COMMERCE CASE MANAGEMENT PROGRAM DECISIONS:

RESTRICTIVE COVENANTS AND NON-COMPETE AGREEMENTS

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The Commerce Case Management Program of the Philadelphia Court of Common Pleas began issuing opinions in 2000. Since that time, the Program Judges have issued approximately 700 opinions. Among those opinions, encompassing a wide array of business and commercial law issues, are cases concerning employee restrictive covenants and non-compete agreements.

Recently, the scope and enforceability of non-compete agreements between employers and former employees have become the topics of some national debate. For example, in 2005 the Tennessee Supreme Court held that all restrictive covenants between physicians and their

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This work is part of a joint project between the Philadelphia Bar Association's Business Law Section and its Business Litigation Committee, and Temple's Beasley School of Law. Students of Professor William J. Woodward, Jr. work with a lawyer mentor/editor to summarize and describe opinions in the Commerce Case Management Program. Each lawyer works with two law students on a particular area of the law in which the Commerce Program Judges have issued opinions, with the students doing the initial research and writing and the lawyer guiding and editing the work.

As completed, each "chapter" will be posted on the Business Litigation Committee's web page, which can be located on the Bar Association's website, http://www.philadelphiabar.org/, with the goal to catch up to the 700 opinions already written, and then to keep up with the well over 100 opinions added annually. Ideally, we hope to publish this compilation in a single book. If you are interested in participating in this project that has so many potential benefits, please contact Lee Applebaum at (215) 893-8702 or lapplebaum@finemanlawfirm.com. We express our appreciation to Al Dandridge, Merritt Cole, Mitchell Bach, Eric Milby, Kim Jessum and all those who have been supportive of this effort in developing the relationship between Temple and the Business Law Section.

employers were invalid *per se*.[2] That court applied a heightened level of scrutiny because of the potential ill effect on the public. On the other end of the spectrum, where the restrictive covenant is part of the sale of a business, Pennsylvania courts apply a lower level of scrutiny.[3]

Typically, the relationship is between a business and an individual. An employer may require an employee to sign a non-compete agreement upon hiring or promotion. There is an element of adhesion involved in this situation; therefore, while not necessarily forbidding non-compete agreements, most, if not all, state courts disfavor such agreements. In all of the Commerce Program opinions, whether the Court applied Washington, Massachusetts or Pennsylvania law, the general rule used to determine the validity of such agreements is represented in the Restatement (Second) of Contracts § 188 (1979).[4]

Frequently, in the Commerce Program opinions, the Court finds that an agreement is overbroad with respect to its scope, i.e., duration and geographic area. In these instances, the Court usually modifies --"blue pencils" -- the scope of the agreement, rather than striking it down. For example, if the Court finds that an agreement with a duration of two years is overbroad, rather than holding it unenforceable the Court may reduce the period to one year.[5] Although the Court will modify these agreements, the blue pencil rule does not give courts the leeway to rewrite employment agreements. Thus, if there are sufficiently unreasonable terms contained in the non-compete, the court may be required to invalidate the entire covenant.

Even where the threshold of scrutiny is reduced, as in the case when a sale of a business is involved rather than an employment relationship, courts still will enforce the agreement; but not

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[2] Murfreesboro Medical Clinic, P.A. v. David Udom, 166 S.W. 3d 674 (Tenn. 2005).

[3] See Reporting Services Associates, Inc. v. Veritext, L.L.C., June Term 2003, No. 489, 2003 WL 22183927, 2003 Phila. Ct. Com. Pl. LEXIS 66 (C.C.P. Phila. Sept. 10, 2003) (Jones, J.), infra.

[4] Under the Restatement, e.g., a covenant not to compete might be invalid if it: (i) fails to protect an employers' legitimate business interests; (ii) inflicts an unreasonable burden on the employee; or (iii) interferes with public policy against such an agreement. The Restatement (Second) of Contracts § 188 analyzes these issues under a reasonableness standard.

[5] See Cooper v. Cerelli, February Term 2002, No. 1260, 2002 WL 1758351, 2002 Phila. Ct. Com. Pl. LEXIS 51 (C.C.P. Phila. July 8, 2002) (the Court modified the scope from 2 years and 100 miles to 1 year and 25 miles), infra.

before modifying the terms to make them reasonable.[6] It appears in some cases that even questionable actions by a party may have a limited effect on the Court's decisions when balanced against other factors. For example, where an employee allegedly lied to her supervisor about her new employment and solicited business from customers of her former employer, the Court still blue penciled the agreement to make it more reasonable.[7]

The following case summaries present a brief analysis of each Commerce Program opinion on issues addressing non-compete agreements and restrictive covenants. There is also an appellate level decision included in the following discussion. In most cases, the former employer sought to enjoin its former employee from working for a competitor -- in some cases claiming damages -- though this is not the posture in every case.

The Court will not enforce an agreement unless actual harm has occurred or is reasonably certain to occur. For example, Innaphase Corp. v. Overman[8] involved a director of customer service for a software company leaving the company to work for a putative competitor. Although both companies operated in the same market segment, the Court determined that there was no direct competition and therefore no harm. In another decision, the Court invalidated a non-compete agreement when the employee was dismissed for poor performance. In Labor Ready v. Trojan Labor,[9] the Court determined that because the employee was dismissed for performance

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[6]See Reporting Services Associates, Inc., infra.
[7]See Robert Half of Pa. Inc. v. Feight, April Term 2000, No 1667, 48 Pa. D. & C.4th 129 (C.C.P. Phila. June 29, 2000), infra; see also United Products Corp. v. Transtech Manufacturing Inc., August Term 2000, No. 4051, 2000 WL 33711051, 2000 Phila. Ct. Com. PL. LEXIS 91 (C.C.P. Phila. Nov. 9, 2000), infra. In that case, there was evidence to suggest that a former employee stole employee records. The non-compete agreement was missing, but the court upheld it anyway in a limited capacity, despite evidence that the employee was competing while still employed with the company.
[8]February Term 2003, No. 2807, 2004 WL 237718, 2004 Phila. Ct. Com. Pl. LEXIS 83 (C.C.P. Phila. Feb. 5, 2004) (Sheppard, J.), infra.
[9]December Term 2000, No. 3264, 2001 WL 1807932, 2001 Phila. Ct. Com. Pl. LEXIS 99 (C.C.P. Phila. Jan. 25, 2001), infra.

reasons, there was no goodwill for the company to protect.[10] The Court has also considered whether the employer gave valid consideration in exchange for the agreement not to compete.

In Philadelphia Ear, Nose, & Throat Surgical Associates v. Roth[11] and WellSpan Health v. Bayliss,[12] a Superior Court case, the Courts included an additional public interest element where the agreements involve physicians. They assessed the harm that the covenant could have on the public welfare, with access to treatment being an overriding concern. In Philadelphia Ear Nose & Throat Surgical Associates, the Commerce Court did not enforce the covenant because of this public policy concern; however, in WellSpan Health the Superior Court merely reduced the geographic scope in order to eliminate public harm.

COMMERCE CASE MANAGEMENT PROGRAM OPINIONS[13]

Philadelphia Ear, Nose, & Throat Surgical Associates, P.C. v. Roth, January Term 2000, No. 2321, 44 Pa. D. & C.4th 427 (C.C.P. Phila. Mar. 13, 2000) (Sheppard, J.) (the Court denied enforcement due to public harm and a prior contractual breach by the moving party). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/philaearnosethroat.pdf.

In Philadelphia Ear, Nose, & Throat Surgical Associates, the Court denied the request of Philadelphia Ear Nose and Throat ("PENT") for a preliminary injunction against its former employee, defendant Maurice Roth, M.D. (Dr. Roth). PENT claimed that Dr. Roth had violated the restrictive covenant contained in his employment agreement.[14]

On July 5, 1995, the parties entered into an employment agreement including a requirement that PENT would pay Dr. Roth's professional liability insurance for the duration of

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[10]But see Olympic Paper Company v. Dubin Paper Company, October Term 2000, No. 4384, 60 Pa. D. & C.4th 102 (C.C.P. Phila. Dec. 29, 2000) (a prior decision where the employer dismissed the employee for poor performance and the Court still upheld the covenant), infra. In Labor Ready, there was conflicting evidence concerning the employee's poor performance.
[11]January Term 2000, No. 2321, 44 Pa. D. & C.4th 427 (C.C.P. Phila. Mar. 13, 2000), infra.
[12]869 A.2d 990 (Pa. Super. 2005).
[13]This section was updated on May 27, 2007.
[14]Dr. Roth initially challenged PENT's capacity to enforce the restrictive covenant, as it had gone through a number of name changes over the years of Dr. Roth's employment, eventually settling on PENT. The Court, however, ruled that corporate name changes do not affect the existing rights of persons other than shareholders.

his employment. A restrictive covenant in the agreement precluded Dr. Roth from: (1) retaining his staff privileges at a number of Philadelphia area hospitals (particularly Northeastern); and (2) soliciting any of PENT's patients for a period of two years after his termination from employment. Under the agreement's language, any violation of the non-compete terms entitled PENT to injunctive relief and damages. Upon terminating Dr. Roth's employment in 1999, PENT sought a preliminary injunction to enforce the restrictive covenant. The Court determined that PENT failed to establish the elements necessary to grant the injunction.

In order for a court to grant an injunction, the moving party must sufficiently establish the following five elements:

1) that relief is necessary to prevent immediate and irreparable harm that damages cannot compensate;
2) that greater injury will occur from refusing the injunction than granting it;
3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
4) that the alleged wrong is manifest, and the injunction is reasonably suited to abate it; and
5) that the plaintiff's right to relief is clear.[15]

In addition, courts closely examine restraints on physicians because of the value of their services to society.[16]

PENT did not establish an irreparable injury. Dr. Roth did not take patient lists or solicit any of PENT's patients. Further, since 1995, Northeastern Hospital's patient volume greatly increased; reaching a level which PENT alone could not serve. This lack of capacity did not exist when the restrictive covenant was first conceived. Thus, there was no harm to PENT resulting from Dr. Roth's treating patients at Northeastern.

Nor was the second criteria established. First, banning Dr. Roth from Northeastern would cause genuine harm to the community. Second, allowing him to practice would have no effect on PENT because PENT could not accommodate these excess patients.

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[15]Cappiello v. Duca, 449 Pa. Super. 100, 672 A.2d 1373, 1376 (1996) (citation omitted).
[16]New Castle Orthopedic Associates v. Burns, 481 Pa. 460, 392 A.2d 1383, 1385 (1978).

Finally, PENT failed to establish a clear right to relief. From 1997 until Dr. Roth's 1999 termination, PENT failed to pay Dr. Roth's malpractice insurance and other expenses as stipulated in the employment agreement. Instead, PENT deducted these expenses from Dr. Roth's salary despite Dr. Roth's repeated complaints. Under Pennsylvania law, when a party materially breaches a contract the non-breaching party is not required to fulfill its duties under the contract.[17] This undermined PENT's argument that it had a clear right to enforce the agreement.

Robert Half of Pennsylvania Inc. v. Feight, April Term 2000, No. 1667, 48 Pa. D. & C.4th 129 (C.C.P. Phila. June 29, 2000) (Herron, J.) (the Court modified an overbroad agreement). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/half-opn.pdf.

In Robert Half of Pennsylvania Inc., the Court partially granted a petition for a preliminary injunction. The Court blue penciled a restrictive covenant. It enjoined a former employee from soliciting, contacting or otherwise engaging in business relations with clients with whom she had established relationships while working for her former employer.

Robert Half of Pennsylvania Inc. ("RHI"), located in center-city Philadelphia, operates three divisions of a nationwide personnel placement agency: (i) "Accountemps"; (ii) "Affiliates"; and (iii) "Office Team." The "Accountemps," "Affiliates" and "Office Team" divisions place temporary accounting, legal and administrative personnel with various businesses and law firms. The "Affiliates" division places lawyers, legal secretaries and paralegals.

Shana Feight ("Feight"), a young college graduate living in Philadelphia, worked as a staffing manager for the "Accountemps" division. This was an entry-level position. Feight worked for RHI for nearly two years, during which time she received between twenty and forty-five hours of training. She did not place legal professionals, but RHI's "Accountemps" division provided services to some law firms; and Feight had professional contact with some law firms. The "Affiliates" and "Accountemps" employees had considerable interaction, and the two

[17] Ott v. Buehler Lumber Co., 373 Pa. Super. 515, 541 A.2d 1143, 1145 (1988).

divisions shared 360 common clients. Feight had 13 law firm clients on which she received commissions, and she was encouraged to cross-sell RHI's legal placement services, as well as her own division's services.

Despite RHI's attempts to retain Feight, she resigned. She allegedly misinformed her supervisors concerning her future employment with Legal Search, a direct competitor of RHI's "Affiliates" division. While later working for Legal Search, Feight allegedly contacted and attempted to place legal personnel at a number of law firms with which she had professional contact during her employment at RHI.

Feight had an employment agreement with RHI. She had been asked to sign it on her first day of work. The agreement included non-disclosure and non-compete terms. The non-compete terms set forth the consideration and other reasons for RHI to demand a non-compete, e.g., giving Feight a valuable position and giving her access to valuable confidential information and trade secrets. The agreement required that she not be involved with any competitor for one year after termination, within a 50 mile radius of RHI's office.

Applying the law and facts to the agreement, the Court provided RHI with some relief, but not all that it sought. RHI contended that the non-compete agreement should encompass non-law firm clients as well as law firms. The Court disagreed. The Court determined that the restrictive covenant should only apply to law firms for which Feight received commission while at RHI; otherwise the covenant would place an undue burden on Feight, i.e., she would be unable to work in the employee placement field in the greater Philadelphia area for one year.

The Court followed the three part test set forth in John G. Bryant Co. v. Slinging and Repair Inc.,[18] for determining whether a non-compete agreement is enforceable. The three part enforceability test addresses whether the covenant: (i) is ancillary to the employment relationship; (ii) is limited in time and geographic scope; and (iii) is necessary to protect a legitimate business

[18] 471 Pa. 1, 369 A.2d 1164, 1168 (1977).

interest without imposing undue hardship on the employee. An agreement passing this test is facially valid.

On the ancillary to employment element, Feight accepted the offer of employment verbally, prior to signing the agreement. However, because RHI regularly provided this same provision in its employment contracts, the agreement contained valid consideration. Further, the Court determined that under Insulation Corp. of America v. Brobston,[19] the agreement was supported by adequate consideration because the covenant was incidental to Feight's hiring.

On the reasonable duration and geographic scope prong, the Court considered the time that it would take to replace the former employee, Feight. This included the time it would take for the new employee to demonstrate effectiveness. This is an objective measure used to determine reasonableness of the non-compete's duration. Under Boldt Machinery & Tools v. Wallace,[20] an employee who has frequent contact with the client needs less time to become effective. Despite testimony that three months were sufficient to replace Feight, the Court determined that since Feight telephoned clients every 30-120 days, and that several calls might be necessary to demonstrate effectiveness, a one year restriction was reasonable.

Because Feight did not raise the fifty-mile restriction in her brief, the Court did not have to determine whether it was reasonable. However, the Court commented that the fifty-mile provision was inherently reasonable because the Court had modified the agreement to include only sixteen clients. It also cited Boldt for the proposition that a distance required to cover the company's sales territory was a reasonable distance.

Finally, on protectible interest, the Court determined that RHI had a legitimate business interest in protecting the client goodwill that Feight established while at RHI. However, RHI had no legitimate business interest in protecting the identities of clients and hiring contacts known to

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[19] 446 Pa. Super. 520, 667 A.2d 729, 733-34 (1995).
[20] 469 Pa. 504, 366 A.2d 902, 906-907 (1976).

Feight, because their identities were not trade secrets. Thus, the language in the agreement was broader than necessary to protect RHI's legitimate business interests.

The Court cited a law review article, Employee Agreements Not to Compete,[21] which the Pennsylvania Supreme Court had quoted in John G. Bryant Co., for the proposition that the goodwill of an employer is a protectible business interest. The Court reasoned that because the employment placement industry is highly competitive, client relationships are critical to success and continued candidate placement.[22] Therefore, only the relationships with clients were a legitimate protectible business interest. Contacts with clients that did not substantiate a relationship did not rise to the level of a protectible business interest. The Court determined that the remaining clients' identities were not trade secrets because companies engaging in the same business generally knew the clients' identities.[23] Since there was no evidence that Feight took copies of any detailed client data or memorized such information, RHI did not demonstrate misappropriation of this data. Lastly, the Court concluded that RHI had no protectible business interest in the training that it provided Feight; the training techniques in general sales are well known, and are not trade secrets.[24]

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[21] Harlan Blake, Employee Agreements Not to Compete, 73 Harv.L.Rev. 625, 653-54 (1960).

[22] Robert Clifton Assocs. v. O' Connor, 338 Pa. Super. 246, 487 A.2d 947, 951-52 (1985) (using the same reasoning).

[23] Bettinger v. Carl Berke Assoc., 455 Pa. 100, 314 A.2d 296, 298 (Pa. 1974); Harsco Corp. v. Klein, 395 Pa. Super. 212, 576 A.2d 1118, 1121 (1990) (stating that customers of an employer were not confidential where the identities of the employers were generally known); Restatement (Third) of Unfair Competition § 42, cmt f. (1995) (stating that "solicitation of the same customers by a number of competitors is evidence that the customer identities are generally known or readily ascertainable in the trade.").

[24] Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 136 A.2d 838, 846 (1957) (special training may also place a burden on the employee in order to transfer those skills learned to another job).

United Products Corp. v. Transtech Manufacturing Inc., August Term 2000, No. 4051, 2000 WL 33711051, 2000 Phila. Ct. Com. PL. LEXIS 91 (C.C.P. Phila. Nov. 9, 2000) (Sheppard, J.) (the Court modified an overbroad agreement). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/unitedff.pdf.

In United Products Corp., the Court partially granted a preliminary injunction, based on a restrictive covenant signed by the defendants.

United Products Corp. ("UPC") was in the business of providing parts for railcar interiors and coupling rods, chiefly working for SEPTA and Amtrak. The defendants, Amodei and Furry, were former UPC employees and founders of Transtech Manufacturing Inc. ("Transtech"). Transtech provides parts to railroad companies, including parts for railcar interiors and coupling rods.

Amodei and Furry both signed restrictive covenants with UPC after they started working at UPC. They signed when their employee status changed, with promotions and increases in pay. The employment agreements at issue provided:

> for a period of two (2) years after the termination of my employment for any reason, except by the Company without cause, I shall not manage, operate or control or act as an employee of … any entity which is engaged in any business in which the Company was engaged while I was employed by the Company.
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> and
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> for a period of twenty-four (24) months after the termination of my employment for any reason, voluntarily or involuntarily, I shall not… solicit or negotiate with any person or entity which was a company customer or employee while I was employed by the Company. Further, I agree I shall not accept or solicit employment opportunities with the company's customers, vendors, consultants, sub-contractors.

Amtrak and SEPTA constituted 90% of UPC's revenue. While at UPC, Amodei was involved in an Amtrak related project as the project's engineering manager.[25] Furry assumed Amodei's duties when Amodei resigned. Because Furry was originally hired in a financial

[25] There was some indication in the record that Amodei misrepresented on his employment application that he possessed a degree in mechanical engineering.

capacity, he had access to much of the company's financial records and dealings with its bonding agent. Approximately four months after Amodei resigned, Furry also resigned. Furry was also involved with SEPTA in the same capacity that Amodei was involved with Amtrak.[26] UPC alleged that Furry improperly removed his original non-compete agreement from UPC management's office.

Furry and Amodei founded Transtech after Amodei resigned, but before Furry resigned. Among other things, Transtech solicited business with Amtrak, and low-bid UPC on a job for Amtrak (unsuccessfully). Transtech also solicited business with SEPTA. UPC sought an injunction prohibiting Transtech, Amodei and Furry from doing any business with Amtrak and SEPTA for two years. The Court granted one year's relief, but only as to parts for railcar interiors and coupling rods.

First, the Court analyzed whether a preliminary injunction was necessary. It followed the Pennsylvania Supreme Court's five part test used in School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n.[27]: (1) relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages; (2) greater injury will occur from refusing the injunction than from granting it; (3) the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct: (4) the wrong is actionable and the plaintiff's right to relief is clear; and (5) the injunction is reasonably suited to abate that wrong.

The Court determined that UPC had no protectible trade secrets, but it did find that the relationships between Furry and Amodei on the one hand, and Amtrak and SEPTA on the other, implicated protectible business interests. However, since UPC's services were limited to rail car interiors and coupling rods, the non-compete agreement would likewise be limited to those same products. The Court stated that Furry and Amodei did not violate the non-compete agreements

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[26]There is an indication that Furry violated the non-compete and solicitation agreement while he was employed by UPC.
[27]542 Pa. 335, 667 A.2d 5, 6 (1995).

unless Transtech sold the same products as UPC, even while Furry or Amodei were employed with UPC.

The Court further analyzed the agreement to determine its enforceability, relying on John G Bryant Co.'s[28] three-part test: The agreements are valid only if: (1) they are ancillary to an employment relation; (2) they are reasonably limited in duration and geographic scope; and (3) enforcement is necessary to protect a legitimate business interest of the employer without imposing an undue hardship on the employee. Since both Furry's and Amodei's agreements were supported by adequate new consideration, i.e., the promotions, the change in employment status and increases in pay, the agreements satisfied the first part of the test.[29] The Court cited John G. Bryant Co. to support the proposition that goodwill between clients and employees is a protectible business interest. However, the Court observed that the protection could go no further than what was necessary to protect actual relationships that Furry and Amodei established while at UPC. On the duration element, the Court found that the employee taking Amodei's and Furry's place had sufficient experience, and had frequent contact with Amtrak and SEPTA through weekly meetings. The Court held that a one year term of enforcement was sufficient to protect UPC, measuring that year from Furry's last day at UPC.

Olympic Paper Company v. Dubin Paper Company, October Term 2002, No. 4384, 60 Pa. D. & C.4th 102 (C.C.P. Phila. Dec. 29, 2000) (Sheppard, J.) (the court modified an overbroad agreement). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/oly.pdf.

In Olympic Paper Co., the Court upheld a restrictive covenant against a former employee ("Reddy") and Reddy's new employer ("Dubin") based on a court-modified restrictive covenant.

Olympic is a seller and distributor of restaurant and food service paper products. Reddy held numerous positions at Olympic Paper Company ("Olympic"). It was not until Reddy became

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[28] John G. Bryant Co., 369 A.2d at 1168.
[29] Insulation Corp. of America, 667 A.2d at 733.

a sales representative, however, that he was required to sign a non-compete agreement. As consideration for the agreement, Reddy received a $100 bonus, as well as an increased earning potential.

The terms of the non-compete prohibited Reddy from directly or indirectly engaging in any contravening business "within a radius of 150 miles" for a period of one year following termination of employment. It also prohibited divulging trade secrets, including but not limited to customer and price lists. Five months after starting his position as a sales representative, Reddy was terminated for "poor performance." Three weeks later, he began working as a sales representative at Dubin, Olympic's direct competitor, where he attempted to contact at least twenty of Olympic's customers.

In order to enforce a restrictive covenant, it must be: (1) ancillary to the taking of regular employment and supported by valid consideration; (2) reasonably limited in duration and geographic scope; and (3) necessary to protect a legitimate business interest of the employer without imposing undue hardship on the employee.[30] As stated in that case: "The law is clear that the burden is on him who sets up unreasonableness as the basis of contractual illegality to show how and why it is unlawful."[31]

Reddy was informed of the non-compete agreement prior to commencing work as a sales representative, and received the consideration described above. Therefore, the first criterion was satisfied. Considering that Reddy was only employed as a sales representative for five months, the Court determined that it is not reasonable to enforce the covenant for a duration of one year, which was longer than his actual salesperson employment period. Thus, the Court reduced the restrictive period to six months.

Even then, Reddy was only enjoined from soliciting those customers with whom he personally established goodwill on Olympic's behalf while working as Olympic's sales

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[30] John G. Bryant Co., 369 A.2d at 1168.
[31] Id at 1169.

representative. Although Pennsylvania courts have recognized an employer's legitimate interest in trade secrets and customer goodwill, those interests do not extend to cases where the former employee had little to no contact with clients or customers. Thermo-Guard, Inc. v. Cochran.[32] The Court also determined that any client accounts generated from Reddy's previous positions at Olympic were not protected by the non-compete because Reddy was not subject to a restrictive covenant at that point.

The employer bears the burden of demonstrating that putative trade secrets are indeed confidential. In this case, customer identities would be common knowledge to all firms in the same business as the employer; and Olympic's price and customer lists were available to other employees in positions not subject to restrictive covenants. Thus, Olympic failed to establish that these items deserved protection as confidential information. Still, as the employee agreement required Reddy to return all company materials upon termination, Olympic retained a proprietary and contractual interest in its price and customer lists, etc., and those had to be returned.

Labor Ready, Inc. v. Trojan Labor, December Term 2000, No. 3264, 2001 WL 1807932, 2001 Phila. Ct. Com. Pl. LEXIS 99 (C.C.P. Phila. Jan. 25, 2001) (Sheppard, J.) (non-compete invalid as applied; *per se* rule for poor performance; the court applied Washington law). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/lr0012-3264.pdf.

In Labor Ready, the Court categorically held that a preliminary injunction based on a restrictive covenant would not be granted where there are (1) no trade secrets involved and (2) the employer ("Labor Ready") terminated the former employee ("Czeponis") for poor performance. Czeponis' next employer ("Trojan") terminated Czeponis in light of this litigation. Labor Ready discontinued the action against Trojan; however, it continued suit against Czeponis.

Labor Ready is a Washington State corporation with three offices located in Philadelphia. It provides temporary employees to its clients. In May of 2000, Labor Ready hired Czeponis as a

[32] 408 Pa. Super. 54, 596 A.2d 188, 193 (1991).

manager in training. Czeponis signed an "Employment Contract and Statement of at Will Employment," which contained the following non-solicitation and non-competition language:

> during the term of this Employment Contract and for a period of one (1) year immediately following the termination of Employee's employment, for any cause whatsoever,[…] said Employee shall not[…]:
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> > (a) […] influence or solicit any customer or customers of Company;
> >
> > (b) Divulge the names and addresses or any information concerning any customer of Company; (c) […] be employed by […] the same, similar, or related line of business as that carried on now by Company within a radius of ten (10) miles from Company's office at which Employee was last employed[…].

Following six weeks of on-the-job training, over two months as branch manager and two months as site coordinator at the Philadelphia naval shipyard, Labor Ready terminated Czeponis' employment. The client was allegedly dissatisfied with her performance. One week later, Czeponis began working for Trojan, Labor Ready's competitor, in essentially the same capacity for the same client.

Although Czeponis knew considerable information about Labor Ready's business practices, she did not have access to its computer network and did not know much about Labor Ready's overhead costs. She had not negotiated contracts with clients. Further, despite Labor Ready's lower personnel placement rate at the navy yard in the month following Czeponis' joining Trojan, Czeponis did not use any Labor Ready employees on Trojan's behalf.

The Court analyzed the three claims before it: (i) breach of contract; (ii) misappropriation of trade secrets; and (iii) tortious interference with business relations. The employment contract designated Washington law as governing contract interpretation. Accordingly, the Court applied Washington law to the contract claim; however, it also cited Pennsylvania decisions.

Of course the Court cited Pennsylvania cases to set out the procedural standards that: (i) "a preliminary injunction is a most extraordinary form of relief which is to be granted only in the most compelling cases"; and (ii) a court may grant the injunction only if the moving party establishes, among other things, a clear right to relief for an actionable wrong.[33] The Court also determined that Washington non-compete law,[34] which resembles the Restatement's approach,[35] is substantially similar to Pennsylvania law with respect to restrictive covenants. The Court cited two cases, a recent Philadelphia Commerce Program decision[36] and a Pennsylvania Supreme Court decision[37] which require a covenant not to compete to: (i) be ancillary to an employment relation; (ii) be reasonably limited in duration and geographic scope; and (iii) protect a legitimate business interest of the employer without imposing an undue hardship on the employee.[38]

Although there was conflicting evidence with respect to Czeponis' poor performance,[39] the Court used Washington and Pennsylvania case law to support the proposition that where there is no goodwill between the customer and the employee, evidenced by the alleged poor performance, the covenant is unenforceable. The Court referred to Insulation Corp. of America,[40] which held that an employer who terminates an employee for poor performance cannot enforce a restrictive covenant against that employee. Utilizing Washington law, the Court also held that employee

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[33] Goodies Olde Fashion Fudge Co. v. Kuiros, 408 Pa. Super. 495, 597 A.2d 141, 144 (1991); School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, 542 Pa. 335, 667 A.2d 5, 6 n. 2 (1995); New Castle Orthopedic Assocs. v. Burns, 481 Pa. 460, 392 A.2d 1383, 1385 (1978).

[34] Perry v. Moran, 748 P.2d 224, 228-229 (Wash.1987) (Washington uses four part test: (1) the restraint is necessary for the protection of the employer's business or goodwill; (2) the restraint does not impose on the employee any greater restraint than is reasonably necessary to protect the employer's business or goodwill; (3) the loss of the employee's services and skills does not cause an injury to the public so great as to warrant non-enforcement of the covenant; and (4) the covenant is reasonably limited in time and geographic scope).

[35] See Restatement (Second) of Contracts § 188 ("A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if: (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.")

[36] Robert Half of Pennsylvania, Inc., supra.

[37] John G. Bryant Co., 369 A.2d at 1168.

[38] Cf. Restatement Second of Contracts § 188.

[39] It was evident to the Court that the termination of employment for poor performance may have been an attempt to avoid a wrongful termination action by Czeponis.

[40] 667 A.2d at 734-37.

training alone does not constitute a sufficient business interest upon which to base the enforcement of a restrictive covenant.[41]

<u>Omicron Systems, Inc. v. Weiner</u>, August Term 2001, No. 669, 2002 WL 452238, 2002 Phila. Ct. Com. Pl. LEXIS 11 (C.C.P. Phila. March 14, 2002) (Herron, J.) (the Court required an amended complaint, but did not require arbitration). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/omicron.pdf.

Omicron Systems ("Omicron") filed suit against its former employee ("Weiner") for breach of a restrictive covenant. Weiner, in turn, raised preliminary objections asserting that Omicron: (1) was required to arbitrate; and (2) failed to plead the elements required to obtain injunctive relief on the restrictive covenant. The Court concluded that there was no duty to arbitrate the non-compete disputes, but that Omicron failed to plead all of the necessary elements to obtain relief. The Court directed the plaintiffs to file an amended complaint within twenty days.

The parties entered into an employment agreement in December 1993. The agreement included a restrictive covenant which extended for two years after separation from employment for any reason. Weiner was to receive stock upon his departure, contingent on his compliance with the non-compete. In June 2001 Weiner resigned. Before leaving, he signed a letter recognizing his duties under the restrictive covenant. Weiner then started working for Proscape Technologies in the same capacity at which he worked with Omicron. Omicron moved for injunctive relief and damages which resulted from Weiner's breach of the employment agreement. Weiner asserted that the dispute was subject to arbitration and/or failed to state a claim.

To be enforceable, arbitration agreements must be clear, expressing the unequivocal intent of the parties as manifested by the writing itself.[42] The employment agreement in question contained a broad arbitration clause. The agreement's restrictive covenant section, in turn,

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[41]<u>Copier Specialists, Inc. v. Gillen</u>, 887 P.2d 919, 920 (Wash.App.1995) (holding that covenant not to compete was not enforceable to protect only the training that the employee received from his employer).
[42]<u>Brown v. D. & P. Willow Inc.</u>, 454 Pa. Super. 539, 686 A.2d 14 (1996).

contained a more specific clause that allowed litigation of disputes. Under Pennsylvania law, where two provisions in a contract are inconsistent, the specific contractual provision will be deemed a limiting qualification on the more general language.[43] Thus, Omicron was not required to arbitrate its claim.

On the issue of obtaining injunctive relief, the Court was satisfied that Omicron met the requirements of the three pronged Olympic Paper Co.[44] test to enforce a restrictive covenant. Omicron failed, however, to plead all of the elements needed to obtain a preliminary injunction.[45] In its complaint, Omicron adequately alleged immediate and irreparable harm as a result of Weiner's competition, his solicitation of customers and use of trade secrets. However, Omicron failed to adequately plead the other elements. Thus, it was directed to file an amended complaint within twenty days.

Omicron Systems, Inc. v. Weiner, August Term 2001, No. 669, 2003 Phila. Ct. Com. Pl. LEXIS 64 (C.C.P. Phila. October 10, 2003) (Cohen, J.), aff'd in part, rev'd in part, 860 A.2d 554 (Pa. Super. 2004) (damages awarded for violation of restrictive covenant in non-jury trial).[46] This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/omicron1003.pdf.

The dispute described immediately above did not settle, and went to trial in 2003. The Court seemed to have little trouble in ruling that the restrictive covenant was enforceable and had been violated. The instant opinion arose as the result of post-trial motions.

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[43] Wilborn Hosiery Co. v. Grissinger, 22 Pa. D. & C.3d 263, 266 (C.C.P. Dauphin 1981).
[44] See Olympic Paper Co., discussed supra.
[45] Omicron had to satisfy the four-part test to be entitled to a preliminary injunction, citing Valley Forge Hist. Soc'y v. Washington Mem. Chapel, 493 Pa. 491, 426 A.2d 1123 (1981) on the need to establish: a clear right to relief; the existence of a harm not compensable by money damages; that greater injury would result if the injunction is denied; and that the parties could be restored to the status quo ante.
[46] In Omicron Systems, Inc. v. Weiner, 860 A.2d 554 (Pa. Super. 2004), the Superior Court affirmed the Commerce Court's liquidated damages award, but reversed the award of attorneys' fees; agreeing, however, that Weiner had violated the non-compete and confidentiality agreements with Omicron.

Applying the Supreme Court's test in John G. Bryant Co.,[47] the Court found that Omicron and Weiner's new employer, Proscape, shared the same clients and provided "similar if not identical services." Further, while working at Proscape, Weiner used an Omicron form as a template, and applied information he acquired at Omicron, for Proscape's benefit. This breached the restrictive covenant and violated a confidentiality agreement. The Court granted an award of attorneys' fees, even though not pleaded in the Complaint, reasoning that attorneys' fees were provided for in the employment agreement. As set forth in footnote 45 below, the Superior Court reversed the award of attorneys' fees.

Weiner argued that even if true that he used proposal language taken from his work with Omicron, no damages resulted from that use, i.e., "no harm, no foul." The Court cited case law for the proposition that it had wide latitude in awarding damages for breach of a restrictive covenant. On this basis, the Court awarded a contractually determined sum of $238,000, absent proof of any other damages. The Court permitted these liquidated damages as "proven compensation" for the value of Weiner's work for Proscape using Omicron's information. The Court was further concerned about discovery tactics that obstructed Omicron's ability to prove the value of additional lost business. The liquidated damages award was upheld on appeal.

Cooper v. Cerelli, February Term 2002, No. 1260, 2002 WL 1758351, 2002 Phila. Ct. Com. Pl. LEXIS 51 (C.C.P. Phila. July 8, 2002) (Sheppard, J.) (the Court modified an overbroad agreement). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/cooperff.pdf.

An employment agreement was entered into between Cerelli and Bravo Productions, a company which provides lighting related services. The agreement contained a non-compete clause against Cerelli's soliciting customers, competing against Bravo, encouraging competition against Bravo or soliciting Bravo employees. The restrictive covenant included a two year non-compete period from the date of termination, with a geographical scope encompassing a one hundred mile

[47] 471 Pa. 1, 369 A.2d 1164, 1168 (Pa. 1977).

radius from City Hall, Philadelphia. Cerelli was terminated for good cause on February 8, 2002. Subsequent to his termination, he formed his own company which offered consulting services for lighting and drapery needs; and provided referrals from which his clients could solicit bids from lighting companies competing with Bravo. Through Cerelli's suggestions, his customers in fact used the services of Bravo's competitors.

The Court granted Bravo a preliminary injunction, but held that the temporal and geographic limitations were overbroad. Accordingly, the court reduced the restrictions to one year from the date of termination and a twenty-five mile radius from City Hall, Philadelphia.

Innaphase Corporation v. Overman, February Term 2003, No. 2807, 2004 WL 237718, 2004 Phila. Ct. Com. Pl. LEXIS 83 (C.C.P. Phila. Feb. 5, 2004) (Sheppard, J.) (evidence did not support the necessity for enforcement of overbroad non-compete provision). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/innaphase-op_to_superior_ct.pdf.

In Innaphase Corp., the Court explained its rationale for the denial of a motion for a preliminary injunction. The Court vacated a special injunction and held that the parties shall commit to arbitration.[48] The Court held that the burden on the former employee of not competing for twelve months was greater than the harm that could occur to the company, due to the limited competition between them.

Innaphase Corporation ("Innaphase") is a Delaware corporation that develops, sells and consults on Laboratory Information Management Systems ("LIMS"). It derives eighty percent of its revenue from pharmaceutical customers. Labware is a direct competitor in the LIMS market; however, it only derives seventeen percent of its revenue from pharmaceutical customers. Meric Overman ("Overman') had worked at Labware prior to his employment at Innaphase.

Over the course of two years at Innaphase, Overman held the positions of Director of Customer Implementation, Senior Director of Customer Services and Vice President of Customer

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[48]The Court held that by bringing this suit in court, Innaphase did not waive its right to compel arbitration, which was stipulated in the employment contract.

Services. Labware's Chief Executive Officer contacted Overman and offered him a position. This new position at Labware was not dependent on the number of customers that Overman recruited. Further, Overman's primary reason for taking the Labware position was to spend more time with his family; his one-way commute to Labware being ten minutes, as opposed to a one hour commute to Innaphase.

In Innaphase's second argument,[49] it contended that the Court should grant a preliminary injunction based on the contractual provision which stated that following twelve months after the termination of employment "the employee shall not engage in any other employment […] that would be competitive." The contract provided several ways in which the employee shall not compete, e.g., confidentiality and non-disclosure. Although the Court's analysis focused on the confidentiality agreement, it noted that the contract failed to provide a limit on geographic scope for the agreement.

The Court ruled for the employee. There was no protectible business interest. Despite Overman's intimate knowledge of Innaphase's software, Overman was not technically skilled and could not reproduce Innaphase's software, i.e., Innaphase's protected business interest. Further, despite his close customer contact, Overman would not be engaged in competitive work with Labware. He would merely be involved with Labware's software products. Thus, Innaphase's putative hardship could not overcome the real burden that would be placed on Overman if the twelve month restriction were enforced.

All Seasons Services Inc. v. Newnam, October Term 2002, No. 2173, 2006 Phila. Ct. Com. Pl. LEXIS 301 (C.C.P. Phila. July 20, 2006) (Sheppard, J.) (the Court applied Massachusetts law upholding a non-competition agreement, and awarded damages). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/021002173.pdf.

[49]It based its primary argument on the confidentiality agreement in the contract, which the Court did not find was sufficiently supported by the evidence.

In All Seasons Inc., the Court upheld a non-competition agreement and awarded nearly $80,000 in damages, including interest during the three years of the proceedings. However, the Court did not award damages where the customers had already decided to change vendors and where the employee's involvement was incidental. The Court applied the rule of reason with respect to the duration and scope of the agreement.

John Newnam ("Newnam") worked for All Seasons Services, Inc. ("Seasons") as district manager for less than one year and for Season's corporate predecessor for several years. Newnam signed the non-competition agreement when he started with Seasons. Although Seasons terminated Newnam's employment, he submitted a letter of resignation, signed a reaffirmation of the non-competition agreement and received severance compensation. This provided that, on termination, Newnam would not compete with Seasons for a period of three months, and would not solicit Season's customers for a period of one year. Newnam accepted an employment offer with Raley Downes Services ("RDS"), a Seasons competitor, within a few months of his termination. He also decided to target several Seasons customers that he knew were unhappy with Seasons' services.

The agreement contained a choice of law provision that Massachusetts law governed the agreement. The Court determined that the agreement's terms were reasonable, generally citing a Massachusetts Supreme Court decision[50] upholding a two-year agreement, but only within the salesperson's territory.

The Court's discussion focused on the factual circumstances surrounding the six customers that signed agreements with RDS following Newnam's employment. It determined that Newnam breached his contract by soliciting business with five of Seasons' customers; a sixth customer contacted RDS without Newnam's solicitation. Additionally, three of the customers had already decided to change vendors prior to Newnam's solicitation; therefore, Seasons did not sustain

[50] All Stainless v. Colby, 364 Mass. 773, 308 N.E.2d 481 (1974).

damages caused by Newnam's breach in those instances. The Court awarded damages comprised of six months of lost profits for one customer (this customer went out of business six months after it changed vendors), and three years lost profits for the remaining customer, plus interest.

Reporting Services Assoc. Inc. v. Veritext, L.L.C., June Term 2003, No. 489, 2003 WL 22183927, 2003 Phila. Ct. Com. Pl. LEXIS 66 (C.C.P. Phila. Sept. 10, 2003) (Jones, J.) (the Court modified an overbroad agreement between businesses). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/reporting-services-op.pdf.

In Reporting Services Assoc. Inc., the Court held that a restrictive covenant attached to the sale of a business was reasonable, though the Court reduced the duration from five years to one year. Accordingly, the Court denied the former employee's/owner's request for a preliminary injunction releasing him from the restrictive covenant.

On April 17, 1998, Lee Goldstein sold Reporting Services Associates. Inc. ("RSA") to Veritext. Part of the Asset Purchase Agreement included an employment agreement whereby Veritext would employ Goldstein until April 18, 2001. This included a restrictive covenant setting a duration of five years after closing or after the termination of Goldstein's employment, whichever was longer. As consideration for the non-compete, Goldstein received an additional $100,000. After his employment contract expired, Goldstein remained employed by RSA. He was terminated in May 2003, following his demand for payment under a Promissory Note. Veritext claimed termination was due to poor performance.

Goldstein commenced this action to declare the restrictive covenant unenforceable. First the Court addressed the non-compete's enforceability under the three part test utilized in Olympic Paper.[51] The Court then determined whether a preliminary injunction was necessary to prevent irreparable injury or gross injustice.

In deciding that the non-compete was enforceable, the Court found that the restrictive covenant was supported by adequate consideration—$100,000, and that it was part of the goodwill component purchased in the sale of assets. Further, all of the terms of the buy and sell agreement,

[51] See Olympic Paper Co., supra.

which contained the non-compete, were bargained for by Goldstein. He fully understood and assented to those terms.

The Court also determined that the geographic restriction under the non-compete—encompassing New Jersey, Pennsylvania, and Delaware—was not unreasonable. Goldstein could still work in any other jurisdiction, and was therefore not prohibited from earning a living. In addition, the Court observed that restrictive covenants resulting from the sale of a business are treated less rigorously then restrictive covenants ancillary to employment agreements.[52]

As to the five year duration, the Court determined that the interval was broader than necessary to protect Veritext's interests. Thus, it was reduced to one year. The Court stated that imposing a five year non-compete restriction from the date of Goldstein's termination would impose undue hardship, outweighing any hardship that would fall on Veritext. Overall, however, greater injury would occur by granting Goldstein a preliminary injunction eliminating any restrictions than would occur from allowing the restrictive covenant in its modified form.[53]

Doyle Consulting Group, Inc. v. Stoffel, June Term 2003, No. 2099, 2004 Phila. Ct. Com. Pl. LEXIS 81 (C.C.P. Phila. Feb. 13, 2004) (Cohen, J.), aff'd, 869 A.2d 18 (Pa.Super. 2004) (restriction against non-solicitation of customer inapplicable because former customer had no current relationship with former employer at time that customer engaged the former employee's new firm). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/doyle-op.pdf**.**

Stoffel was employed for 6½ years as a client consultant by Doyle Consulting Group ("DCG"), an insurance broker. Stoffel left DCG in 2002 and formed Integrity Consulting Group ("ICG"). ICG was also an insurance broker, and thus a DCG competitor. One of Stoffel's clients while still at DCG, Jackson Township, left DCG around the same time in 2002 that Stoffel's employment ended. The Township found another broker to handle its insurance business in 2002-

[52] Scobell, Inc. v. Schade, 455 Pa. Super. 414, 688 A.2d 715, 718 (1997).

[53] The case subsequently settled, Plaintiffs sought to have the discontinuance stricken and the case reopened for alleged violations of the settlement agreement, and the Court refused that petition. Reporting Services Assoc. Inc. v. Veritext, L.L.C., June Term 2003, No. 489, 2006 Phila. Ct. Com. Pl. LEXIS 243 (C.C.P. Phila. May 30, 2006) (Jones, J.). An appeal was taken to Superior Court, No 2235 EDA 2005, but was discontinued by Plaintiffs on August 7, 2006.

2003. One year later, Jackson Township took bids from 5 different brokers, including both DCG and ICG, for its 2003-2004 insurance business. The Township chose ICG (and Stoffel) as its new broker.

DCG instituted action against ICG and Stoffel on the following non-solicitation clause in the DCG-Stoffel employment agreement: "for a two year period following the termination of [Stoffel's] employment with [DCG] . . . [Stoffel] shall not . . . accept or receive insurance agency or brokerage business from, or act as a consultant to, any customer or account of [DCG] of which [Stoffel is] or shall become aware or with which [Stoffel has] had personal contact as a result of, in connection with, through [his] employment with, or through [his] affiliation with, [DCG]...." The Court assumed for the sake of argument that the employment agreement was valid.

Stoffel's defense was based upon the argument that Jackson Township was not DCG's customer in 2003 when ICG submitted its bid. Jackson Township had selected another broker in July 2002 to replace DCG, and it only engaged ICG one year later to replace that non-party broker. The Court looked to the dictionary definition of "customer," and found that the term included a continuing relationship component carrying into the present. It found similar uses of the word "customer" in various Pennsylvania statutes. In addition, the Court supported a narrow construction of the word "customer" by citing to case law that "'restrictive covenants constitute a restraint on the employee's trade, and are strictly construed against the employer.'"[54] Finally, the contract was construed against DCG as its draftsman, resolving ambiguities against the drafting party as the party with the power to make the document clear. Thus, summary judgment was entered in Defendants Stoffel's and ICG's favor on the permanent injunction issue at hand.

The Court did however add in its Order that through the end of the two year period after Stoffel's termination of employment, Stoffel and ICG "shall not, either directly or indirectly, in any capacity whatsoever, solicit from, or sell to, or accept business from, or accept or receive any

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[54] All-Pak, Inc. v. Johnston, 694 A.2d 347, 351 (Pa. Super.1997).

payments, consulting fees, or brokerage commissions whatsoever from, or serve, or act as a consultant to, or accept or receive insurance agency or brokerage business from, any *current* customer, client, or account of plaintiff's." (Emphasis added).[55]

<u>Clark, v. Weber, Gallagher, Simpson, Stapleton, Fires & Bewby, LLP</u>, January Term 2006, No. 4118, 2006 Phila. Ct. Com. Pl. LEXIS 396 (October 17, 2006) (Abramson, J.) (non-compete clause in law firm partnership agreement was not basis to ignore arbitration clause, even if unenforceable; and its enforceability is within the scope of the arbitration clause). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/060104118.pdf.

This case involved a claims arising from a law partner's withdraw from his firm. Among other things, the former partner, as a plaintiff, asserted that a non-competition provision in the partnership agreement was an invalid restraint of trade. The firm sought to enforce an arbitration provision in the same agreement. The former partner claimed that because the non-compete was an illegal restraint of trade, the arbitration agreement was unenforceable. The Court rejected this argument in light of a severability provision in the contract, which would allow the arbitration clause's enforcement even if the non-compete terms were unenforceable. The Court further found that the enforceability of the non-compete provision was within the scope of arbitrable matters.

<u>Farm Journal Inc. v. Tribune Entertainment Company</u>, December Term 2005, No. 2397, 2006 Phila. Ct. Com. Pl. LEXIS 217 (May 25, 2006) (Sheppard, J.) (non-compete in asset purchase agreement not violated when employees of seller's subsidiary were not within the subsidiary's control, but competed independently). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/051202397.pdf.

This case involved a preliminary injunction in connection with a covenant not to compete found in an asset purchase agreement. Farm Journal, Inc. ("Farm Journal") purchased the assets of Tribune Entertainment Company ("TEC"). TEC had aired a television program, U.S. Farm Report. TEC covenanted "that neither it, nor any of its Affiliates, would engage in programming 'substantially similar' to U.S. Farm Report for a period of three-and-a-half years from the date of

[55]The Court had stated there was no evidence Stoffel had approached other DCG clients and the two year period in this Order would end in 4½ months.

the sale." Farm Journal alleged that two TEC affiliates, Samuelson and Armstrong, " launched a nationally televised agricultural news program … 'substantially similar' to U.S Farm Report." TEC was the parent company of WGN Radio, which employed Samuelson and Armstrong.

Samuelson and Armstrong had hosted U.S. Farm Report prior to the asset purchase agreement. The program was aired on television by TEC until the date of the asset purchase agreement. Neither Samuelson nor Armstrong were employed by TEC or WGN to host that program. Rather, they were independent contractors for HYP, which in turn was an independent contractor producing U.S. Farm Report for TEC. This was not unusual. "The standard in the broadcasting industry permitted broadcasters to work on multiple communication platforms." Although WGN was aware of their work on the television program, U.S. Farm Report, this television work was unconnected to WGN's radio programs. Apparently, working for different entities fell within the industry custom and did not pose a problem to WGN.

After the assert purchase agreement, Farm Journal continued producing U.S. Farm Report, but terminated HYP. Farm Journal was unsuccessful in attempts to keep Samuelson and Armstrong as hosts. The two went on to create an LLC which was to produce a new program, "This Week in AgriBusiness." This new program had no production connection to TEC or WGN and would air on an unrelated satellite channel.

The asset purchase agreement provided: "Neither TEC nor any Affiliates of TEC shall engage in any television business the same as or substantially similar to the production of U.S. Farm Report or the exploitation of U.S. Farm Report as it is now being conducted by TEC." WGN was not aware of the non-compete agreement and Samuelson and Armstrong were never asked to sign a non-compete. Farm Journal took the position that if Samuelson's and Armstrong's new program aired, this would violate TEC's non-compete agreement. The issue was the definition of "affiliate" in the asset purchase agreement, and the determination of what level of "control" existed that might make Samuelson and Armstrong affiliates of TEC, via WGN.

The agreement defined control as "the possession, direct or indirect, of the power to direct or cause the direction of the management or policies of such Person, whether through the ownership of voting securities, by agreement or otherwise." The Court found that Samuelson and Armstrong were not under WGN's control when they were creating a television program with no connection to WGN; rather, they were only in WGN's control when working on radio program as WGN employees. Thus, there was no possible violation of the non-compete agreement by TEC.

The Court suggested "parenthetically":

> that it would be unreasonable and contrary to public policy to find that the covenant not to compete extends to Samuelson and Armstrong's outside work. Restrictive covenants are not favored in Pennsylvania and have been historically viewed as trade restraints that can prevent employees from earning a living. See Jacobson & Co. v. Int'l Env't Corp., 427 Pa. 439, 235 A.2d 612 (Pa. 1967). The court recognizes that a covenant not to compete which is ancillary to a contract for the sale of a business is subject to a less rigorous reasonableness examination then that ancillary to an employment contract. See Scobell, Inc. v. Schade, 455 Pa. Super. 414, 688 A.2d 715, 718 (Pa. Super. 1997). However, finding that TEC violated the covenant not to compete when Samuelson and Armstrong entered into a private business venture outside the scope of their employment and outside TEC's common control would place an unreasonable restriction upon Samuelson and Armstrong's freedom with no resulting benefit. It would also place an unreasonable burden upon TEC to monitor the outside activities of its employees. Absent an explicit provision, the court is reluctant to find a violation of the covenant not to compete. Any other interpretation would bargain away the private rights of Samuelson and Armstrong to perform any work outside the scope of their employment with WGN Radio, notwithstanding the acknowledged custom in the industry that performers typically work in both mediums.

Cho v. Choe, March Term 2004, No. 5940, 2006 Phila. Ct. Com. Pl. LEXIS 89 (February 16, 2006) (Sheppard J.), aff'd w/o opinion, 915 A.2d 137 (Pa. Super. 2006) (per curiam) (buyer of business fails to clearly demonstrate breach of non-compete agreement by seller).

This case involves the sale of a business. The seller claimed the sales prices was $1.9 Million, with $1.7 Million paid at the time of sale and $200,000 to be paid over time in the form of post-dated checks. Defendant claims the sale price was $1.7 Million and the additional $200,000 was for a covenant not to compete. The seller opened a competing business and hired two former employees. After a non-jury trial, the Court found that the buyer had not clearly demonstrated a breach of the non-compete agreement.

SUPERIOR COURT CASE

WellSpan Health v. Bayliss, 869 A.2d 990 (Pa. Super. 2005) (the court upheld a trial court-modified agreement).

In WellSpan, the Superior Court affirmed a ruling that enforced a hospital's restrictive covenant against a physician, but only in counties where the hospital provided the same service as the physician.

WellSpan Health (the "Hospital" or "WellSpan") is a non-profit healthcare system based in York, Pennsylvania. The Hospital services York, Lancaster, Dauphin, Cumberland, and Adams Counties. WellSpan hired Dr. Bayliss, a perinatologist, as Medical Director of Perinatal and Genetic Program at York Hospital. Prior to employment, Dr. Bayliss signed a restrictive covenant which precluded him from practicing perinatology in any of the five counties in which WellSpan offered any services. The covenant's duration was for two years after his termination. The WellSpan perinatal program, however, only served York County. Though it had plans to expand into Lancaster County, those plans never materialized.

In February 2003, Dr. Bayliss announced his resignation from WellSpan. In June, Dr. Bayliss announced his intent to establish a maternal fetal medicine practice at Lancaster Hospital's Women and Babies Hospital in Lancaster County. WellSpan promptly filed a motion for a preliminary injunction. The Trial Court upheld the restrictive covenant with respect to York and Adams Counties, but refused to enforce the covenant in Lancaster, Dauphin, or Cumberland Counties where WellSpan did not compete for perinatology patients. In October 2003, WellSpan lost its argument for a permanent injunction and then appealed.

The Superior Court set out the basic law on permanent injunctions. A permanent injunction is awarded to prevent a legal wrong for which there is no adequate redress at law.[56] The plaintiff must prove a clear right to relief[57] and that actual and substantial injury has occurred or is threatened in the future.[58]

In applying this law to non-compete agreements, a court must first balance the employer's protectible business interest against the employee's interest in earning a living. With physicians, the public interest is an additional special concern that must be weighed in the balance. When patient-demand in the geographical region exceeds the ability of appropriately trained physicians to provide expeditious treatment, then the public interest predominates over the right to enforce a non-competition agreement by injunction.[59] Moreover, to be enforceable, a non-compete must be reasonably necessary for the employer's protection. If, as here, the Hospital does not even compete in a particular geographic region, enforcement of the non-compete is not reasonably necessary for its protection. Further, the non-compete was against the public interest of Lancaster County citizens. Accordingly, the Trial Court's ruling was upheld.

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[56] Soja v. Factoryville Sportsmen's Club, 361 Pa. Super. 473, 522 A.2d 1129, 1131 (1987).
[57] Buffalo Township v. Jones, 571 Pa. 637, 813 A.2d 659, 663 (2002).
[58] Peugeot Motors of America, Inc. v. Stout, 310 Pa.Super. 412, 456 A.2d 1002, 1008-9 (1983).
[59] West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d 295, 299 (Pa. Super. 1999).