

Va. High Court Breathes Life Into Noncompete Clauses

Law360, New York (October 29, 2013, 12:02 PM ET) -- For years, employment lawyers in Virginia suffered through the reality that it was almost impossible to have a noncompete agreement enforced in Virginia. Judges routinely dismissed complaints trying to enforce noncompete clauses without any discovery at the motion to dismiss stage (in Virginia, called a demurrer).

In *Assurance Data Inc. v. Malyevac*, No. 121989 (VA 9/12/13), the Supreme Court of Virginia dramatically changed that state of affairs. The Supreme Court ruled that employers must generally be allowed a trial to present evidence to demonstrate that the terms of their noncompete agreement are not overbroad and are reasonably designed to protect confidential and proprietary information.

Virginia has always taken an adverse view of noncompete clauses, even more than other states. Whereas most states allow noncompete agreements which prohibit employment with a competitor, if they are reasonably limited in time and geographic scope, Virginia will not enforce such a restriction.

Rather, the noncompete limitation can only restrict an employee from working for competitor in a job in which the employee may use confidential or trade secret information. As an example, an employer can prevent a salesperson from jumping ship to work for a competitor as a salesperson, but the noncompete agreement cannot prevent the salesperson from working as a janitor for a competitor (since the salesman's knowledge of confidential information presumably would not assist him as a janitor).

Moreover, Virginia, unlike many other states, does not have a blue-pencil rule which allows courts to modify and narrow the noncompete agreement so that its scope is reasonable. Thus, if the noncompete agreement was not properly drafted and is overbroad, it is simply unenforceable in Virginia.

For employment attorneys who are aware of Virginia particularities, it is possible to draft a noncompete clause which is enforceable. However, many companies use noncompete clauses that are designed for national use, and thus are merely limited to a reasonable time and geographic area, and still exclude all employment with a competitor in all types of jobs. As such, they would not be enforced in Virginia.

Thus, if the noncompete agreement is not drafted properly for Virginia, excluding work for a competitor only in jobs that would use confidential or trade secret information, it will not be enforced. That has remained unchanged.

However, judges had become used to not enforcing noncompete agreements, and thus, they have routinely dismissed complaints to enforce noncompete provisions, even when the noncompete clause met the Virginia-peculiar requirements of being job-specific — limited to jobs where the confidential information would be used.

Judges would review the complaint, hear the argument and decide as a matter of law that the noncompete was overbroad (e.g., too long in time or covering too much geographic area) and thus not enforceable. There would be no discovery, no evidence, no trial.

In Assurance Data Inc., the Supreme Court of Virginia was faced with one such case, and the court surprisingly put its foot down and rejected that approach.

The Supreme Court ruled that “a demurrer cannot be used to decide on the merits whether a restraint on competition is enforceable.” Id. at 1. The court held that an employer must be allowed to present evidence to meet its burden of proof that the noncompete “is narrowly drawn to protect the employer’s legitimate business interest, is not unduly burdensome on the employee’s ability to earn a living, and is not against public policy.” Id. at 9.

There can be no doubt that the Assurance Data decision will invigorate employers to enforce noncompete agreements and make employers more reluctant to hire employees who are subject to noncompete provisions. Even if employers believe they can ultimately win at trial, the cost of discovery and a trial may persuade employers to pass on the employee. Certainly, that will be the case if there are other well-qualified candidates.

Only in the rare situation where one has special skills or is so above the other candidates would one expect an employer to accept the risk and cost inherent in fighting off a noncompete agreement litigation, not to mention the possible liability for damages.

While the employer can ask for an indemnification agreement from the employee, how realistic will it be that the employee will have the financial worth to be able to pay for the cost of litigation and a possible adverse judgment?

Time will tell how the circuit courts will handle this decision. While the decision may be over-read to require trials in all noncompete cases, it appears that a poorly written noncompete may still be dismissed by a demurrer.

That is, if the noncompete agreement prohibits the worker from employment in all jobs with a competitor, including as a janitor, then it can be expected that a lawsuit to enforce that agreement will still be dismissed at the motion to dismiss or demurrer stage. Conversely, circuit court judges may still find the courage to grant demurrers when the length of time for a noncompete or its geographic scope is way too broad.

However, it can be expected that in light of Assurance Data, most noncompete enforcement cases will survive a demurrer and require a trial. This is particularly so since in Virginia, state-court summary judgment motions are virtually nonexistent because of Virginia courts' peculiar rules, e.g., not allowing the use of affidavits or deposition testimony for a summary judgment motion.

Employees in Virginia should now take care before agreeing to a noncompete agreement as it may well effectively make them unemployable after they leave their employment. Likewise, employers should be careful before hiring someone subject to a noncompete agreement. The old days in Virginia that a lawsuit to enforce the noncompete agreement will go nowhere are now over.

That brings up an interesting question for draftspeople of noncompete clauses — should a jury waiver clause be included in the noncompete clause? While generally, employers prefer judges to rule on employment matters instead of juries, given Virginia judges' history of not enforcing noncompete agreements, it is not clear at all clear that circuit courts judges are preferable to juries in employers' attempts to enforce noncompete clauses.

Of course, since a jury will naturally identify with the worker and not the employer (realizing that they themselves could be made unemployed by a noncompete agreement), it is still likely preferable to have a judge decide the issue. Lawyers will have to closely see how the circuit judges handle the new and surprising directive from the Supreme Court of Virginia.

One thing is certain: More litigation can be expected in Virginia to enforce noncompete agreements, and draftspeople should tailor noncompete agreements to Virginia's unusual rules. Employer's should limit noncompete agreements to six months, to the geographic territories where the employee worked, e.g., for a salesperson, their sales territory, and the worker from employment with competitors in their same or similar job where they could use confidential or proprietary information.

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