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Involuntary Servitude: The Current Enforcement of Employee Covenants Not to Compete – A Proposal for Reform

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INVOLUNTARY NONSERVITUDE: THE CURRENT JUDICIAL ENFORCEMENT OF EMPLOYEE COVENANTS NOT TO COMPETE—A PROPOSAL FOR REFORM

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A covenant not to compete is a contractual restriction upon an individual's ability to compete with another person or entity following the termination of some transaction or relationship between the two.[1]

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1. Hutter, *Drafting Enforceable Employee Non-Competition Agreements to Protect Confidential Business Information: A Lawyer's Practical Approach to the Case Law*, 45 ALB. L. REV. 311, 312 n.9 (1981). *See* 6A A. CORBIN, CORBIN ON CONTRACTS § 1394, at 89 (1962) (discussing enforcement of restrictive promises in employment contracts); RESTATEMENT (SECOND) OF CONTRACTS § 188(2) (1979) (defining promises imposing restraints ancillary to valid transactions or relationships). A covenant not to compete may be ancillary to a sale of a business or an employment or partnership relationship. RESTATEMENT (SECOND) OF CONTRACTS § 188(2) (1979). When the sale of goodwill is part of a business transaction, the covenant "engages [the seller] not to act so as unreasonably to diminish the value of what he has sold." The covenant is thus an important factor in the purchase price. Courts have traditionally been more willing to uphold the validity of covenants in cases involving business transactions and sales of goodwill than in cases involving employment relationships. *Id.*

This Article addresses covenants only in the context of agency relationships and not as they relate to sales of businesses. Agency relationships occur in both employment and partnership settings. The factors relevant to covenants not to compete in partnerships, especially the fiduciary duty of partners to the partnership and their fellow partners, are similar to those in the general employment context. The major relevant difference between partnership and employment relationships is that a partner is more likely to possess equal bargaining power to the partnership employer, whereas a general employee is not likely to have as much power as the employer. This

Because of the increasing emphasis in the American economy on technically skilled employees and service oriented businesses, the covenant not to compete has become a standard addition to employment contracts.[2] Moreover, the number of litigated and reported cases may represent only a small percentage of the actual number of employment restrictions currently in force.[3] Regardless of their validity and enforceability, covenants not to compete chill the free movement of employees and eliminate competition among actual and potential employers.[4] Because of both these effects and the existence of many unchallenged covenants of questionable validity, the judicial system must clearly define the legal parameters of the enforceability of such covenants.

Traditionally, scholars in this area have generally been content to organize the voluminous case law available and describe the patterns of legal analysis contained therein.[5] This Article instead suggests a unifying theory for consistently resolving all litigation of covenants not to compete. This theory focuses on the employer's protectable interest and limits postassociational restraints to the extent of this interest. This Article proposes that the appropriate sources of both the definition of protectable interest and the limitation on injunctive relief are those agency and unfair competition doctrines that justify postassociational restraints in the absence of contractual restrictions. Under this approach, the terms of any agreement will generally be viewed as superfluous. This Article concludes that the covenant not to compete and related contract law rules should, in most cases, be given no effect.

Article includes both employment and partnership relationships when using agency and employment terminology, except as otherwise indicated.

2. *See* S. LIEBERSTEIN, WHO OWNS WHAT IS IN YOUR HEAD? 164-70 (1979) (advising use of contractual clauses to protect employer secrets and inventions); [Milgram on Trade Secrets] 12 BUSINESS ORGANIZATIONS (MB) § 3.02, at 3-8 (1983) (of 86 corporations surveyed in 1965, 83 used contracts to protect trade secrets; it is anticipated a current survey would find a higher percentage of such contracts) [hereinafter cited as MILGRIM]; Hutter, supra note 1, at 311-12 (covenants prohibiting employees from competing with former employers quite prevalent).

3. Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade*, 1977 U. ILL. L.F. 620, 622-23.

4. *See* Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 682-83 (1960) (intimidation imposed by covenants, regardless of enforceability, restricts employee mobility).

5. *See, e.g.*, Stein, *Employee Non-Competition Restrictions by Contract and Otherwise*, 1983 A.B.A. DIV. OF PROF. EDUC. (compiling judicial treatment of non-competition clauses in the employment context); Handler & Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 756-66 (1982) (providing, in appendix format, numerous decisions upholding or invalidating covenants not to compete); Annot., 61 A.L.R.3D 397 (1975) (collecting cases determining the enforceability of covenants with unreasonable restrictions on competition).

I. AGENCY PRINCIPLES AND POSTASSOCIATIONAL RESTRAINTS

The fiduciary nature of the agency relationship mandates that an agent not use certain information to the principal's detriment either during the relationship or after its termination. During the agency relationship, the agent has "a duty not to compete with the principal concerning the subject matter of his agency."[6] The agent does not violate this duty merely by making arrangements to compete with the principal in the future,[7] but does violate this duty through acts of disloyalty or actual or direct competition.[8] An agent can therefore purchase a rival business prior to leaving the principal's employ[9] but cannot, while still employed, solicit business from the principal's customers[10] or encourage other employees to either terminate relations with the employer or resign en masse to join a new enterprise.[11] Courts may award damages or impose postassociational restraints to remedy an agent's pretermination conduct.[12] Courts frequently characterize the cause of

6. RESTATEMENT (SECOND) OF AGENCY § 393 (1957).

7. *E.g.*, Maryland Metals, Inc. v. Metzner, 282 Md. 31, 39-40, 382 A.2d 564, 569 (1978). *Cf.* United Bd. & Carton Corp. v. Britting, 61 N.J. Super. 340, 347, 160 A.2d 660, 664 (App. Div. 1960) (injunction against former employee limited to prevent him from dealing with customers to whom he sold while actually working for the employer).

8. *See, e.g.*, Foley v. D'Agostino, 21 A.D.2d 60, 69, 248 N.Y.S.2d 121, 130 (App. Div. 1964) (employee who, during period of employment, carries out conspiracy to compete with employer violates duty of loyalty); Lowndes Prod., Inc. v. Brower, 259 S.C. 322, 335, 191 S.E.2d 761, 768 (1972) (employee violated duty by appropriating employer's "carefully developed business relationship" while still in his employ); *see also* RESTATEMENT (SECOND) OF AGENCY § 393 comment e (1957) (an agent may not "solicit customers for . . . rival business before the end of his employment nor can he properly do other similar acts in direct competition with the employer's business").

9. RESTATEMENT (SECOND) OF AGENCY § 393 comment e (1957).

10. *See, e.g.*, Arnold's Ice Cream Co. v. Carlson, 330 F. Supp. 1185, 1187 (E.D.N.Y. 1971) (employee violated responsibility to employer by soliciting employer's customers before resigning).

11. *See, e.g.*, Bancroft-Whitney Co. v. Glen, 64 Cal. 2d 327, 347-48, 49 Cal. Rptr. 825, 840, 411 P.2d 921, 936 (1966) (corporate president's efforts to obtain key employees for its competitor constituted a breach of fiduciary duties); Duane Jones Co. v. Burke, 306 N.Y. 172, 188-89, 117 N.E.2d 237, 245 (1954) (employees violated fiduciary duty to employer by diverting over half of employer's personnel into employees' newly formed corporation).

12. *E.g.*, McLean v. Hubbard, 24 Misc. 2d 92, 96-97, 194 N.Y.S.2d 644, 648-50 (Sup. Ct. 1959), *aff'd* 208 N.Y.S.2d 443 (1960) (injunction granted where former manager of telephone service set up own answering service using knowledge obtained through such employment); United Bd. & Carton Corp. v. Britting, 61 N.J. Super. 340, 347, 160 A.2d 660, 664 (App. Div. 1960) (injunction against former employee limited to prevent him from dealing with customers to whom he sold while actually working for the employer); Duane Jones Co. v. Burke, 306 N.Y. 172, 188-89, 117 N.E.2d 237, 245 (1954) (damages appropriate where employees violated fiduciary duty to employer by diverting over half of employer's personnel into employees' newly formed corporation).

action as arising from a breach of the agent's duty of loyalty rather than from the principal's interest in information.[13]

After the agency terminates, the agent's fiduciary obligations become less stringent and the agent is free to compete with the former principal.[14] Even if the agent has not violated any pretermination duties, however, a court may still enjoin or impose damages for the agent's posttermination use of certain information obtained during the agency relationship.[15] In these cases, courts generally justify such action either by characterizing the protected information as the exclusive property of the principal,[16] or by deriving the principal's interest in the protected information from the confidential nature of the agency relationship itself.[17] The best rationale incorporates elements of both justifications. The principal has a legitimate interest in freely communicating information to agents without fearing they will later use the information to the principal's detriment.[18] In assessing the propriety of any postassociational restraint, a court must balance the principal's interest in the information against the agent's acknowledged rights to terminate the relationship, compete with the former principal, and preserve personal market skills.[19] In this balancing, a court must

13. *See supra* text accompanying notes 7-11. Because the duty of loyalty, rather than the principal's protectable information, is the basis of granting relief to plaintiff-employers in pretermination cases, posttermination restraints arising from a breach of pretermination duty are not the focus of this Article.

14. *See* RESTATEMENT (SECOND) OF AGENCY § 396(a) (1957) (unless otherwise agreed, the agent may compete with a former principal). *But see id.* § 396(b)-(d) (limiting the no duty rule).

15. *Id.* § 396(b)-(d).

16. *See, e.g.*, By-Buk Co. v. Printed Cellophane Tape Co., 163 Cal. App. 2d 157, 164, 329 P.2d 147, 151 (1958) (characterizing confidential information as property of the employer which is held in trust by the employee); Donahue v. Permacel Tape Corp., 1234 Ind. 398, 404, 127 N.E.2d 235, 240 (1955) (employer has property rights in confidential information). *Cf.* MILGRIM, *supra* note 2, § 1.01, at 1-2 (courts generally hold that trade secrets are property).

17. *See* E.I. Du Pont De Nemours Power Co. v. Masland, 244 U.S. 100, 102 (1917) (confidential relationship requires nondisclosure of information acquired through that relationship, regardless of whether the information is "property"); Smith v. Dravo Corp., 203 F.2d 369, 375-76 (7th Cir. 1953) (information protected because it is secret); Structural Dynamics Research Corp. v. Engineering Mechanics Research Corp., 401 F. Supp. 1102, 1111 (E.D. Mich. 1975) (duty not to disclose trade secrets derived from confidential relationship). Courts have also found "an implied contract" not to disclose confidential information obtained in the course of a confidential relationship. *E.g.*, Westervelt v. Nat'l Paper & Supply Co., 154 Ind. 673, 678-79, 57 N.E. 552, 554 (1900).

18. *See* Hutter, *Trade Secret Misappropriation: A Lawyer's Practical Approach to the Case Law*, 1 W. NEW ENG. L. REV. 1, 7-9 (1978) (enumerating various approaches courts use to conclude that principal has legitimate interest in trade secrets). One can view this information, which provides the agent with special skill or knowledge, as an asset of the principal. *See* RESTATEMENT (SECOND) OF AGENCY § 396 comment b (1957) (principal's information is often a unique asset of great value).

19. RESTATEMENT (SECOND) OF AGENCY § 396 comment b (1957).

distinguish between the protectable information that legitimately belongs to the principal and the knowledge, personality traits, and market skills that the agent validly possesses.[20]

The *Restatement (Second) of Agency* delineates the ambit of each party's interest by focusing upon the concepts of trade secrets and confidential information.[21] If the principal invested energy and effort in developing the information, and treated the information as secret or revealed it confidentially to the agent, then the principal has a protectable interest in the information.[22] The former agent may not use this information or disclose it to third parties.[23] The agent may continue to use personal skills, including those acquired or honed during the course of the agency, as well as generally known or available information regarding the business.[24]

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20. *See, e.g.,* Revcor, Inc. v. Fame, Inc., 85 Ill. App. 2d 350, 357-58, 228 N.E.2d 742, 746 (1967) (agent need not ignore his own general talent and friendships when competing with former employer so long as no special confidence is violated); Lamb v. Quality Inspection Serv., Inc., 398 So. 2d 643, 648 (La. Ct. App. 1981) ("What is entitled to protection is knowledge confidentially gained, but an employer cannot prevent his employee from using the skill or intelligence acquired through experience received in the course of the employment"); Hallmark Personnel of Texas, Inc. v. Franks, 562 S.W.2d 933, 936 (Tex. Civ. App. 1978) (employee may use his inventive powers but not his principal's trade secret).

21. The agent:

> (b) has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty. The agent is entitled to use general information concerning the method of business of the principal and the names of the customers retained in his memory, if not acquired in violation of his duty as agent;
> (c) has a duty to account for profits made by the sale or use of trade secrets and other confidential information, whether or not in competition with the principal; [and]
> (d) has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation.

RESTATEMENT (SECOND) OF AGENCY § 396(b)-(d) (1957).

22. *Id.* § 396(b).

23. *Id.*

24. *Id. See also id.* § 396 comments b, g. Some courts have found no protectable interest of the principal when the information was retained in the agent's memory. *See, e.g.,* Leo Silfen, Inc. v. Cream, 29 N.Y.2d 387, 389-95, 278 N.E.2d 636, 637-41, 328 N.Y.S.2d 423, 425-31 (1972) (allowing former employee to use customer list because he did not compile it by "a physical taking or studied copying"). The best approach focuses on the secrecy of the information or the confidentiality of the attendant circumstances: "The mere fact that an ex-employee has a good memory and needs no tangible records seems to be a slender reed upon which to hang a finding of nonliability." 2 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 29:5 (1973). Memorized information can therefore still be subject to a postassociational restraint. *See, e.g.,* Adolph Gottscho, Inc. v. American Marking Corp., 35 N.J. Super. 333, *passim*, 114 A.2d 19, *passim* (Ch. Div. 1954) (granting injunction against former employee who knew machine design well enough to recreate it for competitor without actual blueprints or copies), *aff'd*, 18 N.J. 467, 114 A.2d 438 (1955). *See also* 2 J. MCCARTHY, *supra* (concluding that it is immaterial whether information is written or memorized).

The precise definition of a trade secret and the degree of secrecy or confidentiality sufficient to support a postassociational restraint is a matter of state law[25] and thus varies with the particular jurisdiction. The *Restatement of Torts*[26] describes the factors which determine whether an employer has a trade secret:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[27]

The concept of a trade secret is therefore not limited to any particular subject matter or type of information.[28] Trade secrets can range from complex, high technology information[29] to simple lists of the principal's customers.[30]

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25. *E.g.*, Sims v. Mack Truck Corp., 608 F.2d 87, 95 (3d Cir. 1979), *cert. denied*, 445 U.S. 930 (1980). *See* MILGRIM, *supra* note 2, § 2.01, at 2-2.1 to -12 (compiling various definitions of "trade secret").

26. The authors of the *Restatement (Second) of Torts* omitted the sections appearing in the *Restatement of Torts* pertaining to "liability for harm caused by unfair trade practices." RESTATEMENT (SECOND) OF TORTS, division 9 introductory note, at 1 (1977). In the belief that this area of law is of historical interest only, the authors of the *Restatement (Second) of Torts* stated that it is "no more dependent upon Tort law than it is on many other general fields of the law and upon broad statutory developments, particularly at the federal level." *Id.* Courts, however, continue to rely on the *Restatement of Torts* in this area. *See, e.g.*, cases cited *infra* note 31.

27. RESTATEMENT OF TORTS § 757 comment b (1939).

28. The *Restatement* defines a trade secret as follows:

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business.

Id.

29. *See, e.g.*, Analogic Corp. v. Data Translation, Inc., 371 Mass. 643, 644-46, 358 N.E.2d 804, 805-06 (1976) (proprietary information learned during development of high speed data acquisition module is trade secret); B.F. Goodrich Co. v. Wohlgemuth, 117 Ohio App. 493, 499, 192 N.E.2d 99, 104 (1963) (knowledge of the manufacture of space suits is trade secret).

30. *E.g.*, Hayes-Albion Corp. v. Kuberski, 108 Mich. App. 642, 650-52, 311 N.W.2d 122, 126-27 (1981). Customer lists are not protected if the information can be compiled from sources readily available to those in the industry.

> The general rule is that, where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products, trade secret protection will not attach and courts will not enjoin the former employee from soliciting his previous employer's customers. Customer lists are protected,

The core inquiry in determining whether certain information is protectable is the principal's relation to the information—that is, the degree to which the principal created the information or treated it as a valuable, nonpublic asset.[31] Protectable information may include information that is shrouded by a cloak of confidentiality due to the nature of the agency relationship but that does not technically qualify as a trade secret.[32] In these cases, the agent has usually acquired the information in the course of a confidential relationship or through improper means.[33] In either circumstance the principal has a reasonable expectation of confidentiality.[34]

Jurisdictional differences in the definitions of trade secrets and confidential information are beyond the scope of this Article. It is sufficient to state here that the principal's protectable interest is defined by the applicable state's concept of secrecy and confidentiality. If no protectable interest exists, then the principal has no right to prohibit the former agent from using the information, and, consequently, no post-

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on the other hand, where the customers are not known in the trade or are discoverable only by extraordinary efforts or where an employee appropriates the list by copying or studied memory.

AGA Aktiebolag v. ABA Optical Corp., 441 F. Supp. 747, 754 (E.D.N.Y. 1977) (citation omitted).

31. *See, e.g.,* Eaton Corp. v. Appliance Valves Corp., 526 F. Supp. 1172, 1178-79 (N.D. Ind. 1981) (information qualifies as a trade secret or confidential information when employer intended to keep information secret and incurred cost in gaining information); Holiday Food Co. v. Munroe, 37 Conn. Supp. 546, 550-51, 426 A.2d 814, 816-17 (Super. Ct. 1981) (applying *Restatement of Torts*' six factors to determine whether customer list is a trade secret); Lamb v. Quality Inspection Serv., Inc., 398 So. 2d 643, 645 (La. Ct. App. 1981) (test for trade secrecy includes whether information is valuable and secret).

32. *See, e.g.,* Leo Silfen, Inc. v. Cream, 29 N.Y.2d 387, 391, 278 N.E.2d 636, 639, 328 N.Y.S.2d 423, 427 (1972) (had there been a physical taking of a customer list it might not have been a violation of a trade secret but an "egregious breach of trust and confidence"); *see also* RESTATEMENT (SECOND) OF AGENCY § 396(b) (1957) (prohibiting agent's use of trade secrets or "other similar confidential matters").

33. *See* Hutter, *supra* note 18, at 9 (trade secret law prohibits only acquisition of confidential information by unfair means).

34. *Compare* AGA Aktiebolag v. ABA Optical Corp., 441 F. Supp. 747, 754 (E.D. N.Y. 1977) (lists of prospective customers rather than actual customers do not receive trade secret protection) *with* RESTATEMENT OF TORTS § 757 comment b (1939) (information which is not a trade secret may be protected if acquired in a confidential relationship or through improper means). Confidential information is not clearly defined by the courts or commentators. As noted in the *Restatement of Torts*, confidential information includes more than just trade secrets. Confidential information should include the items of knowledge necessary to make the particular relationship economically efficient—information which the principal must disclose to the agent to obtain the full value of the relationship and which should not, in fairness, be subsequently employed against the principal by competitors. This rationale supports a principal's protectable interest in confidential information in the covenant context: "Arguably the employer does not get the full value of the employment contract if he cannot confidently give the employee access to confidential information needed for most efficient performance of his job." RESTATEMENT (SECOND) OF CONTRACTS § 188 comment b (1979). *See infra* text accompanying notes 53-54, 75.

associational restraint will be available.[35]

If a protectable interest does exist, courts have a variety of remedies to limit the agent's activities and ensure the requisite protection. A court may order the offending agent to pay damages based on the agent's misuse of the principal's asset.[36] The court may also enjoin the agent from soliciting certain customers or employees of the principal or restrain the agent from using or disclosing the principal's protected information.[37] Courts are reluctant, however, to impose an occupational ban upon a former agent,[38] and reserve this drastic remedy for those cases in which the agent's subsequent employment involves an inevitable or substantial risk of disclosure or appropriation of the principal's information.[39] In imposing a ban on a type of subsequent employment, the court may condition the order upon the principal's payment of a salary to the agent for the effective period of the ban.[40] Thus, in the absence of contractual agreement, courts may order damages for past misuse or issue postassociational restraints ranging from narrow restrictions upon the use of protected information to bans on practicing an occupation inextricably related to the use of such information.

Agency principles dictate that, if the principal's interest warrants the imposition of a restraint on the former agent's activities, the duration of the restriction must also be limited by the nature of the protected information.[41] The length of an injunction is therefore normally

35. *E.g.,* Leo Silfen, Inc. v. Cream, 29 N.Y.2d 387, 394-96, 278 N.E.2d 636, 640-42, 328 N.Y.S.2d 423, 429-31 (1972); Abbott Laboratories v. Norse Chemical Corp., 33 Wis. 2d 445, 465-68, 147 N.W.2d 529, 539-41 (1967).

36. The actual standard for computation of damages varies greatly from jurisdiction to jurisdiction. *See* Annot., 11 A.L.R.4TH 4-12 (1982) (presenting various measures of damages for misappropriation of trade secrets). *See also supra* note 12 and accompanying text.

37. *E.g.,* AGA Aktiebolag v. ABA Optical Corp., 441 F. Supp. 747, 755 (E.D.N.Y. 1977); United Bd. & Carton Corp. v. Britting, 61 N.J. Super. 340, 346-47, 160 A.2d 660, 663-64 (App. Div. 1960).

38. *See, e.g.,* E.W. Bliss Co. v. Struthers-Dunn, Inc., 408 F.2d 1108, 1114-15 (8th Cir. 1969) (lower court order too broad because it restrained defendants beyond unlawful competition); Pemco Corp. v. Rose, 257 S.E.2d 885, 891 (W. Va. 1979) (restraint that employee shall "not engage, either directly or indirectly, in any business or enterprise, the nature of which is competitive to the company's business" is too broad).

39. *See* B.F. Goodrich Co. v. Wohlgemuth, 117 Ohio App. 493, 500-01, 192 N.E.2d 99, 105 (1963) (former employee enjoined from working for competitor because risk of disclosure threatened "irreparable injury" to former employer).

40. Emery Indus., Inc. v. Cottier, 202 U.S.P.Q. (BNA) 829, 836-37 (S.D. Ohio 1978) (enjoining former employee for one year).

41. *See, e.g.,* Henry Hope X-Ray Prod., Inc. v. Marron Carrel, Inc., 674 F.2d 1336, 1342 (9th Cir. 1982) ("The limitation to confidential information contains the implicit temporal limitation that information may be disclosed when it ceases to be confidential"); Bryan v. Kershaw, 366 F.2d 497, 499 (5th Cir. 1966) (injunction to run for time "necessary to remove the competitive advan-

determined by the period of time that the information is expected to remain useful, secret, or confidential.[42] The proscribed period is frequently limited to the time it would take an analogous reasonable agent to discover the protected information independently.[43] Because the scope of a principal's protectable interest depends on secrecy and confidentiality,[44] the extent of the restraint imposed in the noncontractual cases is coextensive with the principal's protectable interest.

Agency law properly accommodates the principal's interest in protecting valuable information and the agent's right to pursue a chosen occupation. Agency rules preventing the misuse of protectable information rarely require or justify imposing an occupational ban on the agent. By contrast, application of contract principles and specific terms of covenants not to compete often results in overprotection of the principal's interest at the expense of the agent's right to practice a trade. The next section analyzes current judicial treatment of covenants not to compete.

II. COVENANTS NOT TO COMPETE

A. THE CURRENT APPROACH

When a party to a contract seeks to have a court either enforce or declare invalid a contractual restriction on an agent's postemployment activities, courts have generally applied the rules of contract law independent of and oblivious to the noncontractual agency precepts.[45] The legality of any covenant not to compete is initially suspect as a restraint of trade.[46] Courts—and many legislatures[47]—disfavor re-

tage gained through the illegally used trade secrets"); Plant Indus., Inc. v. Coleman, 287 F. Supp. 636, 645 (C.D. Cal. 1968) (ex-employer's trade secret could legitimately be duplicated within 18 months; injunction against use to run for that reasonable time period). *See generally* Hutter, *supra* note 2, at 332-35 (describing reasonable time restraints).

42. *Id.*

43. *See, e.g.,* Allis-Chalmers Mfg. Co. v. Continental Aviation & Eng'g Corp., 225 F. Supp. 645, 654 (E.D. Mich. 1966) (limiting injunction until the information comes into defendant's possession legitimately); Revcor, Inc. v. Fame, Inc., 85 Ill. App. 2d 350, 356, 228 N.E.2d 742, 745 (1967) (proper time frame of injunction is period required to duplicate process by lawful means); Analogic Corp. v. Data Translation, Inc., 371 Mass. 643, 648, 358 N.E.2d 804, 808 (1976) (employer's trade secrets entitled to be "protected at least until others in the trade are likely, through legitimate business procedures, to have become aware of these secrets").

44. *See supra* text accompanying notes 34-35.

45. Noncontractual postassociational restraints are a relatively recent legal development, whereas covenants not to compete have been litigated since the early period of English common law. For a discussion of the early English cases, see Blake, *supra* note 4, at 629-37.

46. *See* RESTATEMENT (SECOND) OF CONTRACTS § 186 (1979) (promises that limit competition or restrict promisor's exercise of gainful occupation are restraints of trade).

straints of trade and, consequently, courts tend to construe covenants not to compete against the principal seeking its enforcement.[48]

Aside from the traditional distaste with which courts view agreements restraining trade, modern courts recognize the inherent tension raised by covenants not to compete. On the one hand, courts are aware these restrictions place a heavy burden upon the ability of agents to pursue their careers and practice their skills.[49] Public policy favoring agent mobility and free competition is evident in the near-unanimous judicial acknowledgement of the covenant's disfavored status as a restraint of trade.[50] Courts also perceive the covenant as inherently unfair because the principal's bargaining power is usually superior to the agent's.[51] This negotiating imbalance enhances the likelihood that the

47. Certain states regulate the validity of covenants not to compete by statute. Some jurisdictions declare them invalid pursuant to a general state antitrust statute. *E.g.,* N.C. GEN. STAT. § 75-2 (1981). Others specifically declare unreasonable covenants not to compete invalid. *E.g.,* LA. REV. STAT. ANN. § 23.921 (West 1964); WIS. STAT. ANN. § 103.465(West 1974). A final group specifically declares covenants illegal, but with some exceptions—usually for covenants ancillary to a sale of business or the dissolution of a partnership. *E.g.,* CAL. BUS. & PROF. CODE §§ 16600-16602 (West 1964); FLA. STAT. ANN. § 542.33 (West Supp. 1983); MONT. CODE ANN. §§ 28-2-703 to -705 (1983); N.D. CENT. CODE § 9-08-06 (1975); OKLA. STAT. tit. 15, §§ 217-219 (1966); OR. REV. STAT. § 653.295 (1981); S.D. CODIFIED LAWS ANN. §§ 53-9-8 to -11 (1980). Typical exceptions are as follows:

> (b) One who sells the good will of a business may agree with the buyer and one who is employed as an agent, servant or employee may agree with his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a specified county, city or part thereof so long as the buyer, or any person deriving title to the good will from him, or employer carries on a like business therein.
>
> (c) Upon or in anticipation of a dissolution of the partnership, partners may agree that none of them will carry on a similar business within the same county, city or town, or within a specified part thereof, where the partnership business has been transacted. . . .

ALA. CODE § 8-1-1 (1975).

48. *See, e.g.,* Josten's, Inc. v. Cuquet, 383 F. Supp. 295, 297- 99 (E.D. Mo. 1974) (refusing to enforce covenant not to compete because employer could not prove its enforcement necessary to avoid irreparable injury).

49. *See* Van Prod. Co. v. General Welding & Fabricating Co., 419 Pa. 248, 261, 213 A.2d 769, 776 (1965) (noting other courts recognize that denying employee use of his wealth of experience would "wipe out his means of livelihood").

50. *See supra* notes 46-48 and accompanying text. In a well-known opinion, a court noted that a restrictive covenant, "[b]eing a contract in restraint of trade[,] . . . is presumptively void." Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685, 693 (Ohio C.P. Cuyahoga County 1952). *See also* Purchasing Assocs., Inc. v. Weitz, 13 N.Y.2d 267, 272, 196 N.E.2d 245, 247, 246 N.Y.S.2d 600, 604 (1963) (strong policy considerations "against sanctioning the loss of a man's livelihood"). The common law policy against restraints of trade has been described as "one of its oldest and best established." RESTATEMENT (SECOND) OF CONTRACTS division 8 introductory note, topic 2 (1979).

51. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188 comment g (1979) (courts scrutinize these restraints "with particular care because they are often the product of unequal bargaining power").

covenant will restrict the agent's mobility to an extent far greater than any legitimate need of the principal. The agent, eager for the job opportunity, is not likely to seriously consider the potentially devastating impact of such a covenant on a career.[52] On the other hand, courts are sympathetic to the principal's need to protect trade secrets, confidential information, and goodwill.[53] The cases consequently recognize that the principal has a legitimate interest in protecting the economic efficiency of business relationships. Economic policy dictates that the principal be free to communicate information to employees without fearing future adverse use of such information by a departed employee.[54]

Balancing these competing policies has led modern courts to scrutinize covenants not to compete by stating, first, that any such covenant, ancillary to an agency relationship, is unenforceable unless it protects some legitimate interest of the principal.[55] Thus, the heart of the contract analysis of the restraint, similar to that of the agency analysis, lies in the definition of the principal's protectable interests. In the covenant cases, such interests encompass the agent's possession of trade secrets[56] or some other form of confidential information.[57] In addition, when the agent has had significant customer contact[58] or possesses skills that are considered extraordinary or unique in the market, courts recognize

52. *Id.*

53. *See infra* note 55; *see also* Structural Dynamics Research Corp. v. Eng'g Mechanics Research Corp., 401 F. Supp. 1102, 1110 (E.D. Mich. 1975) (policy underlying trade secrecy law considers need for useful knowledge to be discovered and protection of discoverer to encourage inventiveness); Mixing Equip. Co. v. Philadelphia Gear, Inc., 312 F. Supp. 1269, 1274 (E.D. Pa. 1970) (according trade secret status to fruits of research in form of charts, graphs, and tables for daily use), *modified*, 436 F.2d 1308 (3d Cir. 1971).

54. RESTATEMENT (SECOND) OF CONTRACTS § 188 comments b, c, g (1979); see MILGRIM, *supra* note 2, § 5.02[2], at 5-15 (justifying employer's property right in trade secrets as both encouraging development of new technology and creating job opportunities and employment stability).

55. *E.g.*, American Broadcasting Cos. v. Wolf, 52 N.Y.2d 394, 403, 420 N.E.2d 363, 367, 438 N.Y.S.2d 482, 486 (1981); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(a) (1979) (restraints are unreasonable if greater than needed to protect promised legitimate interest); Blake, *supra* note 4, at 649 (restraints are reasonable only if no greater than necessary to protect employer's legitimate interest).

56. *E.g.*, Mixing Equip. Co. v. Philadelphia Gear, Inc., 436 F.2d 1308, 1312-13 (3d Cir. 1971).

57. *E.g.*, Gorman Publishing Co. v. Stillman, 516 F. Supp. 98, 105 (N.D. Ill. 1980); Structural Dynamics Research Corp. v. Eng'g Mechanics Research Corp., 401 F. Supp. 1102, 1114 (E.D. Mich. 1975); All Stainless, Inc. v. Colby, 364 Mass. 773, 779-80, 308 N.E.2d 481, 485-86 (1974); Reed, Roberts Assocs., Inc. v. Strauman, 40 N.Y.2d 303, 306-08, 553 N.E.2d 590, 593-94, 386 N.Y.S.2d 677, 680 (1976); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 188 comment g (1979) (employer's interest in confidential trade information).

58. *E.g.*, North Pac. Lumber Co. v. Moore, 275 Or. 359, 364-66, 551 P.2d 431, 434-35 (1976); Sidco Paper Co. v. Aaron, 465 Pa. 586, 593-94, 351 A.2d 250, 253-54 (1976); Hospital Consultants,

an interest sufficient to support a restraint.[59]

If the court finds that the principal has a protectable interest,[60] it then examines the reasonableness of the restraint in light of the attendant circumstances.[61] Originating in the English common law treatment of the validity of covenants not to compete,[62] the modern formulation of the reasonableness standard is analogous to the "rule of reason" traditionally applied in a restraint of trade inquiry under section one of the Sherman Antitrust Act.[63] In analyzing the reasonableness of covenants not to compete, courts look to the geographic scope of the agreement,[64] the length of time the restraint is to continue,[65] and the types of

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Inc. v. Potyka, 531 S.W.2d 657, 661 (Tex. Civ. App. 1975). *See generally* Blake, *supra* note 4, at 653-67 (discussing employer's protectable interest in employee's contact with clientele).

59. *E.g.,* Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685, 696 (Ohio C.P. Cuyahoga County 1952). Determining whether an agent is unique theoretically does not depend on the excellence of his work, his competence, or his expertise but rather focuses on the possibility of replacing the agent or the irreparable harm that the principal would suffer upon losing the agent's services. Hutter, *supra* note 1, at 327. *E.g.,* Mixing Equip. Co. v. Philadelphia Gear, Inc., 436 F.2d 1308, 1313 (3d Cir. 1971). *See generally* Kniffin, *Employee Noncompetition Covenants: The Perils of Performing Unique Services*, 10 RUT.-CAM. L. REV. 25, 36-52 (1978) (discussing factors that comprise employee uniqueness).

60. Because the concept of an employer's protectable interest has been inconsistently defined, some courts have concluded too rapidly that the mere presence of a covenant not to compete imbues the principal with a protectable interest. *See, e.g.,* Continental Group, Inc. v. Kinsley, 422 F. Supp. 838, 844 (D. Conn. 1976) (covenants are result of conscious choice and therefore reasonable ones may be enforced); Foster and Co. v. Snodgrass, 333 So. 2d 521, 522 (Fla. Dist. Ct. App. 1976) (covenant is enforceable so long as not "harsh or oppressive").

61. RESTATEMENT (SECOND) OF CONTRACTS § 188 comment d (1979); Blake, *supra* note 4, at 674. *E.g.,* Reed, Roberts Assocs., Inc. v. Strauman, 40 N.Y.2d 303, 307, 353 N.E.2d 590, 592-93, 386 N.Y.S.2d 677, 679 (1976).

62. *See* Blake, *supra* note 4, at 629-46 (discussing early English cases).

63. 15 U.S.C. §§ 1-7. The "rule of reason" inquiry developed in antitrust cases when courts were confronted by a statute that, on its face, declared void all agreements which restrained trade. Because every business contract is, to some extent, a restraint of trade, the efficient working of the economy demanded that business agreements which only arguably or incidentally restrained trade be found valid. Interpreting the Sherman Act to proscribe only unreasonable restraints was justified by the fear that if the Act were applied literally it would negate all business contracts. In contrast to antitrust restraints, there is no need to salvage a core group of covenants not to compete. Therefore, despite its merit in the antitrust setting, a reasonableness inquiry does not seem appropriate to evaluate a covenant's validity.

64. *See, e.g.,* Marine Contractors Co. v. Hurley, 365 Mass. 280, 289, 310 N.E.2d 915, 920 (1974) (restriction on practicing trade within 100 miles of former employer valid since employee worked that area); Harwell Enters., Inc. v. Heim, 276 N.C. 475, 478-81, 173 S.E.2d 316, 318-20 (1970) (restrictive covenant barring competition in the entire United States reasonable when employer engaged in nationwide activities); Boldt Mach. & Tools, Inc. v. Wallace, 469 Pa. 504, 516, 366 A.2d 902, 908 (1976) (covenant including "the employer's total trade territory" too broad where employee only worked a portion of such territory).

65. *See, e.g.,* Rector-Phillips-Morse, Inc. v. Vroman, 253 Ark. 750, 752-53, 489 S.W.2d 1, 3 (1973) (three-year restraint exceeded useful life of trade secret information); Beckman v. Cox Broadcasting Corp., 250 Ga. 127, 130, 296 S.E.2d 566, 569 (1982) (covenant prohibiting television

agent activity subject to restraint.[66] The reasonableness of any particular restraint is theoretically tempered by the nature and extent of the principal's protectable interests.[67] Courts may also invalidate restrictions on public policy grounds.[68] Courts implicitly acknowledge the subjectivity inherent in this inquiry by disavowing precedent and noting that each case must be evaluated in light of its own unique factual circumstances.[69]

If the court finds the restriction imposed by the covenant reasonable, it will enforce the covenant.[70] But if the court finds the covenant unreasonable in whole or in part, the enforcement issue becomes more uncertain. Some courts hold unreasonableness in any one of the relevant areas of inquiry—time, space, or activity—renders the entire covenant invalid and unenforceable.[71] Other courts employ a "blue pencil"

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personality from appearing on the air for six months reasonable); John G. Bryant Co. v. Sling Testing and Repair, Inc., 471 Pa. 1, 13, 369 A.2d 1164, 1170 (1977) (three-year restrictive covenant reasonable when that duration of time needed to strengthen and reaffirm business contacts).

66. *See, e.g.,* Barnes Group, Inc. v. Harper, 653 F.2d 175, 180 (5th Cir. 1981) (covenant barring agent from soliciting principal's customers valid); Karpinski v. Ingrasci, 28 N.Y.2d 45, 50-51, 268 N.E.2d 751, 754, 320 N.Y.S.2d 1, 5-6 (1971) (covenant barring oral surgeon from working in dentistry or oral surgery too broad); Pemco Corp. v. Rose, 257 S.E.2d 885, 891 (W. Va. 1979) (covenant barring employee from engaging in any competitive business unduly oppressive).

67. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188 comment d (1979) (unreasonableness is that which goes beyond what is necessary to protect promisee's legitimate interests).

68. *See, e.g.,* Josten's Inc. v. Cuquet, 383 F. Supp. 295, 299 (E.D. Mo. 1974) (disparity in size and market power is a public policy factor to be taken into consideration when determining validity of restrictive covenant); Dwyer v. Jung, 137 N.J. Super. 135, 136, 348 A.2d 208, 208 (App. Div. 1975) (voiding covenant in law partnership agreement as against public policy); *cf.* Gelder Medical Group v. Webber, 41 N.Y.2d 680, 685, 363 N.E.2d 573, 577, 394 N.Y.S.2d 867, 871 (1977) (considering, but rejecting on the facts, shortage of doctors as policy ground to refuse to enforce restrictive covenant); RESTATEMENT (SECOND) OF CONTRACTS § 188 comment h, illustration 14 (1979) (shortage of doctors in particular area covered by covenant should void some covenants on public policy grounds). Some commentators believe that public policy is not actually a factor in the reasonableness analysis despite courts' statements to the contrary. *See* Handler & Lazaroff, *supra* note 5, at 720 (public injury should not be distinct element of proof in covenant cases).

69. *See, e.g.,* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Stidham, 658 F.2d 1098, 1101 (5th Cir. 1981) (because authorities on restrictive covenants are "at war," the standard of reasonableness has "been rendered hollow and meaningless"); *see also* Hutter, *supra* note 2, at 328-29 (this area of law is a "mass of factually distinct and irreconcilable decisions").

70. *See* Blake, *supra* note 4, at 648-49 (reasonable restraints valid); Handler & Lazaroff, *supra* note 5, at 758-63 (if the geographic and temporal scope of restraint bears a direct relationship to the protection needed, covenant is valid).

71. *See, e.g.,* Rector-Phillips-Morse, Inc. v. Vroman, 253 Ark. 750, 753-56, 489 S.W.2d 1, 4 (1973) (refusing to grant partial injunctive relief when only the temporal element of a restrictive covenant was offensive); Purcell v. Joyner, 231 Ga. 85, 86-87, 200 S.E.2d 363, 365 (1973) (declining to apply "theory of severability" to invalidate unreasonable aspects of otherwise reasonable covenant); Note, *Employee Covenants Not to Compete: Where Does Virginia Stand?*, 15 U. RICH. L. REV. 105, 135-37 (1980) (minority of courts will declare entire covenant void if portions thereof are unreasonable).

rule, invalidating the unreasonable portions of the covenant while enforcing other parts of the agreement that are grammatically separable from the offending portions.[72] Finally, some courts rewrite the offending covenant to the extent deemed reasonable under the circumstances.[73] These courts then enforce the "rewritten" restraint against the former agent. Courts in this third group will not rewrite the restraint if the principal negotiated or imposed the restriction in bad faith.[74] In summary, courts vary widely in their approaches to enforcing covenants not to compete.

B. A CRITIQUE OF THE CURRENT APPROACH

The modern analysis of covenants not to compete is unsatisfactory in its conception and inconsistent in its application. The extent of the principal's protectable interest should be the most significant inquiry in judicial evaluation of a covenant not to compete. Unfortunately, courts fail to adequately scrutinize or define the protectable interest of the principal in analyzing such covenants. Although trade secrets and confidential information are properly included within the scope of the principal's protectable interests, an agent's exposure to customers or possession of unique skills is not. The agent's attributes are therefore irrelevant in determining the scope of protectable information.

An agent's relationship with customers is a function of individual personality and particular market skills unless the information at the core of the relationship qualifies as a trade secret or confidential infor-

72. One court described the blue pencil rule as follows:

> There is a line of authority which states that if the territory specified in the contract is by the phraseology of the contract so described as to be divisible, the contract is separable and may be enforced as to such portions of the territory so described as are reasonable. This is the so-called "blue-pencil rule" and applies only to cases where the contract in terms specifies several distinct areas, so that erasing the description of one or more of those areas leaves the description of an area for which the restriction is reasonable.

Timenterial, Inc. v. Dagata, 29 Conn. Supp. 180, 184, 277 A.2d 512, 514 (Super. Ct. 1971). The blue pencil rule, endorsed by the *Restatement of Contracts* § 518, has been disavowed by the *Restatement (Second) of Contracts* as "contrary to the weight of authority." RESTATEMENT (SECOND) OF CONTRACTS § 184 Reporter's Note (1979).

73. *E.g.,* Solari Indus., Inc. v. Malady, 55 N.J. 571, 585, 264 A.2d 53, 61 (1970); Raimonde v. Van Vlerah, 42 Ohio St. 2d 21, 25-26, 325 N.E.2d 544, 547 (1975); Sidco Paper Co. v. Aaron, 465 Pa. 586, 596-99, 351 A.2d 250, 254-57 (1976).

74. E. FARNSWORTH, CONTRACTS § 5.8, at 363 (1982). The purpose of the good faith requirement is to discourage principals from drafting overbroad covenants for their in terrorem effect on agents. *See* RESTATEMENT (SECOND) OF CONTRACTS § 184 comment a (1979) (a party who engaged in serious misconduct cannot take advantage of partial enforcement rule). Some courts presume, however, that a principal is acting in good faith. *E.g.,* Raimonde v. Van Vlerah, 42 Ohio St. 2d 21, 25, 325 N.E.2d 544, 547 (1975). For a criticism of this presumption, see MILGRIM, *supra* note 2, § 3.02[2], at 3-76 to -79.

mation.[75] Similarly, an agent's heightened level of expertise or competence is a skill belonging to the agent if it is not attributable to trade secrets or confidential information.[76] Including either quality within the ambit of a protectable interest insulates the principal from a former agent's legitimate competition.[77] Those decisions stating that the mere

75. The concept of confidential information appears to encompass the situation involving contacts between customers and agents where, by virtue of the fungible nature of the product involved and the frequency and regularity of the contacts between the customer and the agent, the customer perceives the agent as *being* the principal or "the business." This situation occurs most commonly in the route salesman context. The customer contacts here are essential to the economic efficiency of the principal-agent relationship. *See supra* note 34. The principal's protectable interest here is simply the right to inform customers that the principal remains a source for the product previously provided by the agent. The restraint should therefore be limited to the period the principal needs to introduce the new agent to the customers. *See infra* note 94; *see also* MICH. COMP. LAWS ANN. § 445.766 (West 1967) (allowing exception to general invalidity of noncompetition covenants and providing for enforcement of covenants in the "route salesman" context for a 90 day period following termination of the contract or services); *Developments in the Law, Competitive Torts*, 77 HARV. L. REV. 888, 956-57 (1964):

> Because [in the route driver context] the customers' only contact with the employer normally is through the driver and the product usually is similar to that of competitors, customers may often follow the deliveryman when he leaves. It is this customer contact, not any secretness of the list, that is important, so these cases do not really fall within the trade secret category. . . . Where product differentiation is minimal, the case for preventing solicitation of former customers for a limited period of time is strong, while customers will not have products delivered by persons known to them, they are still free to choose among suppliers on the basis of their products. And though the deliveryman will lose the advantage of customer contact, in most cases the work of others initially induced the customer to buy the product, and the deliveryman's personal contact is a byproduct of his primary job. The most appropriate remedy would be a temporary injunction forbidding him from soliciting former customers until his former employer's new deliveryman has had an opportunity to become acquainted with the customers.

Id. The imposition of the restraint is properly based on the principal's protectable interest rather than the existence or nonexistence of a contract. *See* Blake, *supra* note 4, at 653-67 (discussing extra protection afforded principal in area of customer relationships).

76. *See* 6A A. CORBIN, *supra* note 1, at 97-100 (exceptional skill of employee should have no bearing on question of restraint's illegality); C. KAUFMAN, CORBIN ON CONTRACTS § 1391B (Supp. 1982) (analogizing that "Princeton could not have enjoined Albert Einstein from leaving to take a position at Harvard just because he was famous and his scientific writings enhanced Princeton's reputation"). Furthermore, a restraint can never be properly justified by the agent's job proficiency. An occupational ban in a covenant does not make the principal whole, it merely punishes the agent for being indispensible. This rationale cannot therefore justify a postassociational restraint. *E.g.*, Robbins v. Finlay, 645 P.2d 623, 628 (Utah 1982); Hallmark Personnel of Texas v. Franks, 562 S.W.2d 933, 936 (Tex. Civ. App. 1978); Club Aluminum Co. v. Young, 263 Mass. 223, 226-28, 160 N.E. 804, 806 (1928); *see also* Sullivan, *supra* note 3, at 640 ("the very 'specialness' of the employee mandates that he be free to compete").

77. *E.g.*, Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 33, 274 A.2d 577, 581 (1971); Ellis v. Lionikis, 162 N.J. Super. 579, 585, 394 A.2d 116, 119 (App. Div. 1978); *see also* Blake, *supra* note 4, at 646-47 (goal of restraint "is not to prevent the competitive use of the unique personal qualities of the employee . . . but to prevent competitive use, for a time, of information or relationships which pertain peculiarly to the employer and which the employee acquired in the course of the employment").

existence of the agreement constitutes a sufficient protectable interest[78] highlight the faulty analysis produced by the strict application of contract rules to covenant litigation. Thus, the courts misconceive the principal's protectable interest by deriving the scope of the restraint from contract law rather than the more appropriate limitation defined by agency law.

The rules of contract law also mandate application of a reasonableness analysis that has produced confusion and inconsistency in modern judicial treatment of covenants not to compete. The concept of a reasonable restraint varies from jurisdiction to jurisdiction and frequently even within a particular jurisdiction.[79] The courts' struggle to balance the variety of factors involved has produced a series of rules with no precedential value. This confusion and inconsistency may encourage many restrictive covenants to go unchallenged as an agent may abide by the covenant's terms rather than face litigation costs and the uncertainty of judicial action.[80] An unchallenged covenant also limits an agent's mobility by inhibiting other principals from employing the agent.[81]

Aside from the obvious statement that courts are more likely to uphold covenants with narrower geographic restraints, shorter time periods, or more limited activity restrictions, the cases provide little guidance. In applying the reasonableness test, courts do appear to concentrate more upon time and space restrictions than activity restraints.[82] Thus, courts are likely to enforce a "reasonable" one year restraint in a small geographic area even if it incorporates an occupational ban. This result fails to consider the critical issue in restraint cases—the relationship of the principal's protectable interest, properly defined, to the activity restriction imposed upon the agent.

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78. *See supra* note 60 and accompanying text.

79. *See* Hutter, *supra* note 1, at 328-29 (test of reasonableness suffers from a mass of factually distinct and irreconcilable decisions).

80. *Cf.* Sullivan, *supra* note 3, at 622-23 (employees avoid litigation "by moving beyond the ambit of the restrictive covenant" or by never leaving their employment). As one commentator observes, "While taking each case on its merits is an appealing approach, it is an approach which tends to place litigation expense burdens on defendants (former employees) who as a class are frequently not in an economic position to test their rights." MILGRIM, *supra* note 2, § 3.02[2],at 3-81 (footnote omitted).

81. Violating the covenant not to compete could subject a competing principal to tort liability for intentional interference with the performance of a contract. *E.g.*, Gorman Publishing Co. v. Stillman, 516 F. Supp. 98, 106 (N.D. Ill. 1980); *see* RESTATEMENT (SECOND) OF TORTS § 766 (1977) (detailing liability of third party who intentionally interferes with performance of a contract).

82. *See supra* notes 63-69 and accompanying text.

Even if the results produced were consistent and clear, the nature of current reasonableness analysis encourages courts to ignore the truly relevant issue in any restraint case: the definition of the employer's protectable interest. By focusing on whether one year is too long, courts have actually become receptive to imposing an occupational ban on an employee for *some* period. Despite caveats that covenants not to compete are disfavored restraints of trade and inherently suspect,[83] in many cases the current judicial treatment of such covenants therefore actually results in enforcing occupational restrictions.[84] Instead of focusing on the concept of reasonableness, courts should focus on protecting the secret or confidential information obtained by the agent from the principal. Courts should limit any restraint imposed, especially an activity restriction, to the minimum extent necessary to safeguard the protectable information.

The "blue pencil rule" and the "rewriting" of offending covenants illustrate another defect in the reasonableness approach. These practices encourage employers to be "unreasonable" in drafting covenants not to compete because there is, in effect, no sanction for being unreasonable. An unchallenged, overbroad covenant will chill an agent from legitimately competing with the principal. If the agent does challenge the covenant and a court finds the restriction unreasonable, the court may still prohibit the agent from competing to the extent the court considers reasonable, if the principal acted in good faith.[85] If courts are receptive to enforcing at least some type of restraint, the number and scope of restrictive covenants will increase.

III. THE PROPOSAL: A UNIFORM AGENCY ANALYSIS

Courts closely scrutinize and strictly construe postassociational restraints in both contractual and noncontractual cases because these restrictions are judicially suspect restraints of trade. The restraints imposed must be no more restrictive than is justified by the nature of the principal's protectable interest in any particular case.[86] The principal's trade secrets and confidential information are the proper protectable interests in both contract and noncontract cases.[87] In the absence

83. *See supra* text accompanying notes 46-48.

84. *See, e.g.*, Annot., 43 A.L.R.2D 94, 213-21 (1955) (compiling cases considering reasonableness of restraint's duration); 45 A.L.R.2D 77 (1952) (collecting cases on how enforceability of covenants is affected by duration of restriction).

85. *See supra* text accompanying note 73.

86. *See supra* text accompanying notes 35-40, 46-48, 67.

87. *See supra* text accompanying notes 22, 75-78. *See also* MILGRIM, *supra* note 2,

of a contract, an agent's fiduciary duty provides a basis for a postassociational restraint sufficient to safeguard these defined interests.[88]

The question arises, in light of these premises, as to why the terms of a covenant not to compete should provide the basis for imposing any restriction on the postassociational activities of the former agent. That is, why should an agreement between principal and agent enhance the protection against unfair competition and misuse of protectable information already provided by the fiduciary duties imposed by agency principles? The appropriate response is that, in most cases, it should not.

Using contract rules to evaluate a covenant's validity permits courts to enforce occupational bans that give more protection from competition to a principal's interests than is legitimately justified.[89] This result directly contradicts the principle, acknowledged in the covenant cases themselves, that the principal's protectable interests should limit the extent of any postassociational restraint.[90] In applying contract doctrines, courts fail to perceive that a restriction tailored to prevent misuse of protected information sufficiently safeguards the principal's interests without unnecessarily and unfairly banning the agent from a chosen occupation. If the restriction is coextensive with the principal's protectable interests, the covenant adds nothing to the protection provided by the agent's common law fiduciary duty. The contractual covenant is therefore superfluous. If the covenant is broader than the protectable interest, it is merely the principal's attempt to overextend rights—an attempt perhaps made possible by the principal's disproportionate bargaining power in the preemployment context.[91] A court should therefore subordinate the rules of contract law to agency concepts when analyzing postassociational restraints.[92]

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§ 3.02[1][d], at 3-13 to -18 ("good authority can be urged that restrictive covenants should not be used to prohibit ordinary services not involving any element of secrecy of the employer's business").

88. *See supra* text accompanying notes 35-43.

89. Courts overprotect a principal's interests any time they *enforce* a covenant's occupational ban when a more narrowly drawn restriction (against, for example, solicitation of the principal's customers, or disclosure of confidential information) would fully protect the principal's legitimate interests.

90. *See supra* text accompanying note 86. *See also* Jim W. Miller Constr., Inc. v. Schaefer, 298 N.W.2d 455, 459 (Minn. 1980) ("[T]he fact that an employee has during the course of his employment acquired nonconfidential information and skills that are not secret processes cannot support the enforcement of a restrictive covenant").

91. *See supra* text accompanying notes 51-52.

92. In addition to or in lieu of covenants not to compete, a principal and an agent may contract not to disclose trade secrets or confidential information. Hutter, *supra* note 1, at 315-16.

In *all* cases determining the validity of a postassociational restraint, the initial inquiry should be whether, during the course of the employment, the former agent obtained trade secrets or confidential information belonging to the principal. If not, the principal has no protectable interest, the agent's posttermination competition is authorized by agency principles, and the court should deny relief and dismiss the action. If the agent had access to protectable information of the principal, the court must then determine whether the agent's subsequent activity has constituted or would constitute misuse of the information.

Misuse which has already occurred renders the former agent liable for damages to the principal;[93] misuse which is threatened can be enjoined. When granting equitable relief, the court should analyze whether a restriction on the particular agent permits continued competition with the former principal but prohibits unfair competition. For example, if a customer list is a trade secret and is therefore within the principal's protectable interest, the court should prevent misuse of the information by enjoining the former agent from soliciting those customers for an appropriate period.[94] However, a principal's interest in a customer list does not justify banning the agent from the occupation itself.[95] The agent should be able to compete on the next block on the next day if the agent is not misusing the protected information by soliciting customers from the list. Courts should disfavor occupational bans and only enforce them in the rare instances allowed under agency and

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Nondisclosure agreements should also be treated as superfluous because the interest being protected—nondisclosure of protected information—is fully safeguarded by agency and unfair competition precepts. A principal could require an agent to acknowledge in writing that certain information was confidential or secret and such a writing could be a factor in a subsequent judicial inquiry regarding the protectability of the information at issue. However, such an acknowledgement should not extend the scope of a principal's protectable interest or influence the propriety of any remedy. Blake, *supra* note 4, at 671.

93. In many cases, damages caused by misuse of information will be speculative and hard to prove. Considering the disfavored status of the covenant and its disproportionate impact on employees with little or no real bargaining strength, the principal seeking enforcement of a covenant clearly should have the burden of proving harm.

94. The appropriate period for an injunction may depend on the nature of the business' product or service. *See Developments in the Law—Competitive Torts*, 77 HARV. L. REV. 888, 957 (1964) (when product differentiation is minimal, "[t]he most appropriate remedy would be a temporary injunction forbidding [the former employee] from soliciting former customers until his former employer's new [employee] has had an opportunity to become acquainted with the customers"); *see also* Blake, *supra* note 4, at 663-67 (discussing employer's remedies that ensure retention of its customers).

95. *See generally* 6A A. CORBIN, *supra* note 1, at 105-06 (injunction can "prevent the disclosure of secrets or the solicitation of old customers without requiring the employee to refrain wholly from renewing employment in the same vicinity").

unfair competition principles.[96]

A court is justified in applying contract rules only in the rare instance where, at the time of contracting, the agent possesses bargaining power equal to that of the principal. This equality is likely to exist when an agent negotiates a personal services contract or an agent with acknowledged expertise and reputation within an industry fills a significant position within the principal's business.[97] In these situations the court can justifiably conclude that the principal "purchased" the covenant not to compete. One can evaluate whether the agent possessed sufficient bargaining power by examining analogous inquiries of bargaining strength in other contractual contexts.[98] Any doubts regarding the equality of bargaining power should be resolved against the employer due to the infrequency of its occurrence and the legal system's disfavor for restraints on trade.[99] This analysis of bargaining power appears to be much more germane to the enforcement of a contractual restraint than the ill-defined concept of the unique employee.[100] If a court disallows the covenant because of the agent's lack of bargaining power, the principal should still be entitled to invoke the agent's fiduciary duty to protect appropriate information.

Treating the covenant as a nullity effectively harmonizes judicial

96. *See supra* notes 38-40 and accompanying text.

97. *See* Blake, *supra* note 4, at 661 (employee possessing high degree of skill more likely than not able to bargain for appropriate restraint); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1844 (1980) (at will employees with unspecialized skills bear full risk of wrongful termination because of lack of bargaining power). One reason for the less exacting judicial scrutiny of covenants in the sale of businesses is the increased likelihood that such covenants are the product of bona fide negotiation. *See* 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1643 (3d ed. 1972) (courts more likely to uphold agreement to refrain from competition in contract of sale than in contracts of employment); Blake, *supra* note 4, at 646-47 (goodwill sale obligates seller to deliver thing sold by refraining from competition).

98. *See, e.g.*, Closius, *Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry*, 24 B.C.L. REV. 341, 375-77 (1983) (adequate union participation in structuring of final management proposal means there has been significant modification of management proposal or receipt of a specific significant quid pro quo for including a term). One strong indicator of bargaining strength would be a provision for the agent to receive the same salary during the effective term of the contractual restriction. Enforcement of an occupational ban seems less intrusive on the agent's rights if the agent receives a salary for the proscribed period. *See, e.g.*, Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264, 1268 (8th Cir. 1978) (employee guaranteed salary during restricted period after discharge if comparable work could not be found because of covenant). Such a payment would also indicate that the principal had purchased the occupational ban in a good faith negotiation. The imposition of an occupational ban in the noncontractual context can be conditioned on such a payment. *See supra* note 40 and accompanying text.

99. *See supra* notes 46-48 and accompanying text.

100. *See supra* notes 59, 76 and accompanying text.

treatment of restraints in both contractual and noncontractual cases. Agency concepts protect the principal's legitimate interests by preventing agents from engaging in activities that violate their fiduciary duty. By focusing on limiting the use of the principal's protected interest—the information—rather than the "reasonableness" of time, space, and activity limitations, agents will be able to continue their careers, subject to specific limitations, and compete with former principals, rather than having to seek employment outside their fields of training.

A number of courts have justified the current receptivity to enforcement of occupational bans by stating that restricting the use of the protected information is the effective equivalent of an occupational ban because it so reduces the agent's marketability.[101] This criticism fails to consider that free market forces are the proper means of determining whether the former agent, limited to personal talents and restricted from misuse of the principal's protected information, remains saleable and effective in the market. The principal can police compliance with any injunction to ensure that no misuse of the protected information accounts for the agent's marketability if the agent remains saleable.[102] In addition, in ordering an occupational ban, courts are frequently trying to avoid the arguably difficult legal issues presented by questions of what constitutes a trade secret or confidential information.[103] This inquiry, however, cannot legitimately be circumvented. If a piece of information is neither a trade secret nor confidential in nature, it is not an asset of the principal but rather a legitimate part of the agent's personality and market skills. Therefore, only trade secrets or confidential information constitute a protectable interest sufficient to justify any form of postassociational restraint. A court can adequately balance the legitimate interests of the principal, the agent, and the public only by focusing on the principal's actual protectable interests and restricting the former agent's particular activities only to the extent necessary to prevent misuse of the information.

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101. *See, e.g.*, All Stainless, Inc. v. Colby, 364 Mass. 773, 781 n.3, 308 N.E.2d 481, 487 n.3 (1974) (new employer "would not be likely to retain [the employee] to work in an area in which all or a portion of the potential customers could not be solicited by him").

102. *Cf.* Hutter, *supra* note 1, at 315 (employer may obtain injunction against disclosure before actual disclosure by showing that disclosure is imminent or inevitable).

103. *E.g.*, MILGRIM, *supra* note 2, § 3.02[1][d], at 3-13 (noting, without explanation, that "[w]hile use and disclosure of a former employer's trade secrets by an ex-employee is clearly prohibited as a matter of law, . . . such ex-employee's taking competitive employment which would increase the likelihood of wrongful use or disclosure might not be enjoined absent a valid covenant not to compete").

IV. APPLICATION OF THE PROPOSAL

Adopting the system of analysis proposed in this Article would change both the legal reasoning of and the results achieved by courts in restrictive covenant cases. This change is best illustrated by applying the thesis of this Article to some of the illustrations to section 188 of the *Restatement (Second) of Contracts* and to a number of recent cases. This examination demonstrates that focusing on protection of the principal's information and ignoring the contract's generally adhesive terms provides the principal adequate protection while avoiding unnecessary and inefficient restrictions on the former agent's right to compete.

Illustration six of section 188 describes a covenant restricting a contact lens fitter from similar employment in the same town for three years following termination of the employment relationship.[104] The *Restatement* concludes that the three year occupational ban is enforceable because the employee had close relationships with the employer's customers.[105] The employer's protectable interest does not justify this result. The court's initial inquiry should be whether the agent's relationship with the customers involves the employee's use of information belonging to the employer. If the customer relations are not the property of the employer because the information at the heart of the relation was neither a trade secret nor confidential, no postassociational restraint on the employee's activity is justified because the employer is not entitled to protection from competition. If the customer relations are the property of the employer, the employee, on the facts, should still not be banned from pursuing his occupation for three years. The lens fitter should be able to open his practice in the same town the next day subject to an injunction preventing misuse of the employer's information. In this case, a court should enjoin the fitter from soliciting his former employer's customers for a reasonable period of time.[106] The result obtained from the analysis proposed by this Article comports

104. The full text of illustration 6 is as follows:

> A employs B as a fitter of contact lenses under a one-year employment contract. As part of the employment agreement, B promises not to work as a fitter of contact lenses in the same town for three years after the termination of his employment. B works for A for five years, during which he has close relationships with A's customers, who come to rely upon him. B's contacts with A's customers are such as to attract them away from A. B's promise is not unreasonably in restraint of trade and enforcement is not precluded on grounds of public policy.

RESTATEMENT (SECOND) OF CONTRACTS § 188 comment g, illustration 6 (1979).

105. *Id.*

106. The injunction should last until the benefits of the information expire. In solicitation of customer cases, the time period of the injunction ends when the principal can hire a new agent and the new agent has time to become acquainted with the customers. *See* Blake, *supra* note 4, at 659

with the principle enunciated, but frequently ignored, by the courts that any restriction on the former employee's activities should be drawn as narrowly as possible while still protecting the principal's interest. Moreover, a narrow restriction prohibiting misuse of the principal's information would permit the principal's customers to patronize the lens fitter of their choice, so long as these customers are not solicited by the former agent.[107] The principal can police the injunction by demonstrating, as an evidentiary matter, that lost customers now buying from the former agent had, in fact, been solicited by the agent during the proscribed period. Since the extent of the justifiable restraint is limited by the employer's protectable interest,[108] a court should consider this covenant a nullity.

Illustration eight describes a covenant restricting a dance instructor from similar employment in the same town for three years following termination of the employment relationship even though he acquired no confidential information in his direct dealings with customers.[109] Because the dance instructor did not obtain any trade secrets or confidential information during his employment, there is no sufficient protectable interest of the employer to justify any restraint. In this case, the *Restatement* and the analysis proposed in this Article would both conclude that the covenant is unenforceable and the instructor is free to compete with his former employer without being subject to any restrictions upon his activities.

Illustration nine, however, again provides for the enforcement of a complete occupational ban for three years following termination of an

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(frequency of agent's contact with ex-employer's customers determines length of postemployment restriction); *see also supra* note 94.

107. If customers leave the principal upon learning of the agent's departure, their acts of bringing business to the agent's new employment would not necessarily be actionable. The principal's information must be misused by the agent in order for liability to attach. If the agent does not use the information in some form of solicitation, the departure of the customers results from the market's response to competition and not misuse of information. *See supra* note 14.

108. The lens fitter could be enjoined from engaging in the field if the court were convinced that the principal's customers were the only contact lens customers in the area. This situation would appear to be rare. If applicable, the occupational ban should still contain a time limit. *See supra* notes 41-43 and accompanying text.

109. The full text of illustration 8 is as follows:

> A employs B as an instructor in his dance studio. As part of the employment agreement, B promises not to work as a dance instructor in the same town for three years after the termination of his employment. B works for five years and deals directly with customers but does not work with any customer for a substantial period of time and acquires no confidential information in his work. B's promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy.

RESTATEMENT (SECOND) OF CONTRACTS § 188 comment g, illustration 8 (1979).

employment relationship.[110] If a court concludes that the chemist obtained confidential information during his employment, the pharmaceutical company is entitled to a restraint preventing only the misuse of the information. The chemist should therefore be allowed to compete in the same industry without using the protected information. The pharmaceutical industry will decide if the chemist is marketable without the protected information. If the chemist used the banned information in the subsequent employment, the former company could sue for damages.[111] If the company could prove that disclosure of the information was inextricably entwined with the job, the court could order an occupational ban for the shortest useful life of the information.[112] All of these results can be achieved pursuant to the fiduciary duties of agency law. Once again the covenant not to compete should be treated as a nullity, in contrast to the views of the *Restatement*.

The same analysis applies to covenants involving professionals and partners, but the increased likelihood that these parties have equal bargaining power increases the probability that a court will enforce the covenant.[113] Illustration eleven of the *Restatement* would have a court

110. The full text of illustration 9 is as follows:

> A employs B as a research chemist in his nationwide pharmaceutical business. As part of the employment agreement, B promises not to work in the pharmaceutical industry at any place in the country for three years after the termination of his employment. B works for five years and acquires valuable confidential information that would be useful to A's competitors and would unreasonably harm A's business. B can find employment as a research chemist outside of the pharmaceutical industry. B's promise is not unreasonably in restraint of trade and enforcement is not precluded on the grounds of public policy.

RESTATEMENT (SECOND) OF CONTRACTS § 188 comment g, illustration 9 (1979).

111. *A* would be allowed to prove damages. He would know of the development of his product by a competitor. He would then subjectively prove *B*'s disclosure or, in partial proof of disclosure, objectively prove that the competitor could not have independently developed the product within that time period. If *A* cannot prove the latter, the information was probably not a trade secret or confidential. Moreover, using a contract analysis does not significantly reduce the difficulty of proving damages. *See supra* note 93 and accompanying text.

112. *See supra* notes 41-43 and accompanying text.

113. *See supra* text accompanying notes 97-100. The appropriateness of enforcing a restrictive covenant on competition according to its terms, rather than limiting it to protection of the principal's protectable information, appears to be a particular application of the black letter contract rule that courts will not inquire into the adequacy of consideration once consideration is found to be present. This rule in turn grew out of the modern notion of consideration as bargain and exchange. The presence of apparently fair and roughly equal bargaining positions of the parties leads to the assumption that the parties' agreement on the exchange removes any need for judicial scrutiny into adequacy. In the context of an agreement between principal and agent on postemployment competitive restrictions, the terms of the agreement should be enforced as a matter of contract law if the bargaining process has been carefully scrutinized and the covenant is the result of actual bargaining and not adhesion. The existence of such bargaining assures that the exchange has been meaningful and the principal has purchased the restriction. For a general discussion of consideration, see E. FARNSWORTH, CONTRACTS § 2.2, at 41-42 (1982). Farnsworth

enforce a three-year ban on the practice of veterinary medicine in the town in which the partnership practice was located.[114] The initial inquiry in such cases should be whether the three veterinarians had roughly similar bargaining power. If so, a court should enforce the three year ban as a valid contract term suitably purchased by the other parties. If not, a court should treat the covenant as a nullity and examine whether the retiring veterinarian obtained any informational assets of the partnership or the other parties. If he has not, the veterinarian should be free to compete without any restrictions on his activities. If he has, he should be able to compete subject to his not employing the information belonging to the partnership or his former partners. The continuing business is only entitled to protection from the misuse of its information, not from competition itself.

Illustrations twelve and thirteen reinforce the same principles. In illustration twelve, the *Restatement* would not have a court enforce an occupational ban involving an experienced dentist and a younger one.[115] This covenant, unlike covenants negotiated by comparably experienced professionals as in illustration eleven, is not likely to be the product of equal bargaining power and, on this ground, should rarely be enforced. Absent some special bargaining circumstance, a court should treat the covenant as a nullity and restrain the younger doctor only from using information proven to be the older doctor's property.[116] Likewise, illustration thirteen would not have a court enforce a

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notes the evolution of the consideration doctrine as leading the courts' concerns away from the substance of the exchange. "Their sole inquiry now was into the process by which the parties had arrived at that exchange—was it the product of a 'bargain'? . . . Under the bargain theory a promise that had been exchanged as a result of that process satisfied the fundamental test of enforceability without more." *Id.* § 2.2, at 42.

114. The full text of illustration 11 is as follows:

> A, B and C form a partnership to practice veterinary medicine in a town for ten years. In the partnership agreement, each promises that if, on the termination of the partnership, the practice is continued by the other two members, he will not practice veterinary medicine in the same town during its continuance up to a maximum of three years. The restraint is not more extensive than is necessary for the protection of each partner's interest in the partnership. Their promises are not unreasonably in restraint of trade and enforcement is not precluded on grounds of public policy.

RESTATEMENT (SECOND) OF CONTRACTS § 188 comment h, illustration 11 (1979).

115. The full text of illustration 12 is as follows:

> A, an experienced dentist and oral surgeon, takes into partnership B, a younger dentist and oral surgeon. In the partnership agreement, B promises that, if he withdraws from the partnership, he will not practice dentistry or oral surgery in the city for three years. Their practice is limited to oral surgery, and does not include dentistry. The activity proscribed is more extensive than is necessary for A's protection. B's promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy.

RESTATEMENT (SECOND) OF CONTRACTS § 188 comment h, illustration 12 (1979).

116. The *Restatement* refers to the possibility of enforcement of the "reasonable" portion of the restraint. *Id.* A "reasonableness" analysis encourages principals to draft overbroad covenants

restraint on a former partner in a nationwide accounting firm which would prevent him from practicing in any city where the former employer had an office.[117] In these situations, bargaining power characteristically favors the large firm. Therefore, the applicable restrictions should be limited to those sanctioned by fiduciary duty and the employer's protectable interests.

Because of the strictures of the contract law analysis, even those cases which focus intelligently on a principal's protectable interests fail to appreciate that such interests provide the basis for restraining the agent's posttermination activity.[118] As a result, these cases almost always impose occupational bans on the agent exceeding the protection to which the principal is legitimately entitled. For example, the court in *Gorman Publishing Co. v. Stillman*[119] considered a restrictive covenant in an employment contract which, by its terms, barred the agent for two years after the termination of his employment from engaging "in a business directly competitive with [the] Company anywhere in the United States or the foreign areas where the Company has done business or has planned or scheduled business."[120] In assessing the validity of this covenant, the court accurately observed that such a covenant "is not enforceable unless the employer can demonstrate that a 'protectible interest' justifies it."[121] The court then carefully scrutinized the nature of the principal's business and the agent's specific activities and responsibilities. The court concluded that, based on the agent's extensive knowledge of the principal's advertisers, "the covenant not to compete was reasonably drawn to protect a legitimate interest and was enforceable."[122] Thus, the defendant was barred from competitive employment for the two-year term of the covenant.[123]

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and chills the mobility of agents by increasing the number of covenants. *See supra* text accompanying note 85; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 188 comment g, illustration 10 (1979) (ten-year covenant not to compete too long for fields with rapid technological change).

117. The full text of illustration 13 is as follows:

> A works for five years as a partner in a nationwide firm of accountants. In the partnership agreement, A promises not to engage in accounting in any city where the firm has an office for three years after his withdrawal from the partnership. The firm has offices in the twenty largest cities in the United States. A's promise imposes great hardship on him because this area includes almost all that in which he could engage in a comparable accounting practice. The promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy.

RESTATEMENT (SECOND) OF CONTRACTS § 188 comment h, illustration 13 (1979).

118. *See supra* note 60.

119. 516 F. Supp. 98 (N.D. Ill. 1980).

120. *Id.* at 101.

121. *Id.* at 104.

122. *Id.* at 106.

123. *Id.*

Putting aside the question of whether the information at issue was sufficiently confidential to justify protection, the court-approved two-year ban on competition was far broader than necessary to protect the principal's protectable interest in that information and also restricted the agent's activities far more than necessary. If, as the court found, the principal's right to protection from the competitive activity of the former agent rested in confidential information concerning the principal's advertisers,[124] then an injunction against solicitation of those advertisers by the agent would have provided the principal with all the protection the information warranted. The duration of the injunction should be limited to the time necessary for the principal to replace the agent with a new employee and to train the new employee to retain those advertisers for the publication. Enforcing the scope and duration of the occupational ban as specified in the contract is simply inappropriate in the absence of an inquiry into either the need for such a ban to protect the confidential information or the actual bargaining power of the parties at the time of contracting.[125] Without a careful analysis of the principal's interest, the covenant should not be designated as reasonable.

The inappropriateness of applying contract law concepts to an analysis of covenants not to compete is further illustrated by *Continental Group, Inc. v. Kinsley*.[126] At issue in *Kinsley* was the validity of a covenant by which the agent agreed not to "engage in any competitive enterprise" for a period of eighteen months following termination of his employment.[127] Despite the court's finding that there was substantial dispute over the existence of any confidential information and its subsequent use by the agent,[128] the court enforced the occupational ban according to the agreement's terms. The court justified its conclusion by applying the contract notion that, because the employment relationship had been conducted pursuant to a formal agreement, the contract must add something to the protection otherwise available to the principal through agency principles.[129]

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124. *Id.* at 105-06.

125. The court stated that Gorman was represented by counsel at the time of agreement, and indicated that the employment contract was negotiated in good faith between parties possessing similar bargaining strength. *Id.* at 101. The court, however, did not rely or elaborate upon these factors.

126. 422 F. Supp. 838 (D. Conn. 1976).

127. *Id.* at 841 n.1.

128. *Id.* at 844.

129. The exact language of the court is as follows:

> Moreover, it is by no means clear, as TPT appears to contend, that the test for enforcing a non-competition covenant is the same as would apply in obtaining an injunction to bar disclosure of trade secrets in the absence of a non-competition covenant or

The error of this analysis is manifest. The conclusion is preceded by findings that both the nature of the information involved and its potential for abuse in the competitive employment undertaken by the agent were highly problematic.[130] In addition, this reasoning suggests that the benefits of the "interesting work" undertaken by the former agent were unrelated to any benefit obtained by the principal. On the contrary, the agent's skills, learning, and talents were used in the service of the principal, who presumably "got what he paid for" from such an employee. To suggest that such tasks would not be undertaken unless the agent would agree to be thereafter barred from competition fails to analyze or appreciate the value of skilled employees to the business enterprise or the realities of employer/employee bargaining power. It is possible, of course, that the employer's information was so inextricably interwoven with the agent's activities that only a complete ban on competitive employment for the useful life of that information's secrecy would serve to protect adequately the principal's legitimate interest. But the court's failure to inquire into this issue or into the bargaining power of the parties, and its reliance on the terms of the contract, served both to restrict unfairly the activities of a highly trained agent and to provide unwarranted freedom from competition for the principal. The court allowed this result despite its recognition that a noncompetition agreement "interferes to some extent with an individual's freedom to pursue his calling and with the mobility of talent within the economy."[131]

Applying contract law rules in the case of an allegedly unique em-

even an injunction to enforce a covenant not to disclose trade secrets. The non-competition covenant adds something to the protection available to the employer beyond what he would expect from the normal incidents of the employer-employee relationship or from a secrecy agreement. . . . While an injunction to bar competitive employment is a more drastic remedy than an injunction to bar disclosure of the former employer's secrets, in some circumstances it is an entirely appropriate remedy because of the conscious choices both the employer and employee made when the covenant was given. At that point the employer decided he would make the employee privy to confidential information concerning the employer's product development; if the employee preferred not to give the covenant, the employer could have assigned him elsewhere within the company or terminated his employment. Similarly, the employee decided to accept the opportunity to be involved in the employer's sensitive product development work and signed the covenant which he understood was a requirement of having that opportunity for work of an interesting nature. If he preferred not to be bound by the covenant, he could have declined the opportunity for the specialized work. While these considerations would not warrant enforcement of covenants in situations where doing so would be unreasonable, they do provide justification for enforcement of otherwise reasonable covenants to protect against disclosure of all confidential information concerning the employer's development of a new product, including some confidential information that might not technically qualify as a trade secret.

Id. (citations omitted).

130. *Id.* at 843-44.

131. *Id.* at 843.

ployee also encourages decision by fiat rather than analysis. In *Bradford v. New York Times Co.*,[132] a knowledgeable, highly placed employee had signed an agreement with the Times providing, in part, that upon terminating his employment he would not engage in any business competing with the Times during any period in which he was receiving payments from the company's Incentive Compensation Plan.[133] Thereafter, he joined high level management of a competing newspaper chain. When the Times sought to terminate his Incentive Compensation Plan payments, the employee sued for a determination that the restrictive covenant was unenforceable. He argued that enforcement could not be based on threatened disclosure of trade secrets or unfair solicitation of customers of the Times.[134] Nevertheless, referring to a New York Court of Appeals case which suggested that restrictive covenants were enforceable against employees whose "services are deemed 'special, unique or extraordinary,'" the Second Circuit court ordered enforcement of the contractual restriction.[135] The court reasoned that the employee's "duties should leave no real doubt that he, if anyone at the Times, was in the category special, unique or extraordinary."[136] Thus, in spite of a clear holding that no protectable information of the Times was subject to misuse by the employee, the occupational ban contained in the covenant was enforced.

This opinion plainly demonstrates that the traditional notion of employee uniqueness is misplaced in evaluating the appropriateness of enforcing a contractual restriction on competitive employment. Because courts frequently use the concept when a particular agent has been a successful employee, the uniqueness analysis completely ignores the crucial issue of whether the agent's competition with the principal implicates any protectable information of that principal. The contract in *Bradford* would have been properly enforced if the agent had possessed enough bargaining power at the time of the agreement to justify a conclusion that the Times had purchased the restraint pursuant to good faith bargaining. However, the *Bradford* court did not rely upon this reasoning. The current notion of the unique employee therefore appears to sanction imposing a disfavored restraint of trade based upon the expertise of an agent as demonstrated solely by the agent's status in the principal's hierarchy. If the law governing the propriety of postas-

132. 501 F.2d 51 (2d Cir. 1974).
133. *Id.* at 54.
134. *Id.* at 58.
135. *Id.* at 58-59.
136. *Id.*

sociational restraints is to emerge from the swamp of inconsistency and lack of direction in which it is currently mired, such enforcement by unreasoned categorization must be abandoned. If a court is to uphold a competitive restriction on the basis of the employee's uniqueness rather than on the protectable nature of the information threatened with misuse, the focus in such relatively rare instances must be on the fairness of bargaining at the time the covenant was made.

CONCLUSION

Courts uniformly recognize covenants not to compete as contracts in restraint of trade and, as such, subject to judicial disfavor and close scrutiny. In spite of repeated assertions to this effect, courts routinely enforce covenants not to compete against agents in employment contracts. This imposition of occupational bans impairs agents' ability to obtain rewarding employment and decreases economic efficiency and productivity. These negative effects result from applying rules of contract law which, except in unusual and specific instances, are inappropriate and unnecessary. Principals are not entitled to insulation from competition by agents; rather, they are only entitled to protection from unfair competition arising out of the agent's misuse of information belonging to the principal. The principal's information is adequately safeguarded by applying the rules of agency and unfair competition. Imposing the unfair and inefficient restraints of contract law limits the mobility of agents and grants principals more protection than their interests warrant. Except in the rare instance when agent and principal possess equal bargaining power, postassociational restraints should be the product of a careful evaluation of the information properly within the ambit of the principal's protectable interests and the degree of restriction needed to prevent misuse of such information by the agent.