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The Voice

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This Week's Feature



Proceed with Caution: Drafting Restrictive Covenants to Survive Court Scrutiny

By John A. Drake

Restrictive covenant authors walk a fine line: restrictions that are too narrow may not sufficiently protect a company's legitimate interests, but with overbroad restrictions, courts will declare them void, often leaving the company with no protection at all.

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- Predicting Jurors' Verdict Leanings in the Trump Era, March 26, 2020, 12:00 pm–1:30 pm

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- Toxic Torts and Environmental Law, February 19–21, 2020
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- South Carolina

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Quote of the Week

With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds...."

—Abraham Lincoln (b. Feb. 12, 1809), "[Second Inaugural Address](#)" (Mar. 4, 1865).

This Week's Feature

Proceed with Caution: Drafting Restrictive Covenants to Survive Court Scrutiny

By John A. Drake



Restrictive covenant authors walk a fine line: restrictions that are too narrow may not sufficiently protect a company's legitimate interests, but with overbroad restrictions, courts will declare them void, often leaving the company with no protection at all.

Two recent Indiana Supreme Court rulings—one on the “blue pencil” doctrine, the other on liquidated damages—are good reminders of drafting tips, including not overreaching, in all jurisdictions. They illustrate important lessons to help companies draft reasonable restrictions that can survive the elimination of offending clauses and provisions.

Restriction Categories and Characteristics

Restrictive covenants typically include provisions for non-competition, nonsolicitation (of customers or employees, or both), and confidentiality. Most jurisdictions allow these “restraints on trade” if they are reasonable in terms of the scope of activity, geography, and time when reviewed in light of the protectable interests at stake. For example, many courts will invalidate a provision that prohibits a former employee from working in any capacity whatsoever for a competitor.

Three Approaches to Overbroad Language

Courts generally take one of three approaches when they find restrictive covenant language to be overbroad:

1. Blue pencil: delete unreasonable provisions and enforce remaining reasonable provisions, without rewriting or adding to the contract. (E.g., Indiana, Maryland.)
2. Red pencil: Invalidate an overbroad restrictive covenant provision, with no editing or reformation. (E.g., Nebraska, Virginia.)
3. Reformation: Rewrite a provision to make it reasonable and enforceable. (E.g., Illinois, New York.)

Recent Lessons from the Indiana Supreme Court

Two rulings from Indiana's highest court drive home mistakes to avoid and how to survive blue penciling.

In one case, the Indiana Supreme Court could not blue pencil an unreasonably broad employee nonsolicitation provision because “there is no language that we could excise to render its scope reasonable.” *Heraeus Medical, LLC v. Zimmer, Inc.*, 135 N.E.3d 150, 156 (Ind. 2019). The nonsolicitation language applied to “any individual employed” at the company when the defendant left his employment. This provision was not “clearly divisible into parts,” and no reasonable restriction would remain to be enforced after elimination of the overbroad language (“any individual employed”). *Id.* at 155–56.

In another case, the Indiana Supreme Court found a restrictive covenant's liquidated damages provision to call for an unenforceable penalty. *Am. Consulting, Inc. v. Han-num Wagle & Cline Eng'g, Inc.*, 136 N.E.3d 208 (Ind. 2019).

The provisions at issue were as follows:

- Marlin Knowles must pay 50 percent of the salary of any employee that Knowles caused to leave the former employer, American Structurepoint, Inc. (ASI).
- Jonathan Day and David Lancet must pay 100 percent of the salary of any employee that each caused to leave the former employer, ASI.
- Knowles must pay 45 percent of ASI's prior 12 months of revenue generated by any client that Knowles successfully solicited to do business with Knowles' new employer.

Calculated in this manner, the amounts of the employee nonsolicitation damages ranged from \$176,000 to \$272,000; the customer nonsolicitation damages range was in the millions of dollars. *Id.* at 212.

The court held that these provisions were unenforceable because of the following:

- An employee's salary did not reasonably correlate to, and was not reflective of, revenue for ASI.

- The sum was not certain but was based on a percentage of a yet-to-be-determined amount.
- The amounts of the damages far exceeded the defendant employees' salaries, making them appear punitive.

Id. at 212-14. The court did not even consider blue penciling the “too broad” liquidated damages provisions.

Lesson No. 1: Don't Overshoot or Cast Too Wide a Net

First, companies must carefully evaluate the law of the applicable jurisdiction to assess what is reasonable in the specific context of the employees' activities, the company's business, and the industry. Generally, barring solicitation of *any* employees or *any* customers might be considered overshooting and unenforceable.

For example, defining “Company” to include past, present, and future parent companies, subsidiaries, and affiliates, among others, could lead a court to interpret a nonsolicitation clause to be a restriction on soliciting customers or employees with whom a person never had contact. That is likely to be overbroad and unenforceable in almost any jurisdiction.

Lesson No. 2: Draft Serial, “Fallback” Restrictions

In jurisdictions that follow the blue-pencil rule, draft restrictions in a series from the broadest to the narrowest such that excising overbroad language leaves some restrictions intact. A recommended practice is to list such restrictions (by numbers or otherwise) so that they are clearly divisible. For example, geographic restrictions might be listed as (1) the United States, (2) a specifically defined region of several states, (3) one state, (4) several named counties, and/or (5) a radius of 50 miles from the company's offices.

Lesson No. 3: Include Reformation and Severability Clauses

Including a provision that the parties agree that a court may reform (rewrite) unenforceable provisions may help a restrictive covenant survive—if the jurisdiction will entertain reformation. Note, however, that only some courts will reform an overbroad provision automatically. Courts in many reformation jurisdictions retain discretion whether to do so, and often, they will decline to do it. Mitigate risk with a severability clause. Again, though, this is no panacea; some red-pencil jurisdictions (e.g., Nebraska) will most likely void a restrictive covenant if it contains any overbroad provisions.

Conclusion

No matter the jurisdiction, companies must carefully consider the enforceable scope of restrictive covenants in light of the specific situation and then draft the agreements to survive blue penciling and reformation.

John A. Drake of **Ogletree Deakins** practices commercial litigation and employment law. With a focus on trade secrets and restrictive covenant matters, Mr. Drake, practicing from the firm's Indianapolis office, advises companies across the nation. He has secured or defeated numerous restraining orders and injunctions in high-stakes cases. Admitted to practice in Indiana and Illinois, Mr. Drake also litigates employment claims on behalf of employers and advises companies on intellectual property issues. Mr. Drake is the online community vice chair of the DRI Commercial Litigation Committee.

And The Defense Wins

Keep The Defense Wins Coming!

Please send 250–500 word summaries of your “wins,” including the case name, your firm name, your firm position, city of practice, and e-mail address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to DefenseWins@dri.org. Please note that DRI membership is a prerequisite to be listed in “And the Defense Wins,” and it may take several weeks for *The Voice* to publish your win.

William S. Kronenberg



On November 15, 2020, a California jury ruled in favor of USA Swimming in a lawsuit brought by a swimmer who had alleged sexual abuse by a coach of the local Stockton Swim Club. USA Swimming’s attorney was DRI member [William S. Kronenberg](#) of the Oakland-based, civil litigation law firm **Kronenberg Law PC**.

This was the first case to go trial against USA Swimming, part of the US Olympic program, in which it was accused of legal responsibility for the actions of a swim coach employed by an independent swim club. In closing argument the plaintiff’s counsel asked the jury to return a verdict of \$54 million. Instead, the jury found no liability. The jury of eight women and four men deliberated less than three hours before issuing a verdict, finding that USA Swimming did not fall below the standard of care and was not responsible for the conduct of a coach employed by the former Stockton Swim Club.

The jury was presented with the entire athlete protection program, from the Code of Conduct and mandatory screening and training of coaches, to educational models for parents and swimmers, along with expert testimony, which found that it met or exceeded the standards necessary for a safe environment. While no youth-serving organization can ever be 100 percent safe, the jury conclusively found that USA Swimming’s program was properly designed, implemented, and staffed.

Mr. Kronenberg is the managing member of Kronenberg Law and specializes in the defense of catastrophic personal injury, wrongful death, and product liability cases.

Bryan E. Stanton and Carson C. Smith



On January 31, 2020, **Pierce Couch Hendrickson Baysinger & Green** partners and DRI members [Bryan E. Stanton](#) and [Carson C. Smith](#) achieved a favorable verdict in Adair County District Court after a week-long trial involving claims of agricultural negligence.

The plaintiff alleged during the trial that in February 2017 his cattle were exposed to metal-contaminated feed, which caused a theoretical risk of an undetermined future injury. According to the plaintiff, this risk diminished the value of about 132 cows and three bulls. The plaintiff’s minimum-claimed economic damage was \$360,000, the purported cost to replace the herd. The defendant took ownership of the metal exposure just months into the case, and, as a result, the primary issue in the case was whether an exposure—without any physical injury—actually damaged the value of the plaintiff’s herd.

The defense successfully limited the plaintiff’s damages expert, an agricultural economist from College Station, to being unable to provide any opinions about any aspects of the cause or effect of hardware disease, metal toxicity, health issues, open cow issues, or any other veterinarian-related issues in the case. Further, despite having numerous damage models previously prepared, the court limited his testimony to his replacement damage model.

Before the trial, court also granted the defendant’s motion for summary judgment as pertained to the plaintiff’s claim for intentional infliction of emotional distress. Then, during the trial, the court granted the defendant’s motion for directed verdict on the plaintiff’s claim for negligence per se, after substantial argument. The remaining claims were the plaintiff’s negligence diminution-in-value claim and a claim for punitive damages.

During the defendant’s case-in-chief, defense counsel secured a stipulation from the plaintiff in the form of an agreed jury instruction stating that he was not claiming physical injury or physical impairment to any of the cattle herd. This likely assisted the jury in its determination. Ultimately, the unanimous, 12-person jury attributed 20 percent negligence to the plaintiff and awarded the plaintiff a fraction of the sought damages. The reduced award, \$42,400, was far less than previously offered to resolve the claim. In fact, it was almost half of an offer to confess

And The Defense Wins

that was made in 2018. The nominal award was in spite of the fact that the jurors were not given instructions about mitigation but were provided with multiple punitive damage instructions. Further, the defendant was not permitted to put on evidence about the physical condition of the plaintiff's cattle, even though testing from October 2019 showed that many of the cows had conditions unrelated to potential metal ingestion.

The verdict was the culmination of about three years of litigation, during which opposing counsel over-aggressively pursued multiple theories of liability, including the one stipulated as no longer being claimed during the trial.

The case was *Ronnie Pevehouse v. Five Rivers Distribution, LLC*, No. CJ-2019-72 (transferred from Muskogee County District Court, No. CJ-2017-467), in the District Court of Adair County, Oklahoma.

DRI Foundation Tributes

John Trimble

John Trimble, a partner at Lewis Wagner LLP in Indianapolis, was the distinguished recipient of DRI's 2019 Richard H. Krochock Award. This annual award honors an individual who has provided exemplary leadership to the DRI Young Lawyers Committee through sponsorship or participation in its programs and activities, provided guidance, support and service as a mentor to Young Lawyers Committee members, and who has promoted those qualities which enhance the public image of the civil defense trial lawyer. John served on the DRI Board of Directors from 2003 to 2006 and recently chaired the DRI Law Practice Management Committee. John has attended local defense organization annual meetings to assist with strategic planning, metrics, and marketing and he routinely meets with young lawyers to provide career advice, including how to increase participation within DRI's extensive community. To put it simply, John is an extraordinary leader.

Are you an aspiring leader like John? Have you benefited from John's generous sharing of his wisdom? DRI is proud to offer you a unique way to honor John on [his DRI Tribute page](#) through the DRI Foundation.

A DRI Tribute allows individuals or entities to recognize a living DRI member. The member can be recognized for accomplishments, an anniversary, or any other celebratory event. All funds donated to the tribute will benefit the DRI Foundation, a not-for-profit that uses tax exempt gifts and grants to fund law-related public service projects, support the judicial system, and further the interests of the defense bar. Additionally, your contribution will provide key resources to assist DRI in providing \$10,000 diversity law student scholarships. Please [click here](#) to learn more.



John Trimble (center), with DRI Immediate Past President Toyja Kelley and DRI President Phil Willman, accepting the Richard H. Krochock Award during the 2019 DRI Annual Meeting Awards Ceremony.

DRI Cares

CSH Law Offices Give Back for the Holidays

The offices of **Cranfill Sumner & Hartzog LLP** (CSH Law) celebrated the holidays by helping nonprofit organizations in their local areas. All three offices participated in the CSH Law Holiday Care Drive, a food drive to benefit nonprofits in their local areas. The Raleigh and Wilmington offices donated to the [Food Bank of Central and Eastern North Carolina](#), and the Charlotte office donated to the [Urban Ministry Center](#). The Holiday Care Drive was set up as a friendly competition to see which team could donate the

most food. Teams of 4-5 people were challenged with donating food needed by the Food Bank.

The Charlotte office donated 345 food items to the Urban Ministry Center. The Food Bank of Central and Eastern North Carolina received 1,300 pounds of food from the Raleigh office and 385 pounds of food from the Wilmington office.



SST Supports Local Shelters Through The Night Ministry

Sinars Slowikowski Tomaska (SST) proudly hosted Miranda Dean of The Night Ministry (TNM) for an educational lunch and learn about the organization and their practices. After the presentation and video about TNM's outreach, employees from all SST offices participated in the creation of more than 200 hygiene kits for distribution at local shelters and via the TNM Health Outreach Bus. Six days per week, the Health Outreach Bus brings compassionate, accessible medical care, food, hygiene supplies, case management, and a sense of community into Chicago neighborhoods with high concentrations of homelessness or poverty. The Health Outreach Bus travels on a regular schedule to East Garfield Park, Douglas Park, Humboldt Park, South Shore, Pilsen, New City, and Rodgers Park.

The Night Ministry was founded in 1976 to serve people on Chicago's nighttime streets struggling with loneliness, despair, poverty, substance abuse, homelessness, and more. It has cultivated a data-driven culture of learning, to guide the execution of its programs. The numbers and percentages on the organization's dashboards help to evaluate the efficacy of their efforts and the effect the services have

on their clients and the larger Chicagoland community. For example, last year through TNM's Health Outreach Bus and Street Medicine Team, they were able to provide more than 1,700 free health assessments to 1,200 patients and treat 537 health conditions that would have otherwise gone uncared for. At their Youth Programs, TNM provided more than 19,000 bed nights for 455 homeless young adults and 47 of their children and helped 192 young adults transition to stable housing.

In addition to the other services described above, TNM is focused on the need for human connection. TNM believes that the practices of acceptance, compassion, and empathy; of listening and offering help without conditions; of being a steady, reliable presence are all the foundations of the work The Night Ministry does today. These are the guiding principles in which TNM delivers their services to more than 5,600 individuals every year.

SST would like to thank Miranda Dean and all its volunteers for the continuing hard and meaningful work they offer for the community. For more information on The Night Ministry, please visit www.thenightministry.org.



DRI Cares



Upcoming Seminars

Toxic Torts and Environmental Law, February 19–21, 2020



If you haven't registered for DRI's Toxic Torts and Environmental Law Seminar, February 19–21 in Phoenix, there's still time! This is the premier gathering for the defense bar, focusing on litigation strategies and regulatory updates. Earn up to 9.75 hours of CLE while networking with top toxic tort and environmental lawyers from across the United States. [Click here](#) to view the brochure and to register for the program.

Litigation Skills Seminar, March 18–20, 2020



If you haven't registered for the DRI Litigation Skills Seminar, March 18–20, in Las Vegas, what are you waiting for? This is your chance to observe some of the best trial lawyers in the country litigate *Walker v. Brewster & Safe Security*, a case arising out of the paralysis of a five-year-old child who was accidentally shot by his half-brother at a college basketball game. Skill-building workshops focus on the four phases of litigation, with each phase containing mock exercises and presentations on best practices. Register for this seminar by February 25 to save \$100. [Click here](#) to view the brochure and to register for the program.

Construction Law Seminar, April 2–3, 2020



Join us at DRI's 2020 Construction Law Seminar for education and relationship-building that will prepare you for 2020 and beyond! Earn up to 12 hours, including 1 hour of ethics credit, by attending interactive sessions about the challenges and opportunities within the construction industry. Learn how the industry is preparing for, insuring against, and responding to cyber risks; current MBE/WBE contracting issues; how climate change affects building design and claims; and more. Register online by March 3 to save \$100. [Click here](#) to view the brochure and to register for the program.

Upcoming Seminars

Trucking Law Seminar, April 30–May 1, 2020



DRI's Trucking Law Seminar is a one-of-a-kind event for trucking lawyers and industry personnel. Help humanize the trucking industry by participating in sessions led by Chris Spear, president of the American Trucking Association; Jim Mullen, general counsel for the Federal Motor Carrier Safety Administration; and other subject-matter experts. This seminar will set the standard for how trucking companies and their drivers are perceived in the future. Register by April 1 for the best rate. [Click here](#) to view the brochure and to register for the program.

Employment and Labor Law Seminar, May 20–22, 2020



Join management-side employment and labor attorneys and in-house counsel from across the country at DRI's Employment and Labor Law Seminar, May 20–22 in Denver. Now in its 43rd year, this seminar is indispensable for experienced practitioners as well as for those who are just getting started in labor and employment law. Learn about the risks posed by appearance discrimination, voir dire and jury selection techniques in a practical litigation workshop, and more. Save \$100 when you register by April 20. [Click here](#) to view the brochure and to register for the program.

Upcoming Webinars

Avoiding Hidden Catastrophes—The Healthcare Professional as a Witness, March 3, 2020, 12:00 pm–1:00 pm CST



Despite significant differences in personalities and emotional expression among healthcare professionals, physician and nursing witnesses are repeatedly dealt with in a universal manner when preparing for depositions in medical malpractice cases, resulting in ineffective, and often damaging, testimony. Among physicians, two primary personalities can be identified, while nursing staff can similarly be broken down into distinct personalities. Individual healthcare personalities must be identified and uniquely addressed early on from both a cognitive and emotional perspective to avoid destructive testimony that will unnecessarily increase both the value and exposure of the case. [Click here](#) to register.

Predicting Jurors' Verdict Leanings in the Trump Era, March 26, 2020, 12:00 pm–1:30 pm



Increasing polarization in American politics has led to a substantial shift in civil juror decision-making and jury verdicts. This webinar examines the effects of political beliefs on trial outcomes. Research results indicating the extent to which individual jurors' political orientation affects verdict preference will be presented, followed by discussion of how case characteristics and juror political orientation can interact to produce unexpected outcomes. Attendees will learn how socio-political changes can affect deliberation dynamics and how to evaluate the composition of a jury. Finally, presenters will review evidenced-based strategies for identifying favorable and unfavorable jurors. [Click here](#) to register.

DRI Membership—Did You Know...

DRI's New Young Lawyer Membership Package—Get More for Less

[Click here](#) to take advantage of DRI's new Young Lawyers Membership Package—"One Ask."

Did you know that DRI's new membership package *One Ask for Young Lawyers* is designed specifically for young lawyers who are within five years of their bar date, ready to renew their DRI membership, and plan to complete CLE credits for the coming year?

The *One Ask* membership package makes it easy to make **one ask** of your firm administrator to renew your DRI membership and save your firm (or your wallet) **up to 20 percent off the registration fees** for DRI's renowned Annual Meeting and seminars.

With **One Ask**, you pay your membership dues and lock in reduced registration fees for DRI's Annual Summit and seminars.

Choose from two packages.

- **Package 1:** Young Lawyers Renewal Membership and the Annual Summit and seminar discount combined: your cost is \$1,500, and your saving is \$455.
- **Package 2:** Young Lawyers Renewal Membership and two seminars combined: your cost is \$1,500, and your saving is \$435.

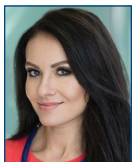
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State Membership Chair/State Representative Spotlight

South Carolina

State Membership Chair

Catherine Ava Kopiec, Associate, Rogers Townsend LLC



Areas of Practice: Construction, product liability, and insurance defense.

DRI member since 2013.

Catherine's experience with DRI: "I am currently the second vice-chair of the DRI Young Lawyers Committee, the South Carolina state membership chair, and the young lawyers marketing liaison for the DRI Product Liability Committee. My experience with DRI has been phenomenal, and the connections that I have made have been so valuable to me, both on a professional and personal level. I'm excited to continue to grow my role in DRI and to help more people learn about what an amazing organization this is."

Fun Fact: "We are getting our second puppy, an English Lab, this spring/summer, and our little Boykin Spaniel, Parker, will no longer be an only pup! It took us about 8 months just to come up with a name, but we landed on Sutton as a nod to the famous Chapel Hill restaurant Sutton's Drug Store; my fiancé and I are both Tar Heels."

State Representative

David A. Anderson, Shareholder, Richardson Plowden & Robinson PA



Areas of Practice: Insurance defense litigation, mediation, and arbitration.

DRI member since 2001.

David's experience with DRI: "DRI allows me to be associated with the nation's best and brightest attorneys dedicated to the defense of civil actions."

Fun Fact: "Courtesy of the United States Army, the first five times that I flew in an airplane, I never landed in one. It was Airborne training, when each time I boarded the aircraft, I jumped out of it. It was not until my senior year in college, when I boarded a commercial airliner, that I actually landed in it."

New Member Spotlight

Leah N. Ledford, Taylor Wellons Politz & Duhe APLC



[Leah N. Ledford](#) is a partner in the Madison, Mississippi, office of **Taylor Wellons Politz & Duhe APLC**. She was admitted to practice in May of 2004, and she has since developed her practice to focus primarily in the area of insurance defense litigation. She has managed a diverse array of complex cases through verdict or resolution, including medical malpractice, premises liability, toxic tort, and product liability claims.

Outside of her litigation practice, Ms. Ledford has also served as general counsel to various local governing

bodies. She is admitted to practice in Mississippi, the US Court of Appeals for the Fifth Circuit, and the US District Courts for the Southern and Northern Districts of Mississippi.

Ms. Ledford attended Mississippi State University, graduating with honors and receiving a bachelor of business administration, with a minor in economics. She earned her juris doctorate from the University of Mississippi School of Law. Outside of the office, Ms. Ledford keeps busy with her four daughters, and she enjoys reading, live music, and being outdoors.

Quote of the Week

“With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation’s wounds....”

—Abraham Lincoln (b. Feb. 12, 1809), “[Second Inaugural Address](#)” (Mar. 4, 1865).