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Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements

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Griffin Toronjo Pivateau*

Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements

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I. INTRODUCTION

A. The Noncompete Agreement is Not an Agreement at All

Perhaps no contractual clause invites as little respect as the noncompete agreement. In a few states, the agreement is void and unenforceable. In the remaining states, a noncompete agreement scarcely rises to the level of a legally enforceable contract. The traditional elements of contract formation are not found in a noncompete agreement. One often finds neither a bargained-for exchange nor a meeting of the minds in these agreements. Too often, the parties to a noncompete agreement do not believe that the agreement will be enforced according to its terms.

Similarly, courts give little credence to the agreement as it is actually written. Often, in those states that permit enforcement of noncompete agreements, the language of the agreement represents a mere starting point. In most jurisdictions, courts routinely "blue pencil" or reform covenants that are not reasonable, as determined by a multipart test. The blue pencil doctrine gives courts the authority to either (1) strike unreasonable clauses from a noncompete agreement, leaving the rest to be enforced, or (2) actually modify the agreement to reflect the terms that the parties could have—and probably should have—agreed to.

B. A Proposal to End the Blue Pencil Doctrine

This Article proposes that courts put an end to the blue pencil doctrine. The blue pencil doctrine violates basic contractual principles

and has been used to alter nonconcompete agreements in two ways. First, some courts intrude into what should be negotiated agreements between the parties by substituting the courts' own contract terms for those found in the agreements. Second, other courts have altered noncompete agreements by striking "unreasonable" clauses and leaving the rest of the agreement as written. Both scenarios essentially turn courts into attorneys after the fact. Worse yet, the blue pencil doctrine, because it creates an agreement that the parties did not actually agree to, does nothing to address the underlying problems of noncompete agreements.

Several states already follow this "no-modification" rule. Wisconsin has even mandated the no-modification approach by statute.[1] Moreover, eliminating the blue pencil doctrine comports with recent trends as courts have indicated a greater willingness to refuse to reform agreements that are not reasonable on their face.[2] As will be seen herein, several recent decisions indicate that judges have grown increasingly leery of reforming unenforceable restrictive covenants and have been unwilling to aid employers who overreach.

With this in mind, courts everywhere should seize this opportunity to end to the practice. It is time to put the blue pencil down.

C. An Argument for a New Test

Simply putting the blue pencil down will not end the difficulties that courts face in the construction of noncompete agreements. Therefore, as an alternative to the use of the blue pencil doctrine, this Article proposes that courts should conduct a threshold test before applying the standard reasonableness analysis. The proposed threshold test would require that the agreement pass a three-part specificity test before the court can further evaluate the contract's enforceability. The idea is that every noncompete agreement should maintain a certain minimum level of specificity. This specificity requirement, as outlined below, may be instituted either legislatively or introduced via common law. The specificity requirement should mandate that the contract identify the following: (1) the employment position subject to the restriction; (2) the legitimate business interests that the restriction will protect; and (3) the means by which the proposed restriction will protect those interests. This imposes only a minimal extra burden on employers while providing courts with the tools necessary to construe the agreements.

1. WIS. STAT. § 103.465 (2002). According to the statute, "Any covenant [not to compete], described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint."
2. *See infra* section IV.A.

Refusing to blue-pencil documents and implementing the specificity requirement brings a number of advantages. First, courts are no longer faced with the obligation to make new contracts between the parties. Second, an employee is able to know exactly what restrictions will bind him if he chooses to leave his job. Finally, and perhaps most importantly, an employer is required to consider the terms and conditions of its employees' contracts carefully, value those employees accordingly, and draft the agreement's language carefully.

D. An Article Overview

Part II of this Article will provide an overview of the noncompete agreement, as well as describe the difficulties faced by litigants and courts alike in the enforcement of noncompete agreements. Part III examines the use of the blue pencil doctrine, its development, and the differences between liberal and strict use. Part IV outlines the specificity requirement and its accompanying three-part analysis. Part V concludes by establishing that the specificity requirement will simultaneously benefit employers, employees, and the judicial system.

II. THE NONCOMPETE AGREEMENT EXPLAINED BRIEFLY

> It is no doubt apparent to the reader at this point that we have not cleared up the swampy morass of conflicting interests and policies into which a court may eventually need to plunge to resolve the problems these covenants present.[3]

A. The "Swampy Morass"

Generally, a noncompete agreement is "[a]n agreement, generally part of a contract of employment or a contract to sell a business, in which the covenantor agrees for a specific period of time and within a particular area to refrain from competition with the covenantee."[4] The noncompete agreement is known by other names, most notably as a "covenant not to compete," a "restrictive covenant," or a "non-compete clause." The terms are freely interchangeable, and refer to an employment contract provision purporting to limit an employee's power, upon leaving his employment, to compete in the market in which his former employer does business.[5] But, since no substantive difference exists among the names, this Article will refer to such covenants as "noncompete agreements."

The noncompete agreement is a form of restrictive covenant that adds limitations to an employment contract. Generally, employers pursue these agreements in two instances: when hiring a new employee or when purchasing an established business. Typically, these

3. Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 917 (W. Va. 1982).
4. BLACK'S LAW DICTIONARY 364 (6th ed. 1990).
5. *Reddy*, 298 S.E.2d at 916.

agreements restrict former employees from performing similar work within a certain geographic area for a competitor during a specific period of time.

This Article primarily addresses noncompete agreements in a post-employment context.[6] Noncompete agreements executed in conjunction with employment generally are designed to prohibit an employee from competing with his employer after the termination of the employment agreement.[7] Courts will scrutinize restrictions on the behavior of former employees closely, while they will review agreements restricting the sellers of businesses at a lower level of scrutiny.[8] In the employment context, noncompete agreements generally span four different areas: (1) general non-competition; (2) customer (or client) non-solicitation; (3) employee non-solicitation; and (4) non-disclosure.[9] Nevertheless, these four different areas are regularly intermingled. Noncompete agreements may, and often do, contain some or all of these protective clauses.

Theoretically, noncompete agreements are not meant to punish the former employee.[10] Instead, they are meant to protect the employer from unfair competition.[11] Noncompete agreements arguably protect an employer's customer base, trade secrets, and other information necessary to its success. One might argue that a noncompete agreement encourages employers to invest in their employees. An employer does not wish to invest in an employee only to see the employee take the skills acquired, or the company's customers, with him to another employer. The employer will invest more in the employee if a means exists to guard against the employee's movement to a competitor. As a result, today's employment agreements typically include noncompete agreements. There is little doubt that most employers favor such agreements. Moreover, noncompete agreements are almost invariably drafted in favor of the employer.[12] Notably, an agreement need not be specifically styled as a noncompete agreement to be construed as one. Any agreement that has "the potential . . . to act as a restraint on

6. Noncompete agreements are often included in contracts executed in conjunction with the sale of a business.

7. Ronald B. Coolley, *Definitions, Duties, Covenants Not to Compete, Assignment After Termination and Severability*, 14 AIPLA Q.J. 20, 24 (1986).

8. *See, e.g.*, Watson v. Waffle House, Inc., 324 S.E.2d 175, 177 (Ga. 1985); Richardson v. Paxton Co., 127 S.E.2d 113, 117 (Va. 1962).

9. Kenneth J. Vanko, *"You're Fired! And Don't Forget Your Non-compete . . ." The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1, 2 (2002).

10. *See* Superior Gearbox Co. v. Edwards, 869 S.W.2d 239, 247 (Mo. Ct. App. 1993).

11. William M. Corrigan & Michael B. Kass, *Non-Compete Agreements And Unfair Competition—An Updated Overview*, 62 J. MO. B. 81, 81 (2006).

12. Vanko, *supra* note 9, at 1.

trade . . . 'should be subject to the same standards of reasonableness as covenants not to compete.'"[13]

As noncompete agreements constitute at least a partial restraint on trade, the legal system constantly struggles to balance such restraints against the countervailing forces of a free market economy. In response to this tension, some states, notably California, Montana, and Oklahoma, prohibit employers from enforcing noncompete agreements as a matter of public policy, or severely limit the noncompete agreements employers may enforce.[14]

California's refusal to enforce noncompete agreements has received a great deal of academic attention in light of its overall economic health.[15] The purpose of the state statute that prohibits noncompete agreements is plain: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[16]

B. Enforcement of the Noncompete Agreement

1. *The Reasonableness Test*

Among the remaining states, noncompete agreements are enforceable only to the extent that they are "reasonably necessary to protect narrowly defined and well-recognized employer interests."[17] Thus, almost all courts apply a standard of reasonableness in deciding whether to enforce a noncompete agreement. As will be seen below, however, "reasonableness" as a standard holds minimal value in the construction of noncompete agreements.[18]

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13. Hardy v. Mann Frankfort, No. 01-05-01080-CV, 2007 Tex. App. LEXIS 3442, at *12 (Tex. App. May 3, 2007) (citing Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 385 (Tex. 1991)). In *Peat Marwick*, the plaintiff sought to enforce a contractual provision that required its former employee to pay a certain amount to his former employer whenever he provided accounting services to the employer's previous clients. *Peat Marwick*, 818 S.W.2d. at 383. Although the provision was not styled as a noncompete agreement, the court concluded "that provisions clearly intended to restrict the right to render personal services are in restraint of trade and must be analyzed for the same standards of reasonableness as covenants not to compete to be enforceable." *Id.* at 388.
14. CAL. BUS. & PROF. CODE § 16600 (Deering 2007); OKLA. STAT. tit 15, §§ 217, 219A (Cum. Supp. 2007); MONT. CODE ANN. § 28–2–703 (2005).
15. *See generally* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999).
16. CAL. BUS. & PROF. CODE § 16600 (Deering 2007).
17. *See* Washington County Mem'l Hosp. v. Sidebottom, 7 S.W.3d 542, 545 (Mo. Ct. App. 1999) (citing Easy Returns Midwest, Inc. v. Schultz, 964 S.W.2d 450, 453 (Mo. Ct. App. 1998)).
18. The court in *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906 (W. Va. 1982), put it best:

    Reasonableness, in the context of restrictive covenants, is a term of art, although it is not a term lending itself to crisp, exact definition. Reason-

Although nineteen states provide a statutory framework for the regulation of noncompete agreements, the rest do not, and have chosen instead to rely on the court system.[19] In common law jurisdictions, a noncompete agreement will be upheld only "if the restraint imposed is not unreasonable, is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public."[20] Courts will enforce such covenants only where they are "strictly limited in time and territorial effect and . . . [are] otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee."[21] In common law jurisdictions, agreements are enforced if they are found to be reasonable considering three factors:

> First, . . . [the agreement] must be ancillary to an otherwise valid contract, transaction or relationship. Second, the restraint created must not be greater than necessary to protect the promisee's legitimate interests such as business, goodwill, trade secrets, or other confidential or proprietary information. Third, the promisee's need for the protection given by the agreement must not be outweighed by either the hardship to the promissor or any injury likely to the public.[22]

Many states follow the test set forth in the Restatement, which takes into consideration the following factors that are quite similar: (1) whether the restriction is greater than necessary to protect the business and goodwill of the employer; (2) whether the employer's need for protection outweighs the economic hardship which the covenant imposes on the departing party; and (3) whether the restriction adversely affects the interests of the public.[23]

> ableness, as a juridical term, is generally used to define the limits of acceptability and thus concerns the perimeter and not the structure of the area it is used to describe. This general observation is nowhere more particularly true than with respect to a restrictive covenant. Once a contract falls within the rule of reason, the rule operates only as a conclusive observation and provides no further guidance. A court's manipulation of the terms of an anticompetitive covenant, where none of its provisions standing alone is an inherently unreasonable one, cannot be accomplished with reasonableness as the standard. It is like being in the jungle—you're either in or you're out, and once you're in the distinction is worthless for establishing your exact location.

Id. at 911.

19. Vanko, *supra* note 9, at 2.
20. W.R. Grace & Co., Dearborn Div. v. Mouyal, 422 S.E.2d 529, 531 (Ga. 1992) (quoting Rakestraw v. Lanier, 30 S.E. 735, 738 (Ga. 1898)).
21. Palmer & Cay, Inc., v. Marsh & McLennan Co., 404 F.3d 1297, 1303 (11th Cir. 2005).
22. Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 386 (Tex. 1991). In Texas, the common law test was later codified in the Texas Business and Commerce Code.
23. RESTATEMENT (SECOND) of CONTRACTS § 188 cmt. a (1979).

With regard to the first of these factors, courts examine noncompete agreements to make sure they are limited because such agreements limit the exercise or pursuit of an individual's occupation. Thus, to be enforceable, agreements must be reasonable in three ways: scope (referring to the subject matter of the agreement), duration, and geography.[24]

2. Limitations on Scope of Activity

There are two general types of "scope of activity" limitations: those that prohibit the employee from soliciting the employer's customers and those that prohibit the employee from engaging in any competitive business. With respect to customer solicitation, "reasonable" limitations are valid and enforceable.[25] A legitimate purpose of a noncompete agreement is to prevent "employees or departing partners from using the business contacts and rapport established during the relationship of representing . . . [a] firm to take the firm's customers with him."[26] Thus, noncompete agreements that are limited to those customers with whom the employee had daily contact on a personal level would likely be deemed reasonable.

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24. *See* UARCO Inc. v. Lam, 18 F. Supp. 2d 1116, 1121 (D. Haw. 1998) (noting parameters of reasonableness inquiry); Pinnacle Performance, Inc. v. Hessing, 17 P.3d 308, 311 (Idaho Ct. App. 2001) (same).

25. *See* Ruscitto v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 777 F. Supp. 1349, 1354 (N.D. Tex. 1991) (limiting the solicitation of "any of the clients of Merrill Lynch whom [the employee] served or whose names became known to [the employee] while in the employ of Merrill Lynch" was reasonable), *aff'd*, 948 F.2d 1286 (5th Cir. 1991), *cert. denied*, 504 U.S. 930 (1992); Picker Int'l v. Blanton, 756 F. Supp. 971, 982 (N.D. Tex. 1990) (holding that the limitation against servicing MRI systems that employee serviced while with employer was reasonable); Investors Diversified Servs., Inc. v. McElroy, 645 S.W.2d 338, 339 (Tex. App. 1982) (holding that the limitation against soliciting customers with whom the employee dealt or had contact during employment was reasonable).

26. *Peat Marwick*, 818 S.W.2d at 387. Some customer solicitation limitations may be considered overbroad, unreasonable, and, therefore, unenforceable, at least without reformation. In *Peat Marwick*, the Texas Supreme Court held that a covenant not to compete was overbroad and unenforceable. *Id.* at 388. The covenant prohibited a former partner of an accounting firm from soliciting or doing business for clients acquired by the firm after the partner left, or with whom the partner had no contact while at the firm. For a scope of activity limitation of this type to be reasonable, there must be "a connection between the personal involvement of the former firm member [and] the client." *Id.* at 387. Therefore, a covenant against soliciting customers should be limited to customers with whom the employee had contact during the period of employment; absent such a limitation, the covenant is overbroad.

The second, and broader, scope of activity limitation is one that prohibits any competitive activity. Texas courts generally uphold such limitations when the employer is engaged in only a single type of business. On the other hand, when an employer engages in a number of different types of business, such a limitation may be unreasonable unless it is limited to the specific type of business in which the employee worked while employed by the employer.

3. Limitations on Time

The duration of the restriction also determines the reasonableness of the restraint. Restraints that are unlimited in time are almost always unreasonable.[27] However, it is necessary to consider the particular industry at issue to determine whether the particular restraint is reasonable as to time. The courts' inconsistent analysis under this fact-specific nature of this inquiry has led to frustration. As one commentator states:

> A look at the cases finds courts upholding restrictive covenants that last as long as five or ten years, while invalidating others that last only one or two years. Moreover, courts in the same jurisdiction will uphold a three-year limitation in one case but invalidate it in another. Unfortunately, in so doing the courts seldom attempt to reconcile their decisions, except perhaps by saying that each case must be decided on its own facts. In reviewing the cases, one could decide that the decisions are totally serendipitous and would not be far wrong. However, luck and good fortune are not particularly helpful when drafting clauses.[28]

A review of case law indicates that most courts usually uphold time limitations of one or two years. While limitations of three to five years may be upheld in the sale of a business, the decisions conflict as to whether a three to five year limitation is reasonable in an employment situation.[29]

4. Limitations on Geography

The geographical limitation in a noncompete agreement must be definite. An indefinite description of the geographical area should render the agreement unenforceable as written.[30] Numerous courts have found that a reasonable area consists of the territory in which the employee worked while employed.[31] Beyond this general rule,

27. *See, e.g.*, Taylor v. Saurman, 1 A. 40, 41 (Pa. 1885) (declaring covenant not to engage in photography again void as against public policy).
28. 1 KURT H. DECKER, COVENANTS NOT TO COMPETE 127 (2d ed. 1993).
29. Texas cases provide a representative array of decisions. *See generally* Property Tax Assocs., Inc. v. Staffeldt, 800 S.W.2d 349, 350 (Tex. App. 1990) ("The courts of this state have upheld restrictions ranging from two to five years as reasonable."); Investors Diversified Servs., Inc. v. McElroy, 645 S.W.2d 338, 339 (Tex. App. 1982) ("[T]wo to five years have repeatedly been held to be reasonable."); Bob Pagan Ford, Inc. v. Smith, 638 S.W.2d 176 (Tex. App. 1982) (upholding trial court's decision to reform the restricted period under an employment agreement from three years to six months).
30. *See generally* Butts Retail, Inc. v. Diversifoods, Inc., 840 S.W.2d 770, 774 (Tex. App. 1992) (holding the language "'metropolitan area' of the Parkdale Mall store in Beaumont, Texas" indefinite and unenforceable); Gomez v. Zamora, 814 S.W.2d 114, 117–18 (Tex. App. 1991) (holding the language "existing marketing area" and "future marketing area of the employer begun during employment" indefinite and unenforceable).
31. Once again, we can look to Texas decisions for a representative example. *See e.g.*, Zep Mfg. Co. v. Harthcock, 824 S.W.2d 654, 660 (Tex. App. 1992); Diversified

however, what constitutes a reasonable geographical area invariably depends upon the facts of the specific case.

Traditionally, the reasonableness of a geographic limitation was directly related to the location of the territory in which the employee worked for his former employer.[32] Courts have found that geographic restraints were reasonable "if the area of the restraint is no broader than the territory throughout which the employee was able to establish contact with his employer's customers during the term of his employment."[33]

III. THE BLUE PENCIL DOCTRINE IN ENFORCEMENT OF NONCOMPETE AGREEMENTS

A. The Blue Pencil Doctrine Defined

The "blue-pencil test" is a "judicial standard for deciding whether to invalidate the whole contract or only the offending words."[34] If the blue pencil doctrine is strictly applied, "only the offending words are invalidated if it would be possible to delete them simply by running a blue pencil through them, as opposed to changing, adding, or rearranging words."[35]

The blue pencil doctrine is based in large part on the "understanding that there is not necessarily a sinister purpose behind an overbroad restrictive covenant."[36] Courts can and do look to the good faith of the employer in determining whether to utilize the blue pencil doctrine.[37]

Human Res. Group, Inc. v. Levinson-Polakoff, 752 S.W.2d 8, 12 (Tex. App. 1988); Martin v. Linen Sys. for Hosps., Inc., 671 S.W.2d 706, 709 (Tex. App. 1984); Cross v. Chem-Air S., Inc., 648 S.W.2d 754, 757 (Tex. App. 1983).

32. *See* Diversified Human Res. Group, Inc. v. Levinson-Polakoff, 752 S.W.2d 8, 12 (Tex. App. 1988); Butler v. Arrow Mirror & Glass, Inc., 51 S.W.3d 787, 793 (Tex. App. 2001).

33. Todd M. Foss, *Texas, Covenants Not to Compete, and the Twenty-First Century: Can the Pieces Fit Together in a Dot.Com Business World*, 3 HOUS. BUS. & TAX L.J. 207, 225 (2003) (citation omitted). *See, e.g.*, Curtis v. Ziff Energy Group, Ltd., 12 S.W.3d 114, 119 (Tex. App. 2000); Evan's World Travel, Inc. v. Adams, 978 S.W.2d 225, 232–33 (Tex. App. 1998).

34. BLACK'S LAW DICTIONARY 183 (8th ed. 2004).

35. *Id.*

36. *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 914 (W. Va. 1982) ("[I]n most cases, the promise is not required by the employer because he is a hard-hearted oppressor of the poor. He too is engaged in the struggle for prosperity and must bend every effort to gain and to retain the good will of his customers. It is the function of the law to maintain a reasonable balance . . . ." (quoting A.L. CORBIN, CONTRACTS § 1394 at 89 (1962)).

37. *See id.* at 916. ("If the reviewing court is satisfied that the covenant is reasonable on its face, hence within the perimeter of the rule of reason, it may then proceed with analysis leading to a 'rule of best result.' Pursuant to that analysis, the court may narrow the covenant so that it conforms to the actual requirements of the parties.")

B. Three Approaches to the Blue Pencil Doctrine

Use of the blue pencil doctrine differs from state to state. Among those states that enforce noncompete agreements, three schools of thought exist. The First Circuit has stated:

> Courts presented with restrictive covenants containing unenforceable provisions have taken three approaches: (1) the "all or nothing" approach, which would void the restrictive covenant entirely if any part is unenforceable, (2) the "blue pencil" approach, which enables the court to enforce the reasonable terms provided the covenant remains grammatically coherent once its unreasonable provisions are excised, and (3) the "partial enforcement" approach, which reforms and enforces the restrictive covenant to *the extent it is reasonable*, unless the "circumstances indicate bad faith or deliberate overreaching" on the part of the employer.[38]

As noted above, some states follow a "no modification" approach to noncompete agreements. Also known as the "all-or-nothing" rule, it precludes the use of the blue pencil doctrine. Courts must refrain from either rewriting or striking overbroad provisions in noncompete agreements. Courts in no-modification states first determine whether the restrictive covenant is reasonable as written. If not, the court will not modify or eliminate provisions, but will instead refuse to enforce the agreement at all.

The second approach is known as the strict blue-pencil rule. The strict blue-pencil rule does not allow courts to rewrite overbroad noncompete agreements. Instead, the strict approach allows courts only to strike overbroad provisions and enforce what is left of the agreement. Enforcement is permitted only if the agreement is reasonably limited after the overbroad provisions have been removed.

Finally, other states have adopted a liberal form of blue pencil doctrine: the "reasonable modification" approach. These states permit a court to rewrite an overbroad non-competition agreement to reasonably limit the restrictions found in the agreement.

1. *The No-Modification States*

It is the position of this Article that the no-modification rule, as exemplified by the Wisconsin statute described herein, should be adopted either legislatively or as a common law standard in those states that enforce noncompete agreements.

The blue pencil doctrine, although used in a majority of states, is not universal. Certain states, notably Georgia, Virginia, and Wisconsin, follow the "no-modification" rule.[39] This rule recognizes the ineq-

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38. Ferrofluidics Corp. v. Advanced Vacuum Components, Inc., 968 F.2d 1463, 1469 (1st Cir. 1992) (citing Durapin, Inc. v. Am. Prods. Inc., 559 A.2d 1051, 1058 (R.I. 1989)).

39. Nebraska courts have not applied the blue pencil doctrine, but one cannot count it among the no-modification states, as the Nebraska Supreme Court has re-

uities inherent in a rule that imposes an agreement on the parties that was not part of the original bargained-for agreement.

Georgia's use of the no-modification approach is a representative example. Noncompete agreements in Georgia may not be blue-penciled to sever or modify any overreaching provisions.[40] Thus, "if any [restrictive] covenant . . . within a given employment contract is unreasonable either in time, territory, or prohibited business activity, then all covenants not to compete within the same employment contract are unenforceable."[41]

Similarly, courts in Virginia evaluate the noncompete agreement as written without revising or eliminating provisions. Virginia courts lack the authority to "'blue pencil' or otherwise rewrite the contract" to eliminate any illegal overbreadth.[42] Ambiguous language susceptible to two or more differing interpretations, one of which is functionally overbroad, renders the entire noncompete agreement unenforceable. This remains true even though it may be reasonable in the context of the factors present.[43]

Wisconsin has codified its "no blue pencil rule" in § 103.465 of the *Wisconsin Statutes.* According to the statute, "[a]ny covenant [not to compete] . . . imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint."[44]

2. *The Strict Blue Pencil Doctrine*

The strict blue pencil doctrine permits only the removal of unreasonable contractual provisions. The court is not permitted to revise or add language to the agreement. The strict blue pencil doctrine attempts to restrict employer overreaching by removing the offending provisions and leaving an otherwise enforceable agreement.[45]

Indiana provides an example of a jurisdiction that uses the strict blue pencil doctrine. When reviewing covenants not to compete, Indiana courts have historically enforced reasonable restrictions, but have struck unreasonable restrictions, provided the restrictions are divisi-

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served the right to use the doctrine. Polly v. Ray D. Hilderman & Co., 225 Neb. 662, 669, 407 N.W.2d 751, 756–57 (1987).

40. Allied Informatics, Inc. v. Yeruva, 554 S.E.2d 550, 553 (Ga. Ct. App. 2001)

41. Ward v. Process Control Corp., 277 S.E.2d 671, 673 (Ga. 1981).

42. *See* Pais v. Automation Products, Inc., 36 Va. Cir. 230, 239 (Va. Cir. Ct. 1995).

43. Lanmark Tech. Inc. v. Canales, 454 F. Supp. 2d 524, 529 (E.D. Va. 2006)

44. WIS. STAT. § 103.465 (2007).

45. Deustche Post Global Mail, Ltd. v. Conrad, 292 F.Supp 2d 748, 754 (D. Md. 2003) (The strict approach is "limited to removing the offending language without supplementing or rearranging the remaining language.").

ble.[46] Although the practice is long-standing, Indiana courts did not use the label "blue pencil doctrine" until 1982.[47]

Under Indiana law, "when an employer drafts an overly broad covenant, the price of over-reaching is that the restriction cannot be enforced at all, even if it would have been possible to draft and enforce a narrower, more reasonable restriction."[48] Even in those cases where the equities of the situation might suggest enforcement, courts have no alternative but to reject the overly broad clause rather than modify it.[49]

If, however, the noncompete agreement is clearly separated into parts, and if some parts are reasonable and others are not, the offending clauses may be severed so that the reasonable portions may be enforced.[50] The court is constrained in that it may apply only the terms within the contract and cannot add terms.[51]

Similarly, in Arizona, although courts will not add terms or rewrite provisions to covenants,[52] they will blue pencil restrictive covenants, "eliminating grammatically severable, unreasonable provisions."[53] In the case of severable clauses, an Arizona court can enforce the lawful part and ignore the unlawful part.[54] Even though courts are permitted to prune contracts, they cannot rewrite them for the parties.[55] The strict blue pencil doctrine will not save those documents that would require the court to rewrite the durational requirement or add geographic limitations.[56] In short, the strict blue pencil doctrine in Arizona permits courts to consider separate clauses separately, but without severable language to excise to render an agreement reasonable, the court is without power to enforce the agreement.

Notably, in strict blue pencil states, if the agreement fails to meet the standard of reasonableness in any of the three areas—scope, dura-

46. Wiley v. Baumgardner, 97 Ind. 66, 69 (1884); Beard v. Dennis, 6 Ind. 200, 203–05 (1855); Bennett v. Carmichael Produce Co., 115 N.E. 793, 795–96 (Ind. App. 1917).
47. *See* Seach v. Richards, Dieterle & Co., 439 N.E.2d 208, 215 (Ind. Ct. App. 1982).
48. Dearborn v. Everett J. Prescott, Inc., 486 F. Supp. 2d 802, 809 (S.D. Ind. 2007). *See also* Young v. Van Zandt, 449 N.E.2d 300, 304 (Ind. App. 1983) ("If the covenant is not reasonable as written, the court may not create a reasonable restriction under the guise of interpretation, since this would subject the parties to an agreement they had not made.").
49. Donahue v. Permacel Tape Corp., 127 N.E.2d 235, 241 (Ind. 1955).
50. Licocci v. Cardinal Associates, Inc., 445 N.E.2d 556, 561 (Ind. 1983) ("[I]f the covenant is clearly separated into parts and some parts are reasonable and others are not, the contract may be held divisible.").
51. *Id.*
52. Valley Med. Specialists v. Farber, 982 P.2d 1277, 1286 (Ariz. 1999).
53. *Id.*
54. Olliver/Pilcher Ins. Inc. v. Daniels, 715 P.2d 1218, 1221 (Ariz. 1986).
55. *Id.*
56. *Id.*

tion, or geography—the court will find the *entire* agreement unenforceable. For instance, in *Valley Medical Specialists v. Farber*,[57] the Arizona Supreme Court addressed the enforceability of a non-compete clause prohibiting a departing physician from practicing medicine within a five-mile radius of any of three specific clinic locations for a period of three years.[58] The contract also had a reformation clause that allowed a court, if necessary, to amend the non-compete provision to make it enforceable.[59] Despite the reformation clause, the Court held that the non-compete was unenforceable because both the scope of the activity prohibited and duration were unreasonable.[60] Thus, the reformation clause did not permit the appellate court to rewrite the non-compete provision "in an attempt to make it enforceable."[61] The Court explained, under Arizona law, courts may blue-pencil a covenant by "eliminating grammatically severable, unreasonable provisions," but they are prohibited from adding or rewriting provisions.[62]

Some courts in strict blue pencil states have indicated that they prefer not to narrow the scope of a clause because the parties did not agree to new terms.[63] The strict blue pencil rule holds that a court may not, under the guise of interpretation, redraft a noncompete agreement to make it more reasonable or narrower.[64]

One state court recently described what it believed was the proper use of the strict blue pencil doctrine. The court explained that under such an approach, "[t]he 'blue pencil' marks, but does not write."[65] The Eleventh Circuit has explained that in a strict blue pencil jurisdiction, courts "cannot rewrite . . . restrictive covenants, inserting clauses and providing sufficient limitations so as to render the restrictions reasonable and enforceable. . . ."[66]

West Virginia follows a similar approach regarding the enforcement of noncompete agreements.[67] These courts follow a "rule of reason" that determines the enforceability of any noncompetition

57. 982 P.2d 1277 (Ariz. 1999).
58. *Id.* at 1279.
59. *Id.* at 1285 n.2.
60. *Id.* at 1284–85.
61. *Id.* at 1286.
62. *Id.*
63. *See* Dicen v. New Sesco, Inc., 839 N.E.2d 684, 689 (Ind. 2005); Burk v. Heritage Food Serv. Equip., Inc., 737 N.E.2d 803, 811–12 (Ind. Ct. App. 2000).
64. *See* Licocci v. Cardinal Assocs., Inc., 445 N.E.2d 556, 561 (Ind. 1983).
65. New Atlanta Ear, Nose & Throat Assocs., P.C. v. Pratt, 560 S.E.2d 268, 273 (Ga. Ct. App. 2002) (quoting Hamrick v. Kelley, 392 S.E.2d 518, 519 (Ga. 1990)). *See* Watson v. Waffle House, Inc., 324 S.E.2d 175, 177 (Ga. 1985); Richard P. Rita Pers. Services Int'l, Inc. v. Kot, 191 S.E.2d 79, 80 (Ga. 1972).
66. Donovan v. Hobbs Group, LLC, 181 F. App'x 782, 783 (11th Cir. 2006); *New Atlanta*, 560 S.E.2d at 273.
67. Pancake Realty Co. v. Harber, 73 S.E.2d 438, 440–43 (W. Va. 1952).

covenant.[68] Under this rule, the courts should approach restrictive covenants with "grave reservations."[69] In West Virginia, therefore, a covenant that is unreasonable on its face is utterly void and unenforceable.[70] For instance, an excessively broad covenant with respect to time or geographic scope is unreasonable on its face.[71]

The West Virginia Supreme Court attempted to distinguish the difference between a threshold reasonableness analysis and a subsequent approach. In determining whether a covenant is unreasonable on its face, the court must keep in mind that it is a threshold question:

> Our courts should approach the available authority with respect to time and area limitations with caution. Most other courts fail to use the distinction we have adopted between a threshold inquiry as to the reasonableness of the covenant and a "rule of best result" within the general ambit of the rule of reason. Those courts use rule of reason language well past the threshold inquiry, and their standard of reasonableness for purposes of shaving the covenant to reasonable proportions should not be confused with a standard of "reasonableness on its face" for the purpose of deciding whether the covenant merits further scrutiny.[72]

Courts use the strict blue pencil rule to strike an unreasonable restriction "to the extent that a grammatically meaningful reasonable restriction remains after the words making the restriction unreasonable are stricken."[73]

In North Carolina, an unreasonably broad provision also renders the entire covenant unenforceable. Under North Carolina law, "equity will neither enforce nor reform an overreaching and unreasonable cov-

68. Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 915 (W. Va. 1982).
69. *Id.*
70. *See id.* ("No court should trouble itself to rewrite an inherently unreasonable covenant to bring the covenant within the rule of reason.").
71. *Id.*
72. *Id.* at 915, n.7.
73. A.N. Deringer, Inc. v. Strough, 103 F.3d 243, 247 (2d Cir. 1996). In *Beit v. Beit*, 63 A.2d 161 (Conn. 1948), the Court stated:

> There is undoubtedly a strong tendency on the part of courts to regard as divisible restraints of trade which are unreasonable in the extent of area covered and to hold them invalid only so far as necessary for the protection of the covenantee, where the terms of the promise permit that to be done without clearly violating the intent of the parties . . . . A restrictive covenant which contains or may be read as containing distinct undertakings bounded by different limits of space or time, or different in subject matter, may be good as to part and bad as to part. But this does not mean that a single covenant may be artificially split up in order to pick out some part of it that it can be upheld. Severance is permissible only in the case of a covenant which is in effect a combination of several distinct covenants. Where the covenant is intended by the parties to be an entirety, it cannot properly be so divided by a court that it will be held good for a certain area but invalid for another; indeed . . . this would be to make an agreement for the parties into which they did not voluntarily enter.

Id. at 204–05 (citations omitted) (internal quotation marks omitted).

enant."[74] More specifically, while North Carolina's blue pencil rule severely limits what the court may do to alter an unenforceable covenant, a court "may choose not to enforce a distinctly severable part of a covenant in order to render the provision reasonable."[75]

3. *The Liberal Blue Pencil Doctrine*

The liberal blue pencil doctrine permits a court greater leeway to change an agreement substantively. Courts may use the blue pencil doctrine to modify an unreasonable noncompete agreement and enforce the agreement only to the extent that it is reasonable.[76] A court may thus use the liberal blue pencil approach to modify the covenant so that it is no broader than what is reasonably necessary to protect the employer.[77]

In Minnesota, a liberal blue pencil state, courts face few limits on their equitable powers. In the case of *Klick v. Crosstown State Bank of Ham Lake, Inc.*,[78] for instance, the court stated that it had the power and discretion to modify an employment contract or not, depending upon equitable considerations and the particular facts of the case.[79]

Illinois also follows the liberal blue pencil rule, allowing courts "to modify . . . unreasonable terms of an agreement in order to make it reasonable."[80]

New Jersey is another example of a jurisdiction that applies the blue pencil rule liberally. There, when restrictive covenants are found to violate the reasonableness test, rather than deem the covenant void *ab initio*, courts will enforce them to the extent that is reasonable under the circumstances.[81] This principle of partial enforcement does not depend upon mechanical divisibility of a contract clause, but rather asks whether or not "partial enforcement is possible without injury to the public and without injustice to the parties."[82]

Likewise, Pennsylvania courts also view the blue pencil doctrine liberally. Even when confronted with a "limitless" restriction that would render a noncompete clause inherently unreasonable, a court

74. Hartman v. W.H. Odell & Assocs., Inc., 450 S.E.2d 912, 917 (N.C. Ct. App. 1994) (quoting Beasley v. Banks, 90 368 S.E.2d 885, 886 (N.C. Ct. App. 1988)).

75. *Id.* at 920.

76. Bess v. Bothman, 257 N.W.2d 791, 794 (Minn. 1977).

77. *Id.*

78. 372 N.W.2d 85 (Minn. Ct. App. 1985).

79. *Id.* at 88–89.

80. Joy v. Hay Group, Inc., No. 02C4989, 2003 WL 22118930, at *10 (N.D. Ill. Sept. 11, 2003).

81. *See* Hudson Foam Latex Prods., Inc. v. Aiken, 198 A.2d 136, 140 (N.J. Super. Ct. App. Div. 1964) (citing Chas. S. Wood & Co. v. Kane, 125 A.2d 872 (N.J. Super. Ct. App. Div. 1956)).

82. Solari Indus. Inc. v. Malady, 264 A.2d 53, 57 (N.J. 1970).

may still save the agreement.[83] Under Pennsylvania law, a court sitting in equity may grant enforcement of an overbroad covenant and, to cure the overbreadth, has the power to craft a restriction to make it reasonable and enforceable.[84]

Massachusetts and New Hampshire also follow the liberal blue pencil doctrine. In Massachusetts, "courts will not invalidate an unreasonable noncompete covenant completely but will enforce it to the extent that it is reasonable."[85] In New Hampshire, "[e]ven if the trial court determines that the covenant is unreasonable, the employer nonetheless may be entitled to equitable relief in the form of reformation or partial enforcement of an overly broad covenant upon a showing of his exercise of good faith in the execution of the employment contract."[86]

Maine follows the most unusual method of applying the liberal blue pencil doctrine. In Maine, the Court completely disregards the agreement as drafted and agreed to by the parties.[87] Instead, the court considers the scope of the covenant only as the employer seeks to enforce it.[88] In essence, the alleged bargained-for exchange between the parties lacks all meaning. This unique interpretation of the blue pencil doctrine was developed in *Chapman & Drake v. Harrington*,[89] in which the Court wrote the following: "Since the reasonableness of the noncompetition agreement depends upon the specific facts of the case . . . we assess that agreement only as . . . [the plaintiff] has sought to apply it and not as it might have been enforced on its plain terms."[90]

C. Step-Down Provisions

Employers now frequently include step-down provisions within their noncompete agreements. These provisions generally provide alternative restrictions within the contract itself. By permitting a court confronted with an unreasonable restriction to choose the alternative that is reasonable, the step-down provision essentially writes the liberal blue pencil rule into the contract. Logic dictates that enforcement

83. Hillard v. Medtronic. Inc., 910 F. Supp. 173, 177 (M.D. Pa. 1995).
84. *Id.*; Sidco Paper Co. v. Aaron, 351 A.2d 250, 254 (Wash. 1968).
85. L.G. Balfour Co. v. McGinnis, 759 F. Supp. 840, 845 (D.D.C. 1991).
86. Smith, Batchelder & Rugg v. Foster, 406 A.2d 1310, 1311 (N.H. 1979).
87. *See* Brignull v. Albert, 666 A.2d 82, 84 (Me. 1995).
88. Everett J. Prescott, Inc. v. Ross, 383 F. Supp. 2d 180, 190 (D. Me. 2005); *Brignull*, 666 A.2d at 84.
89. 545 A.2d 645 (Me. 1988).
90. *Id.* at 647 (citing Am. Sec. Serv., Inc. v. Vodra, 222 Neb. 480, 488, 385 N.W.2d 73, 79 (1986)).

of the step-down provision ensures an eventual employer victory. Such provisions "seek[ ] to make the 'possible' inevitable."[91]

It remains an open question as to whether courts in blue pencil states will enforce step-down provisions.[92] An Arizona court has, however, found that "carefully crafted . . . step-down provisions are a permissible application of Arizona's blue-pencil rule."[93] In *Compass Bank v. Hartley*,[94] the court found that such provisions were enforceable where the court could "cross-out some unreasonable sections in favor of more reasonable ones without rewriting them."[95]

The *Compass Bank* court explained that agreements providing different options, some of which may be reasonable, gave the employer and employee the chance to consider possible alternatives prior to execution of the agreement.[96] As such, the parties had the ability to examine and consider the range of alternative terms in the contract before ever signing it.[97] If a court eliminated an unreasonable term, the elimination of the term would constitute an insignificant change because the parties had already considered such a modification in the execution of the contract.[98] The court concluded by noting that a different result would occur in those situations where the alternatives are "indefinite and inconsistent with the underlying provision, and are not easily severable from unreasonable provisions."[99] In such cases, the agreement would be void as there would have been "no meeting of the minds."[100]

As will be seen in greater detail below, courts in other states disagree with this conclusion.

IV. ARGUMENTS AGAINST THE USE OF THE BLUE PENCIL DOCTRINE

A. The Blue Pencil Doctrine Harms Employees

The blue pencil places too heavy of a burden on employees. The blue pencil doctrine permits employers to overreach, and in so doing, harms employees. In many jurisdictions, employers may safely exe-

91. Ali J. Farhang & Ray K. Harris, *Non-Compete Agreements With Step-Down Provisions*, ARIZ. ATT'Y, Dec. 2005, at 32 n.11.
92. Ray K. Harris & Ali J. Farhang, *Non-Compete Agreements with Step-Down Provisions: Will Courts in "Blue-Pencil" States Enforce Them?*, COMPUTER & INTERNET L., Jul. 2006, at 1, 1.
93. Compass Bank v. Hartley, 430 F. Supp. 2d 973, 981 (D. Ariz. 2006).
94. *Id.*
95. *Id.* at 981.
96. *Id.*
97. *Id.*
98. *Id.*
99. Compass Bank v. Hartley, 430 F. Supp. 2d 973, 981 (D. Ariz. 2006).
100. *Id.*

cute contracts that contain unenforceable agreements. The employer then receives what amounts to a free ride on a contractual provision that the employer is well aware would never be enforced. In the words of one commentator, "[t]his smacks of having one's employee's cake, and eating it too."[101]

The problem is commonly referred to as the *in terrorem* effect. Blue-penciling of the contract permits an "*in terrorem* effect on an employee, who must try to interpret the ambiguous provision to decide whether it is prudent, from a standpoint of possible legal liability, to accept a particular job or whether it might be necessary to resist plaintiff's efforts to assert that the provision covers a particular job."[102] It is true that an employer may try to limit the *in terrorem* effect of an ambiguous non-compete clause by interpreting it narrowly, but such a "request for limited relief cannot cure what is otherwise a defective non-competition agreement."[103]

Numerous courts have noted the possible harmful effect of the overly broad covenant. In the case of *Reddy v. Community Health Foundation of Man,*[104] the Court decried the use of overly broad provisions, "where savage covenants are included in employment contracts so that their overbreadth operates, by *in terrorem* effect, to subjugate employees unaware of the tentative nature of such a covenant."[105] Likewise, in *Valley Medical Specialists v. Farber,*[106] the Court noted that "[f]or every agreement that makes its way to court, many more do not.

Perhaps the Court in *Rita Personnel Services*[107] best captured the essence of the problem:

> For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction.[108]

By providing an eventual remedy of sorts, the blue pencil doctrine increases the use of overly broad clauses. In those states employing the doctrine, employers are effectively encouraged to enter into other-

101. Richard P. Rita Pers. Services Int'l, Inc. v. Kot, 191 S.E.2d 79, 81 (Ga.1972) (citing Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 682–83 (1960)).
102. Lanmark Tech. Inc. v. Canales, 454 F. Supp. 2d 524, 529 (E.D. Va. 2006) (quoting Pais v. Automation Prods. 36 Va. Cir. 230, 239 (1995)).
103. Cliff Simmons Roofing, Inc., v. Cash, 49 Va. Cir. 156, 158 (1999).
104. 298 S.E.2d 906 (W. Va. 1982)
105. *Id.* at 916.
106. 982 P.2d 1277 (Ariz. 1999).
107. Richard P. Rita Pers. Services Int'l, Inc. v. Kot, 191 S.E.2d 79 (Ga. 1972).
108. *Id.* at 81 (emphasis added) (quoting Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 682–83 (1960)).

wise unenforceable agreements. The *Rita Personnel Services* Court properly noted the negative consequences of the blue pencil doctrine. The Court explained that "[i]f severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable."[109] The *Valley Medical* Court echoed the same sentiment when it stated that "employers may therefore create ominous covenants, knowing that if the words are challenged, courts will modify the agreement to make it enforceable."[110]

The noncompete agreement most harms those employees not aware of the peculiar nature of the covenant. An agreement that would never be enforced in a court may prevent an employee from changing positions, from starting a new business, or from seeking more compensation.

Some dispute the *in terrorem* effect of noncompete agreements. In *Raimonde v. Van Vlerah*,[111] the Ohio Supreme Court faced a situation in which the defendant argued that the blue pencil doctrine would allow employers to dictate restraints "without fear, knowing that judges will rewrite contracts if they are taken to court."[112] The Court found the contention meritless, explaining that "[m]ost employers who enter contracts do so in good faith, and seek only to protect legitimate interests. In fact, relatively few employment contracts reach the courts."[113]

B. The Blue Pencil Doctrine Creates Confusion

The blue pencil doctrine creates confusion for employees, employers, and the court system. The problem arises out of the fact that it is impossible to predict the construction of a noncompete agreement accurately.

1. *The Doctrine Confuses Employees*

The blue pencil doctrine confuses employees. Since the doctrine builds uncertainty into every employment contract, an employee may never be certain of his rights under the agreement. In a blue pencil state, an employee wishing to leave his employer for a competitor will not know the actual terms of his noncompete agreement. Even if the agreement appears unreasonable and unenforceable, the blue pencil doctrine creates uncertainty.

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109. *Id.*
110. *Valley Medical Specialists*, 982 P.2d at 1286 (citing Blake, *supra* note 108, at 682–83).
111. 325 N.E.2d 544 (Ohio 1975).
112. *Id.* at 547.
113. *Id.*

This uncertainty carries with it costs to the employee. The employee who remains at his position, fearful that the blue pencil would not help his case, suffers lost opportunity costs. The employee who leaves his position may be forced to accept a reduced salary from a new employer due to the perceived risk of litigation.

The court in *Dearborn v. Everett J. Prescott, Inc.*[114] accurately described the employee's dilemma: "The restless or departing employee could have no 'clear understanding of what conduct is prohibited.' He could not secure meaningful legal advice because he could not know what the employer might want to enforce. He could not ask the employer to decide without effectively burning bridges with the employer."[115]

2. *The Doctrine Confuses Employers*

It is not just employees who suffer—the blue pencil doctrine also causes confusion for employers. The blue pencil doctrine leaves an employer guessing as to how broadly it can draft a restrictive covenant before the court will refuse to blue pencil it. As discussed further below, examples exist of courts in "blue pencil" states that were so offended by an overreaching covenant that they refused to alter the agreement.[116] Several recent decisions found the court nullifying the agreement completely rather than amending it, even where amendment was possible.[117]

Other examples of potential harm suffered by employers through the combined effect of noncompete agreements and the blue pencil doctrine also exist. Although the point is often lost in the discussion of noncompete agreements, for every employer that benefits from the noncompete agreement, another suffers. Companies who want to hire an applicant subject to a noncompete agreement must weigh the potential benefits of the agreement against the burden of possibly having to enforce the agreement. Often, the hiring employer must perform its own legal analysis to discover whether the noncompete agreement can or will be enforced. Unfortunately, because of the blue pencil doctrine, even after performing such analysis, potential employers lack guidance as to the extent the noncompete agreement will be enforced since courts over time have interpreted similar agreements in different ways. Thus, employers may be deprived of access to well-trained employees, even those subject to otherwise unenforceable agreements.[118]

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114. 486 F. Supp. 2d 802 (S.D. Ind. 2007).
115. *Id.* at 816.
116. *See infra* section V.A.
117. *See id.*
118. In *DP Solutions, Inc v Rollins, Inc.* 353 F.3d 421 (5th Cir. 2003), the defendant hired two former employees of the plaintiff. *Id.* at 426. The plaintiff brought suit

3. *The Doctrine Confuses the Legal System*

The blue pencil doctrine creates confusion for the legal system. Among those states where noncompete agreements are enforced, courts can look forward to an ever-growing stream of noncompete litigation. Courts are already overburdened with the need to decide questions of reasonableness and whether the restraint as set forth in the agreement is actually necessary to protect the legitimate business interests of the employer. The blue pencil doctrine does nothing to alleviate this problem, as courts must take on the additional burden of rewriting an agreement in the manner that the parties could have, but did not, write it upon execution.

4. *The Blue Pencil Doctrine Encourages Litigation*

The above discussion makes it clear that the fact-specific nature of the reasonableness test alone creates an incentive to litigate. As the test is presently construed, it is difficult for anyone—employer, employee, or attorney—to predict the result of the threshold reasonableness question. Even for those agreements that contain limits on scope, duration, and geography, it is virtually impossible to predict whether those limits will be held enforceable. While virtually everyone would agree that a five-year ban would violate public policy, it would be hard to guess whether a six-month to three-year prohibition would be held enforceable. Similarly, while a worldwide geographic restriction seems too large, one could make the case that for those doing business on the Internet, the world may well be a proper geographic restriction.

The blue pencil doctrine exacerbates the problem by providing further uncertainty. The blue pencil doctrine deprives the court and the parties of the touchstone to contract construction: the actual, written agreement between the parties. The blue pencil doctrine gives those employees wealthy enough to access the court system license to test the limits of the noncompete agreement. The blue pencil doctrine encourages litigation by building a degree of uncertainty into every employment agreement.

Further, noncompete agreement-related litigation may go beyond a mere employer-employee dispute. A company that hires an employee nominally bound by a noncompete agreement with a former employer may face potential liability for, among other things, tortious interfer-

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alleging tortious interference with contract. *Id.* The court awarded the plaintiff $27,000 in damages, arising out of defendant's hiring of plaintiff's ex-employees. *Id.* at 426, 430–31. The damages figure was based on testimony by the plaintiff's attorneys as to the amount of fees expended in pursuit of the tortious interference claim. *Id.* at 430–31.

ence with contract.[119] The new employer must often make the difficult decision of whether to hire an applicant or risk a lawsuit, based on a purposely vague agreement signed years before.

Finally, special attention must be paid to another recent trend. The employer who demands its employees sign an unenforceable noncompete agreement may open itself to liability for wrongful termination. An employer that terminates an employee for refusing to sign a potentially unenforceable noncompete agreement may, as demonstrated by recent decisions from New Jersey and California, face a lawsuit of its own.[120]

V. PUTTING THE BLUE PENCIL DOWN

A. Recent Trends Support the End of the Blue Pencil Doctrine

Reformers eager to end the blue pencil doctrine may find support in several recent decisions. Recently, several federal courts have exhibited a reluctance to tolerate noncompete agreements with overly onerous covenants.

One such case is *Hay Group, Inc. v. Bassick*.[121] In that matter, the court faced a noncompete agreement that purported to ban the employment of the defendant in any capacity with any competitor.[122] The noncompete agreement also contained a severability clause, which plaintiff believed would save the agreement from being found completely unenforceable.[123]

As noted previously, Illinois courts take a liberal approach to the blue pencil doctrine, which provides the court with ample opportunity to amend the agreement in place. In this case, however, the court noted that "[w]hile a court applying Illinois law may 'make slight modifications to effectuate the intent of the parties . . . the *degree* of unreasonableness of the original restraint' is a significant factor in guiding

119. *Id.* at 430–31.

120. *See* Maw v. Advanced Clinical Commc'ns, Inc., 820 A.2d 105 (N.J. Super. Ct. App. Div. 2003); Walia v. Aetna, Inc., 113 Cal.Rptr.2d 737 (Cal. Ct. App. 2001).

121. No. 02C8194, 2005 U.S. Dist. LEXIS 22095 (E.D. Ill. September 29, 2005).

122. *Id.* at *10–*11.

123. The severability clause in *Hay Group* read as follows:

> It is the desire and intent of the parties that the provisions of this Covenant Not to Compete shall be enforced to the fullest extent permissible under the laws and public policies applied in each jurisdiction in which enforcement is sought. If any particular provisions or portion of this Covenant Not to Compete shall be adjudicated to be invalid or unenforceable, this Covenant Not to Compete shall be deemed amended to delete therefrom such provision or portion adjudicated to be invalid or unenforceable, such amendment to apply only with respect to the operation of this paragraph in the particular jurisdiction in which such adjudication is made.

Id. at *11.

the court's modification."[124] The court noted that in those cases where "the restraint is patently 'unfair because of its overbreadth,' courts will refuse to modify the agreement, even in the presence of a severability clause."[125]

Under Illinois law, when a court determines whether to apply the blue pencil and reform a covenant, it must first examine the fairness of the initial restraint.[126] In Illinois "[a] court should refuse to modify an unreasonable restrictive covenant 'where the *degree* of unreasonableness renders it unfair.'"[127] Under Illinois law, public policy discourages dramatic revisions of restrictive covenants.[128] Moreover, "courts generally try to stay away from rewriting agreements or mak[ing] drastic modifications."[129]

Another Illinois federal court summed up this fairness test in *Pactiv Corp. v. Menasha Corp.*[130] In *Pactiv*, the court confronted the question of whether to blue pencil an unreasonable noncompete provision.[131] The plaintiff argued that, even if the court refused to enforce the overly broad noncompete agreement at issue, the court retained sufficient power to modify the agreement to make it comply with the law.[132] The court acknowledged that Illinois law provided it with discretionary authority to blue pencil an unreasonable agreement.[133]

The court noted, however, that in determining whether or not to amend an agreement, it would examine the "fairness of the restraint initially imposed."[134] The court could decline to exercise its power to modify a noncompete agreement "where the degree of unreasonableness renders it unfair."[135]

The *Pactiv* court recognized the danger created by a court's use of the blue pencil doctrine. The *Pactiv* court noted that a court "should consider, importantly, that the 'modification could have the potential effect of discouraging the narrow and precise draftsmanship which should be reflected in written agreements.'"[136] In other words, courts

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124. *Id.* at *12–*13 (quoting Eichmann v. Nat'l Hosp. and Health Care Servs., Inc., 719 N.E.2d 1141, 1149 (Ill. App. Ct. 1999)).
125. *Id.* at *13 (quoting *Eichmann,* 719 N.E.2d at 1149).
126. *Id.*
127. Pactiv Corp. v. Menasha Corp., 261 F. Supp. 2d 1009, 1015 (N.D. Ill. 2003) (quoting *Eichmann*, 719 N.E.2d at 1149).
128. *Id.* at 1016.
129. Joy v. Hay Group, Inc., No. 02C4989, 2003 WL 22118930, at *10 (N.D. Ill. Sept. 11, 2003).
130. 261 F. Supp. 2d 1009, 1015 (N.D. Ill. 2003).
131. *Id.* at 1015–16.
132. *Id.* at 1015.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 1016 (quoting Eichman v. Nat'l Hosp. & Health Care Servs., Inc., 719 N.E.2d 1141, 1149).

that routinely modify overly broad agreements encourage employers to draft more such agreements. A court may only limit the potential damage of unreasonable agreements by refusing to modify them. When gifted with a court that will create a narrow agreement after the fact, employers have little incentive to draft narrowly tailored agreements on their own.[137]

The court discussed the factors that should be considered when deciding whether to "blue pencil" an agreement if a court has to rewrite the entire agreement to make in enforceable in *Joy v. Hay*.[138] The court explained that, "[i]f, in order to make the terms of the agreement reasonable, a court would essentially have to draft a new agreement, that court would probably decline to do so."[139] The *Joy* court recognized the policy reasons behind its decision not to reform the agreement at issue and explained that "[t]he idea behind declining to rewrite unreasonable and unfair agreements is that courts would like to encourage employers to more narrowly draft their covenants."[140]

Similarly, in Indiana, in *Dearborn v. Everett J. Prescott, Inc.*,[141] the court refused to reform an unreasonably broad agreement.[142] This decision followed *Product Action International, Inc. v. Mero*[143] in which the court held that the practice of allowing a court to reform an overbroad noncompetition clause, instead of striking it down, deprives an employee and a prospective employer of guidance as to what is permissible.[144] The court explained its decision as follows:

> A prospective new employer . . . could not read the . . . [clause] and know what sorts of activity would be prohibited and what would not . . . A current employee may be frozen in his or her job by an unreasonably broad covenant. Even if the employee believes the covenant is too broad, she may be able to test that proposition only through expensive and risky litigation.[145]

Further, a severability clause could not save the agreement.[146] The *Product Action* court refused to accept the plaintiff's demand that it reform the contract in accordance with the severability clause.[147] The court said that to do so "would require the court to add terms that

137. *Id.*
138. No. 02C4989, 2003 WL 22118930, at *11 (N.D. Ill. Sept. 11, 2003).
139. *Id.* at *10.
140. *Id.*
141. 486 F. Supp. 2d 802 (S.D. Ind. 2007).
142. *Id.* at 821.
143. 277 F. Supp. 2d 919 (S.D. Ind. 2003).
144. *Id.* at 930–31.
145. *Id.*
146. The clause stated:

> If the scope of any stated restriction is too broad to permit enforcement of such restriction to its fullest extent, then such restriction shall be enforced to the maximum extent permitted by law and the court making such determination shall have the power to modify this Agreement in order for it to conform with the applicable law. *Id.* at 922.

147. *See id.* at 927–32.

the parties never agreed to."[148] The court provided a succinct argument for abolishing the blue pencil doctrine by noting that when an employee seeks to avoid an overbroad covenant, courts should not be asked to "do for the employer what it should have done in the first place—write a reasonable covenant."[149]

Finally, a Maryland court wrestled with the issue as to whether it should blue pencil an overly restrictive noncompete agreement in *Deutsche Post Global Mail, Ltd. v. Conrad*.[150] There, the plaintiff sued two former employees and attempted to enforce only a very narrow portion of the original restrictive covenant.[151] To make the restriction enforceable, the court noted that it only needed to strike out certain provisions in the agreement.[152] The court acknowledged that these deletions would have been "in line with what Maryland courts have traditionally done under the blue pencil rule."[153] Nevertheless, since the court was troubled by the language of the nonsolicitation portion of agreement, it refused to blue pencil the agreement and found the entire agreement unenforcecable.[154]

B. A New Threshold Inquiry

As shown above, the blue pencil doctrine fails on a number of levels. Even in those jurisdictions that recognize the doctrine, courts can choose whether or not to apply it. A review of case law reveals that the doctrine is employed inconsistently and irregularly. As such, both courts and practitioners likly will find the doctrine of little use.

Thus, it is time to institute a new threshold test. Before engaging in the standard reasonableness test, a court should determine if the agreement meets a new standard of specificity. An enforceable agreement would contain language that makes it specific to the employee to be restrained, that identifies the business interest that the provision will protect, and that describes the means by which the interest would be protected.

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148. *Id.* at 928.
149. Product Action Int'l, Inc. v. Mero, 277 F. Supp. 2d 919, 932 (S.D. Ind. 2003).
150. 292 F. Supp. 2d 748 (D. Md. 2003).
151. *Id.* at 754.
152. *Id.*
153. *Id.* The judge acknowledged his personal misgivings about the blue pencil doctrine:

> In my view to permit blue penciling encourages an employer to impose an overly broad restrictive covenant, knowing that if the covenant is challenged by an employee the only consequence suffered by the employer will be to have a court write a narrower restriction for it. This appears to me to be extremely unfair and contrary to sound public policy.

Id. at 754 n.3.
154. *Id.* at 756, 758.

The proposed new threshold test will benefit both employees and employers. This proposed new threshold test will bring consistency and clarity to the enforcement of noncompete agreements. It will enable drafters to establish the actual enforceable parameters of a noncompete agreement within the four corners of the document. Furthermore, the specificity test will add an increased measure of predictability to the question of whether a noncompete agreement will be enforced. An employee will know, at the time they sign the document, the employer's expectations as to the limits of the employee's future employment with a competitor. Moreover, the employee will sign the document knowing that it will likely be enforced and, therefore, will know what to expect after signing it.

B. A Proposal for Specificity

1. *The Provision Must be Made Specific to the Promissor*

The first part of the proposed test requires that the provision be made specifically for the employee in his current position. This should prevent the automatic inclusion of boilerplate language, which invites litigation and abuse. This "identity" test goes beyond merely naming the restrained party. At the outset, the noncompete agreement should identify the employment position or job area being restrained. Thus, the identity requirement prevents the employer from using the noncompete agreement years after its original execution in those cases in which the employer and the employee are in circumstances far different than those in which the contract was executed.

The noncompete agreement should set forth, in detail, the reasons why this particular employee will be restrained from competing after the termination of his employment. The employer should consider factors such as the particular education or experience of the employee at the time of hire, the specialized training that he might receive on the job, and the specialized knowledge that he will receive while employed.

There are recent cases that suggest that it would be beneficial for courts to require "specificity." One example of the problem caused by the failure to write a restrictive covenant pursuant to job position is illustrated in *Park-Ohio Industries, Inc. v. Carter*.[155] In this 2007 case, the court faced a noncompete agreement executed in 1978—almost thirty years prior to the termination of employment.[156] The plaintiff's predecessor had originally hired the defendant for an entry-level position.[157] At the time of suit, the restrictive covenant barred the plaintiff from working in a competitive business anywhere in the

155. No. 06-15652, 2007 U.S. Dist. LEXIS 9095 (E.D. Mich. Feb. 8, 2007).
156. *Id.* at *7.
157. *Id.* at *2.

United States or Canada.[158] The court had to construe an agreement that was executed by a previous employer and that was meant to restrain a brand-new hire in a low-level position. From the agreement, it was apparent that nobody had contemplated that the restrictive covenant would someday be used against a senior-level manager with decades of work history. Nevertheless, because of the lack of specificity in the original agreement, the court found itself in the uncomfortable position of conducting a standard of reasonableness analysis, in the same way that it would have if the contract had been executed just days before the suit.[159]

From the employee's perspective, this requirement would provide numerous benefits. The proposed rule of specificity requires the employer to make the prima facie case that the noncompete agreement is reasonable. The specificity requirement would also ensure that the employee had adequate knowledge of the fact that he would be restrained from competing with his employer. Finally, by requiring specificity, employers would be discouraged from automatically including noncompete agreements in employment contracts. An employer would have to balance the benefit to be gained by the noncompete agreement against the added burden of specifically describing the reasons for the agreement. One can easily imagine that employers would be less likely to use the agreement if the law required them to take the time to state the specific reasons for its use.

Another recent case illustrates the difficulty of dealing with agreements drafted without regard to the parties or positions being restrained. In *Dearborn v. Everett J. Prescott, Inc.*,[160] the court faced a situation in which a company required all sales representatives and managers nationwide to sign non-competition agreements.[161] All of the agreements were identical in their form and scope and failed to differentiate between employees with different duties.[162] Further, the agreements failed to take into account where the employee lived and all contained statements that Maine law would govern their construction.[163] Finally, all agreements provided for an identical token payment of $250 regardless of the employee's position.[164]

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158. *Id.* at *7–*8.

159. *Id.* at *29–*36. The case was further complicated by the legal gymnastics the court was required to perform as a result of the choice of law provision contained in the agreement. The agreement contained a provision choosing Ohio law. Carter argued that Michigan law should apply. Although noncompete agreements have been enforceable in Michigan since 1985, at the time the contract was signed, the law declared them invalid. *Id.* at *14.

160. 486 F.Supp. 2d 802 (S.D. Ind. 2007).

161. *Id.* at 805–06.

162. *Id.* at 806.

163. *Id.*

164. *Id.*

The plaintiff, Dearborn, was an Indiana resident, and the defendant employer, though based in Maine, maintained 32 offices in nine different states.[165] The plaintiff worked for the defendant for ten years, spending all of that time at various offices in Indiana.[166] Nevertheless, despite the plaintiff's Indiana citizenship and despite the plaintiff's decade of work in Indiana, the defendant argued that, Maine law should apply.[167]

Application of Maine law would have doubtlessly benefited the defendant employer, and, thus, it had little reason to restrict the agreement. As noted above, under Maine law, the enforceability of a noncompetition covenant depends, not on the covenant as written, but instead on the extent to which the employer seeks to enforce it.[168] Indiana law, however, limited—in the absence of genuine trade secrets, geographic and customer restrictions on a departing salesman to ensure that such restrictions were not broader than the scope of the employee's former responsibilities.[169]

Finally, a review of *Telxon Corp. v. Hoffman*[170] reveals yet another case where blanket noncompete agreements created an unenforceable provision.[171] The court was so offended by the lack of fairness inherent to the agreement at issue that it refused to "blue pencil" the agreement.[172] The court called out for a specificity standard by stating that "[w]e also hope to encourage employers to write contracts more narrowly tailored to serve their own individual needs and, if necessary, to vary those documents to restrict only the activities of particular employees."[173]

165. *Id.* at 805.

166. Dearborn v. J. Everett J. Prescott, Inc., 486 F. Supp. 2d 802, 805 (S.D. Ind. 2007).

167. *Id.* at 807.

168. *See* Everett J. Prescott, Inc. v. Ross, 383 F. Supp. 2d 180, 190 (D. Me. 2005) (citing Brignull v. Albert, 666 A.2d 82, 84 (Me. 1995)) (enforcing identical agreement to extent that EJP demanded it be enforced).

169. *See, e.g.,* Standard Register Co. v. Cleaver, 30 F. Supp. 2d 1084, 1096-97 (N.D. Ind. 1998); Donahue v. Permacel Tape Corp., 127 N.E.2d 235, 241 (Ind. 1955); Vukovich v. Coleman, 789 N.E.2d 520, 525 (Ind. Ct. App. 2003); Norlund v. Faust, 675 N.E.2d 1142, 1155 (Ind. Ct. App. 1997) ("The use of territorial boundaries is only one method of limiting a covenant's scope, and when a covenant not to compete contains a restraint which clearly defines a class of persons with whom contact is prohibited, the need for a geographical restraint is decreased."); Medical Specialists v. Sleweon, 652 N.E.2d 517, 523–24 (Ind. Ct. App. 1995).

170. 720 F. Supp. 657 (E.D. Ill. 1989).

171. *Id.* at 660, 671.

172. *Id.* at 665–66.

173. *Id.* at 666.

2. *The Provision Must be Made Specific as to the Interests Being Protected*

Post-litigation analysis of protectable interests is costly, inefficient, and may well lead to the wrong result. Thus, the proposed analysis requires that the noncompete agreement identify the business interests that the provision will protect. As discussed above, the states that enforce noncompete agreements generally will do so only if the provision can be said to protect a legitimate business interest. This remains true in both statutory and common law enforcement schemes.

The litigation of noncompete agreements often concerns whether the previous employer actually had a legitimate business interest at stake when it attempted to restrain the employee from working in a similar position at a competing business.[174] Some have described the protected interest to be "the most crucial element to enforceability."[175] Many courts find that a noncompete agreement cannot be used to prevent competition per se; instead, the interest sought to be enforced by use of the noncompete agreement must be proprietary.[176]

The limits, whether in terms of geography or customers, must be reasonably congruent with the employer's protectable interest.[177] The general requirement for geographic or customer limits is tied to the former employee's own activities and may not apply if a broader covenant is necessary to protect the employer's genuine trade secrets.[178]

Too often, courts are required to review noncompete agreements without knowing exactly which of the employer's many varied interests is being protected. In fact, employers are not discouraged from drafting clauses broadly in the hope that a court will read the clause as protecting one of the above-named interests. The proposed specificity test will place the burden on employers to actually name the interests that the noncompete agreement protects.

Under the proposed specificity test, the business interest to be protected should generally fall within one of the three categories discussed previously. The business interest should consist of a trade

174. *See* Katherine R. Schoofs, *Employer Beware: Missouri Puts the Brakes on Interests Protected by a Restrictive Covenant,* 70 U. MO. KAN. CITY L. REV. 171 (2001).

175. Mark W. Freel & Matthew T. Oliverio, *When Commercial Freedoms Collide: Trade Secrets, Covenants Not To Compete and Free Enterprise*, 47 R.I. B.J., May 1999, at 9, 11.

176. Valley Med. Specialists v. Farber, 982 P.2d 1277, 1281 (Ariz. 1999).

177. Standard Register Co. v. Cleaver, 30 F. Supp. 2d 1084, 1096 (N.D. Ind. 1998) (recognizing employer's legitimate interests with current customers in similar case under Indiana law involving printed business forms and other business specialty printing products); Smart Corp. v. Grider, 650 N.E.2d 80, 83 (Ind. Ct. App. 1995) ("A covenant not to compete must be sufficiently specific in scope to coincide with only the legitimate interests of the employer . . . .").

178. *See* Donahue v. Permacel Tape Corp., 127 N.E.2d 235, 239 (Ind. 1955); *accord.* Ackerman v. Kimball Int'l, Inc., 652 N.E.2d 507, 510 (Ind. 1995).

secret or confidential information, customer relationships, and more rarely, goodwill.[179] State law differs, but virtually all states recognize these as protectable interests.[180]

States such as Utah, New York and Maryland include the employee's unique services among legitimate business interests.[181] Kentucky, Pennsylvania and Georgia hold that employee training falls within the rubric of legitimate business interests,[182] while New Hampshire and Washington reject this theory and hold that an employer's interest in recouping the costs associated with "recruiting and hiring employees" is not protectable through a non-compete clause.[183] Florida and Tennessee recognize this interest, but with a distinction,

179. In Texas and Massachusetts, as well as many other states, goodwill is a protected employer interest. *See* TEX. BUS. & COM. CODE ANN. § 15.50(a) (Vernon 2002) (including employer goodwill as protectable interest); IKON Office Solutions, Inc. v. Belanger, 59 F. Supp. 2d 125, 128 (D. Mass. 1999) (holding that goodwill of employer is a protectable interest, if employee cultivated his relationship with the client during his employment with the employer).

180. *See, e.g.*, Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 386 (Tex. 1991) ("[T]he restraint created [in a noncompete agreement] must not be greater than necessary to protect the . . . [employer's] legitimate interests such as business goodwill, trade secrets, or other confidential or proprietary information."). *See also* Easy Returns Midwest, Inc. v. Schultz, 964 S.W.2d 450, 453 (Mo. Ct. App. 1998) Paramount Termite Control Co v. Rector, 380 S.E.2d 922, 925 (Va. 1989) (finding that customer contacts of former employees and knowledge of Paramount's methods of operation warranted the need for non-competition agreements); Ridley v. Krout, 180 P.2d 124, 129 (Wyo. 1947) (stating that special facts that make a restrictive covenant reasonable include possession of trade secrets, confidential information communicated by employer, and special influence with customer obtained while employed).

181. *See* System Concepts, Inc. v. Dixon, 669 P.2d 421, 426 (Utah 1983) (holding that the unique services of an employee are a protectable employer interest); Reed, Roberts Assocs. Inc. v. Strauman, 353 N.E.2d 590, 593 (N.Y. 1976) ("[I]njunctive relief may be available where an employee's services are unique or extraordinary and the covenant is reasonable . . . ."); Becker v. Bailey, 299 A.2d 835, 838 (Md. 1973) ("[R]estrictive covenants may be applied and enforced only against those employees who provide unique services or to prevent the future misuse of trade secrets, routes or lists of clients, or solicitation of customers.").

182. *See Borg*-Warner Protective Servs. Corp. v. Guardsmark, Inc., 946 F. Supp. 495, 501–02 (E.D. Ky. 1996) (protecting employer's interests in training and development costs of employees); Wesley-Jessen, Inc. v. Armento, 519 F. Supp. 1352, 1358 (N.D. Ga. 1981) (holding that employer has an interest in the training it provides employees); Thermo-Guard, Inc. v. Cochran, 596 A.2d 188, 193–94 (Pa. Super. Ct. 1991) (recognizing employer's interest in "specialized training and skills" that it taught the employee).

183. *See* National Employment Serv. Corp. v. Olsten Staffing Serv., Inc., 761 A.2d 401, 405 (N.H. 2000) (rejecting employee training as protectable interest); Copier Specialists, Inc. v. Gillen, 887 P.2d 919, 920 (Wash. Ct. App. 1995) (holding that, in absence of other protectable interests, training of employee did not warrant enforcement of non-competition agreement).

by mandating that an employer must show "extraordinary or specialized training" before a restrictive covenant can be enforced.[184]

Among those states that recognize customer relationships as a protectable interest, however, differences arise as to what sort of relationships may be protected. Some states require a more permanent relationship between customer and business for such a relationship to fall within the realm of protected interests. For instance, in Illinois, in *Office Mates 5, North Shore, Inc. v. Hazen*,[185] the court indicated that the relationship between employer and customer must be nearly permanent.[186] In Alabama, however, a customer relationship need not rise to the level of near-permanence.[187] Instead, Alabama law requires only a "close relationship."[188] Applying Ohio law, the court in *Chicago Title Insurance Corporation v. Magnuson*[189] seemed to imply only that such relationships should be "strong" and "important."[190] Missouri law seems to have an even lower threshold.[191] In Missouri, protectable interests arise when an employer has "a stock of customers who regularly deal with the employer."[192] In the absence of a defined group of customers systematically dealing with the employer, no protectable interest arises.[193]

Case law supports the proposed requirement of specificity. In *University of Florida Board of Trustees v. Sanal*,[194] the employer urged the court to interpret "specific prospective" customers to include all people residing within a given geographic area.[195] The court rejected this construction, finding that "to qualify as a 'legitimate business interest' pursuant . . . [to the relevant Florida statute], a 'relationship' with a 'prospective patient' must be, in addition to 'substantial,' one with a particular, identifiable, individual."[196]

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184. *See* Hapney v. Cent. Garage, Inc., 579 So. 2d 127, 131 (Fla. Dist. Ct. App. 1991) (holding that "to a limited degree, extraordinary or specialized training" is a legitimate employer interest); Vantage Tech., LLC v. Cross, 17 S.W.3d 637, 644–45 (Tenn. Ct. App. 1999) ("[E]mployer may have a protectable interest in the *unique* knowledge and skill that an employee receives through special training by his employer, at least when such training is present along with other factors tending to show a protectable interest.").
185. 599 N.E.2d 1072, 1080–83 (Ill. App. Ct. 1992).
186. *Id.* at 1080–83.
187. Concrete Co. v. Lambert, 510 F. Supp. 2d 570, 583 (M.D. Ala. 2007).
188. *Id.* ("A protectable interest may exist when an employee is in a position to gain confidential information, [to gain] access to secret lists, or to develop a close relationship with clients.").
189. 487 F.3d 985 (6th Cir. 2007).
190. *Id.* at 993–94.
191. JTL Consulting, L.L.C. v. Shanahan, 190 S.W.3d 389, 398 (Mo. Ct. App. 2006).
192. *Id.*
193. *Id.*
194. 837 So. 2d 512, 515 (Fla. Dist. Ct. App. 2003).
195. *Id.* at 515.
196. *Id.* at 516.

The description of the protected interests in the agreement is merely a threshold requirement. The mere naming of the protected interests is not a guarantee of enforcement.

3. *The Provision Must be Made Specific as to the Means of Protection*

The third question a court should ask, as part of its threshold test for enforceability, is whether the contract identifies the means by which the noncompete agreement protects the employer's legitimate business interests. This clause should prove the easiest for drafters to meet and for the court to review.

The proper clause should be written in accordance with the majority position that noncompete agreements should be limited by scope, by geography, and by duration. Compliance with this requirement should require minimum effort. It will require the employer to make a reasonable assessment of the value of this particular employee to the particular business interest being protected.

In addition, compliance with this requirement will ease the burden on courts to create scope, geographic, or duration terms that are not present in the original agreement. As discussed extensively within, virtually all courts review these three issues as part of the reasonableness test. This requirement simply requires the provisions to be stated clearly.[197]

Another benefit is that, when properly drafted, the provision will further notify the employee of all the clauses in his contract. When the employee knows exactly what his contract will say, he will have the chance to negotiate the provisions and to decide how much restraint he is willing to accept.

What would such a specificity provision look like? Obviously, the provision will depend on the type of position being restrained. But generally, as a threshold test, drafters should not bury the specificity requirements in boilerplate language. The language of the specificity provision should be clear, concise, and direct. As such, a model provision under the proposed specificity rule might resemble the following:

Recitals:

197. In a recent unpublished opinion out of the Fifth Circuit, the court confronted the lack of a geographic restriction. In *Security Alarm Financing Enterprises, Inc. v. Green*, No. 06-30332, 2007 U.S. App. LEXIS 4836 (5th Cir. Mar. 2, 2007), the appellate court overturned the district court's finding that the lack of a geographic restriction rendered a noncompete agreement unenforceable. *Id.* at *11. The decision was based on the peculiar facts of the case, but it certainly provides some evidence of ambivalence about refusing to enforce a noncompete agreement based on the lack of a geographic restriction. *See id.*

Employee. The Employee subject to this provision is John Doe. His position at the Company at the time of execution of this agreement is head of paper sales for the area comprised of Green, Eggs, and Ham counties.

Purpose. Employee will have access to customer contact lists belonging to Company. These customer contact lists have been prepared by the Company over a number of years and the Company has an interest in maintaining the confidentiality of the customer contact information. Employee will also have access to confidential pricing information belonging to the Company. This pricing information is not publicly available. The Company desires to protect the data found within these customer contact lists and pricing information from its competitors.

Means. To ensure protection of the Company's customer contact lists and pricing information, this agreement prohibits Employee from competing with the Company. The parties agree that, for a period of six months following the termination of employment, Employee will refrain from engaging in services similar to those he provided for the Company, for himself, or for any competitor of Company.

VI. CONCLUSION: A REVIEW OF BENEFITS GAINED

In short, we have weighed the "blue-pencil" doctrine in the balance, and found it wanting.[198]

Although it introduces yet another layer of analysis, the specificity test will benefit employers, employees, and the public in the long run. It will provide a framework that narrows the issues presented in a dispute and encourages resolution at an early stage.

A. The Noncompete Agreement Needs Reform

The noncompete agreement has attracted a great deal of attention in the last few years. Academics and practitioners alike have examined the subject. The reason for such interest is obvious: many can see an upcoming disaster. The noncompete agreement, which was born centuries ago against a very different social backdrop, fails to comport with modern notions of employment. Employees today are highly mobile: across employers, across careers, and across the world. Despite these changes in the employment landscape, the law surrounding the construction of noncompete agreements has remained fundamentally unaltered for centuries. Although its weaknesses have been apparent for some time, surprisingly few courts have attempted to reform the analytical frameworks through which noncompetes are examined. Instead, repeated attempts to salvage the covenant have only managed to produce a morass of laws, doctrines, and analyses.

The noncompete agreement presents a special challenge for the court system and places an unfair burden on trial courts. Judges must simultaneously balance the needs of the public, the employer, and the employee. In states where no statutory framework exists,

198. Richard P. Rita Pers. Services Int'l, Inc. v. Kot, 191 S.E.2d 79, 81 (Ga. 1972).

courts must fill the role of a legislative body by framing and stating public policy. Courts must also balance the protection of individuals with the need to foster business development.

The disparity among the states in the treatment of noncompete agreements also places a heavy burden on attorneys. In drafting a non-compete agreement, attorneys must be aware of the judicial approach used in the jurisdiction whose law is to govern the agreement. Depending on the state, courts may choose to: 1) refuse to enforce any noncompete agreement; 2) enforce a reasonable agreement but nullify any agreement that fails the reasonableness test; 3) strike any offending clause leaving the rest of the agreement in place; or 4) rewrite the provision to make it enforceable.

B. The Specificity Test Will Free Employees and Employers From Uncertainty and Lack of Clarity

The proposal contained in this Article may place an extra burden on employers initially, but ultimately, the specificity test will benefit both employees and employers. It will provide clarity to both parties and ease uncertainty.

The specificity test benefits employees primarily by giving them notice. Although it is difficult to establish through independent tests, informal surveys reveal that great numbers of employees execute noncompete agreements in the belief that the employer would never attempt to enforce them. In fact, the noncompete agreement stands alone among contractual provisions in that it is actually to the employee's benefit to negotiate an agreement that is broadly favorable to the employer. The employee can be confident that, in the majority of jurisdictions, an overly broad noncompete agreement cannot be enforced.

Application of the specificity test places an additional responsibility on employers. However, that burden is diminished in large part by the benefits that will accrue. Most importantly, employers will benefit from increased predictability. Right now, unless the employer is in a state that has banned all noncompete agreements, little certainty exists as to whether a noncompete agreement will be enforced or not. Currently, employers have incentives to draft agreements as broadly as possible. At the same time, however, they must attempt to guess how broad is too broad. Enforcement depends upon the vagaries of which court will ultimately decide the question of enforceability.

The specificity test will ensure a greater number of noncompete agreements are enforced. Therefore, employees will be encouraged to actively review, discuss, and negotiate their noncompete agreements before execution. Furthermore, greater specificity and certainty will ensure that the *in terrorem* effect of the overly broad noncompete agreement will fade. Finally, the specificity test will provide much

needed relief to the court system. The specificity test will decrease litigation, decrease the use of the form noncompete agreement, and encourage employers and employees to negotiate and abide by agreements without the input of the court system.