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# Validity of Post-Employment Non-Compete Covenants in Broadcast News Employment Contracts

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## Introduction

A post-employment non-compete covenant is an agreement by an employee that, after termination of employment, the employee will not compete with the former employer—usually within a specified geographic area and for a specified period of time. These agreements raise significant questions of law and policy involving the confrontation between employees' interests in freedom to earn a livelihood and employers' interests in protecting their businesses by limiting the former employee's post-employment opportunities.[1] Ironically, both of these interests are generally thought to be protected by freedom of contract, which is one reason this confrontation is receiving increasing attention as post-employment non-compete covenants become a standard part of many employment contracts.[2]

Broadcast news is a highly competitive field featuring subjective employment criteria, poor job security, and high turnover. In this context, effective post-employment restrictions can be especially significant.[3] The news broadcaster whose

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1. Kniffin, *Employee Non-Competition Covenants: The Perils of Performing Unique Services*, 10 RUT.-CAM. L.J. 25 (1978).

2. Closius & Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 532 (1984).

3. Most of the issues discussed in the broadcast news industry arise in connection with various types of personal services contracts. However, the relatively high salaries and subjective employment criteria that prevail in broadcast news give rise to certain specific difficulties shared with other performance-related employment, such as professional sports. This Article focuses upon broadcast news employment contracts, but makes extensive use of other public performance cases in developing the applicable principles.

employment contract has expired or who has been terminated may face limited and unappealing choices: relocate, change professions, or sit idle.

This Article discusses whether, and to what extent, a broadcast news employee may be bound by a contractual provision that purportedly relinquishes his right to contract subsequently for other employment. Specifically, this Article discusses the applicable law of selected jurisdictions,[4] critiques the rationale most often used in defending these covenants ("uniqueness of employee services"), reports the results of a survey regarding industry practices, and discusses the distinctions between legal enforceability and practical enforcement. Finally, this Article proposes changes in the law, including abandonment of the "unique services" rationale and adoption of specialized standards by which the validity of such contract provisions should be tested.

## I
## Commonalities of the Common Law

### A. Background

Initially, courts were hostile to post-employment restrictive covenants. The earliest recorded case, decided in 1414, involved an agreement by a dyer to refrain from practicing his trade for six months after the termination of his employment by the covenantee.[5] Incensed, the judge refused to issue the injunction sought by the covenantee, instead declaring that if the plaintiff was present in court, the judge would imprison him until the plaintiff paid a fine to the king.[6] For nearly 200 years, case law reflected the belief that these covenants were restraints of trade and repugnant to public policy.[7] By the 16th century, however, courts were more accepting of such restraints, occasionally allowing enforcement if the covenant

4. The author originally intended to compare and contrast the laws of those jurisdictions containing the country's largest broadcast markets. Research revealed, however, that there are only minor differences among the many jurisdictions that apply common law principles to the issue of post-employment non-compete covenants; the more notable distinction is between such jurisdictions and those that have enacted relevant statutes.

5. The Dyer's Case, Y.B. 2 Hen. 5, pl. 26 (1414).

6. *Id.*

7. *See* Handler & Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 721-27 (1982).

was reasonable in time and geographic scope, and necessary for the protection of the covenantee.[8] Often the justification for enforcement was based on a freedom of contract rationale: with modern transportation and decentralization of economic activity, an individual covenantor could avoid hardship simply by plying his trade in another location.[9]

Thus developed the general rule that a contract restraining trade was valid if it appeared to be reasonable and was supported by consideration.[10] Indeed, by the late nineteenth century, the traditional public policy argument had been effectively reversed.[11] As one leading commentator noted:

> The objections to restraint of trade, namely, that it divests the promisor of his means of earning a livelihood and of supporting himself and family, and that it deprives the community of the benefit of his services and the benefit which his competition might offer, are offset by the more important social interest involved in making the goodwill of a business or other property vendible, or in protecting the covenantee in some proper interest covered by the contract.[12]

Post-employment restrictive covenants of the type thus far described contemplate and purport to prohibit an individual's direct competition with a former employer, generally as a rival entrepreneur. In contrast, the restrictive covenants typically contained in broadcast talent contracts are intended to restrict the covenantor from working for a third party who is a competitor of the covenantee. This latter form of restriction developed, at least in part, from a different seed: negative covenants prohibiting employees from competing with their employers *during* their employment.[13]

The famous English case of *Lumley v. Wagner*[14] provides an example. *Lumley* involved a personal services contract under which opera singer Wagner was to perform exclusively at Lumley's theater for three months.[15] When it appeared that

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8. *See id* at 727-29.

9. *See* Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 637-38 (1982).

10. Carpenter, *Validity of Contracts Not to Compete*, 76 U. PA. L. REV. 244, 246 (1928).

11. *See id.* at 253-54.

12. *Id.* at 254.

13. *See generally* Tannenbaum, *Enforcement of Personal Service Contracts in the Entertainment Industry*, 42 CALIF. L. REV. 18 (1954).

14. 1 De G.M. & G. 604, 42 Eng. Rep. 687 (1852).

15. *Id.*

Wagner would sing elsewhere during the proscribed period, Lumley sought specific enforcement of the contract.[16] Ultimately, the court enjoined Wagner from performing elsewhere, but declined to force her to sing at Lumley's theatre.[17]

The intent, and probable impact, of a negative covenant like the one in *Lumley* is two-fold. First, its enforcement will tend to encourage performance of the affirmative obligation by depriving the covenantor of alternative employment. This justification, however, is legally inadequate because it indirectly attempts to force performance when the law will not do so directly through an injunction.[18] A covenantor who is not coerced into performing is punished through the resulting income loss.[19]

Second, even if the covenantor is not induced to perform, enforcement of the covenant protects the covenantee from certain competition. This protection is the more accepted rationale for enforcement of restrictive covenants.[20] Professor Williston states:

> In most of the decisions . . . the negative undertaking of the defendant had importance to the plaintiff apart from the pressure which its enforcement would put upon the defendant to perform his affirmative undertaking, and if the defendant's performance of his negative obligation has no value to the plaintiff in itself an injunction will not generally be granted. . . . In general, it is not the mere taking of new employment but unfair competition which equity enjoins.[21]

The post-employment non-compete covenants found in most broadcast talent contracts constitute a blend of these two contractual concepts. Like the covenant in *Lumley,* present day covenants address the sale of public performance services to a third party competitor of the covenantee, and, like the earliest cases (but unlike *Lumley*), they arise only after the covenantor's employment ends. These covenants are, thus, post-employment restrictions on "indirect" competition which prevent an employee from providing services to a third party competitor of the former employer. Under the common law of con-

16. *Id.*
17. *Id.*
18. E. A. FARNSWORTH, CONTRACTS § 12.4 (1982).
19. *Id.*
20. 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1450 (rev. ed. 1937).
21. *Id.*

tracts, this hybrid, like non-compete covenants in general, is initially suspect as a restraint of trade.[22]

A strong presumption of unfairness accompanies post-employment non-compete covenants because of policy concerns, such as the superior bargaining power almost invariably wielded by the employer.[23] Nevertheless, as discussed below, such covenants are frequently enforced.

## B. Reasonableness, Divisibility and Modification

According to modern common law interpretation, post-employment non-compete covenants are enforceable if supported by consideration and reasonable as to geographic scope, duration, and range of activities prohibited.[24] Reasonableness is evaluated against the backdrop of an ostensibly independent determination regarding the legitimacy of the business interest the former employer is trying to protect.[25] Although a minority of jurisdictions will declare an entire covenant void if portions of the provision are found unreasonable,[26] many courts will either partially enforce post-employment non-compete covenants, or modify the offending portions and enforce the covenants as modified.[27] The governing principle is that partial enforcement must not be "against public policy or . . . injurious to the public interest . . . [or] unnecessarily injurious to the covenantor, and must not go beyond what is reasonably necessary to protect the interests of the covenantee."[28]

In determining whether a partially illegal non-compete covenant might be partially enforceable, courts traditionally looked at the divisibility of the reasonable restrictions from the excessive restraints imposed by the covenant. This "blue

22. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 186 (1979).

23. *Id.* at § 188 comment g.

24. *Id.* at § 188 comment d; *see, e.g.*, Weatherford Oil Tool Co. v. Campbell, 340 S.W.2d 950, 951 (Tex. 1960).

25. RESTATEMENT (SECOND) OF CONTRACTS § 188(1) (1979) provides that a non-compete covenant is unreasonable if: "(a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public."

26. Annotation, *Enforceability, Insofar as Restrictions Would be Reasonable, of Contract Containing Unreasonable Restrictions on Competition*, 61 A.L.R.3d 397, 418 (1975). *See also* Purcell v. Joyner, 231 Ga. 85, 86-87, 200 S.E.2d 363, 365 (1973); Rector-Phillips Morse, Inc. v. Vroman, 253 Ark. 750, 753, 489 S.W.2d 1, 4 (1973).

27. Annotation, *supra* note 26, at 410-17.

28. *Id.* at 408.

pencil" test became the standard of divisibility:[29]

> By this rule, the divisibility of a promise in excessive restraint of trade is determined by purely mechanical means: if the promise is so worded that the excessive restraint can be eliminated by crossing out a few of the words with a "blue pencil," while at the same time the remaining words constitute a complete and valid contract, the contract as thus "blue pencilled" will be enforced.[30]

Although many courts still employ divisibility language, the "blue pencil" test has virtually been abandoned.[31] In Illinois, for example, unreasonable restrictions contained within a post-employment non-compete covenant "may be modified and enforced to the extent reasonable [as long] as it appears from the terms of the covenant that the restrictions are severable . . . ."[32] In *Statistical Tabulating Corp. v. Hauck,*[33] the plaintiff (Statistical) sought to enjoin Hauck from competing with Statistical in violation of a post-employment non-compete covenant included in Hauck's employment contract.[34] The trial court granted Statistical's request for a permanent injunction against Hauck's business, modifying the covenant, however, to reduce the proscribed geographical area.[35]

The trial court's decision in *Hauck* clearly demonstrates a willingness to modify a covenant to make it enforceable.[36]

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29. S. WILLISTON, *supra* note 20, at § 1659.

30. 6A A. CORBIN, CORBIN ON CONTRACTS § 1390 (1962).

31. The "blue pencil" test is rejected by the Restatement (Second) of Contracts as "now contrary to the weight of authority." RESTATEMENT (SECOND) OF CONTRACTS § 184 reporter's note (1979).

32. *See* Esmarck, Inc. v. McKee, 118 Ariz. 511, 514, 578 P.2d 190, 193 (1978) (applying Illinois law); *see also* Statistical Tabulating Corp. v. Hauck, 10 Ill. App. 3d 50, 293 N.E.2d 900 (1973).

33. 10 Ill. App. 3d 50, 293 N.E.2d 900 (1973).

34. The covenant agreed to by Hauck provided:

> [I]n consideration of . . . [his] employment by the corporation . . . upon termination of his employment . . . he would not for two years thereafter . . . engage in a business similar or competitive to that of . . . [Statistical] within a radius of 100 miles from any part of 19 other designated cities in various parts of the United States from California to New York . . . or within a radius of 100 miles from any part of any city in which . . . [Statistical] or an affiliated company was operating at the time his employment was terminated.

*Id.* at 51, 293 N.E.2d at 901.

35. *Id.* at 52, 293 N.E.2d at 901-02.

36. *Id.* The Appeals Court of Illinois held that the covenant was unreasonable and that no showing was made as to "possible irreparable injury or grave necessity for the imposition of restraint by the covenant [even] as modified to afford reasonable protection to the rights of the employer." *Id.*

Although willing to change a term, however, the Illinois courts seem unwilling to supply a missing term. In *Akhter v. Shah,*[37] an Illinois appellate court held that "where the original restriction neither provides a time limitation nor clearly identifies the . . . [territorial limits] in which the practice is to be prohibited, the restriction, which is too vague and ambiguous, should not be rewritten by the court."[38]

Some jurisdictions have expressly abandoned formal divisibility.[39] Others employ different principles depending upon the circumstances involved. For example, New York courts have held that the divisibility requirement is dependent upon the nature of the contract.[40] In New York, strict (*i.e.,* formal or technical) divisibility of the contract is required for the modification of a non-compete clause contained in an agreement for the sale of a business, but is not required in connection with the modification of such clauses in employment contracts.[41]

Many courts have adopted the practice of applying stricter standards to test the enforceability of non-compete covenants in employment contracts, as distinguished from those in contracts for the sale of a business.[42] In a further effort to discourage attempts by employers to obtain unjustifiably broad protection, even those courts willing to modify a non-compete covenant will generally refuse to do so if they conclude that the covenant was drafted or included in bad faith.[43]

### 1. *Geographic Scope*

When an express territorial restriction is unreasonably broad, it can be modified by limiting it to the area in which the former employee performed duties for his or her former employer.[44] Some courts have further held that in a case

37. 119 Ill. App. 3d 131, 456 N.E.2d 232 (1983).

38. *Id.* at 135, 456 N.E.2d at 235.

39. *See, e.g.,* Hill v. Central West Pub. Serv. Co., 37 F.2d 451 (5th Cir. 1930).

40. *See* John T. Stanley Co. v. Lagomarsino, 53 F.2d 112 (2d Cir. 1931); Consolidated Syrup Corp. v. Kaiser, 22 N.Y.S.2d 307 (1940).

41. *Lagomarsino,* 53 F.2d at 116.

42. *See, e.g.,* American Hot Rod Assoc. v. Carrier, 500 F.2d 1269 (4th Cir. 1974); *accord* C.G. Caster Co. v. Regan, 43 Ill. App. 3d 663, 357 N.E.2d 162 (1976). The differentiated standard dates back at least to Mitchell v. Reynolds, 1 P.WMS. 181, 24 Eng. Rep. 347 (Q.B. 1711).

43. E. A. FARNSWORTH, *supra* note 18, at 363.

44. *See* Eubank v. Puritan Chemical Co., 353 S.W.2d 90 (Tex. Ct. App. 1962); Central Keystone Plating of Illinois, Inc. v. Hutchinson, 62 Ill. App. 2d 188, 210

where there is no express territorial restriction, the prohibition can be limited to the territory in which the former employee carried out his duties for the employer,[45] or to the employer's business area.[46] If the covenant in question is part of a broadcast talent employment contract, the "employer's business area" and the "area in which the employee performed duties for his employer" are both generally defined by the area reached by the broadcast signal (*i.e.*, the "broadcast market"). Some courts have held that post-employment non-compete covenants may be limited by judicial modification to the former employer's customers.[47] The "employer's customers" concept, however, is not particularly useful in relation to broadcast talent employment contracts. The broadcast employer's customers are its advertisers, but it is audience share, not advertisers, that broadcast employers primarily seek to protect from what they argue is unfair competition.

The geographic reasonableness requirement was applied to a broadcast talent non-compete provision in *Wake Broadcasters, Inc. v. Crawford.*[48] In this 1960 Georgia case, the plaintiff broadcast station was denied an injunction enforcing Crawford's covenant not to engage in radio or television work within fifty miles of any city in which the plaintiff operated, despite the fact that the Crawford's broadcasts were aired in only one broadcast market.[49] This covenant was to be effective for eighteen months after the termination of Crawford's employment with the plaintiff. The Georgia Supreme Court said this restriction went far beyond what was necessary to protect the plaintiff's legitimate business interests and would cause impermissible hardship to the defendant if he was prevented from working in six states on the mere basis of the

N.E.2d 239 (1965); All Stainless, Inc. v. Colby, 364 Mass. 773, 308 N.E.2d 481 (1974); Martin v. Kidde Sales and Services, 496 S.W.2d 714 (Tex. Ct. App. 1973).

45. *See* Wrentham Co. v. Cann, 345 Mass. 737, 189 N.E.2d 559 (1963); McAnally v. Person, 57 S.W.2d 945 (Tex. Ct. App. 1933).

46. *See* Brannen v. Bouley, 272 Mass. 67, 172 N.E. 104 (1930); New England Tree Expert Co. v. Russell, 306 Mass. 504, 28 N.E.2d 997 (1940); Grace v. Orkin Exterminating Co., 255 S.W.2d 279 (Tex. Ct. App. 1953); Thames v. Rotary Engineering Co., 315 S.W.2d 589 (Tex. Ct. App. 1958).

47. *See* Edgecomb v. Edmonston, 257 Mass. 12, 153 N.E. 99 (1926); Martin v. Kidde Sales and Service, 496 S.W.2d 714 (Tex. Ct. App. 1973); Career Placement of White Plains, Inc. v. Vaus, 77 Misc. 2d 788, 354 N.Y.S.2d 764 (1974); Whiting Milk Co. v. O'Connell, 277 Mass. 570, 179 N.E. 169 (1931).

48. 215 Ga. 862, 114 S.E.2d 26 (1960).

49. *Id.* at 863, 114 S.E.2d at 28.

plaintiff corporation's legal presence in those states.[50] Thus, the court affirmed the trial court's dismissal of the plaintiff's petition for an injunction on the grounds that the restriction was geographically unreasonable.[51] The court did not attempt to modify the restriction to make it enforceable.

Most post-employment restrictions included in broadcast news employment contracts purport to prohibit competition within the covenantee's broadcast market. Others define the proscribed territory in terms of miles, as in *Wake Broadcasters*. At least one such covenant, banning competition within a 100 mile radius, has been upheld, but the area identified was not significantly different from the relevant broadcast market.[52]

### 2. *Duration*

In order to be enforceable, a non-compete covenant generally must be limited to a reasonable period of time.[53] The duration of a typical post-employment non-compete clause in a broadcast news talent contract is between three months and one year,[54] but at least one court has held that a two year prohibition was reasonable in the case of a radio announcer/salesman.[55] Five years, however, was found unnecessarily long in the case of a Boston radio announcer who had already been away from the proscribed territory for approximately three years after termination of his employment with the covenantee.[56]

### 3. *Range of Activities Prohibited*

Under the traditional approach, the third element of the reasonableness test requires an examination of the range of activities banned by the covenant. A narrower ban is more likely to be enforceable than a broader one.[57] Arguably, a cov-

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50. *Id.*

51. *Id.*

52. Clooney v. WCPO-TV, 35 Ohio App. 2d 124, 300 N.E.2d 256 (1973).

53. *See, e.g.*, Bob Pagan Ford, Inc. v. Smith, 638 S.W.2d 176 (Tex. Ct. App. 1982); Schmidl v. Central Laundry Supply Co., 13 N.Y.S.2d 817 (1939); Justin Belt Co. v. Yost, 502 S.W.2d 681 (Tex. 1973).

54. *See infra* Section IIIA.

55. Murray v. Lowndes County Broadcasting Co., 248 Ga. 587, 284 S.E.2d 10 (1981).

56. Richmond Bros. v. Westinghouse Broadcasting Co., 357 Mass. 106, 256 N.E.2d 304 (1970).

57. *See, e.g.*, Barnes Group, Inc. v. Harper, 653 F.2d 175, 180 (5th Cir. 1981);

enant purporting to ban a former employee's pursuit of an entire occupation, even within a limited geographical area, should never be enforceable.[58] Nevertheless, the post-employment non-compete covenants typically included in broadcast news employment contracts almost invariably seek to impose complete (albeit geographically limited) occupational bans. Such bans bring into sharp focus the policy issues associated with non-compete covenants.[59]

### C. Employer's Business Interest

Post-employment restrictive covenants are enforceable only if they seek to protect a legitimate business interest of the former employer.[60] Traditionally, such interests comprised only proprietary information, notably trade secrets and customer lists.[61] Nevertheless, courts sometimes enforce restrictive covenants on the most rudimentary of contract law principles (*e.g.*, that the covenant was part of a bargained-for-exchange).[62] This approach ignores the public policy against restraints of trade, and allows enforcement of covenants even when the interest for which the former employer seeks protection is not specified.

The better approach is for the court to require that the employer show a protectable interest, and then expand the "approved list" if the employer's legitimate interest is neither trade secrets nor customer lists. This approach has led to the addition of a new and problematic consideration—the uniqueness of an employee's services—to the list of protectable employer interests.

Increasingly, "uniqueness of employee's services" has been recognized as a legitimate and protectable interest of the employer.[63] In *Reed, Roberts Assocs. v. Strauman,*[64] the New

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Pemco Corp. v. Rose, 163 W. Va. 420, 431, 257 S.E.2d 885, 891 (1979); Karpinski v. Ingrasci, 28 N.Y.2d 45, 50, 268 N.E.2d 751, 754 (1971).

58. *See generally* Closius & Schaffer, *supra* note 2.

59. *See infra* section IIIB.

60. *See* Blake, *supra* note 9, at 649.

61. *See id.* Some authors have gone further and argued that "*only* trade secrets or confidential information constitute a protectable interest sufficient to justify any form of post-associational restraint." Closius & Schaffer, *supra* note 2, at 551 (emphasis added).

62. *See, e.g.,* Foster & Co. v. Snodgrass, 333 So. 2d 521, 522 (Fla. Dist. Ct. App. 1976); Continental Group, Inc. v. Kinsley, 422 F. Supp. 838, 844 (D. Conn. 1976).

63. Kniffin, *supra* note 1, at 26; Tannenbaum, *supra* note 13, at 21.

64. 40 N.Y.2d 303, 353 N.E.2d 590 (1976).

York Court of Appeals refused to enforce a restrictive covenant, but suggested that if the employee had rendered unique services to his employer, the covenant would have been enforced.[65]

*Purchasing Assocs., Inc. v. Weitz*[66] illustrates the emergence of the uniqueness standard as an independent basis for enforcement of a post-employment restrictive covenant. Purchasing Associates, Inc. (Purchasing Associates) was engaged in data processing and hired Weitz for a two year period. Weitz's employment agreement provided that, for two years following termination of his employment, he would not compete with his former employer in any area located within three hundred miles of New York City. The covenant described Weitz's services as "special, unique and extraordinary."[67] After one year, Weitz resigned, established his own company, and began competing within the proscribed geographic area. Purchasing Associates sought an injunction to prohibit Weitz from violating the covenant. The New York Court of Appeals concluded that, although uniqueness could afford a basis for injunctive relief against the former employee, Weitz did not in fact perform unique services.[68]

Although the covenant was not ultimately enforced, the opinion is important for two reasons. First, it established uniqueness of employee services as an independently protectable employer interest, rather than merely an additional factor to be considered in seeking to protect trade secrets or customer lists.[69] Additionally, the court enunciated a standard for "uniqueness," explaining that "more must . . . be shown" than that the individual "excels at his work" or that his services are of great value to the employer.[70] In short, "there must be a finding that the employee's services are of such character as to make replacement impossible or that the loss of such services would cause the employer irreparable injury."[71]

Other jurisdictions generally purport to apply this stan-

65. *Id.* at 308, 353 N.E.2d at 593.

66. 13 N.Y.2d 267, 196 N.E.2d 245 (1963).

67. *Id.* at 270, 196 N.E.2d at 246.

68. *Id.* at 274, 196 N.E.2d at 249.

69. *Id.* at 272, 196 N.E.2d at 248.

70. *Id.* at 274, 196 N.E.2d at 249.

71. *Id.*

dard.[72] Unfortunately, the standard has at least two problems. First, it is not clear, in practice, whether the employee's services must be truly unique or just very important to the covenantee. Second, and far more important, even if the services are unique, "there is no significant correlation between [the] uniqueness of the employee's services and the reasonableness of restraining him from accepting employment with a competing employer."[73]

The standard's ambiguity is illustrated by *Bradford v. New York Times Co.*,[74] a suit contesting the enforceability of a post-employment restrictive covenant stipulating the forfeiture of retirement benefits as liquidated damages. Bradford worked for the *New York Times* for 16 years, during which time he served in various corporate capacities including general manager, vice president, and director. After leaving the *New York Times*, Bradford violated the covenant by going to work for a competitor.[75] The *New York Times* terminated his retirement benefits, which amounted to approximately one-half million dollars.[76] Bradford sued. The Second Circuit Court of Appeals upheld the restrictive covenant on the basis of Bradford's uniqueness, which it found inherent in his "broad and vital corporate responsibilities" and his position as the "No. 2 executive" at the *New York Times*.[77] While the court's position has intuitive appeal, the decision is problematic. It may be assumed that the "No. 2 executive" must have had virtually unfettered access to proprietary information (*e.g.*, trade secrets and customer lists), but if the court was protecting proprietary information, it did not need the uniqueness standard. If it was protecting some other interest, the court should clearly have identified that interest.

A more troublesome aspect of protecting an employer's interest in the "uniqueness of employee services" is that the former employee's skills and abilities, even if developed and/or enhanced while working for the former employer, belong to

72. Annotation, *Enforceability of Covenant Not To Compete Involving Radio or Television Personality*, 36 A.L.R.4th 1139 (1985).

73. Kniffin, *supra* note 1, at 27.

74. 501 F.2d 51 (2d Cir. 1974).

75. *Id.* at 55.

76. *Id.* at 57 n.3.

77. *Id.* at 58.

the employee, not the employer.[78] Therefore, they should not constitute a legitimate basis for the restraint.[79]

Moreover, even if the employee's departure causes irreparable harm to the former employer, enforcement of the negative covenant will not make the covenantee whole, but will only punish the covenantor. Punishment is not generally considered a proper objective of contract law, even in the event of breach.[80] A fortiori, punishment is an improper objective when the employment contract has not been breached, but has merely expired pursuant to its express terms. Nevertheless, the uniqueness rationale is applied generally to entertainment and public performance employment contracts, including personal services contracts in the broadcast news industry.[81] It is particularly troublesome that post-employment non-compete covenants in broadcast news talent contracts almost invariably seek to impose complete occupational bans.[82] If, as suggested above, it is questionable whether the uniqueness of employee services can reasonably be said to constitute an "employer's business interest," certainly "uniqueness" should not support an outright prohibition on the pursuit of an entire occupation, even within a limited geographical area.

The argument in favor of enforcing post-employment non-compete covenants in broadcast news talent employment contracts is that such contracts typically run for terms of two to five years and the marketability of the employee within the relevant broadcast market at the conclusion of the contract's term results largely from exposure gained during the term of the employment contract. The real interest for which the covenantee seeks protection is not the inherent uniqueness of the covenantor's performance, but the covenantee's investment in marketing that performance.[83]

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78. *See, e.g.,* Club Aluminum Co. v. Young, 263 Mass. 223, 227, 160 N.E. 804, 806 (1928).

79. C. KAUFMAN, CORBIN ON CONTRACTS § 1391B (Supp. 1984); Hallmark Personnel of Texas v. Franks, 562 S.W.2d 933, 936 (Tex. Ct. App. 1978); Club Aluminum Co. v. Young, 263 Mass. 223, 227, 160 N.E. 804, 806 (1928).

80. E. A. FARNSWORTH, *supra* note 18, at § 12.8.

81. For citations to cases demonstrating the application of this rule to contracts involving actors, athletes and other performers, see Tannenbaum, *supra* note 13, at nn. 10-20.

82. *See* sample language excerpted from contracts, *infra* section IIIA.

83. The inaccuracy of the "uniqueness" label is manifest when an employer has chosen not to renew the contract of the willing employee, but still wants to preclude the employee from accepting "competing" employment, or when an employer has

This concept was illustrated in the 1982 Georgia case of *Beckman v. Cox Broadcasting Corp.*[84] In *Beckman,* the Georgia Supreme Court upheld a post-employment restrictive covenant with a duration of 180 days and a territory encompassing the area within thirty-five miles of the covenantee's offices. Beckman did not contend that these limits were unreasonable.[85] The issue in this case was whether prohibition of the broadcast of Beckman's voice or image within the specified time period and area was unnecessarily broad. In holding for the broadcasting company, the court expressly considered the company's significant investment in the development and promotion of Beckman's image in the local broadcast market, both individually and as a part of the station's "news team."[86] Thus, the court found that the company had a protectable business interest in the former employee's local popularity to the extent that such popularity resulted from promotional efforts by the company.[87] This approach has the appeal of candor and affords a rational basis for invoking the otherwise irrational "uniqueness" factor. As one commentator has observed:

> [T]he loss against which courts protect the employer is . . . a loss that begins with the departure of the employee but is compounded when he assumes a competitive position. If the employee is truly irreplaceable, then his rendering of services to a competitor creates a loss . . . which the market system cannot compensate.[88]

### D. Consideration for Employee's Covenant

As with contracts in general, a non-compete covenant must be supported by consideration to be enforceable.[89] If the non-compete covenant is executed simultaneously with, and as part of, an employment contract, the employment itself constitutes consideration for the covenant.[90] In the majority of jurisdic-

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made disparaging remarks about an employee, but then argues that the employee renders "unique and extraordinary" services. *See, e.g.,* Matuszak v. Houston Oilers, Inc., 515 S.W.2d 725, 729 (Tex. Ct. App. 1974).

84. 250 Ga. 127, 296 S.E.2d 566 (1982).

85. *Id.* at 129, 296 S.E.2d at 568.

86. *Id.* at 130, 296 S.E.2d at 569.

87. *Id.*

88. Kniffin, *supra* note 1, at 54.

89. Annotation, *Sufficiency of Consideration for Employee's Covenant Not To Compete, Entered Into After Inception of Employment,* 51 A.L.R.3d 825, 828 (1973).

90. *Id.*

tions, however, mere continuation of employment does not constitute consideration for a covenant entered into after the inception of employment. In these jurisdictions new consideration, in the form of additional benefits to the employee, must be provided by the employer for the covenant to be valid.[91] Typical benefits include promotions, salary increases, and annuities.[92]

A minority of jurisdictions, including Texas, Massachusetts, Illinois, and New York, find that continued employment *is* sufficient consideration for the enforcement of a post-employment non-compete covenant.[93] In *McAnally v. Person,*[94] the Texas Court of Appeals ruled that, although the employee had worked three months before execution of the covenant, continued employment was sufficient consideration.[95] Although continued employment is sometimes held to be sufficient consideration in New York, in *Stover v. Gamewell Five Alarm Telephone Co.,*[96] a New York court seemed to take the position that an annuity contract executed by an employer in favor of his employee was necessary consideration for the employee's non-compete covenant entered into after commencement of employment.[97]

### E. Present Day Judicial Enforcement

There is a paucity of case law regarding post-employment non-compete covenants in the broadcast news industry. One commentator's insights on a similar situation in the entertainment industry aptly describe the problem in the broadcast news context:

> [I]f a dispute arises between an employer and an artist, the threat of court action is usually sufficient to induce the parties to compromise and settle out of court. Careers in the entertainment field are typically short-lived; if the artist drops from public view for any length of time his or her career may be dealt a fatal blow.[98]

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91. *Id.* at 830.
92. *Id.*
93. *Id.* at 828.
94. 57 S.W.2d 945 (Tex. Ct. App. 1933).
95. *Id.* at 948.
96. 149 N.Y.S. 650 (1914).
97. *Id.* at 652.
98. Grogan, *Statutory Minimum Compensation and the Granting of Injunctive Relief to Enforce Personal Services Contracts in the Entertainment Industries: The Need for Legislative Reform,* 52 S. CAL. L. REV. 489, 491 (1964).

Many post-employment non-compete covenants expressly state that they are enforceable by injunction. Despite such a proclamation, courts, and not the parties to a contract, must determine whether the prerequisites for the issuance of an injunction have been met. While the parties to a contract may attempt to provide for an equitable remedy such as liquidated damages or injunctive relief, such provisions are not binding upon a court. The alternative remedy is monetary damages with the associated difficulty of establishing and determining the extent of injury. Therefore, despite the difficulty of meeting its requirements, the negative injunction is the most common means of judicial enforcement of personal services contracts in the broadcast news and entertainment industries.[99]

An employer attempting to meet the requirements for equitable relief is defeated at the outset if unable to show a probability of success on the merits with respect to the fundamental issue: breach of contract. This was the result of a 1968 Florida suit in which the defendant radio commentator had signed an agreement including a covenant not to compete for eighteen months following termination of his employment "for any reason other than discharge without cause."[100] Citing the general policy of opposition to restraints of trade, the court interpreted the "ambiguous or doubtful language" of the covenant against its enforcement and concluded that the restriction would have been triggered if the defendant had quit or been fired with cause. Instead, because the contract had expired by its stated terms, the court held that the covenant never became effective.[101]

In *Richmond Brothers, Inc. v. Westinghouse Broadcasting Co.*,[102] the Supreme Judicial Court of Massachusetts affirmed a trial court's dismissal of a suit by a broadcasting company attempting to enjoin competition by a former employee who had been absent from the broadcast market for almost three years. The court did not find the covenant unenforceable, but held

99. Yeam, *New Remedial Developments in the Enforcement of Personal Service Contracts for the Entertainment and Sports Industries: The Rise of Tortious Bad Faith Breach of Contract and the Fall of the Speculative Damage Defense*, 7 LOY. L.A. ENT. L.J. 27 (1987).

100. Storz Broadcasting Co. v. Courtney, 178 So. 2d 40, 41 (Fla. Dist. Ct. App. 1965), *cert. denied*, 188 So. 2d 315 (Fla. 1966).

101. *Storz Broadcasting*, 178 So. 2d at 42.

102. 357 Mass. 106, 256 N.E.2d 304 (1970).

that it was unnecessary to enforce the covenant to its full extent in order to protect the legitimate business interests of the employer, Richmond Brothers, Inc. (Brothers).[103]

Brothers hired Gerald Jacoby as a radio announcer and moderator of a talk show on WMEX in Boston. The initial five year employment contract provided that, for three years after Jacoby ceased to be employed by Brothers, he would not engage in the radio, television, or advertising business anywhere in New England. A subsequent employment agreement between the parties provided Jacoby would not compete with WMEX for five years after termination of his employment with Brothers. After Jacoby terminated his employment with Brothers, he worked in Chicago for three years. He then returned to Boston, where he began broadcasting for Westinghouse's WBZ television and radio stations. Brothers sued to enforce the covenant by injunction.

The court found the restrictive covenant unreasonably long.[104] In making this determination, the court looked at the nature of Brothers' business, the character of the employment involved, the situation of the parties, the necessity of the restriction for the protection of the employer's business, and the right of the employee to work and earn a livelihood.[105] After considering these factors, the court concluded that it was "unable to perceive any business interest of [Brothers] which merits the length of 'protection' it would receive by the enforcement of the covenant."[106]

The court noted that there was no evidence to indicate that Brothers had lost any advertisers since Jacoby returned to the Boston area. Moreover, the court ruled that Jacoby possessed no trade secrets or other pertinent confidential information communicated to him during the course of his employment with Brothers.[107] Next, the court rejected Brothers' claim that Jacoby's immediate success upon his return to Boston was a direct result of Brothers' expenditures and promotion. The court found that the reasons for Jacoby's popularity would be difficult to determine and that, in any case, Jacoby's absence from the broadcasting area for almost three years sufficiently

103. *Id.* at 111, 256 N.E.2d at 308.
104. *Id.* at 110, 256 N.E.2d at 307.
105. *Id.*
106. *Id.*
107. *Id.* at 107, 256 N.E.2d at 305.

protected Brothers' business interests.[108]

The court also stated that an employer cannot prevent an employee from using skill or intelligence acquired, or increased and improved, through experience or instruction received in the course of the employment. Thus, the abilities possessed by Jacoby were his own, and his efforts to use such abilities to earn a living could not be restricted to protect Brothers. The court concluded that enforcement of the covenant beyond the years of Jacoby's absence from Boston would merely protect Brothers against ordinary competition.[109]

In *KWEL, Inc. v. Prassel,*[110] radio station KWEL in Midland, Texas, hired John Prassel as a radio announcer, and included a non-compete covenant in his employment contract. Within several days of his termination by KWEL, Prassel was employed by radio station KNAM in Midland as an announcer and producer of commercial announcements. The new job entailed the same kind of work that he had performed at KWEL, but the stations' formats were different. Prassel acknowledged that he violated the non-compete covenant but denied that the violation had caused any damage to KWEL. The trial court found that while at KWEL, Prassel did not have any selling duties and did not call upon advertising customers.[111] Therefore, there was no "customer list" issue. On appeal, the court held that the terms of the clause were reasonable, but that KWEL was not entitled to a temporary injunction to bar the announcer from working for another station because there was no evidence that KWEL either lost or would lose advertising customers or audience.[112]

*American Broadcasting Co. v. Wolf,*[113] a New York case, involved a complex restrictive covenant and efforts by the American Broadcasting Company (ABC) to enjoin Warner Wolf, a sportscaster, from employment with rival CBS. ABC and Wolf entered into an employment agreement which, following the exercise of a renewal option, was to terminate on March 5, 1980. The contract included a "good faith negotiation and first refusal" provision[114] which bound Wolf to negotiate

108. *Id.* at 111, 256 N.E.2d at 307.
109. *Id.*
110. 527 S.W.2d 821 (Tex. Ct. App. 1975).
111. *Id.*
112. *Id.* at 823.
113. 52 N.Y.2d 394, 420 N.E.2d 363 (1981).
114. The provision reads as follows:

in good faith with ABC for a ninety-day period from December 6, 1979, through March 4, 1980. Negotiations from December 6th through January 19th were to be exclusively with ABC. Following expiration of the ninety-day negotiating period and the contract on March 5, 1980, Wolf was required, before accepting any other offer, to afford ABC a right of first refusal.

Wolf met with ABC in September 1979. At this meeting, proposals and counter proposals were offered by Wolf and ABC with no acceptance by either. Subsequently, unbeknownst to ABC, Wolf met with representatives of CBS, related his employment requirements, and discussed the first refusal and good faith negotiation clause of his ABC contract. Wolf also furnished a copy of his ABC contract to CBS. On October 12th and 16th, ABC officials and Wolf met again to no avail. Finally, on January 2, 1980, ABC agreed to meet substantially all of Wolf's demands. Wolf rejected the offer. On February 1, 1980, after termination of the exclusivity period, Wolf and CBS orally agreed on the terms of Wolf's employment as a sportscaster for WCBS-TV, a CBS-owned station in New York. On February 5th, Wolf submitted a letter of resignation to ABC. On February 6th, ABC representatives made various offers and promises, but Wolf rejected them. Wolf then informed ABC officials that he had made a "gentlemen's agreement" with CBS and would leave on March 5th. ABC filed suit to enjoin Wolf's employment as a sportscaster with CBS and to seek specific enforcement of its right of first refusal.

The trial court ruled that there was no breach of contract

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> You [Wolf] agree, if we so elect, during the last ninety (90) days prior to the expiration of the extended term of this agreement, to enter into good faith negotiations with us for the extension of this agreement on mutually agreeable terms. You [Wolf] further agree that for the first forty-five (45) days of this renegotiation period, you [Wolf] will not negotiate for your services with any other person or company other than WABC-TV or ABC. In the event we are unable to reach an agreement for an extension by the expiration of the extended term hereof, you [Wolf] agree that you will not accept, in any market for a period of three (3) months following expiration of the extended term of this agreement, any offer of employment as a sportscaster, sports news reporter, commentator, program host, or analyst in broadcasting (including television, cable television, pay television, or radio) without first giving us, in writing, an opportunity to employ you on substantially similar terms and you agree to enter into an agreement with us on such terms.

*Id.* at 395, 420 N.E.2d at 364.

and, in any event, equitable relief would be inappropriate. The appellate division, although concluding that Wolf had breached both parts of the good faith negotiation and first refusal provision, nonetheless affirmed on the ground that equitable relief was unwarranted.[115]

The New York Court of Appeals ruled that Wolf did not breach the right of first refusal by accepting an offer during the term of his employment with ABC, but that Wolf had violated the good faith negotiation clause of the contract.[116] The court noted the situations in which injunctive relief could be granted. First, the court stated that if, in violation of an existing contract, an employee refuses to render services to his employer, and the services are unique or extraordinary, an injunction may be issued to prevent the employee from using those services for another person for the duration of the contract, if allowing the employee to work for another employer would certainly result in irreparable harm to the employer.[117]

The second situation in which the court permits injunctive relief is when the employee has expressly agreed not to compete with the employer following the term of the contract, or is threatening to disclose trade secrets or commit another tortious act.[118] Nevertheless, the court noted that, even where there is an express non-compete covenant, it will be "rigorously examined" and will be specifically enforced only if the reasonableness requirements of non-compete covenants are met.[119]

The court then acknowledged the general principles regarding enforcement of non-compete covenants and the uniqueness requirement and refused to grant equitable relief, stating that Wolf did not violate an express non-compete covenant, and that such a covenant covering the post-employment period would not be implied.[120] The court made it clear, however, that Wolf had breached his good faith negotiation obligation, and that its decision denying equitable relief was without prejudice to ABC's right to seek monetary damages.[121]

115. *Id.* at 394, 420 N.E.2d at 363.
116. *Id.* at 398, 420 N.E.2d at 366.
117. *Id.* at 402, 420 N.E.2d at 367.
118. *Id.*
119. *Id.*
120. *Id.* at 405-06, 420 N.E.2d at 368.
121. *Id.* at 406, 420 N.E.2d at 369.

The contract provision at issue in *Wolf* was unusually complex, but it and the other cases discussed in this section serve to illustrate the uncertainties involved in both the ad hoc determination of what is "reasonable," and efforts to predict whether equitable relief will be deemed appropriate. Moreover, these vagaries must be contemplated against the backdrop of the expense and delay of litigation.

## II
## California's Statute: The Uncommon Law

California courts have not adhered to the reasonableness test since 1872.[122] In 1941, the California legislature enacted a statute which provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[123] The current statute invalidates most non-compete clauses and, while the statute's applicability to personal services contracts is settled, it applies only when a person is restrained from pursuing an entire trade, business, or profession, but does not prohibit partial restraints.[124] Thus, the statute prohibits the complete "occupational ban" that is the core of the typical post-employment non-compete covenant included in a broadcast news talent employment contract.

California courts have generally upheld post-employment non-compete covenants limited to a prohibition against the former employee revealing trade secrets or confidential information, such as customer lists.[125] However, if the post-employment covenant is a general one based on territorial or

122. *See* Bosley Medical Group v. Abramson, 161 Cal. App. 3d 284, 288, 207 Cal. Rptr. 477, 480 (1984).

123. CAL. BUS. & PROF. CODE § 16600 (West 1987). Several other states have similar, although generally less broad, statutes. *See, e.g.*, ALA. CODE §§ 22-24 (1958); ARIZ. REV. STAT. ANN. § 44-1401 (1956); FLA. STAT. ANN. § 542.12 (West 1972); LA. REV. STAT. ANN. § 23:932 (West 1964); MICH. COMP. LAWS ANN. § 445.761 (West 1967); MONT. CODE ANN. §§ 13-807 to 809 (1967); N.D. CENT. CODE § 9-08-06 (1975); OKLA. STAT. ANN. tit. 15, §§ 217-19 (West 1966); S.D. CODIFIED LAWS ANN. §§ 53-9-8 to 11 (1967).

124. Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1971); Buskuhl v. Family Life Ins. Co., 271 Cal. App. 2d 514, 76 Cal. Rptr. 602 (1969).

125. *See* Loral Corp. v. Moyes, 174 Cal. App. 3d 268, 219 Cal. Rptr. 836 (1985); Rigging Int'l Maintenance Co. v. Gwin, 128 Cal. App. 3d 594, 180 Cal. Rptr. 451 (1982).

durational restrictions, it is generally unenforceable.[126] The rationale behind the statute and the courts' rulings is that non-compete covenants are against California's public policy.[127]

Trade secrets, customer lists, and other proprietary information are protected by other legal principles, including those of agency.[128] Statutory exceptions exempt sales of businesses and dissolutions of partnerships from the prohibition.[129] A non-compete covenant may be enforceable if it is ancillary to the sale of a business "whereby the seller covenants not to compete in a specified geographic area for such time as the purchaser or his successor in title continues to carry on that business."[130] Partners may agree not to compete within the same city or town in which the partnership transacted business.[131] Post-employment non-compete covenants are not cov-

126. *See* Loew's, Inc. v. Cole, 185 F.2d 641 (9th Cir. 1950), *cert. denied*, 340 U.S. 954 (1951); *see also* KGB, Inc. v. Giannoulas, 104 Cal. App. 3d 844, 164 Cal. Rptr. 571 (1980).

127. *See* Fidelity Credit Assur. Co. of Cal. v. Cosby, 90 Cal. App. 22, 265 P. 372 (1928); Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1971).

128. *See* RESTATEMENT (SECOND) OF AGENCY § 396(a)-(d) (1957).

129. *See* Campbell v. Board of Trustees of Leland Stanford, Jr. University, 817 F.2d 499 (9th Cir. 1987).

130. Kniffin, *supra* note 1, at 35. The specific language of the statutory exception provides:

> Any person who sells the goodwill of a business, or any shareholder of a corporation selling or otherwise disposing of all his shares in said corporation, or any shareholder of a corporation which sells (a) all or substantially all of its operating assets together with the goodwill of the corporation, (b) all or substantially all of the operating assets of a division or a subsidiary of the corporation together with the goodwill of such division or subsidiary, or (c) all of the shares of any subsidiary, may agree with the buyer to refrain from carrying on a similar business within a specified county or counties, city or cities, or a part thereof, in which the business so sold, or that of said corporation, division, or subsidiary has been carried on, so long as the buyer, or any person deriving title to the goodwill or shares from him, carries on like business therein. For the purposes of this section, "subsidiary" shall mean any corporation, a majority of whose voting shares are owned by the selling corporation.

CAL. BUS. & PROF. CODE § 16601 (West 1987).

131. The specific language provides:

> Any partner may, upon or in anticipation of dissolution of the partnership, agree that he will not carry on a similar business within a specified county or counties, city or cities, or a part thereof, where the partnership business has been transacted, so long as any other member of the partnership, or any person deriving title to the business or its goodwill from any such other member of the partnership, carries on a like business therein.

CAL. BUS. & PROF. CODE § 16602 (West 1987).

ered by these exceptions and, hence, are void in California.[132] The reasonableness test applied in most jurisdictions has been rejected by California courts.[133]

The effect of the California statute is to defeat post-employment non-compete covenants that are premised upon the uniqueness of the employee's services. Presumably because of the statute, there are few California cases concerning post-employment non-compete covenants included in broadcast news or other public performance employment contracts. Two cases, however, serve to illustrate the principle and the limitations of the prohibition.

*KGB, Inc. v. Giannoulas*[134] involved an action seeking to enjoin the defendant from appearing clad in a chicken suit ensemble after his employment with the plaintiff radio station had ended. Giannoulas entered into an employment agreement with KGB which provided: "Employee agrees and acknowledges that the costume, concept, and the KGB Chicken are the exclusive property of employer, and . . . agrees not to take any action inconsistent with said rights of employer in and to the concept of the KGB Chicken."[135]

After KGB fired Giannoulas for removing his vest showing KGB's call letters, Giannoulas began to freelance in a "fowl" costume without a name. The trial court granted a preliminary injunction restraining Giannoulas from appearing in a "chicken suit" at any sports or public event where a team from San Diego county appeared.

The appellate court found that the prohibition "invalidly restrict[ed] Giannoulas' right to earn a living and to express himself as an artist."[136] The court stated:

> Public policy disfavors injunctions restraining the right to pursue a calling . . . . On the national scene, the weight of authority shows great reluctance to issue restraints unless the former employer can show irreparable injury. California goes beyond judicial reluctance to possible illegality of such injunctions . . . . Although there are a few statutory exceptions to the ban against restraints of trade, none of them applies . . .

132. *See* Loral Corp. v. Moyes, 174 Cal. App. 3d 268, 219 Cal. Rptr. 836 (1985); *Campbell*, 817 F.2d at 502. *But see* Rigging Int'l Maintenance Co. v. Gwin, 128 Cal. App. 3d 594, 180 Cal. Rptr. 451 (1982).

133. *Campbell*, 817 F.2d at 502.

134. 104 Cal. App. 3d 844, 164 Cal. Rptr. 571 (1980).

135. *Id.* at 853, 164 Cal. Rptr. at 580.

136. *Id.* at 847, 164 Cal. Rptr. at 576.

> where the employer seeks to restrain a performer from continuing to perform after the term of employment expires.[137]

*Muggill v. Reuben H. Donnelley Corp.*[138] also illustrates the application of the California statute. In *Muggill*, the defendants terminated the plaintiff's retirement benefits when, after leaving defendants' employ, the plaintiff went to work for a competing business. The Supreme Court of California held that the termination of Muggill's pension plan was a violation of the California statute in that it placed a restraint on the plaintiff's right to engage in a lawful business.[139] The court said the statute "invalidates provisions in employment contracts prohibiting an employee from working for a competitor after completion of his employment or imposing a penalty if he does so, unless they are necessary to protect the employer's trade secrets."[140] These decisions leave little doubt that a typical broadcast news post-employment non-compete covenant would be flatly unenforceable in California. In jurisdictions where post-employment non-compete covenants are governed by common law, the situation is far less clear.

## III
## Validity of a Typical Post-Employment Non-Compete Covenant in a Broadcast Talent Employment Contract

A non-compete covenant in a broadcast talent employment contract will be enforced "only to the extent that it is reasonable in time and space, necessary to protect legitimate [employer] interests, and not an obstruction of the public interest."[141]

### A. The Reasonableness Test Applied

The following language is typical of post-employment non-compete covenants commonly included in broadcast talent employment contracts:

> After this contract ends either by expiration or termination, the newscaster will not make on-the-air appearances on any

137. *Id.* at 848, 164 Cal. Rptr. at 576-77.
138. 62 Cal. 2d 239, 398 P.2d 147, 42 Cal. Rptr. 107 (1965).
139. *Id.* at 243, 398 P.2d at 151, 42 Cal. Rptr. at 109.
140. *Id.* at 242, 398 P.2d at 149, 42 Cal. Rptr. at 109.
141. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 22.

> other television or radio station operating within fifty miles of WXYZ studios for a period of two months for each year the newscaster was employed by WXYZ or for one year, whichever is less.[142]

Except in jurisdictions such as California, where a statute would void this clause, a test of its validity would require weighing the employer's interest in protecting its business against the employee's interest in avoiding restrictions on his ability to earn a livelihood. First, the clause must be reasonable as to duration, geographic scope and range of activities prohibited. The cases discussed above indicate that it is likely a duration of one year and a geographic limitation of fifty miles would be found reasonable. With respect to the consideration requirement, the non-compete clause, if included in an initial employment contract, is supported by the commencement of employment.[143]

The range of activities prohibited by this sample clause, however, is extremely broad, banning the former employee's pursuit of the occupation within the stipulated time period and area. Whether this prohibition is too broad to be enforced can only be determined with reference to the business interest which the former employer seeks to protect: the uniqueness of employee services. In the broadcast news context, as discussed above, "uniqueness" is often a euphemism for the employer's investment in the employee's popularity. Nevertheless, "uniqueness" is the rubric under which covenants of this type are most often enforced.

Because of the difficulty in showing uniqueness, broadcast talent employment contracts sometimes include "unique services" clauses to bolster the enforceability of non-compete covenants.[144] Yet, despite the best efforts of broadcast employers'

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142. Litwin, *Negotiating Media Contracts: Personal Service Contracts for On-Air Talent*, 31 BOSTON B.J. 14, 16-17 (1987).

143. *See supra* text accompanying notes 89-97.

144. The following language comprises a typical "unique services" clause:

> The services to be furnished by the newscaster hereunder and the rights granted by the newscaster hereunder are of a special character that gives them a unique value, the loss of which cannot be adequately or reasonably compensated for in damages in an action at law. The newscaster's failure to meet the obligations described in this agreement will cause the station irreparable injury or damage for which the station will be entitled to seek and obtain injunctive or other equitable relief. The granting of such relief will not, however, be construed as a waiver of any other rights the station may have against the newscaster in law or in equity.

lawyers, no formal recitation by the parties to the contract will ever bind a court to the conclusion asserted therein. As one court stated, "in a court proceeding, the contractual recital regarding uniqueness of services may be admitted as evidence, to be weighed against the performer's affidavit to the contrary."[145] Generally, employers will need to provide further evidence of the unique nature of employee's services.[146] Mere contractual recitals of uniqueness will not stand against the court's own finding to the contrary.[147]

The focus on "uniqueness" and how to prove it misses the point. The business interest for which the former employer seeks protection is not any inherent uniqueness in the services rendered by the former employee. These services, after all, are far more like those of other broadcast talents than they are different. Rather, the employer seeks to protect its investment in the employee's audience popularity within the broadcast market. This fact is implicitly acknowledged in many "unique services" clauses, which make the duration of the prohibition dependent on the length of employment. Another measure of the former employer's investment in the former employee is the former employee's position in the employer's hierarchy, often indicated by salary.

*Bradford v. New York Times Co.*,[148] while not based on a broadcast news employment contract, nevertheless illustrates the use of employee importance, rather than uniqueness, as a basis for enforcing a post-employment non-compete covenant. The *Bradford* court found a protectable employer interest in the mere fact that Bradford had occupied a high position in the *New York Times* organization.[149] The court simply equated high position with unique services.[150] In addition, it is at least possible that Bradford's high salary persuaded the court, if only intuitively, that the *New York Times* had, in effect, "purchased" the covenant.[151] The seeming pro-employer

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Litwin, *supra* note 142, at 17.

145. KWEL, Inc. v. Prassel, 527 S.W.2d 821 (Tex. Ct. App. 1975).

146. *Id. See also* Harry Rogers Theatrical Enterprises, Inc. v. Comstock, 232 N.Y.S. 1 (N.Y. App. Div. 1928).

147. *Id. See, e.g.*, Fredrick Bros. Artists Corp. v. Yates, 186 Misc. 871, 61 N.Y.S.2d 478 (1946), *rev'd*, 271 N.Y. 69, 62 N.Y.S.2d 714 (1946); Dockstader v. Reed, 121 N.Y. 846, 106 N.Y.S. 795 (1907).

148. 501 F.2d 51 (2d Cir. 1974); *see also supra* notes 74-77 and accompanying text.

149. 501 F.2d at 58.

150. *Id.*

151. Closius & Schaffer, *supra* note 2, at 550.

bias of this rationale in the employment contract context has led some critics to propose the use of other legal principles, such as those of agency and fiduciary responsibility:

> Using contract rules to evaluate a covenant's validity permits the courts to enforce occupational bans that give more protection from competition to [an employer's] interests than is legitimately justified.[152]

The restrictive covenants typically used by broadcast companies are vulnerable to challenges of at least two types. First, it can be argued that a particular covenant is unreasonable, either in part or in its entirety. The more fundamental attack challenges, on policy grounds, the validity of post-employment non-compete covenants in general. The latter challenge is not likely to succeed in states that have not enacted statutes curbing the use of such covenants, but even a court unwilling to engage in "judicial legislation" might find the policy arguments an adequate basis for heightened scrutiny with respect to reasonableness and the employer's business interest.

## B. Policy Considerations

### 1. *Public Interest*

The policy arguments against enforcement would seem especially persuasive when an employer has terminated an employee or is using a post-employment restriction to pressure an employee not to quit. In the latter instance, one court has observed:

> A covenant that serves primarily to bar an employee from working for others or for himself in the same competitive field so as to discourage him from terminating his employ-

152. *Id.* at 548. Closius and Schaffer propose that the common law rules of agency and unfair competition, rather than the rules of contract, should govern the enforceability of post-employment non-compete covenants. *Id.* at 532-35. Their position is that, generally, only trade secrets, customer lists, and the like constitute legitimately protectable employer business interests and that contract law, correctly applied, adds nothing to the protection afforded by agency and related legal principles. *Id.* at 548. The Second Restatement of Agency provides that 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. RESTATEMENT (SECOND) OF AGENCY § 396(b)-(d) (1957).

The potential utility of this argument in the context of broadcast news employment contracts, however, is undercut by Closius and Schaffer themselves, who would make an exception for an employee "with acknowledged expertise and reputation within an industry who fills a significant position within the [employer's] business," and who "possesses bargaining power equal to that of the [employer]." Closius & Schaffer, *supra* note 2, at 550.

> ment is a form of industrial peonage without redeeming virtue in the American economic order.[153]

The court's reference to the "economic order" shifts the focus away from fairness to the individual, and sounds the theme of social utility—a theme that runs through much of the policy discussion regarding post-employment non-compete covenants. The question then becomes whether society is better off with the enforcement of restrictive covenants in a particular industry or business.

It can be argued that the public interest is best served by the enforcement of at least some post-employment non-compete covenants because they protect, and therefore encourage, employer investment, which results in better products and services. It would be extremely difficult, however, to demonstrate this proposition in broadcast news, where it is unclear what "better" means or how it can be measured.

The public interest argument against enforcement is also largely economic. The court in *Reed, Roberts Assocs. v. Strauman*[154] described the economic system's need for "the uninhibited flow of services, talent and ideas"[155] and went on to state that "no restrictions should fetter an employee's right to apply to his own best advantage the skills and knowledge acquired by . . . his previous employment."[156]

The potentially significant collective economic impact of post-employment non-compete restraints has led many authors to advocate application of the rules and principles of antitrust law to the covenants.[157] The Sherman Antitrust Act proscribes "every contract in restraint of trade or commerce among the several states."[158] This seemingly absolute prohibi-

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153. Josten's, Inc. v. Cuquet, 383 F. Supp. 295, 299 (E.D. Md. 1974).

154. 40 N.Y.2d 303, 353 N.E.2d 590 (1976).

155. *Id.* at 307, 353 N.E.2d at 593.

156. *Id.*

157. *See, e.g.*, Goldschmid, *Antitrust's Neglected Step-child: A Proposal for Dealing with Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193, 1204 (1973); Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Post-Employment Restraints of Trade*, 1977 U. ILL. L.F. 621.

158. 15 U.S.C. § 1 (1976). The commerce clause of the Constitution has long been construed as giving Congress significant power over not only interstate activities, but also intrastate labor-management relations. *See, e.g.*, United States v. Darby, 312 U.S. 100, 117-24 (1941); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29-32 (1937). Also, although 15 U.S.C. § 17 (1976) states that human labor is not a commodity or article of commerce, this definition was developed to create room (within the antitrust arena) for labor unions to operate legally. Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332, 335 (7th Cir. 1967).

tion has long been tempered, however, by the "rule of reason."[159] Perhaps as a result, every post-employment restraint tested under the rule has survived.[160]

In *Newburger, Loeb & Co., Inc. v. Gross,*[161] for example, the Second Circuit Court of Appeals observed that "employee agreements not to compete are proper subjects for scrutiny under section 1 of the Sherman Act."[162] In concluding that the restriction at issue was reasonable, and therefore enforceable, the court cited the covenantee's "legitimate interest" in preventing the covenantor from competing for customers of the covenantee.[163]

*Newburger* involved a securities brokerage firm, rather than a broadcasting company, but nevertheless demonstrates that an antitrust analysis ultimately tests the covenant against a standard not appreciably different from the previously discussed standard for non-compete covenants under basic contract law—the test of reasonableness.[164] Arguing that the economic issues remain relevant, however, noted antitrust

159. *See* Standard Oil Co. v. United States, 221 U.S. 1, 57-60 (1910) (acknowledging that every contract restrains trade and, therefore, the prohibition cannot be absolute).

160. *See, e.g.,* Bradford v. New York Times Co., 501 F.2d 51, 59 (2d Cir. 1974); Frackowiak v. Farmer Ins. Co., Inc., 411 F. Supp. 1309, 1318-19 (D. Kan. 1976); Alders v. A.F.A. Corp. of Fla., 353 F. Supp. 654, 656 (S.D. Fla. 1973); Miller v. Kimberly-Clark Corp., 339 F. Supp. 1296, 1297 (E.D. Wis. 1971).

At least one author has argued that the survival of the restrictions under antitrust analysis results from the courts' failure to consider labor market impact, as opposed to product market impact. Product market analysis is the traditional approach, but labor market analysis has been employed in some sports cases. Note, *The Antitrust Implications of Employee Non-compete Agreements: A Labor Market Analysis,* 66 MINN. L. REV. 519 (1982) (citing Radovich v. N.F.L., 352 U.S. 445, 453-54 (1957); Mackey v. N.F.L., 543 F.2d 606, 616-18 (8th Cir. 1975), *cert. dismissed,* 434 U.S. 801 (1977)).

161. 563 F.2d 1057 (2d Cir. 1977).

162. *Id.* at 1082.

> When a company interferes with free competition for one of its former employee's services, the market's ability to achieve the most economically efficient allocation of labor is impaired . . . . Morever, employee-noncompetition clauses can tie up industry expertise and experience . . . . Restraints on postemployment competition that serve no legitimate purpose at the time they are adopted would be per se invalid . . . . Even if the clause is not overbroad per se, it might still be scrutinized for unreasonableness: Are the restrictions so burdensome that their anticompetitive purposes and effects outweigh their justifications? Restraints that fail this balancing test might be struck down under a rule of reason.

*Id.*

163. *Id.* at 1082-83.

164. *See supra* notes 24-25 and accompanying text.

scholar Professor Sullivan has suggested that "the courts should take into account market impact in a more explicit and more serious manner than they have so far."[165] He advocates a five-factor analysis for evaluation of post-employment non-compete covenants: (1) the totality of the anti-competitive restraints imposed by the employer involved and not merely those of one plaintiff; (2) the extent to which there is a pattern of such restraints in the relevant industry; (3) the state of competition in the industry, generally, and in the relevant geographic market; (4) the scope of the restraint's prohibition and the remedy provided in the contract for noncompliance; and (5) the nature of the employee restrained, with special disfavor for restraints on employees who are particularly valuable to competitors. Additionally, Professor Sullivan suggests that courts subject proffered employer justifications to a higher degree of scrutiny.[166]

2. *Individual Rights*

A second and distinct set of policy questions concerns the applicability and impact of the concept of individual rights. Beneath the simplicity of the phrase "freedom of contract" is the conflict between the sanctity of one contract (here, an agreement not to compete) and an individual's freedom to make a second contract (for the sale of one's personal services). Indeed, freedom of contract is a misnomer if what is meant is that parties should be free to agree on whatever terms they like, and that the state, through its judicial apparatus, should enforce those agreements. Reality is neither so simple nor so absolute.

Judicial refusal to enforce contracts involving fraud, duress or incapacity, for example, is at once a prerequisite of, and an exception to, freedom of contract.[167] It is a prerequisite because freedom of contract is generally thought to be meaningful only when parties with contractual capacity act voluntarily.[168] Even when these conditions are met, however, the parties are not entirely free to do as they please, for the

165. Sullivan, *supra* note 157, at 647.

166. *Id.* at 647-49

167. Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 569-70 (1982). Professor Duncan Kennedy describes this as "the constitutive character of the exceptions to enforcement." *Id.*

168. *Id.*

doctrines of undue influence and unconscionability give courts broad latitude to adjust or avoid otherwise valid agreements.[169]

One difficulty in applying the doctrine of unconscionability to employment contracts in broadcast news is that the doctrine is most often invoked in situations involving unequal bargaining power.[170] A relatively well-paid broadcast newsperson may not appear to need this particular type of protection. Perhaps the real issue is the difficulty of protecting the employee from his or her own willingness to enter into a bad bargain.[171] Blatantly paternalistic treatment of highly-paid, skilled, professional adults may seem ill-conceived, but there is abundant precedent for this in legislation regarding mandatory use of seat belts, the social security system, and the federal system of securities regulation. The question is whether the prospective freedom to sell one's services is an interest whose alienation the law should regulate, or even forbid.[172] The idea that freedom to ply one's trade is an interest "owned" by each individually is neither radical nor novel.[173] To conclude that this interest should be inalienable, however, requires a second, more difficult step. Prohibitions against selling oneself into slavery or agreeing to be murdered are scarcely controversial, but the analogy to an agreement not to do a particular kind of work in a particular area during a particular period of time seems wholly theoretical and quite at-

169. *Id.*

170. *Id.* at 614-15. *See also* U.C.C. § 2-302 comment (1978) (on unconscionability). "The principle is one of the prevention of oppression." *Id.*

171. Kennedy, *supra* note 167, at 634. "Courts using the doctrine of unconscionability like to put their decisions on grounds of unequal bargaining power . . . [b]ut it's often obvious that they are concerned not with power but with naivete." *Id.*

172. *See generally* Calebresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 HARV. L. REV. 1089 (1972). There are three types of "entitlements": those protected by property rules, those protected by liability rules, and those that are inalienable. "An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller." *Id.* at 1092-93.

173. *See* J. LOCKE, SECOND TREATISE OF GOVERNMENT ch. V (P. Laslett rev. ed. 1963). "Every Man has a *Property* in his own *Person* . . . . The *Labour* of his Body and the *Work* of his Hands . . . are properly his." *Id.* at § 27 (emphasis in original). *See also* J. BENTHAM, THEORY OF LEGISLATION 112 (R. Hildreth trans. 4th ed. 1882) ("The idea of property consists in an established expectation."); Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1971) ("[T]he dichotomy between personal liberties and property rights is a false one . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."). *See generally* Radin, *Property and Personhood,* 34 STAN. L. REV. 957 (1982).

tenuated.[174] There would be little basis for objection if, during the period of restraint, the covenantor was paid not to work. This differs from the typical situation, however, only because in the typical situation the covenantor is, arguably, paid in advance not to work during the period of the restraint.

Despite these difficulties with the individual rights argument, it seems likely that the California statute is motivated, at least in part, by related concerns. This would tend to explain the California statute's exception for sales of businesses and dissolutions of partnerships. Presumably, additional support for the statutory prohibition came from concerns regarding efficiency and social utility which were, perhaps, merely intuitive. These issues are difficult to specify and still more difficult to assess empirically.[175]

## IV
## Enforcement: the Practice in the Industry

The results of a recent informal survey conducted by the author afford some insight into the practices of television stations in this country's top broadcast markets with respect to post-employment non-compete covenants.[176] Nearly all (96%) of the stations responding to the survey have written employment agreements with most of their on-air talent. The great majority of these stations (80%) use a "standard form" contract to define the relationship. The written talent contracts employed by 76% of the stations "always" include post-employment non-compete covenants; nearly all the remaining stations require such covenants "sometimes."

Of the stations that use post-employment non-compete covenants, the duration of these covenants ranged from thirty days to one year. For news anchors, the most common (60%) duration of restriction was one year. For reporters, one year restrictions were also most common (50%), but six month

174. *See generally* Calabresi & Melamed, *supra* note 172, at 1113-15 & nn. 45-51.

175. The legislative history of, and cases interpreting the California statute say little more than that restraints on otherwise lawful employment are violative of California's public policy. *See, e.g., supra* notes 122-40 and accompanying text.

176. As part of the research for this Article, the author mailed a written questionnaire (and a duplicate follow-up to non-respondents) to the news directors of commercial broadcast television stations in the country's top twenty broadcast markets. Seventy-nine questionnaires were mailed; thirty-six responses were received. Survey results are available from the author and at COMM/ENT.

restrictions were not unusual (30%). Regarding geographical scope, all but two respondents indicated that the restrictions employed by their stations prohibited competition within the immediate broadcast market. One news director indicated that his station uses contract language prohibiting post-employment competition within a 100 mile radius. Another indicated that his station attempts to prohibit competition within a 75 mile radius.

Approximately one-half of the respondents indicated that they or their stations had sought to enforce post-employment non-compete covenants. More than 90% of these efforts were successful. Most (64%) of the successful efforts reportedly involved litigation. One respondent indicated that his station had twice used litigation to delay resolution of the issue beyond the period of the restriction and then reached a settlement. A slight majority of the responding news directors indicated that they thought post-employment non-compete covenants were valuable because they were legally enforceable.[177] A smaller, but significant, group (21%) indicated that they thought the covenants were "valuable because employees voluntarily abided."[178] Still smaller groups of respondents indicated that they thought the covenants were "valuable because employers enforce them by 'gentlemen's agreement'" (15%), or "not valuable" (6%).[179]

The paucity of case law resulting from efforts to enforce post-employment non-compete covenants in broadcast talent contracts may result from "the uncertain state of the law with respect to the circumstances in which prohibitory injunctions may be granted or denied [making] both the artist and the em-

177. Respondents who indicated that they thought post-employment non-compete covenants were valuable because they were legally enforceable included one news director at a California station. However, such covenants are clearly unenforceable in California. *See supra* notes 123-27 and accompanying text.

178. While it is possible that employees voluntarily abide because they believe that the non-compete covenants are fair, it is also possible that many employees think that the covenants are unfair and even unenforceable. The principal problem with ad hoc determinations of what is "reasonable" is that this approach makes litigation virtually inevitable in the event of a dispute. Therefore, employees, who typically have fewer resources than employers, are likely to abide simply because they are effectively intimidated. *Cf.* Sullivan, *supra* note 157, at 622-23.

179. With respect to this inquiry, the combined percentages exceed 100% because respondents were invited to check as many responses as accurately reflected their views. One respondent indicated that he or she thought the covenants were valuable because they were legally enforceable, but added a question mark.

ployer wary of waging an appellate court case at considerable expense."[180] The burden of this uncertainty weighs more heavily upon the employee, though, because the employer is almost certain to have superior resources. Thus, "[f]or every covenant that finds its way into court, there are thousands which exercise an *in terrorem* effect on employees . . . ."[181] Judicial enforcement of post-employment non-compete covenants is less frequent in the broadcast news industry than is voluntary compliance by covenantors and potential employers who decline to hire them.

In other contexts, voluntary compliance with unenforceable contract provisions often results from an erroneous belief in judicial enforceability. In this instance, however, it appears that the players (employers, employees, and potential employers) comply not because they are unaware of, for example, the California statute, but because of extrajudicial enforcement, or the fear of it.

Such extrajudicial enforcement is accomplished primarily in two ways: through an unspoken agreement among employers in the broadcast industry that they will not "raid each other's shops"; and through the fears of employees that their reputations, and hence marketability, will be jeopardized if they fail to honor agreements into which they have knowingly entered. The anti-shop-raiding consensus among employers is based on a well-founded belief that the non-compete covenant may be the only protection that employers have against greatly intensified salary competition for talent. The demise of non-compete covenants might, under certain conditions, unleash a virtual price war, which would benefit talent but would probably do employers, as a class, more harm than good. In addition, in the background lurks the possibility that hiring an employee in violation of the post-employment non-compete covenant could subject a subsequent employer to tort liability for intentional interference with business relations.[182]

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180. Grogan, *supra* note 98, at 492.

181. Blake, *supra* note 9, at 682.

182. *See, e.g.*, Gorman Publishing Co. v. Stillman, 516 F. Supp. 98, 106 (N.D. Ill. 1980). *See generally* RESTATEMENT (SECOND) OF TORTS §§ 766-774A (1977) (discussion of intentional interference with contractual relationships).

Of course, an employee-covenantor willing to undertake the expense of litigation may attempt to assuage the fears of prospective employers by seeking a declaratory judgment. For example, Clooney v. WCPO TV Div. of Scripps-Howard Broadcasting Co., 35 Ohio App. 2d 124, 300 N.E.2d 256 (1973), involved a television personality who

The employee must consider not only the possibility of being shunned by the fraternity of broadcast news employers, but also the high cost of litigation and the very real possibility that the final determination of even eventually successful litigation might not occur until after the post-employment restriction has expired. "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."[183] Ultimately, therefore, post-employment non-compete covenants are likely to be effective, whether judicially enforceable or not, because of the functional intimidation born of grossly unequal resources.[184]

## V
## Alternative Proposals

The burden resulting from the confused state of the law regarding non-compete covenants is borne disproportionately by employees who, with inferior resources, often must undertake expensive litigation to secure, or even ascertain, their rights. In order to address this problem, the law should be made clear and, ideally, uniform. Alternative approaches to clarification of this area of the law are discussed below.

### A. Statutory Prohibition

The straightest path to clarity and uniformity would be the enactment by each jurisdiction in the United States of legislation similar to that adopted in California.[185] Presumably, most employers would oppose such a wide-reaching prohibition on post-employment non-compete covenants. Although it might be difficult for these employers to show that California's statute has caused actual loss to California employers, the success

hosted a one hour program five days per week. His employment contract included a one year post-employment restriction prohibiting competition within 100 miles of WCPO. *Id.* at 125, 300 N.E.2d at 257. The contract also stated that Clooney's services were "special, unique, unusual, [and of an] extraordinary" character. *Id.* Upon leaving WCPO, Clooney sought a declaratory judgment that the restriction was unenforceable. Ultimately, the restriction was upheld on the basis that its provisions were reasonable given Clooney's "unique services." *Id.* at 126-28, 300 N.E.2d at 258-59.

183. *Milgram on Trade Secrets*, 12 Bus. Org. (MB) 3-121 (1988).

184. Blake, *supra* note 9, at 682-88.

185. See *supra* notes 123-24 and accompanying text.

of extrajudicial enforcement in California may largely be attributable to judicial enforceability elsewhere, and effective nationwide prohibition of post-employment non-compete covenants would soon unravel the scheme of extrajudicial enforcement. Although this is probably true, a scheme based largely upon intimidation and disproportionate power arguably should be unraveled.

## B. Statutory Regulation

Legislatures unwilling to prohibit post-employment non-compete covenants that are premised upon the uniqueness rationale might consider the less extreme step of statutory regulation. Either or both of two requirements could be imposed.

### 1. *Minimum Compensation*

A post-employment non-compete covenant premised upon the uniqueness rationale could, by statute, be made enforceable only if the employee in question is highly paid. Statutorily-specified minimum compensation would reduce the number of post-employment restrictions employers seek to impose and simultaneously ensure that the restrictions that were imposed would affect only employees in whom the employer had made a more substantial investment. In addition, statutory minimum compensation as a condition to the enforceability of post-employment non-compete covenants would increase the likelihood that contesting employees would be able to afford legal assistance.

The above proposition finds support in that, although apparently not applicable to post-employment restrictions, one California statute establishes minimum annual compensation as a prerequisite to the grant of an injunction to prevent the breach of a personal services contract.[186]

186. The general rule in California is that personal services contracts cannot be specifically enforced. CAL. CIV. CODE § 3390 (Deering 1984). There is an exception, however, and thus injunctions may be granted to prevent the breach of such contracts which are "in writing . . . where the minimum compensation for such service is at the rate of not less than six thousand dollars per annum and where the promised service is of a special, unique, unusual, extraordinary or intellectual character, which gives it peculiar value . . . ." *Id.* at § 3423(5). *See also* CAL. CIV. PROC. CODE § 526(5) (West 1979). The $6,000 figure was adopted in a 1919 amendment. CAL. CIV. CODE § 3423(5). It is now absurdly low, but has not been subsequently amended; thus, the principle remains the same.

2. *Employer Investment*

It is suggested throughout this Article that the only legitimate employer's interest in the "uniqueness" of a broadcast news employee's services is the employer's investment in promoting (advertising) the employee. This fact should be explicitly and statutorily acknowledged in legislation that need not be limited to the broadcast news industry. This proposition is not unprecedented: a Louisiana statute declares void any non-compete agreement that the employer may "require or direct any employee to enter into." However, such a restriction may be enforceable if it does not exceed two years, and if "the employer incurs an expense in the training of the employee or incurs an expense in the advertisement of the business . . . ."[187] Legislation following this model should make clear that the expense incurred must be substantial. Also, it should be made clear that the referenced advertisement must connect the employee-covenantor with the business.[188]

### C. Common Law Clarity and Candor

The approach least likely to produce uniformity and predictability is the present common law system of ad hoc determination of the restriction's reasonableness. Nevertheless, this system could be greatly improved if courts making these determinations would be clear and candid about the employer's business interest and the economic issues (*e.g.*, potential market impact). A more precise focus on these issues would allow the underlying policy considerations to guide the development of this area of law in a rational direction and, hence, toward a greater degree of clarity and predictability.

## Conclusion

Most radio and television personalities are willing to sign employment contracts including post-employment non-compete covenants because of the compensation promised in the contract.[189] As a result, post-employment non-compete cove-

187. LA. REV. STAT. ANN. § 23:921 (West 1985).

188. Louisiana courts have so construed the Louisiana statute. *See* Nalco Chemical Co. v. Hall, 237 F. Supp. 678, 681 (E.D. La. 1965), *aff'd*, 347 F.2d 90 (5th Cir. 1965).

189. *See supra* notes 176-84 and accompanying text. *See also* Litwin, *supra* note 142.

nants are quite common in broadcast talent contracts.[190] Judicial enforcement of the covenants is unacceptably unpredictable, however, and extrajudicial enforcement makes a mockery of the law.

The principal problem with judicial enforcement is the ambiguity and questionable relevance of the "unique services" rationale. In the broadcast news context, this rationale should be abandoned in favor of an examination of the extent to which the employer has invested in the local marketability of the employee.

The surest path to greater consistency is statutory reform. Prohibitions such as the California statute, however, may only serve to increase instances of extrajudicial enforcement. A compromise solution should link enforceability to employer investment and minimum compensation.

190. Litwin, *supra* note 142, at 17.