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2002

# The Bite could be out of Noncompete Clauses

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## Recommended Citation

Taylor, Porcher L. "The Bite Could Be Out of Noncompete Clauses." *Inside Business: The Richmond Business Journal* 8, no. 11 (2002): 16.

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# The bite could be out of noncompete clauses

**W**hile Virginia is generally a pro-business state, the courts do not favor employee noncompete agreements because they are restraints of trade.

Earthweb, a dot-com company, could be the catalyst for the ultimate demise of employee noncompete agreements in the trade-secret sensitive, high-tech industry. A national judicial landslide could result from this novel caveat-employer case. Then, in the coming years, Virginia's burgeoning high-tech corridor near Washington, D.C., and other such areas could go the way of Silicon Valley's successful free-agency model. California is the only state where noncompetes are void on public policy grounds.

Post-employment restrictive covenants have come a long way since the Middle Ages. In the

Unhappy with Schlack's jumping ship, Earthweb filed suit seeking to stop him from working for the competitor, claiming potential loss of trade secrets and breach of his noncompete agreement.

First, the trial judge rejected the claim that ITworld.com was a competitor as defined in the noncompete because it was a start-up and marketed different products to different audiences. Next, in an eyebrow-lifting warning to high-tech companies, the judge voided the noncompete on the grounds that "a one-year hiatus from the work-



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force is several generations, if not an eternity."

In other words, even if Schlack jumped ship with today's trade secrets, they could be obsolete in short order in this science-fiction-becomes-reality era.

To be sure, the case set no precedent for Virginia's or any other state or federal

## Indeed, a six-month noncompete for Bill Gates' executives might be a veritable eternity.

1414 Dyer's Case, a court denied enforcement of a bond against competition by a former employee, with the rebuke by one of the judges that "by God, if the plaintiff were here he should go to prison until he paid a fine to the King."

Such restraints of trade were presumed illegal under English common law, even where the handcuffs on the employee's mobility were limited to six months. One distinguished scholar argued that the medieval judiciary cast a highly suspect eye on overreaching master craftsmen who sought to oppress their apprentices.

In our knowledge economy, proprietary information is the priceless coin of the high-tech realm. However, in 1999 in *Earthweb v. Schlack*, a federal district judge in New York sent a "wake-up call to technology companies and their counsel" about the short longevity of some of the coins in the realm. Apparently, this is the first time a court took notice of the light-like-speed of new knowledge in the Internet environment.

Schlack had resigned from his employment as a vice president with Earthweb, which provides online products and services to professionals in the IT industry. Schlack was responsible for the content of the company's Web sites.

Schlack's noncompete agreement handcuffed him for 12 months from working with a competitor following separation. After working at Earthweb for less than a year, he resigned and accepted a position with ITworld.com, a provider of information technology print-based data.

Nonetheless, there are two converging forces that may validate the foresight of the trial court and ultimately pave the way for Virginia judges to take due notice of the short life of some high-tech industry noncompetes.

First, breakthroughs in molecular electronics threaten to render obsolete the entire semiconductor industry, say some industry experts. Truly disruptive technologies are real and continue to eclipse today's technology.

Second, planned obsolescence is a shrewd marketing ploy of the consumer electronics industry, especially with personal computers. Microsoft would not be the high-tech titan it is today if consumers had not obediently flocked back to buy the next generation of Windows. Indeed, a six-month noncompete for Bill Gates' executives might be a veritable eternity.

This raises an issue of business ethics. If courts take judicial notice of this planned obsolescence, then many noncompete clauses in the consumer electronics industry might not be worth the cybertext that they are printed on.

Shades of medieval craftsmen tactics? Caveat high-tech noncompetes! **IB**

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