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## Agreements Not to Compete

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In conclusion, it is clear that harmless constitutional error remains an unsolved problem in Louisiana criminal procedure. In the opinion of this writer, the proper application of the federal rule conflicts with present statutory provisions. Hopefully, a solution will be found that not only resolves the dilemma but also benefits our system of criminal justice.

E. B. Dittmer II

### AGREEMENTS NOT TO COMPETE

American courts traditionally have refused to enforce agreements not to compete in a business, profession or trade unless such restrictive covenants are merely incidental to the primary purpose of a larger lawful transaction.<sup>1</sup> Usually an ancillary agreement between competitors which limits competition is presumed to be an unreasonable restraint of trade in violation of the federal antitrust laws;<sup>2</sup> frequently, however, noncompetition agreements are used in connection with interests thought to require protection, such as the sale of a business,<sup>3</sup> a lease,<sup>4</sup> a partnership dissolution<sup>5</sup> or a contract of employment.<sup>6</sup> In most jurisdictions these noncompetition agreements will be considered reasonable, and thus enforceable, if considering the subject matter, the type of business and the relationship of the parties, the restriction is intended to afford fair protection to the interests of the covenantee and not so comprehensive as to impinge unreasonably upon the public interest or to place undue hardship on the party restricted.<sup>7</sup> This broad rule has resulted in varying interpretations and applications throughout the American court system.<sup>8</sup>

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1. Irving Inv. Corp. v. Gordon, 3 N.J. 217, 69 A.2d 725 (1949).

2. Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1890).

3. Tri-Continental Fin. Corp. v. Tropical Marine Enterprises, 164 F. Supp. 1 (S.D. Fla. 1958), *aff'd*, 265 F.2d 619 (5th Cir. 1959); Hirsh v. Miller, 249 La. 489, 187 So.2d 709 (1966).

4. Goldberg v. Tri-States Theatre Corp., 126 F.2d 26 (8th Cir. 1942); M. M. Ullman & Co. v. Levy, 172 La. 79, 133 So. 369 (1931).

5. McCray v. Blackburn, 236 So.2d 859 (La. App. 3d Cir. 1970); Schlag v. Johnson, 208 S.W. 369 (Tex. Civ. App. 1919).

6. Electrical Prod. Consol. v. Howell, 108 Colo. 370, 117 P.2d 1010 (1941); Aetna Fin. Co. v. Adams, 170 So.2d 740 (La. App. 1st Cir. 1964), *cert. denied*, 247 La. 489, 172 So.2d 294 (1965).

7. Ceresia v. Mitchell, 242 S.W.2d 359 (Ky. App. 1951).

8. The first case to reach the courts on noncompetition agreements was the *Dyer* case, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414), and the court struck the covenant down as a restraint on economic freedom, regardless of its reasonableness. The first case to uphold such an agreement was

## Basic Restrictions

### Statutory Restrictions

The great majority of jurisdictions have customarily expressed disfavor with noncompetition agreements.<sup>9</sup> The most formidable display of this opposition has appeared in the form of prohibitory statutes. With few exceptions these statutory restrictions have prohibited contracts in which any person is restrained from exercising a lawful profession, trade or business of any kind.<sup>10</sup> The most common of the statutory exceptions are agreements ancillary to the sale of the good will of a business or partnership dissolutions.<sup>11</sup> Several states, in addition to permitting these common exceptions, also exclude from the general rule customer solicitation,<sup>12</sup> customer lists<sup>13</sup> and stock transfer provisions.<sup>14</sup> The statutes of Louisiana<sup>15</sup> and South Dakota<sup>16</sup> even permit the use of the basic noncompetition agreements between employer and employee if certain conditions are fulfilled. However, all statutory schemes have in common the provision that the restraint must be specifically restricted in time and geographical area in order to be valid.<sup>17</sup>

### Non-Statutory Restrictions

In the absence of statute, a noncompetition covenant to be enforceable must meet the test of reasonableness in light of the facts of each particular case.<sup>18</sup> Courts are more likely to consider

*Mitchel v. Reynolds*, I. P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711), the court for the first time evaluating the amount of restraint present and correlating this to the interests of the parties involved. See *Blake, Employee Agreements Not To Compete*, 73 HARV. L. REV. 625 (1960).

9. *Kaumagraph Co. v. Stampagraph Co.*, 197 App. Div. 66, 188 N.Y.S. 678 (1921), *aff'd*, 235 N.Y. 1, 138 N.E. 485 (1923).

10. ALA. CODE tit. 9, § 22 (1958); OKLA. STAT. ANN. tit. 15, § 217 (1966).

11. ALA. CODE tit. 9, §§ 23-24 (1958); CALIF. BUS. & PROF. CODE §§ 16601-16602 (Deering 1937); FLA. STAT. ANN. § 542.12 (1967); MONT. REV. CODE ANN. tit. 13, §§ 808-809 (1947); N.D. CENTURY CODE tit. 9, § 08-06 (1959); OKLA. STAT. ANN. tit. 15, §§ 218-219 (1966); S.D. CODE tit. 10, § 10.0706 (1939).

12. ALA. CODE tit. 9, § 23 (1958); FLA. STAT. ANN. § 542.12 (1967).

13. MICH. STAT. ANN. § 28.66 (1962).

14. CALIF. BUS. & PROF. CODE § 16601 (Deering 1937).

15. LA. R.S. 23:921 (1950).

16. S.D. CODE tit. 10, § 10.0706 (1939).

17. ALA. CODE tit. 9, §§ 23-24 (1958); FLA. STAT. ANN. § 542.12 (1967).

18. *Arthur Murray Dance Studios v. Witter*, 62 Ohio L. Abs. 17, 105 N.E.2d 685 (1952).

enforceable an agreement ancillary to a sale,<sup>19</sup> lease<sup>20</sup> or partnership<sup>21</sup> than one involving an employment contract.<sup>22</sup> The most compelling reason for this distinction is that the vendor, lessor or partner is normally in a much better position to protect his interests than is the employee bargaining with his employer.<sup>23</sup>

Regardless of the relationship of the parties involved, the covenant's reasonableness is thoroughly scrutinized. Generally, enforceability is determined by weighing the interests of the person protected, the person restrained and the general public.<sup>24</sup> Noncompetition agreements are usually held enforceable if the restrictions regarding duration and territorial extent are reasonable.<sup>25</sup> A covenant not to do business in a territory exceeding that in which the employer does business, or not to do business with a class of persons with whom the employer is not concerned, would be excessive;<sup>26</sup> by contrast, an agreement to abstain from a particular business activity for two years within a restricted geographical area would probably be held enforceable.<sup>27</sup> Thus the covenant must be no more limiting to the person restricted than is necessary to protect the covenantee.<sup>28</sup>

However, covenantees often have valuable interests which merit protection. For example, an employer must often invest sizeable sums of money in employee training.<sup>29</sup> Furthermore, employees can easily become privy to trade secrets, customer lists and other confidential matters during the course of their employment. Although protection might be extended in these

19. *Tri-Continental Fin. Corp. v. Tropical Marine Enterprises*, 164 F. Supp. 1 (S.D. Fla. 1958), *aff'd*, 265 F.2d 619 (5th Cir. 1959); *Hirsh v. Miller*, 249 La. 489, 187 So.2d 709 (1966).

20. *Goldberg v. Tri-States Theatre Corp.*, 126 F.2d 26 (8th Cir. 1942); *M. M. Ullman & Co. v. Levy*, 172 La. 79, 133 So. 369 (1931).

21. *McCray v. Blackburn*, 236 So.2d 859 (La. App. 3d Cir. 1970); *Schlag v. Johnson*, 208 S.W. 369 (Tex. Civ. App. 1919).

22. *McLeod v. Meyer*, 237 Ark. 173, 372 S.W.2d 220 (1963).

23. *National Motor Club of La., Inc. v. Conque*, 173 So.2d 238 (La. App. 3d Cir.), *cert. denied*, 247 La. 875, 175 So.2d 110 (1965).

24. *Hickman v. Branan*, 151 So. 113 (La. App. Orl. Cir. 1933); *Arthur Murray Dance Studios v. Witter*, 62 Ohio L. Abs. 17, 105 N.E.2d 685 (1952).

25. *Desselle v. Petrossi*, 207 So.2d 190 (La. App. 4th Cir.), *cert. denied*, 252 La. 108, 209 So.2d 39 (1968); *Ingram Corp. v. Circle*, 188 So.2d 96 (La. App. 4th Cir.), *cert. denied*, 249 La. 712, 190 So.2d 232 (1966).

26. *Kinney v. Scarbrough Co.*, 138 Ga. 77, 74 S.E. 772 (1912).

27. *Bennett v. Kimsey*, 218 Ga. 470, 128 S.E.2d 506 (1962).

28. 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1636 (rev. ed. 1936).

29. *Aetna Fin. Co. v. Adams*, 170 So.2d 740 (La. App. 1st Cir. 1964), *cert. denied*, 247 La. 489, 172 So.2d 294 (1965).

situations to a covenantee in the absence of a restrictive covenant,<sup>30</sup> written evidence of the agreement often facilitates the granting of protection where a court might otherwise be hesitant to intervene. Even with these normally protectable interests, the courts must still compare the value of these interests with the individual's needs and freedom from future restraint. After assessing the needs of both parties a court must balance these needs against the possible effect on the general public to reach its determination of reasonableness.

### *Noncompetition Agreements in Louisiana*

#### *Employment Contracts—Pre-Statutory Restrictions*

Louisiana has generally followed the theory that noncompetition agreements ancillary to employment contracts are to be examined more critically than other restrictive covenants.<sup>31</sup> However, the courts in earlier cases did not employ the reasonableness test in assessing the validity of restrictive agree-

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30. *Standard Brands, Inc. v. Zumpe*, 264 F. Supp. 254 (E.D. La. 1967). A trade secret has been said to consist "of any formula or pattern, any machine or process of manufacturing or of any device or compilation of information used in one's business; and which may give to the user an opportunity to obtain an advantage over competitors who do not know or use it." *Mycalex Corp. of America v. Pemco Corp.*, 64 F. Supp. 420, 423 (D. Md. 1946). When a process or formula gains trade secret status it will, in all probability, be protected by the courts without the necessity of a restrictive covenant. For this reason a more extensive survey would be beyond the scope of this Comment. For more specific information on the trade secret doctrine, see R. CALLMANN, *THE LAW OF UNFAIR COMPETITION AND TRADEMARKS* (1950); R. MILGRAM, *TRADE SECRETS* (1968); A. TURNER, *THE LAW OF TRADE SECRETS* (1962). For an article dealing strictly with Louisiana trade secrecy, see Barranger, *Industrial Trade Secrecy in Louisiana*, 43 TUL. L. REV. 775 (1969).

Customer lists are usually spoken of in terms of those which have been written and those which have been committed to memory. The majority position in common law jurisdictions seems to be that protection will be extended to an employer's written customer list, even without a restrictive covenant. When taking this position the courts necessarily exclude memorized lists from such protection. See *T. P. Laboratories, Inc. v. Hugh*, 261 F. Supp. 349 (E.D. Wis. 1965), *aff'd*, 371 F.2d 231 (7th Cir. 1966); *Blake, Employee Agreements Not To Compete*, 73 HARV. L. REV. 625 (1960); Note, 40 TUL. L. REV. 424 (1966). But see *American Republic Ins. Co. v. Union Fidelity Life Ins. Co.*, 295 F. Supp. 553 (D. Ore. 1968); *Morgan's Home Equip. Co. v. Martucci*, 390 Pa. 618, 136 A.2d 838 (1957); *Bender, Trade Secret Protection of Software*, 38 GEO. WASH. L. REV. 909 (1970).

31. *M. M. Ullman & Co. v. Levy*, 172 La. 79, 133 So. 369 (1931); *Desselle v. Petrossi*, 207 So.2d 190 (La. App. 4th Cir.), *cert. denied*, 252 La. 108, 209 So.2d 39 (1968); *Ingram Corp. v. Circle*, 188 So.2d 96 (La. App. 4th Cir. 1966); *National Motor Club, Inc. v. Conque*, 173 So.2d 238 (La. App. 3d Cir.), *cert. denied*, 247 La. 875, 175 So.2d 110 (1965); *Marine Forwarding & Shipping Co. v. Barone*, 154 So.2d 528 (La. App. 4th Cir. 1963).

ments. Rather than follow this traditional test, it appears that most courts used the doctrine of "serious consideration" as a basis to invalidate virtually all noncompetition covenants ancillary to employment contracts.<sup>32</sup>

The "serious consideration" theory was founded in the case of *Blanchard v. Haber*.<sup>33</sup> In *Blanchard*, a dentist-employee was prohibited by covenant from practicing dentistry within five blocks of his employer for ten years after termination of his employment. Although both the employer and the employee could voluntarily terminate the employment contract on 30-day notice, the court felt that this right of termination, coupled with the noncompetition covenant, weighed too heavily in the employer's favor, and as such the restrictive provision lacked serious consideration.<sup>34</sup> With no consideration there was a lack of mutuality of obligation and the covenant was therefore void.<sup>35</sup> The *Blanchard* court based its decision solely on the serious consideration doctrine without discussing any of the other factors involved, although it seems that adequate consideration had in fact been given.

From this point confusion spread concerning the enforceability of restrictive covenants. Two years after *Blanchard* a federal district court in *Cali v. National Linen Services*<sup>36</sup> upheld a one-year restrictive covenant, stating that to be valid an agreement of this nature must be reasonable, supported by serious consideration, and the restraint no broader than necessary for the protection of the party with whom the contract was made.<sup>37</sup> However, two of the most prominent state court decisions after *Cali*, *Shreveport Laundries v. Teagle*<sup>38</sup> and *Cloverland Dairy Products Co. v. Grace*,<sup>39</sup> relied solely on the serious consideration approach in nullifying noncompetitive employment contracts. It would appear from these later decisions that the

32. *Cloverland Dairy Prod. Co. v. Grace*, 180 La. 694, 157 So. 393 (1934); *Blanchard v. Haber*, 166 La. 1014, 118 So. 117 (1928); *Shreveport Laundries v. Teagle*, 139 So. 563 (La. App. 2d Cir. 1932).

33. 166 La. 1014, 118 So. 117 (1928).

34. LA. CIV. CODE art. 2464; *Blanchard v. Haber*, 166 La. 1014, 1017-18, 118 So. 117, 118-19 (1928).

35. LA. CIV. CODE arts. 2024, 2034; *Blanchard v. Haber*, 166 La. 1014, 1019, 118 So. 117, 119 (1928).

36. 38 F.2d 35 (5th Cir. 1930).

37. *Id.* at 37.

38. 139 So. 563 (La. App. 2d Cir. 1932).

39. 180 La. 694, 157 So. 393 (1934).

majority of the courts adhered to the serious consideration theory, but certain language used in the cases actually made the majority position less well defined. Thus the court in *Shreveport Laundries*,<sup>40</sup> while basing its decision on serious consideration, indicated that even if serious consideration had been given, the noncompetition clauses would not have been upheld unless it clearly appeared that nonenforcement would result in substantial injury to the opposite party.<sup>41</sup> It seems, therefore, that while in reality each court formulated its own test for the enforceability of such covenants, most Louisiana courts ostensibly based their decisions, if possible, on serious consideration.<sup>42</sup>

#### *Employment Contracts—Statutory Restrictions*

Although prior to 1934 there did exist uncertainty in the noncompetition clause cases, the vast majority of the decisions nullified such covenants, regardless of the basis of decision. The courts felt that with the passage of Act 133 of 1934 (now R.S. 23:921), the legislature was approving judicial disfavor of restrictive clauses. In *Marine Forwarding & Shipping Co. v. Barone*, the court spoke of the statute as a declaration against restrictions on the spirit of free labor.<sup>43</sup> It is apparent that the court was correct in making such a statement. Act 133 of 1934 provided:

“No employer shall require or direct any employee to enter into any contract whereby the employee agrees not to engage in any competing business for himself, or as the employee of another, upon the termination of his contract of employment with such employer, and all such contracts, or provisions thereof containing such agreements shall be null and unenforceable in any court . . . .”<sup>44</sup>

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40. 139 So. 563 (La. App. 2d Cir. 1932).

41. *Id.* at 566.

42. Although the courts no longer had to use the serious consideration basis for nullifying such covenants after the passage of R.S. 23:921 in 1934, it was not until *Martin-Parry Corp. v. New Orleans Fire Detection Serv.*, 221 La. 677, 60 So.2d 83 (1952), that the courts actually condemned the consideration doctrine as being an erroneous basis for decision. For a more recent decision discussing serious consideration, potestative conditions and noncompetition clauses, see *Long v. Foster & Associates, Inc.*, 242 La. 295, 136 So.2d 48 (1961).

43. 154 So.2d 528, 530 (La. App. 4th Cir. 1963).

44. La. R.S. 23:921 (1950).

In *National Motor Club of Louisiana, Inc. v. Conque*<sup>45</sup> the court summarized the basic public policy behind the statute:

"[T]heir essential basis is the right of individual freedom and of individuals to better themselves in our free-enterprise society, where liberty of the individual is guaranteed. A strong public policy reason likewise for holding unfavorable an agreement exacted by an employer of an employee not to compete after the latter leaves his employment, is the disparity in bargaining power, under which an employee, fearful of losing his means of livelihood, cannot readily refuse to sign an agreement which, if enforceable, amounts to his contracting away his liberty to earn his livelihood in the field of his experience except by continuing in the employment of his present employer."<sup>46</sup>

Armed with legislative approval of their policy, the courts have consistently interpreted Act 133 of 1934 as positing a broad policy against the validity of noncompetition agreements between employers and their employees.<sup>47</sup>

#### *Non-Statutory Exceptions to R.S. 23:921*

Although R.S. 23:921 contains broadly defined prohibitions and has been utilized to its limits by the courts, exceptions (other than the 1962 amendment, discussed *infra*) have developed, or are in various stages of development. These exceptions fall into three categories: employee and customer solicitation, customer lists and trade secrets.

The largest percentage of these exceptions fall in the customer and employee solicitation category. Oddly enough, many of the early Louisiana cases were actually concerned with covenants not to solicit rather than covenants not to compete, and were held unenforceable on the doctrine of serious con-

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45. 173 So.2d 238 (La. App. 3d Cir.), *cert. denied*, 247 La. 875, 175 So.2d 110 (1965).

46. *Id.* at 241.

47. *Standard Brands, Inc. v. Zumpe*, 264 F. Supp. 254 (E.D. La. 1967). It is submitted that Act 133 of 1934 embodies a public policy doctrine which, except for statutory and non-statutory exceptions, cannot be infringed. See LA. CIV. CODE art. 11. See also *Nalco Chemical Co. v. Hall*, 237 F. Supp. 678 (E.D. La.), *aff'd*, 347 F.2d 90 (5th Cir. 1965); *Marine Forwarding & Shipping Co. v. Barone*, 154 So.2d 528 (La. App. 4th Cir. 1963); *Gauthier v. Magee*, 141 So.2d 837 (La. App. 4th Cir. 1962); and *Thomas v. McCrery*, 147 So.2d 467, 469 (La. App. 2d Cir. 1962).



sideration.<sup>48</sup> In 1952, in *Martin-Parry Corp. v. New Orleans Fire Detection Service*,<sup>49</sup> the courts first began to recognize the non-competition covenant exception, there dealing with an employee solicitation clause. The court distinguished contracts in which an employee was restrained from competing with his former employer from those in which the employee agreed not to persuade other employees to discontinue their relationships with the employer, and held the latter valid.<sup>50</sup> In 1963 the Second Circuit Court of Appeal, in *Delta Finance Co. of La. v. Graves*, enforced an agreement not to solicit the former employer's customers, relying on the same distinction as had been drawn in *Martin-Parry* ten years earlier.<sup>51</sup>

The second category of non-statutory exceptions developed in cases treating customer list agreements. The first case to indicate that such covenants might be excluded from the statute's coverage was *Baton Rouge Cigarette Service, Inc. v. Bloemstiel*, in which the court inferred it would have upheld an agreement prohibiting a former employee from using the customer list of his previous employer if the employer had been able to prove that the employee had actually been using the list.<sup>52</sup> Since then the courts have on several occasions indicated their desire to give adequate protection to an employer's customer list. For example, in *Nalco Chemical Co. v. Hall*<sup>53</sup> and *Buckeye Garment Rental Co. v. Jones*,<sup>54</sup> the courts stated that they would extend broad protection to customer lists in appropriate circumstances. Other decisions, although favoring in theory the enforceability of customer list provisions, have indicated a more restrictive attitude. In both *Theatre Time Clock, Inc. v. Stewart*<sup>55</sup> and *National Motor Club of La., Inc. v. Conque*,<sup>56</sup> the courts

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48. *Cloverland Dairy Prod. Co. v. Grace*, 180 La. 694, 157 So. 393 (1934); *Shreveport Laundries v. Teagle*, 139 So. 563 (La. App. 2d Cir. 1932).

49. 221 La. 677, 60 So.2d 83 (1952).

50. *Id.* at 688, 60 So.2d at 85.

51. 180 So.2d 88 (La. App. 2d Cir. 1965). Judicial approbation of non-solicitation agreements has been expressed in several recent cases: *Servisco v. Morreale*, 312 F. Supp. 103 (E.D. La. 1970); *Buckeye Garment Rental Co. v. Jones*, 276 F. Supp. 560 (E.D. La. 1967); *National School Studios, Inc. v. Barrios*, 236 So.2d 309 (La. App. 4th Cir. 1970); *Bookkeepers Business Serv., Inc. v. Davis*, 208 So.2d 1 (La. App. 4th Cir. 1968), all concerning similar agreements not to solicit a former employer's customers.

52. 88 So.2d 742, 746 (La. App. 1st Cir. 1956).

53. 237 F. Supp. 678, 680 (E.D. La.), *aff'd*, 347 F.2d 90 (5th Cir. 1965).

54. 276 F. Supp. 560, 562 (E.D. La. 1967).

55. 276 F. Supp. 593, 599 (E.D. La. 1967).

56. 173 So.2d 238, 244 (La. App. 3d Cir.), *cert. denied*, 247 La. 875, 175 So.2d 110 (1965).

suggested their amenability to enforcing agreements not to use written customer lists, but did not extend protection to customer lists memorized by the former employee.<sup>57</sup>

A third judicially created exception to Louisiana's noncompetition agreement statute appears to be developing with regard to noncompetition agreements in which the employee has obligated himself not to disclose his employer's trade secrets.<sup>58</sup> Neither Louisiana nor any other jurisdiction has any legislation specifically adopting the traditional trade secret concepts;<sup>59</sup> however, while the common law jurisdictions have seen an abundance of trade secret litigation, Louisiana jurisprudence on the subject is sparse. In *Baton Rouge Cigarette Service, Inc. v. Bloomenstiel*,<sup>60</sup> a Louisiana court was first exposed to a trade secret provision, but the court did not consider the clause in reaching its decision. Only four Louisiana cases, *Brown & Root, Inc. v. LaBauve*,<sup>61</sup> *Great Lakes Carbon Corp. v. Continental Oil Co.*,<sup>62</sup> *Standard Brands, Inc. v. Zumpe*,<sup>63</sup> and *Buckeye Garment Rental Co. v. Jones*,<sup>64</sup> have dealt squarely with the trade secret issue, and of these *Brown & Root* and *Great Lakes Carbon Corp.* involved a fiduciary rather than contractual obligation. *Buckeye*,<sup>65</sup> a 1970 case, is the most recent decision upholding an employment contract containing a trade secret provision. *Standard Brands, Inc. v. Zumpe*,<sup>66</sup> however, is the only Louisiana case which has discussed at any length the trade secret doctrine in relation to our public policy restrictions. In *Standard Brands*,

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57. As can be seen, these decisions follow the majority position in the common law that only written customer lists will be given protection, as discussed in note 31 *supra*. The court in *Baton Rouge Cigarette Serv., Inc. v. Bloomenstiel*, 88 So.2d 742 (La. App. 1st Cir. 1956), also indicated that it would extend protection only to written customer lists, rather than those which have been memorized by the former employee.

58. It must be stated that although the Louisiana courts apparently treat noncompetition agreements containing trade secret provisions as exceptions, in reality they are not exceptions. This is because a true trade secret does not require the protection of a restrictive covenant, and will be protected by the courts with or without a noncompetition agreement. See note 30 *supra*.

59. Barranger, *Industrial Trade Secrecy in Louisiana*, 43 TUL. L. REV. 775 (1969).

60. 88 So.2d 742 (La. App. 1st Cir. 1956).

61. 219 F. Supp. 179 (W.D. La. 1962).

62. 219 F. Supp. 468 (W.D. La. 1963), *aff'd*, 345 F.2d 175 (5th Cir.), *cert. denied*, 382 U.S. 905 (1965).

63. 264 F. Supp. 254 (E.D. La. 1967).

64. 276 F. Supp. 560 (E.D. La. 1967).

65. *Id.*

66. 264 F. Supp. 254 (E.D. La. 1967).

trade secrets were defined to include not only communications which were declared at the time to be confidential, but also information which the employee should know the employer would prefer not to have revealed to his competitors, including unique business practices, lists of names and all other matters which are known only to the employer's staff.<sup>67</sup> Although the court did state that it would, in the proper case, uphold a non-competition agreement based on the maintenance of trade secrets, it indicated that it would restrict its protection to those cases in which the employer could show that disclosure was either imminent or inevitable.<sup>68</sup>

Even when noncompetition agreements fall into one of the exceptional categories, this does not mean that they are not totally without limits. These exceptions, like many other situations not within the purview of the statute, are judged according to the reasonableness of the covenant, considering the interests of the contracting parties and the general public.<sup>69</sup>

#### *Act 104 of 1962*

In 1962 the legislature mitigated the effect of R.S. 23:921 by enacting Act 104, and thereby established a limited exception for the "qualified" employer. This exception is offered to employers incurring an expense in the training of an employee or in advertising the employee's association with the business. Even when satisfying these statutory requirements, however, the agreement not to compete must be limited to two years and can only restrict the employee's competition in the same business and territory as his former employer.<sup>70</sup>

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67. *Id.* Although this trade secret definition contains a reference to customer lists, the reference is to "secret" customer lists. The normal customer list will be a non-confidential enumeration of names which the employer is not actually trying to conceal from the public, or, even if he is, he will not often succeed in doing so. For this reason the usual customer list will not fall under the trade secret concepts. For a discussion of the distinction between customer lists, see *Servisco v. Morreale*, 312 F. Supp. 103 (E.D. La. 1970).

68. *Standard Brands, Inc. v. Zumpe*, 264 F. Supp. 254, 261 (E.D. La. 1967).

69. *Hickman v. Branan*, 151 So. 113 (La. App. Orl. Cir. 1933).

70. LA. R.S. 23:921 (1950), as amended by La. Acts 1962, No. 104, provides: "that in those cases where the employer incurs an expense in the training of the employee or incurs an expense in the advertising of the business that the employer is engaged in, then in that event it shall be permissible for the employer and employee to enter into a voluntary contract and agreement whereby the employee is permitted to agree and bind himself that at the termination of his or her employment that said employee will not enter into the same business that employer is engaged over the same route or in the same territory for a period of two years."

The courts have struggled with the proper interpretation of this amendment since its inception. The perplexity arises from the meaning of the terms referring to the expenses incurred in training and advertising of the employee. The majority of the courts are in agreement that the training spoken of in the statute must in some manner be directed toward the contracting employee, and the advertising expense must be incurred while advertising the employee's connection with the business rather than in advertising the business itself.<sup>71</sup> But at this point certainty ends and the conflict begins.

Disorder has arisen in determining exactly how much money must be expended in training or advertisement by an employer to be eligible for the limited protection offered by the statute. The first decision on this point was *Nalco Chemical Co. v. Hall*,<sup>72</sup> in which a federal district court stated that the terms of the amendment imported money not usually or customarily expended in the normal course of employment and further that the employee must be made a specialist by virtue of the special training received.<sup>73</sup> Somewhat later, the First Circuit Court of Appeals in *Aetna Finance Co. v. Adams* considered the statute as requiring only the normal expense incurred in training an employee or advertising his association with the business, although the court found substantial expense had in fact been incurred.<sup>74</sup> In *Aetna* the expenses considered substantial were constant supervision and training administered through various manuals of operation and legal bulletins.<sup>75</sup> In contrast, the Third Circuit, in *National Motor Club of La., Inc. v. Conque*, followed the *Nalco* decision and said there must be substantial sums spent in training or advertisement in order to utilize the amended statute.<sup>76</sup> The *National Motor Club* court considered a \$500 advertisement expense, some of which had accrued prior to formation of the restrictive covenant, and reimbursement for sales meeting

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71. *Nalco Chemical Co. v. Hall*, 237 F. Supp. 678 (E.D. La.), *aff'd*, 347 F.2d 90 (5th Cir. 1965); *National Motor Club of La., Inc. v. Conque*, 173 So.2d 238 (La. App. 3d Cir.), *cert. denied*, 247 La. 875, 175 So.2d 110 (1965); *but see* *World Wide Health Studios, Inc. v. Desmond*, 222 So.2d 517 (La. App. 2d Cir. 1969).

72. 237 F. Supp. 678 (E.D. La.), *aff'd*, 347 F.2d 90 (5th Cir. 1965).

73. *Id.* at 681.

74. 170 So.2d 740, 744 (La. App. 1st Cir. 1964), *writ denied*, 247 La. 489, 172 So.2d 294 (1965).

75. *Id.* at 743.

76. *National Motor Club of La., Inc. v. Conque*, 173 So.2d 238, 241 (La. App. 3d Cir.), *cert. denied*, 247 La. 875, 175 So.2d 110 (1965).

expenses to be normal, rather than substantial, expenditures.<sup>77</sup> In both *Aetna* and *National* the supreme court denied certiorari on the ground that the judgments were correct.<sup>78</sup>

The federal district courts again construed the amendment in 1967 in *Standard Brands, Inc. v. Zumpe*<sup>79</sup> and *Theatre Time Clock, Inc. v. Stewart*.<sup>80</sup> Although not actually dealing with a noncompetition covenant in *Standard Brands*, the court made the statement that Act 104 of 1962 applied only when the employer had spent a substantial amount of money on training and advertisement<sup>81</sup>. In *Theatre Time Clock* an employee's training consisted of four weeks supervision on a sales route, and the court, in nullifying the covenant not to compete, said that the employer must incur substantial expense in training the employee to gain the benefits of R.S. 23:921 as amended.<sup>82</sup>

In 1969, the Second Circuit, in *World Wide Health Studios, Inc. v. Desmond*, stated that it agreed with the *Aetna* normal expense interpretation of the amendment, basing its opinion on a literal reading of the statute, which states "incurs an expense," not a substantial expense.<sup>83</sup> The two most recent cases construing R.S. 23:921 as amended have not settled the uncertainty surrounding the statute's meaning; indeed, the situation has become more precarious. In 1970 the Fourth Circuit Court of Appeal rendered its interpretation of the statute in *National School Studios, Inc. v. Barrios*.<sup>84</sup> Although the court held two weeks training and one picture in an advertisement to be substantial expense, it agreed with *Aetna*, and said the statute contemplated only the employer expending normal and customary sums of money in training the employee or advertising his connection with the employer's business.<sup>85</sup> The latest opinion of a Louisiana court on this question was handed down in *Peltier v. Hebert*,<sup>86</sup> in which the employee's training consisted of supervision on a milk route for two weeks. The Third Circuit held

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77. *Id.* at 242-43.

78. 247 La. 489, 172 So.2d 294 (1965); 247 La. 875, 175 So.2d 110 (1965) (respectfully).

79. 264 F. Supp. 254 (E.D. La. 1967).

80. 276 F. Supp. 593 (E.D. La. 1967).

81. 264 F. Supp. 254, 266 (E.D. La. 1967).

82. 276 F. Supp. 593, 598 (E.D. La. 1967).

83. 222 So.2d 517, 522 (La. App. 2d Cir. 1969).

84. 236 So.2d 309 (La. App. 4th Cir. 1970).

85. *Id.* at 312.

86. 245 So.2d 511 (La. App. 3d Cir. 1971).

that the employer had not incurred a substantial expense in training the employee, and voided a one year noncompetition agreement, stating that more than a minimal training and advertising expenses was needed to constitute a valid exception to the prohibition of R.S. 23:921.<sup>87</sup>

#### *Sales, Leases, Partnerships and Associations*

Louisiana courts have traditionally followed the doctrine of reasonableness in determining the validity of a noncompetition agreement ancillary to a contract for the sale of a business and its good will.<sup>88</sup> In most of these cases the courts have used the same standards employed in common law jurisdictions, i.e., the reasonableness of the restrictions as to duration and territorial extent. In *Wintz v. Vogt*,<sup>89</sup> the court considered reasonable an agreement whereby the vendor of a business was restricted for two years from selling a certain product within the city of New Orleans. An agreement by the vendor with the purchaser of the remaining stock not to compete with the corporation for a limited time was considered not against public policy and thus enforceable in *Hickman v. Branan*.<sup>90</sup> Considered unreasonable in *Lindstrom v. Sauer*<sup>91</sup> was a covenant barring the vendor from competing with the buyer within the city of New Orleans as long as the buyer was in business.<sup>92</sup> It must be remembered that even if a restrictive covenant ancillary to a contract of sale is held reasonable, it is only a personal obligation of the vendor

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87. *Id.* at 515.

88. *Moorman & Givens v. Parkerson*, 127 La. 835, 54 So. 47 (1911).

89. 3 La. Ann. 16 (1848).

90. 151 So. 113 (La. App. Orl. Cir. 1933).

91. 166 So. 636 (La. App. Orl. Cir. 1936); *but see* *May v. Johnson*, 128 So. 540 (La. App. 2d Cir. 1930) (covenant not to compete in town for as long as vendee in business held reasonable); *Moorman & Givens v. Parkerson*, 127 La. 835, 54 So. 47 (1911) (upheld agreement not to compete in Franklin until given permission by the buyer).

92. The reasonableness test as a basis of decision has carried over into more recent cases. In *Ingram Corp. v. Circle*, 188 So.2d 96 (La. App. 4th Cir.), *writ denied*, 249 La. 712, 190 So.2d 232 (1966), an agreement not to compete for four years in the same area in which the buyer of the business was operating was considered reasonable; *see also* *Desselle v. Petrossi*, 207 So.2d 190 (La. App. 4th Cir.), *cert. denied*, 252 La. 108, 209 So.2d 39 (1968) (upheld agreement restricting vendor from competing with the buyer within city of New Orleans for five years). In the most recent case, *Mathieu v. Williams*, 255 So.2d 151 (La. App. 2d Cir. 1971), the court upheld a covenant not to compete within certain delineated boundaries of south Louisiana for five years.

and has been held to be unenforceable by a third party transferee against the original vendor.<sup>93</sup>

Although the decisions rendered on noncompetition agreements ancillary to sales are generally consistent and predictable, there still remains one type of case in which the courts have not firmly stated their position. This involves the unusual factual situation in which the vendor, often as part of the total sales transaction, is employed after the sale by the purchaser of the business. When this occurs and there exists a noncompetition agreement, the courts must decide whether such an agreement is to be treated as an incident of the sale or as a completely separate and independent employer-employee contract subject to R.S. 23:921. In *Eugene Dietzgen Co. v. Kokosky*,<sup>94</sup> the supreme court, although enforcing the covenant as part of the sale of the business, indicated that it might have ruled differently had there been adequate proof of a lack of serious consideration. In the more recent decision, *Hirsh v. Miller*,<sup>95</sup> the Fourth Circuit ruled such a case should be considered a sale, thus prohibiting the application of R.S. 23:921. On review of the *Hirsh* case, the supreme court did not have to rule on this specific question, but did express the opinion that it would in all probability have disagreed with the Fourth Circuit and ruled Miller an employee and entitled to statutory protection.<sup>96</sup>

It appears that the validity of restrictive covenants ancillary to leases is also determined by their reasonableness, though there are few Louisiana cases on point. In *M. M. Ullman & Co. v. Levy*,<sup>97</sup> the court stated that it would, in the proper case, have upheld a covenant not to compete for three years with the lessee in New Orleans. Noncompetition agreements incident to leases are considered, just as sales,<sup>98</sup> to be personal obligations, enforceable only between the two contracting parties.<sup>99</sup>

The cases concerning covenants ancillary to contracts between partners and associates are unsatisfactory; apparently, the courts cannot agree on the proper basis for reaching determi-

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93. *Thomas v. McCrery*, 147 So.2d 467 (La. App. 2d Cir. 1962).

94. 113 La. 449, 37 So. 24 (1904).

95. 167 So.2d 539 (La. App. 4th Cir. 1964).

96. 249 La. 489, 187 So.2d 709 (1966).

97. 172 La. 79, 133 So. 369 (1931).

98. 63 So.2d 437, 439 (La. App. 1st Cir. 1953).

99. *Hebert v. Dupaty*, 42 La. Ann. 343, 7 So. 580 (1890).

nations of the enforceability of such noncompetition agreements. In *Cust v. Item Co.*,<sup>100</sup> decided by the supreme court, a covenant in a contract of copartnership prohibited a "partner" from competing for three years after dissolution of the partnership. It appears that the court, although speaking of the lack of mutuality of obligation, actually based its decision on R.S. 23:921.<sup>101</sup> However, in the more recent case of *McCray v. Blackburn*,<sup>102</sup> the Third Circuit upheld a noncompetition agreement between partners, clearly distinguishing such noncompetition covenants from agreements ancillary to employment contracts. In *McCray* the court held R.S. 23:921 inapplicable, and instead applied the reasonableness test to partnership agreements.<sup>103</sup>

The basis for determination of the validity of a restrictive covenant between associates seems to be just as unpredictable as in partnership agreements. In 1953 the First Circuit, in *Nelson v. Associated Branch Pilots of Port of Lake Charles*,<sup>104</sup> declared unenforceable an agreement between members of a harbor pilots' association in which withdrawing associates had to post bond to assure that they would not compete with other members of the association. The court stated that these associates were essentially the same as employees, and as such, were protected by the broad public policy against such agreements as expressed by the legislature in R.S. 23:921.<sup>105</sup> But in a later case, *McCray v. Cole*,<sup>106</sup> the Third Circuit upheld a noncompetition agreement ancillary to an associational contract. The covenant stipulated liquidated damages if one of the members began competing with his former associates. The court employed the reasonableness test to reach its decision, and distinguished the case from situations prohibited by R.S. 23:921 by saying that the covenant did not actually prohibit associates from competing, but merely made it less profitable to do so.<sup>107</sup>

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100. 200 La. 515, 8 So.2d 361 (1942).

101. *Id.* at 525, 8 So.2d at 364. The court said: "The contract containing such a clause in this case purports to be a copartnership agreement, but public policy forbids such a clause as well in such a contract as we have here as in a contract of employment."

102. 236 So.2d 859 (La. App. 3d Cir. 1970).

103. *Id.* at 861-62.

104. 63 So.2d 437 (La. App. 1st Cir. 1953).

105. *Id.* at 439.

106. 236 So.2d 863 (La. App. 3d Cir. 1970).

107. *Id.* at 867-68. To the writer it is difficult to consider such an agreement as not "actually" prohibiting competition. It is submitted that associates are not included within the strict coverage of R.S. 23:921 and by construing the statute in this manner such justifications for not using the statute would be obviated.



*Conclusion*

From the foregoing discussion it seems apparent that jurisprudential inconsistencies and conflicts exist which make the law concerning noncompetition clauses uncertain in Louisiana. However, there are several statements that can be made with a degree of confidence. Since the passage of R.S. 23:921 the Louisiana courts, in the absence of exceptional circumstances, have repeatedly held employee-employer noncompetition covenants unenforceable. However, some exceptions—customer and employee solicitation, customer lists and trade secrets—have apparently developed which evade the statute's coverage. It also seems well settled that the reasonableness of a restrictive covenant incidental to a sale or lease will determine its validity. Beyond this point, however, noncompetition agreement jurisprudence is marked with indefiniteness.

This unpredictability is most evident in cases dealing with Act 104 of 1962. On one hand are decisions holding that the employer must spend substantial sums of money on an employee's training and advertisement, while on the other are decisions holding only normal expenditures are needed to qualify for the limited benefits of the amendment.

Construing the words of the statute literally it would seem that any expense incurred by an employer in training or advertisement would entitle him to enforcement of a two year restrictive covenant. If, however, this is the proper meaning of the statute, then virtually any employer can qualify for this exception, and this would appear to be inimical to the public policy considerations behind R.S. 23:921. It thus seems that the substantial expense theory would be more in harmony with the traditional Louisiana public policy concepts, while at the same time protecting the interests of the qualified employer.

Restrictive covenants between partners and associates have also been a source of confusion in the Louisiana jurisprudence. Some courts, having clearly distinguished noncompetition agreements between partners and associates from those incident to an employment contract, have held R.S. 23:921 inapplicable, and instead analyzed the covenant in light of its reasonableness. The cases drawing this distinction must be contrasted with the decisions in which partners and associates are found to be

“essentially” employees and as such protected by R.S. 23:921. It would seem that the problem in this area also relates to the proper interpretation of the statute in that the courts must decide exactly who is to be considered within the statute’s definition of employee. It appears that the courts, although using divergent reasoning, have reached the most equitable result in the majority of the partnership and association cases, but have done so at the expense of certainty. The statute, as drafted, seems to apply only to the strict employer-employee relationship, and not to a partner or associate. Interpreting the statute in this way, the courts could still reach just results in partnership and association noncompetition agreement litigation by using the reasonableness test.

In the final analysis, the perplexities of many of the non-competition clause cases could be clarified by a more uniform court interpretation of R.S. 23:921. As this is unlikely, it is suggested that the legislature amend the statute to eliminate the uncertainty surrounding its meaning. In this way the Louisiana courts would have a more efficient and workable vehicle to determine the validity of noncompetition agreements.

*James M. Duncan*

#### MASTER’S VICARIOUS LIABILITY FOR TORTS UNDER ARTICLE 2320—A TERMINOLOGICAL “TAR-BABY”

Under Civil Code article 176, “the master is answerable for the offenses and quasi-offenses committed by his servants, according to the rules which are explained under the title: *Of quasi-contracts, and of offenses and quasi-offenses.*” Thus a master’s liability for physical harm caused by the negligent conduct of his servant is governed by Civil Code articles 2315-2320, especially article 2320. It is the purpose of this Comment to examine the exact and concise distinction between the *master-servant* and *principal-agent* relationships insofar as liability for the negligent tort of a servant or a non-servant agent is concerned. A study of article 2320, its judicial “amendment” and a view of the jurisprudence in four particular areas<sup>1</sup> will emphasize the dis-

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1. The four areas that have given the courts particular difficulty deal with the liability for the torts resulting in physical injury in the following cases: the husband for the wife’s automobile accidents; the automobile dealer