,<sup>55</sup> two licensed clinical social workers who had been employed for more than four years were parties to a contract which proscribed an employee from soliciting the employer's past or present patients or inducing anyone to refrain from referring patients to the employer for a two-year period. The court's opinion does not state why the covenant not to compete was determined to be unenforceable, although the court sustained the employer's motion to dismiss.<sup>56</sup> Rather, the court's opinion focused on whether the court should blue pencil the covenant<sup>57</sup> pursuant to a savings clause<sup>58</sup> in the contract. The court refused to modify the covenant so as to enforce it despite the presence of a savings clause because (1) Virginia courts are wary of applying "savings provisions" when addressing statutes,<sup>59</sup> (2) restrictive covenants in employment contracts are disfavored and are to be construed in favor of the employee,<sup>60</sup> (3) restrictive covenants are restraints of trade,<sup>61</sup> (4) modification of a covenant by the court would violate article I, section 11 of the Vir-

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51. *Id.*, slip op. at 3.

52. VA. CODE ANN. § 13.1-546 (Cum. Supp. 1990).

53. *Bennett*, slip op. at 3. The contract specifically provided that Dr. Bennett was not an agent.

54. *Id.*

55. No. 113961 (Fairfax County Cir. Ct. Apr. 13, 1990).

56. *Id.*, slip op. at 4.

57. Under the blue pencil rule, a court will modify and enforce an unreasonable covenant to the extent that it is reasonable where it is clear from the terms of the agreement that the covenant is severable. See Annotation, *Enforceability, Insofar As Restrictions Would Be Reasonable, Of Contract Containing Unreasonable Restrictions On Competition*, 61 A.L.R.3d 397, 476-77 (1975).

58. A contractual savings clause generally provides that the employer and employee agree that a court, in enforcing a non-competition covenant, may modify the duration, geographic or scope of proscribed activity provisions if the court determines that they are unreasonable.

59. *Halpern*, No. 113961, slip op. at 3.

60. *Id.*

61. *Id.*

ginia Constitution prohibiting interference with contracts, and (5) such modification by the court would be against public policy.<sup>62</sup> Ultimately, the court concluded that it did not want to become the employer's scrivener.<sup>63</sup>

In sharp contrast to the court's analysis in *Halpern*, the Roanoke City Circuit Court in *Consolidated Industrial Roofing, Inc. v. Williams*,<sup>64</sup> enforced a two-year restrictive covenant which prohibited the employee from engaging in "any business contemplated by [the employer] in Roanoke, Virginia, or in any area within One Hundred Fifty (150) Air Miles of Roanoke, Virginia."<sup>65</sup> The covenant further provided that it was to "apply to all business endeavors of [the employer], including, but not limited to roofing (both new construction and repairs) and the sale of roofing supplies and materials."<sup>66</sup>

*Williams* is perhaps most interesting because of the manner in which the court analyzed the scope of activities proscribed by the covenant. As noted above, the covenant precluded competition in "any business contemplated by" the employer. The court observed that if it was to focus only on that language, it would conclude that the scope of activities proscribed was overbroad.<sup>67</sup> However, the court stated that it was required to give "plain meaning . . . to all of the words employed."<sup>68</sup> Therefore, the court referred to additional language in the covenant providing that it applied to all business endeavors of the employer. The court held that "[g]iving these words plain meaning necessitate[d] a finding that the parties intended to preclude [the employee] from working in the roofing industry."<sup>69</sup>

Furthermore, in *Williams*, the court emphasized the facts presented, noting that the employee "was aware that working for a

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62. *Id.* at 4.

63. *Id.*

64. 17 Va. Cir. 341 (City of Roanoke 1989).

65. *Id.*

66. *Id.* at 342. In *Williams*, the court addressed public policy in the same fashion the Supreme Court of Virginia did in *Blue Ridge Anesthesia*, by focusing on the highly competitive nature of the employer's industry. *Id.* at 345. However, the court also examined the adequacy of the supply of personnel willing to be employed. The court in *Williams* also extended the duration of the covenant enforcing it from the date of the court's order for the period stated in the covenant, rather than from the termination of employment. *Id.* at 346.

67. *Id.* at 344.

68. *Id.* (emphasis in original). The court cited *Paramount*, 238 Va. at 174, 380 S.E.2d at 925, for this proposition.

69. *Williams*, 17 Va. Cir. at 344.

competing roofing company would violate the agreement” as the employee had discussed the covenant with both his old and new employers.<sup>70</sup> The court also was influenced by the fact that the old employer had offered inducements for the employee to remain, that the employee also had another job offer which would not have violated the covenant, and that he accepted new employment knowing it would violate the covenant.<sup>71</sup> Finally, the court observed that the old employer was not motivated by malice or spite, but rather by concern for its own well-being.<sup>72</sup> The court concluded that these facts precluded the employee from establishing overbreadth as a ground for avoiding enforcement.<sup>73</sup>

The analysis of the court in *Williams* is unprecedented. While the rules of construction clearly provide that a plain meaning must be given to all the words employed, the court in *Williams* gave an unnatural reading to the words “any business contemplated.” In fact, the language in the *Williams* covenant makes clear by the phrase “including, but not limited to” that it is not limited to roofing.<sup>74</sup> Additionally, the “facts” focused on by the supreme court in *Roanoke Engineering* and other cases in aid of the interpretation and determination of a covenant are those which existed when the covenant was entered into and during the employment relationship as the covenant was modified or renewed, not the facts which existed at the moment of and after breach.<sup>75</sup>

The court in *Williams* essentially holds that no matter how overbroad the covenant, enforcement will occur if the employee has violated what would have been a proper covenant. Thus, the court in *Williams* comes close to adopting, though not overtly, the blue pencil rule. The Supreme Court of Virginia has never adopted the blue pencil rule.<sup>76</sup> Further, the holding in *Richardson v. Paxton Co.* precludes the analysis applied in *Williams*.<sup>77</sup>

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70. *Id.* at 344-45.

71. *Id.* at 345.

72. *Id.*

73. *Id.*

74. *Id.* at 344.

75. *Id.*

76. The supreme court was presented with an opportunity to apply the blue pencil rule and modify an unreasonable covenant not to compete but did not do so in *Richardson*, 203 Va. at 795, 127 S.E.2d at 117. The supreme court did not reach the issue of partial enforcement in *Roanoke Eng'g*, 223 Va. at 552 n.2, 290 S.E.2d at 884 n.2. The Court of Appeals for the Fourth Circuit, applying Virginia law, has refused to judicially modify a restrictive covenant. See *Alston Studios, Inc. v. Lloyd V. Gress & Assoc.*, 492 F.2d 279, 285 (4th Cir. 1974).

77. *Richardson*, 203 Va. at 795, 127 S.E.2d at 117. The decision in *Williams* is also in

## B. *Covenants Prohibiting the Solicitation of Employees*

In *Therapy Services, Inc. v. Crystal City Nursing Center, Inc.*,<sup>78</sup> the Supreme Court of Virginia for the first time addressed the enforceability of a provision in a contract between two businesses restricting employment by one of the parties of certain individuals employed by the other party for a period of time. Therapy Services provided skilled rehabilitation services, through certified physical, occupational and speech therapists, pursuant to a contract with Crystal City. Crystal City covenanted not to hire any of Therapy Services' staff during the life of the contract and for six months following its termination.<sup>79</sup> Crystal City terminated the contract and sought to hire employees of Therapy Services through an independent contractor.<sup>80</sup>

The Supreme Court of Virginia noted that the covenant prohibiting the solicitation of employees was a restraint of trade and would be void if it was unreasonable as between the parties or was injurious to the public.<sup>81</sup> The court addressed the issue of reasonableness by focusing on whether the covenant afforded "fair protection to the interests of the party in favor of whom it [was] given, and [whether it was] not so large as to interfere with the interest of the public."<sup>82</sup> The court concluded that Therapy Services had a "legitimate interest in protecting its ability to maintain professional personnel in its employ. . . ."<sup>83</sup>

In addressing the issue of whether the covenant was injurious to the public, the court focused on both the interest of the employees whose employment was proscribed and the public at large. With respect to the employees, the court noted that such employees had no right to a specific employment, and that therapists were in low supply and in high demand in the relevant geographic area so that alternative employment was readily available.<sup>84</sup> As to the public at large, the court observed that the "availability of therapists' services was not diminished since the affected therapists were not

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sharp contrast to the decision in *Grant v. Carotek, Inc.*, 737 F.2d 410 (4th Cir. 1984) (applying Virginia law).

78. 239 Va. 385, 389 S.E.2d 710 (1990).

79. *Id.* at 386-87, 389 S.E.2d at 711.

80. *Id.* at 387, 389 S.E.2d at 711.

81. *Id.* at 388, 389 S.E.2d at 711.

82. *Id.* (quoting *Merriman v. Cover*, 104 Va. 428, 436, 51 S.E. 817, 819 (1905)).

83. *Therapy Servs.*, 239 Va. at 388, 389 S.E.2d at 711-12.

84. *Id.* at 389, 389 S.E.2d at 712.

precluded from working" in the relevant geographic area or elsewhere.<sup>85</sup> The court therefore enforced the covenant.<sup>86</sup>

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85. *Id.*

86. *Id.*



