

1986

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Recommended Citation

Angela M. Cerino, *A Talent Is a Terrible Thing to Waste: Toward a Workable Solution to the Problem of Restrictive Covenants in Employment Contracts*, 24 Duq. L. Rev. 777 (1986).

Available at: <https://dsc.duq.edu/dlr/vol24/iss3/4>

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A Talent is a Terrible Thing to Waste: Toward a Workable Solution to the Problem of Restrictive Covenants in Employment Contracts

Angela M. Cerino*

INTRODUCTION

The present day employment contract often contains a clause prohibiting the employee from working for a competing firm should the present employment relationship cease. Such a promise is known variously as an employee noncompete agreement, a covenant not to compete or a restrictive covenant.¹ Such covenants are used in a number of fields, including computer programming and

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1. For discussions of the law relating to employee noncompete agreements in specific states, see the following: Georgia: Comment, *A Fresh Look: Lowering the Mortality Rate of Covenants Not to Compete Ancillary to Employment Contracts and to Sale of Business Contracts in Georgia*, 31 EMORY L.J. 635 (1982) [hereinafter cited as *Lowering the Mortality Rate of Covenants Not to Compete*]; Illinois: Kanwit and Conway, *Enforcement of Restrictive Covenants in Illinois Employment Contracts*, 60 CHI. BAR REC. 142 (1978); Maryland: Rosen and Loewy, *Restrictive Covenants in Maryland Employment Agreements: A Guide for Drafting*, 11 U. BALT. L. REV. 377 (1982); Massachusetts: Note, *Recent Developments Concerning Employee Covenants Not to Compete: A Quiet "Corbinization" of Massachusetts Law*, 12 NEW ENG. L. REV. 647 (1977); North Carolina: Comment, *Injunctive Russian Roulette and Employment Noncompetition Cases: A.E.P. Industries v. McClure*, 63 N.C.L. REV. 222 (1984); Pennsylvania: Comment, *Enforcement of Restrictive Covenants In Pennsylvania Employment Contracts*, 80 DICK. L. REV. 693 (1976); South Dakota: Comment, *Employee Restrictive Covenants: Unscrupulous Employees vs. Overreaching Employers*, 27 S.D.L. REV. 220 (1982); Texas: Comment, *Noncompetition Covenants in Employment Contracts: A Texas Common Law Analysis*, 20 HOUS. L. REV. 1197 (1983); Virginia: Note, *Employee Covenants Not To Compete: Where Does Virginia Stand?*, 15 U. RICH. L.R. 105 (1980).

data processing,² sales,³ medicine,⁴ management,⁵ employment counselling,⁶ accountancy,⁷ beauty culture,⁸ radio and television,⁹ and banking.¹⁰ However, in the field of law, an American Bar Association disciplinary rule prohibits attorneys from entering into noncompete agreements.¹¹

The variety of contractual post-employment restrictions is seemingly endless.¹² One type of restraint designates a geographical area within which the employee may not work after the termination of the present employment relationship. For example, the employee is often prohibited by his or her employment contract from working for a competitor within a certain distance of a particular city¹³ or within a given county¹⁴ or state.¹⁵ Other contracts seek to prevent the employee from competing in certain portions of several

2. See *infra* notes 106-13 and accompanying text.

3. See *infra* notes 39-74 and accompanying text. A significant number of the employee covenants not to compete cases before the Pennsylvania Supreme Court during the past 30 years have dealt with the contracts of sales representatives.

4. See *infra* notes 75-97 and accompanying text. For examples of covenants not to compete among medical professionals in other states, see *J.M. Reddy, M.D. v. Community Health Found. of Man*, 298 S.E.2d 906 (W. Va. 1982); *Odess v. Taylor*, 282 Ala. 389, 211 So. 2d 805 (1968); *Middlesex Neurological Assoc., Inc. v. Cohen*, 3 Mass. App. 126, 324 N.E.2d 911 (1975); *Horne v. Radiological Health Serv.*, 83 Misc. 2d 446, 371 N.Y.S.2d 948 (1975); *Cogley Clinic v. Martini*, 253 Iowa 541, 112 N.W.2d 678 (1962); *Foltz v. Struxness*, 168 Kan. 714, 215 P.2d 133 (1950); and *Wilson v. Gamble*, 180 Miss. 499, 177 So. 363 (1937).

5. See *infra* notes 98-123 and accompanying text.

6. See *infra* notes 119-23 and accompanying text.

7. See *Annot.*, 15 A.L.R. 4th 559 (1982).

8. See *infra* note 37.

9. See *Annot.*, 36 A.L.R. 4th 1139 (1985) (discusses enforceability of noncompete covenants involving radio or television personalities).

10. See *infra* notes 114-18 and accompanying text. See also *Grebing v. First National Bank of Cape Girardeau*, 613 S.W.2d 872 (Mo. Ct. App. 1981) (bank loan officer).

11. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-108 (1980). *But see* *Adler v. Barish*, 252 Pa. Super. 553, 382 A.2d 1226 (1977); *Kalish, Covenants Not to Compete and the Legal Profession*, 29 Sr. L. Law J. 423 (1984).

12. For a good analysis of post-employment restrictions by type, see *Lowering the Mortality Rate of Covenants Not to Compete*, *supra* note 1, at 635.

13. See *Herman v. Dixon*, 393 Pa. 33, 141 A.2d 576 (1958) (covenant prohibited competition within 15 miles of the city of Pottsville); *Morgan's Home Equipment Corp. v. Martucci*, 390 Pa. 618, 136 A.2d 838 (1957) (covenant prohibited competition within 100 miles of city of Philadelphia); *Pankas v. Bell*, 413 Pa. 494, 198 A.2d 312 (1964) (covenant prohibited competition within 10 miles of downtown Pittsburgh). See also *Gagliardi Bros., Inc. v. Caputo*, 538 F. Supp. 525 (E.D. Pa. 1982) (covenant prohibited competition within 100 miles of West Chester, Pennsylvania).

14. See *New Castle Orthopedic Assoc. v. Burns*, 481 Pa. 460, 392 A.2d 1383 (1978) (Eagan & Larsen, J.J., concurring) (Roberts & O'Brien, J.J., dissenting) (employee prohibited from competing anywhere in Lawrence County, Pennsylvania).

15. See *Pennsylvania Funds v. Vogel*, 399 Pa. 1, 159 A.2d 472 (1960) (contract prohibited all competition in the state of Pennsylvania).

states,¹⁶ or even in several states in their entirety.¹⁷

Another form of area restriction attempts to limit an employee's competition in what the employer perceives to be its sphere of influence. For example, an employee may be asked not to compete within a certain distance of a particular office where he or she was employed.¹⁸ In other instances, the employee is asked not to compete within a certain radius of *any* office of the employer.¹⁹ In still other cases, the employer bars the employee from competing in the "employer's territory"²⁰ or soliciting the business of certain customers of the employer.²¹

Employment contracts have also placed time restrictions on the post-employment right of an employee to work for a competitor. These have been used in combination with or in place of area restrictions. Such clauses have usually stated that the employee may not engage in the same business as the employer for a certain period of time after the cessation of employment. Time restraints of one²² or two²³ years duration are commonplace.

16. See *Sidco Paper Co. v. Aaron*, 465 Pa. 586, 351 A.2d 250 (1976) (employee had agreed not to compete in "any area of which Richmond, Virginia, is the southern point, Pittsburgh, Pennsylvania, the western point and Boston, Massachusetts, the northern point").

17. See *Jacobson & Co. v. International Env't Corp.*, 427 Pa. 439, 235 A.2d 612 (1967) (employee had promised not to compete in the states of New York, New Jersey, Pennsylvania, Delaware and Connecticut).

18. See *Hayes v. Altman*, 424 Pa. 23, 225 A.2d 670 (1967) (the employee had agreed not to compete in the town in which the office was located or elsewhere within six miles of the employer's office).

19. Fortunately, the Pennsylvania Supreme Court has not enforced such agreements without at least amending them to make their scope more reasonable. In *Albee Homes, Inc. v. Caddie Homes, Inc.*, 417 Pa. 177, 207 A.2d 768 (1965), for example, the agreement provided that the employees were not to compete within 50 miles of *any* sales office of the company, but the court limited enforcement to 50 miles from the office where the employees had actually worked. Ten years later, in *Fox-Morris Assoc., Inc. v. Conroy*, 460 Pa. 290, 333 A.2d 732 (1975), the court affirmed the county court's refusal to grant injunctions against the defendant employees who, by the terms of their covenants were barred from "engaging in a competitive business within a one-hundred-mile radius of any place where [the plaintiff employer] had offices." However, Justice Roberts, in his concurring opinion, argued that the contract should have been partially enforced.

20. See *Boldt Mach. & Tools, Inc. v. Wallace*, 469 Pa. 504, 366 A.2d 902 (1976); *Girard Investment Co. v. Bello*, 456 Pa. 220, 318 A.2d 718 (1974); *Capital Bakers, Inc. v. Townsend*, 426 Pa. 188, 231 A.2d 292 (1967).

21. See *John G. Bryant Co. v. Sling Testing & Repair, Inc.*, 471 Pa. 1, 369 A.2d 1164 (1977); *Pennsylvania Funds Corp. v. Vogel*, 399 Pa. 1, 159 A.2d 472 (1960).

22. See *Bettinger v. Carl Berke Assoc., Inc.*, 455 Pa. 100, 314 A.2d 296 (1974); *Capital Bakers, Inc. v. Townsend*, 426 Pa. 188, 231 A.2d 292 (1967); *Albee Homes, Inc. v. Caddie Homes, Inc.*, 417 Pa. 177, 207 A.2d 768 (1965); *Morgan's Home Equip. Corp. v. Martucci*, 390 Pa. 618, 136 A.2d 838 (1957); *Plunkett Chem. Co. v. Reeve*, 373 Pa. 513, 95 A.2d 925 (1953).

23. See *Sidco Paper Co. v. Aaron*, 465 Pa. 586, 351 A.2d 250 (1976); *Jacobson & Co.*,

Sometimes, a contract lacks an area term, a time restriction, or both. Courts have frequently viewed this omission depending, of course, on the phrasing, as an unenforceable attempt to prohibit the employee from competing anywhere at all.²⁴

Promises or covenants not to compete are important to those who are bound by them—the employees whose careers they will influence. They are also important to society because of their impact upon employment and unemployment. By affecting the availability of workers to the people who rely upon them, such covenants are vitally important to prospective employers and clients. This article suggests that the balance ought to be tipped more heavily in favor of employees and their clients.

BACKGROUND

There is more than a half millennium of judicial precedent on the subject of employee noncompete agreements.²⁵ Early decisions steadfastly upheld the right of a former employee to work for whomever he pleased, and restrictive covenants were viewed as unenforceable restraints of trade.²⁶ A shortage of workers is believed to have been related to this total rejection of restrictions on former employees.²⁷

Some types of covenants not to compete are still unenforceable in most jurisdictions although there is no widespread labor

Inc. v. International Env't Corp., 427 Pa. 439, 235 A.2d 612 (1967); Pennsylvania Funds Corp. v. Vogel, 399 Pa. 1, 159 A.2d 472 (1960).

24. See Trilog Assoc., Inc. v. Famularo, 455 Pa. 243, 314 A.2d 287 (1974); Peripheral Dynamics, Inc. v. Holdsworth, 254 Pa. Super. 310, 385 A.2d 1354 (1978).

25. See Michel v. Reynolds, 1 P. Wms. 181 (K.B. 1711); Colgate v. Bachelier, Cro. Eliz. 872 (1596); The Blacksmith's Case, 2 Leo. 210, 3 Leo. 217 (1587); The Dyer's Case, Y.B. 2 Hen. 5, Pl. 26 (1415). For a discussion of these English cases, as well as the early American cases, see Carpenter, *Validity of Contracts Not to Compete*, 76 U. PA. L. REV. 244 (1928).

26. The Dyer's Case, Y.B. 2 Hen. 5, Pl. 26 (1415). The notion that employee promises not to compete were illegal restraints of trade disappeared for a long time, but made a comeback during the 1970's. See Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193 (1973); Janssen, *Antitrust Considerations in Proceedings Against Former Employees Who Compete Against Their Former Employer*, 31 BUS. LAW. 2063 (1976); Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Post Employment Restraints of Trade*, 1977 U. ILL. L.F. 621 (1977); Note, *The Antitrust Implications of Employee Noncompete Agreements: A Labor Market Analysis*, 66 MINN. L. REV. 519 (1982). Despite the arguments of many commentators, the courts have not looked with favor upon the resurgence of the theory that post-employment limits on competition unduly restrain trade.

27. Carpenter, *supra* note 25, at 244-45; see also Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 627, 136 A.2d 838, 844 (1957).

shortage in the United States today. For example, a promise not to compete, when not ancillary to a contract, is unenforceable as an unlawful restraint of trade. But where the covenant is subsidiary to or ancillary to a legally enforceable transaction, and is itself supported by consideration, it is sometimes enforceable.²⁸ "Ancillary" covenants not to compete often accompany an employment contract, the dissolution of a partnership, or the sale of the goodwill of a business.²⁹

Courts have distinguished covenants against competition ancillary to the sale of business goodwill from those ancillary to an employment contract. The following excerpt from Dean Murray's treatise explains this distinction:

In the sale of a business, unless the good will in the hands of the buyer is protected, the whole purpose of the sale may be frustrated since the essential value of many business entities is found only in their good will. Thus, unless an agreement restricting the seller from interfering with the fundamental subject matter of the sale is enforced, no effective sale can occur The purpose of another common type of restraint, the agreement of an employee not to compete *after* his employment is terminated, is typically quite different Therefore, it has been aptly suggested that, "courts properly should, and do, look more critically to the circumstances of the origin of post-employment restraints than to the circumstances of other classes of restraints."³⁰

The law does, in fact, view post-employment restraints more critically than other types of restrictions on competition. Some states prohibit all or most forms of them by statute.³¹ Most states

28. *E.g.* *Maintenance Specialties, Inc. v. Gottus*, 455 Pa. 327, 314 A.2d 279 (1974); *Sheinman v. Cohen*, 6 Pa. D. & C.3d 261 (1977).

29. J. MURRAY, *MURRAY ON CONTRACTS* 705 (1974).

30. *Id.* at 707, *citing* *Blake, Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 647 (1960).

31. State statutes prohibiting or limiting such post-employment restraints include: Alabama: ALA. CODE § 8-1-1 (1975); California: CAL. BUS. & PROF. CODE § 16600 (West 1964); Colorado: COLO. REV. STAT. § 8-2-113 (1973)(however, the statute permits employee noncompete agreements where the employer wishes to recover the costs of educating or training an employee or where the employee is an executive or staff member of an executive); Louisiana: LA. REV. STAT. ANN. § 23.921 (West 1964)(a maximum two-year restriction is permitted, however, if the employer has trained or advertised for the employee); Michigan: MICH. COMP. LAWS § 445.761 (1967); North Dakota: N.D. CENT. CODE § 9-08-06 (1960); Oklahoma: OKLA. STAT. tit. 15 § 217 (1966); South Dakota: S.D. CODIFIED LAWS ANN. § 53-9-8 (1980). Other state statutes do not actually prohibit non-competition agreements but rather codify common case law concepts. *See, e.g.*, Florida: FLA. STAT. § 542.33 (1980)(agreement is authorized if it is reasonably limited in time and area); Wisconsin: WIS. STAT. § 103.465 (1981-82) (contract would be valid if reasonably necessary for the protection of the employer); or Hawaii: HAWAII REV. STAT. § 480-4 (1980) (such covenants are permissible if limited to such time as may be reasonably necessary for the protection of the employer without imposing

have case decisions which limit the circumstances under which such contracts will be enforced.³² Pennsylvania, which enforces employee noncompete agreements readily, has set certain guidelines for ascertaining whether a given agreement will be enforceable. In the 1976 case of *Sidco Paper Company v. Aaron*,³³ the Pennsylvania Supreme Court summarized the law regarding the enforceability of post-employment non-competition clauses as follows:

Our courts will permit the equitable enforcement of post-employment restraints only where they are incident to an employment relation between the parties to the covenant, the restrictions are reasonably necessary for the protection of the employer, and the restrictions are reasonably limited in duration and geographic extent.³⁴

As will be shown in this article, this rule is not necessarily the one being applied in actual practice in Pennsylvania. Pennsylvania case decisions show an unexplained correlation between the employee's profession and the enforcement by the court of post-employment contract restrictions. Highly-paid, highly-skilled workers,³⁵ such as computer experts, physicians, corporate executives and entrepreneurs have generally enjoyed non-enforcement of their covenants. Lower paid workers,³⁶ such as sales representatives and hairdressers,³⁷ who depend on commissions or tips for a substantial

undue hardship on the employee).

32. See, e.g., *All Stainless, Inc. v. Colby*, 364 Mass. 773, 308 N.E.2d 481 (1974); *National Homes Corp. v. Lester Indus. Inc.*, 293 F. Supp. 1025 (W. D. Va.), *aff'd*, 404 F.2d 225 (4th Cir. 1968); *Reddy v. Community Health Found.*, 298 S.E.2d 906 (W. Va. 1982); *Streiff v. American Family Mut. Ins. Co.*, 118 Wis. 2d 602, 348 N.W.2d 505 (1984). See also 6A A.L. CORBIN, CORBIN ON CONTRACTS § 1394 (1984).

33. 465 Pa. 586, 351 A.2d 250 (1976).

34. *Id.* at 591, 351 A.2d at 252. See also *John G. Bryant Co. v. Sling Testing & Repair, Inc.*, 471 Pa. 1, 369 A.2d 1164 (1977); *Girard Inv. v. Bello*, 456 Pa. 220, 318 A.2d 718 (1974); *Bettinger v. Carl Berke Assoc., Inc.*, 455 Pa. 100, 314 A.2d. 296 (1974); *Jacobson & Co. v. International Equip. Corp.*, 427 Pa. 439, 235 A.2d 612 (1967).

35. See *infra* notes 75-123 and accompanying text.

36. See *infra* notes 39-74 and accompanying text.

37. Beauticians have not fared well in the few reported Pennsylvania cases concerning their noncompete employment covenants. In *Seligman & Latz of Pittsburgh, Inc. v. Vernillo*, 382 Pa. 161, 114 A.2d 672 (1955), the Pennsylvania Supreme Court affirmed the lower court's grant of a preliminary injunction, enjoining the defendants from operating a beauty salon in competition with their former employer in violation of their restrictive covenants. The defendants, two beauticians who had worked for the plaintiff employer, opened a competing beauty salon virtually across the street from the plaintiff's establishment within ten days of voluntarily terminating their employment. They also began to solicit the plaintiff's customers. Both of these acts were prohibited by the defendants' employment contracts for a period of one year after termination of employment. The supreme court held that restrictive covenants in employment contracts were valid unless the employee could prove that the contract constituted an unreasonable or illegal restraint of trade. *Id.* at 164, 114 A.2d at 673.

proportion of their incomes have frequently been subjected to injunctions.³⁸

Furthermore, the court affirmed its position that the scope of review regarding a grant or denial of a preliminary injunction should be limited to a determination as to whether there had been any "apparently reasonable grounds" for the action of the court below. *Id.* at 164, 114 A.2d at 674. The contract in the case before it, the court decided, did not constitute an illegal restraint of trade, since the number of the plaintiff's customers was extremely small and rendered the prohibition against soliciting such customers the equivalent of a limitation to a reasonable geographical area. *Id.* at 166, 114 A.2d at 674-75.

Approximately ten years later, in *Pankas v. Bell*, 413 Pa. 494, 198 A.2d 312 (1964), the supreme court again enforced a covenant not to compete in a hairdresser's employment contract. Bell, a minor at the time, had agreed that if he should leave Pankas' employ he would not engage in the hairstyling business, whether as employer or employee, within a ten-mile radius of downtown Pittsburgh for a period of two years. The court held these restrictions to be reasonable. *Id.* at 495-97, 198 A.2d at 312-13. With respect to the remaining issue of the defendant's capacity, it was held that, while a minor's employment contract is voidable, he should not be permitted to utilize any benefits, training, or knowledge derived from such contract to the detriment of his former employer. The court considered this rule necessary to encourage the employment of minors. *Id.* at 501-02, 198 A.2d at 315.

Did the court in these cases have an accurate sense of the geographical market for this service? If the hairdresser had worked nine miles from downtown Pittsburgh immediately after leaving his job, for example, would that have damaged the former employer? Do the customers of a downtown beauty salon travel ten miles to follow a particular hairdresser?

In *Histand v. Nagorski*, 37 D. & C.2d 157 (1964), however, the court of common pleas was more sensitive to the dilemma of a barber who had signed a ten-year, five-mile noncompete agreement. The court distinguished the restriction in *Seligman*, holding that the ten-year restriction was unreasonable. The court held further that the offending contract provisions were indivisible and that neither an injunction nor damages were, therefore, available. *Id.* at 177.

38. In order to validly grant a preliminary injunction a chancellor in equity must have reasonable grounds upon which to make all three of the following findings: 1) There is an urgent necessity to avoid an injury which would not be compensable by damages. 2) The plaintiff is clearly entitled to relief on the merits of the case. 3) Greater injury would be done by refusing to grant the injunction than by granting it. *E.g.* *Herman v. Dixon*, 393 Pa. 33, 141 A.2d 576 (1958).

The preliminary injunction has been particularly troublesome for employees bound by employee covenants not to compete. As noted by the Pennsylvania Supreme Court in *Herman v. Dixon*:

Since a preliminary injunction is somewhat like a judgment and execution before trial, it will only issue where there is an urgent necessity to avoid injury which cannot be compensated for by damages and should never be awarded except when the rights of the plaintiff are clear. Also, it should in no event ever be issued unless greater injury will be done by refusing it than by granting it.

393 Pa. at 36-37, 141 A.2d at 577.

Appellate review of the issuance or denial of preliminary injunctions is restricted by the reasonable grounds rule which states that a lower court's grant or denial of a preliminary injunction will not be overturned so long as there existed some reasonable grounds for the chancellor's decision. This is an extremely narrow scope of review.

Because the Pennsylvania courts have often not been sympathetic to an employee's argument at the preliminary hearing that his employment restrictions were unreasonable, many such noncompete agreements have been enforced without a thorough review of the merits of the employee's claim that the noncompete covenants constituted an undue hardship. If the

SALES REPRESENTATIVES

The most common approach of the Pennsylvania Supreme Court regarding sales representatives has been to enforce the contract restrictions. This has been so even when the geographical area in which the former employee was prohibited from competing was broader than was necessary to protect the former employer. Under such circumstances, the court has merely rewritten the restrictions in order to make them reasonable.³⁹

In *Morgan's Home Equipment Corporation v. Martucci*,⁴⁰ door-to-door salesmen of household articles were contractually prohibited from competing with their former employer within 100 miles of the city of Philadelphia. The Pennsylvania Supreme Court, in this 1957 case, showed a high level of sensitivity to the employment difficulties that would be presented by such a broad geographic restriction. They reasoned as follows:

An employee is prevented [by a restrictive covenant] from practicing his trade or skill, or from utilizing his experience in the particular type of work with which he is familiar. He may encounter difficulty in transferring his particular experience and training to another line of work, and hence his ability to earn a living is seriously impaired. Further, the employee will usually have few resources in reserve to fall back upon, and he may find it difficult to uproot himself and his family in order to move to a location beyond the area of potential competition with his former employer.⁴¹

The court held that the 100 mile restriction on competition imposed upon the door-to-door salesmen was not reasonably necessary for the protection of the employer and that it constituted an

lower courts had consistently heeded the supreme court's cautionary language in *Herman v. Dixon* regarding preliminary injunctions, many of these cases might have had a result more favorable to the employee.

39. See *John G. Bryant Co. v. Sling Testing & Repair, Inc.*, 471 Pa. 1, 369 A.2d 1164 (1977); *Boldt Mach. & Tools, Inc. v. Wallace*, 469 Pa. 504, 366 A.2d 902 (1976); *Sidco Paper Co. v. Aaron*, 465 Pa. 586, 351 A.2d 250 (1976); *Bettinger v. Carl Berke Assoc., Inc.*, 455 Pa. 100, 314 A.2d 296 (1974); *Jacobson & Co. v. International Equip. Corp.*, 427 Pa. 439, 235 A.2d 612 (1967); *Albee Homes, Inc. v. Caddie Homes, Inc.*, 417 Pa. 177, 207 A.2d 768 (1965). For similar lower court modifications, see *Gordon Wahls Co. v. Linde*, 306 Pa. Super. 64, 452 A.2d 4 (1982)(executive finding agency's employee's one-year, twenty-one state covenant not to compete enforced but injunction modified as overbroad); *Harry Blackwood, Inc. v. Caputo*, 290 Pa. Super. 140, 434 A.2d 169 (1981)(insurance agent's covenant not to call on firm's clients for five years reduced to three years based on testimony regarding the insurance agency's business); *Janitor Jim, Inc. v. Munson*, 32 Pa. D. & C.3d 276 (1983)(injunction issued to enforce covenant not to compete for three years in several counties signed by former salesman/manager in charge of soliciting customers for janitorial services firm).

40. 390 Pa. 618, 136 A.2d 838 (1957).

41. *Id.* at 632, 136 A.2d at 846.

undue hardship upon the employee.⁴² Therefore, the court ruled that the covenant could not be enforced without modification. The court did, however, prohibit the defendants from continuing to solicit the existing customers of their former employer⁴³ and ordered them to account for sales already made to such customers.⁴⁴ This was done because the defendants' solicitation of their former employer's customers was perceived by the court to be equivalent to the taking of trade secrets.⁴⁵ The injunction and accounting were not granted as a result of the breach of contract, but rather in view of the tortious acts of misappropriation and use of a trade secret.⁴⁶

The court, however, adopted a different approach in *Pennsylvania Funds Corporation v. Vogel*.⁴⁷ The county court had enjoined the defendant securities salesman only from selling to his former employer's customers or prospective customers. On appeal, the supreme court remanded the case to enlarge the injunction to cover the entire state of Pennsylvania as provided by the contract.⁴⁸ The court distinguished *Morgan's Home Equipment* from *Pennsylvania Funds* on the grounds that the securities salesmen of Pennsylvania Funds Corporation were given extensive training by their employer.⁴⁹ Furthermore, the court pointed out that the defendant in *Pennsylvania Funds* had opened his own competing business and had enticed fourteen other employees to join him.⁵⁰ The court also noted that the defendants' firm could sell life insurance and accounting services as an alternative source of employment.⁵¹ In *Morgan's Home Equipment*, by contrast, the employees had re-

42. *Id.* at 632-33, 136 A.2d at 846-47.

43. *Id.* at 633, 136 A.2d at 847.

44. *Id.*

45. *Id.* at 623-25, 136 A.2d at 842.

46. RESTATEMENT (SECOND) OF TORTS § 757 comment b. This comment defines a trade secret as follows: A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

Id. The Pennsylvania courts have adopted this definition. See, e.g., *Van Products Co. v. General Welding and Fabricating Co.*, 419 Pa. 248, 213 A.2d 769 (1965); *West Mountain Poultry Co. v. Gress*, 309 Pa. Super. 361, 455 A.2d 651 (1982). For a comprehensive listing of the other jurisdictions that have adopted the Restatement definition of a trade secret, see 12 BUSINESS ORGANIZATIONS, R.M. MILGRIM, TRADE SECRETS § 2.01 (1982).

47. 399 Pa. 1, 159 A.2d 472 (1960).

48. *Id.* at 9, 159 A.2d at 476.

49. *Id.* at 7-8, 159 A.2d at 475-76.

50. *Id.* at 8, 159 A.2d at 476.

51. *Id.* at 9, 159 A.2d at 476.

ceived no special training from their employer,⁵² went to work for another,⁵³ and would have been prevented from earning a livelihood if not permitted to compete with the former employer.⁵⁴ In sum, the court indicated that there would be no hardship if the covenant were enforced, but that in *Morgan's Home Equipment* there would have been hardship.⁵⁵

In *Albee Homes Inc. v. Caddie Homes, Inc.*,⁵⁶ injunctions were issued against the corporate defendant and two individual defendants.⁵⁷ The individual defendants had been showroom salesmen of prefabricated houses for the plaintiff. Their contracts restricted them from competing with the plaintiff "within a radius of 50 miles of any sales office of Albee Homes, Inc."⁵⁸ The court limited the restriction to fifty miles from the location at which the employees had actually worked.⁵⁹ There was "a direct and reasonable connection," the court reasoned, between the covenant and the protection of the former employer's business. No further justification was given to support this view. There was no inquiry into the nature and size of the employer's market.⁶⁰ It is doubtful that it was fifty miles wide. Nor was there an inquiry into the issues raised in *Pennsylvania Funds* and *Morgan's Home Equipment*, such as whether the employee received training from the employer, whether he had alternative skills and whether he would be prevented, by the enforcement of the restriction, from earning a livelihood.

In five other cases, restrictive covenants have been enforced by the court only as to the service areas that salesmen have actually covered even though their contracts provided for heavier restrictions.⁶¹ In another case, *Plunkett Chemical Co. v. Reeve*,⁶² the con-

52. *Id.* at 7, 159 A.2d at 475; *Morgan's Home Equip.*, 390 Pa. at 632, 136 A.2d at 846.

53. *Pennsylvania Funds Corp.*, 399 Pa. at 8, 159 A.2d at 476; *Morgan's Home Equip.*, 390 Pa. at 621, 136 A.2d at 841.

54. *Pennsylvania Funds Corp.*, 399 Pa. at 9, 159 A.2d at 476.

55. *Id.* at 8-9, 159 A.2d at 476.

56. 417 Pa. 177, 207 A.2d 768 (1965).

57. *Id.* at 180-81, 207 A.2d at 770.

58. *Id.* at 184, 207 A.2d at 772.

59. *Id.* at 185-86, 207 A.2d at 773.

60. *Id.* at 186, 207 A.2d at 773.

61. *John G. Bryant Co. v. Sling Testing & Repair, Inc.*, 471 Pa. 1, 369 A.2d 1164 (1977); *Boldt Mach. & Tools, Inc. v. Wallace*, 469 Pa. 504, 366 A.2d 902 (1976); *Sidco Paper Co. v. Aaron*, 465 Pa. 586, 351 A.2d 250 (1976); *Bettinger v. Carl Berke Assoc., Inc.*, 455 Pa. 100, 314 A.2d 296 (1974); *Jacobson & Co. v. International Env't Corp.*, 427 Pa. 439, 235 A.2d 612 (1967).

62. 373 Pa. 513, 95 A.2d 925 (1953).

tract was upheld even though it lacked an area term altogether. The court simply added an area limitation corresponding to the employee's sales territory.⁶³

The employee in *John G. Bryant Co. v. Sling Testing and Repair*,⁶⁴ had promised in his employment agreement not to sell to any of 560 established customer accounts of his employer.⁶⁵ The former employee contended, however, that "some of the corporate customers are so large that the effective area of restriction spans the entire nation."⁶⁶ The court simply affirmed the lower court's ruling that the area of restriction should be limited to the *company's* service area, which included Delaware, eastern Pennsylvania and southern New Jersey.⁶⁷ The former employee was enjoined from selling to the employer's customers in that particular geographical region, but was free to sell to the same customers anywhere else in the world. This result was more equitable than most Pennsylvania decisions involving salesmen. It enabled the ex-employee to choose to either continue to work in the same geographical area as he had been working or to sell to the same companies but in another region. This preserves the worker's mobility without allowing any harm to come to the employer's business.

Both the geographical and time restrictions were arguably too broad in *Boldt Machinery & Tools, Inc. v. Wallace*.⁶⁸ The employment contract contained a five-year restriction on sales by the employee in the employer's territory, which covered western Pennsylvania, southwestern New York and Ohio. The employee had been assigned to a sales territory comprised of only portions of northwestern Pennsylvania and southwestern New York.

The time restriction issue was the more complex of the two issues. In an effort to resolve this issue, the court quoted the famous

63. *Id.* at 516-17, 95 A.2d at 927.

64. 471 Pa. 1, 369 A.2d 1164 (1977).

65. *Id.* at 11, 369 A.2d at 1169. Under most circumstances, inserting a restriction based on the established customer base rather than an arbitrary geographical limitation seems to be the ideal way to draft such agreements, because the relationship between the covenant and the protection of the employer is made clear: the employee is not permitted to interfere with the employer's established accounts.

66. *Id.*

67. *Id.* at 11-12, 369 A.2d at 1169. The court noted that the appellant had presented no evidence that he was unable to establish a business without being able to sell directly to the specified companies and, therefore, he had not met his burden of proving the unreasonableness of the restraint. *Id.* at 12-13, 369 A.2d at 1170. The court interpreted the present noncompete agreement by reference to two prior noncompete agreements between the parties. *Id.* at 11-12, 369 A.2d at 1169.

68. 469 Pa. 504, 366 A.2d 902 (1976).

Harvard Law Review article by Professor Harlan Blake as follows:

In determining whether a restraint extends for a longer period of time than necessary to protect the employer, the court must determine how much time is needed for the risk of injury to be reasonably moderated. When the restraint is for the purpose of protecting customer relationships, its duration is reasonable only if it is no longer than necessary for the employer to put a new man on the job and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to the customers. If the selling or servicing relationship is relatively complex, a longer period may be called for. Courts seldom criticize restraints of six months or a year on the grounds of duration as such, and even longer restraints are often enforced.⁶⁹

Under this analysis, the five-year limitation would seem patently unreasonable, since Blake speaks only in terms of the time it takes for a new sales representative to establish a rapport with the customers. He also specifically suggests six months to a year as a reasonable time period within which to accomplish that goal. Furthermore, even that test is not applied unless there is some necessity to protect the employer from injury. Blake's article is also quoted by the *Boldt* court later in the case, in an effort to further explain the restraint of salesperson-customer relationships: "Frequency of contact may also control or affect the permissible period of the restraint. Paradoxically, if the contract is less frequent a longer period of restraint may be reasonable."⁷⁰ After reading the record of testimony from the employer to the effect that some customers were called upon no more than once every six months, and that the products being sold were relatively complex, the *Boldt* court allowed the five-year restriction to stand.⁷¹

Is it ever fair that an employer should be permitted to prevent a former employee from working in a large region covering parts of two states for a period of five full years? It is difficult to believe that *Boldt Machinery* needed to be free of its former employee's

69. *Id.* at 513-14, 366 A.2d at 907, citing Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 677-78 (1960).

70. *Boldt Machinery*, 469 Pa. at 514, 366 A.2d at 907, citing Blake, *supra* note 69, at 659.

71. *Boldt Machinery*, 469 Pa. at 575, 366 A.2d at 908. The trial court decree as to duration was left undisturbed because there was no majority opinion as to the proper disposition of the issue: three judges would have enforced it; two would have held it unenforceable; and one would have modified it. Justice Pomeroy, writing for those who would have enforced the restraint, noted that "[w]hile a five-year anti-competitive covenant in a contract of employment either approaches or exceeds the bounds of reasonableness . . . [and] [w]hile we would have preferred the period to be shorter, we cannot on this record declare that, as a matter of law, . . . [the restraint] is unreasonable as to time." *Id.* at 515, 366 A.2d at 907-08.

competition in his former sales territory for such a lengthy period of time. Even if some customers were only called upon every six months, it does not follow that such a long interval between sales calls is necessary or even desirable for a business. What would preclude the employer's new sales representative from immediately calling upon all established customers to assure that they would continue to purchase from that company? Such action would represent a prudent counter-strategy for a company faced with competition from any source, whether from a former employee or from some other competitor.

A final case which is of interest is *Bettinger v. Carl Berke Associates*,⁷² where the court granted an injunction against a former sales employee even though his employment contract did not provide for injunctive relief for breach of his covenant not to compete. The fact that the contract specifically mentioned damages as the remedy for its breach did not warrant a conclusion, as far as the court was concerned, that damages should be the exclusive remedy.⁷³ In fact, the court concluded, protection of the former employer would not be accomplished by damages only.⁷⁴ The court failed to explain, however, why damages would be inadequate. It is difficult to understand why the court would order a remedy more harsh than the one provided for in the contract.

Sales representatives in Pennsylvania would be particularly well-advised to consult with an attorney before entering into an employment contract with post-employment competition restrictions. According to the more recent cases, such as *Boldt* and *Bettinger*, any such agreement will be at least partially enforced in Pennsylvania, even if it covers a geographical area as wide as several states or the entire nation. If forced to litigate a noncompete agreement, the best that the salesperson can hope for is that the court will modify the contract so as to make it less burdensome and restrictive.

72. 455 Pa. 100, 314 A.2d 296 (1974).

73. *Id.* at 105, 314 A.2d at 298.

74. *Id.*, 314 A.2d at 299. The court did not specifically state the reason for finding that the remedy could not be limited to damages. However, the explanation is implicit in their rationale for allowing the injunction to stand. The court found that a provider of temporary help, in order to retain his customers, must develop a close personal relationship with them by visiting them on a regular basis. *Id.* at 104-05, 314 A.2d at 298. The former employee in this case had established this rapport with the appellant's clients, and if he were not prevented from continuing to visit these companies, they would likely begin to obtain their temporary services from him. *Id.*

PHYSICIANS AND OTHER MEDICAL PROFESSIONALS

When the signers of restrictive covenants have been physicians, the Pennsylvania Supreme Court has shown more reluctance to enforce the covenants. A typical example of this restrained approach is the case of *Herman v. Dixon*.⁷⁵ Dixon, a gynecologist, had agreed as a condition of employment that upon termination of his employment, he would not engage in the practice of medicine within fifteen miles of the city of Pottsville for a period of three years. Less than three months after beginning to work for the plaintiff employer, however, he severed the relationship and opened his own office in Pottsville. The county court granted a preliminary injunction, but the Pennsylvania Supreme Court reversed.⁷⁶

The court noted in passing that its scope of review was severely limited by the reasonable grounds rule, which states that a lower court's grant or denial of a preliminary injunction will not be overturned as long as there existed some reasonable grounds for the chancellor's decision.⁷⁷ In fact, the court likened the issuance of a preliminary injunction to a judgment and execution before trial. Therefore, the justices maintained, preliminary injunctions should not be granted imprudently. According to the court, the record contained no evidence of damage actually suffered by the plaintiff or of urgent necessity to prevent irreparable harm.⁷⁸ To the contrary, the justices reasoned that the injunction would have caused defendant and his family to suffer greater injury since the defendant was without sufficient financial resources to move his office outside the proscribed area.⁷⁹

The decree of the lower court was reversed, and Dr. Dixon was permitted to continue his practice in competition with his former employer. The court bypassed the usual inquiry into the reasonableness of the restrictions. The reversal was made on the grounds that a preliminary injunction would not have been an appropriate remedy.

The granting of an injunction only where it will prevent greater harm than the refusal to grant one is a sound and well established

75. 393 Pa. 33, 141 A.2d 576 (1958).

76. *Id.* at 38, 141 A.2d at 578.

77. *Id.* at 36, 141 A.2d at 577. *See supra* note 38.

78. 393 Pa. at 38, 141 A.2d at 578.

79. *Id.* *See also* *Madany v. Lee*, 5 Pa. D. & C.3d 108 (1978) (preliminary injunction denied; covenant which precluded the defendant's practice within fifteen miles of the only two hospitals in the area created undue burden on defendant and bore no reasonable relation to the plaintiff's protectable interests).

judicial practice. Damages are, after all, the ordinary remedy for breach of contract. Reasoning similar to that employed in *Dixon* should be widely applied. The courts should routinely inquire as to whether the plaintiff will suffer irreparable harm if an injunction is not granted.

In the 1967 case of *Hayes v. Altman*,⁸⁰ a restrictive covenant was enforced against Dr. Altman, an optometrist who had agreed not to practice optometry in the borough of Monroeville or elsewhere within a radius of six air miles of his employer's office for a period of three years from the termination of employment.⁸¹ Upon completion of his five-year employment contract, Altman was discharged by his employer for having failed to sign a new agreement. About one month later, Altman opened his own practice in Monroeville.⁸²

The chancellor had refused to enforce the covenant, stating that the covenant not to compete was not reasonably necessary for the protection of the former employer and that its enforcement would constitute an undue hardship upon the defendant.⁸³ The standard regarding the employer's need for protection from competition had, of course, been incorporated into the law of Pennsylvania by this time in *Morgan's Home Equipment*.⁸⁴

The Pennsylvania Supreme Court reversed, however, stating that the contract was enforceable as it was reasonable as to time and geographical extent and did not impose undue hardship upon the former employee.⁸⁵ Employment contracts containing covenants not to compete after the termination of employment are prima facie enforceable, it stated, if they are reasonably limited as to duration of time and geographical extent. The court explained that covenants would be found to be reasonably limited if their territory and time restrictions were reasonably necessary for the protection of the employer, without imposing undue hardship on the employee.⁸⁶

80. 424 Pa. 23, 225 A.2d 670 (1967).

81. *Id.* at 25, 225 A.2d at 671.

82. *Id.* at 26, 225 A.2d at 671.

83. *Id.*

84. 390 Pa. 618, 136 A.2d 838 (1957). See *supra* notes 40-46 and accompanying text.

85. 424 Pa. at 29, 225 A.2d at 673.

86. *Id.* at 28-29, 225 A.2d at 672. The court was not reviewing the grant or refusal of a preliminary injunction and its scope of review was not limited by the reasonable grounds rule. It looked to *Seligman & Latz of Pittsburgh, Inc. v. Vernillo*, 382 Pa. 161, 114 A.2d 672 (1955) and *Morgan's Home Equip. Corp. v. Martucci*, 390 Pa. 618, 136 A.2d 838 (1957), for controlling precedent, see *supra* notes 37, 40-46 and accompanying text. See also Hop-

The opinion of the court in *Hayes v. Altman* was handed down nearly three years after the termination of Altman's employment. When Hayes applied to the county court for specific performance, Altman argued that three years from the date of termination had expired and that the restriction would therefore be unenforceable. The chancellor agreed and the supreme court affirmed. Although the contract restrictions were held to be valid, they were never enforced and Altman practiced in the restricted area without interruption.

The most recent case regarding a restrictive covenant in an employment contract of a medical professional to reach Pennsylvania's highest court is *New Castle Orthopedic Associates v. Burns*,⁸⁷ in which a physician, specializing in orthopedics, had agreed that he would not practice medicine in Lawrence County, Pennsylvania, for a two-year period after the termination of his employment. When the physician opened his own office in Lawrence County immediately following his resignation, his former employer filed suit against him. A preliminary injunction was granted against the physician and the superior court affirmed per curiam without opinion. The supreme court however, reversed.⁸⁸

In its opinion, the state supreme court first quoted verbatim the stern rationale of *Herman v. Dixon* regarding the seriousness of the issuance of a preliminary injunction and its likeness to a judgment and execution before trial.⁸⁹ It then set forth a slightly revised version of that rule, stating that the essential prerequisites for the issuance of a preliminary injunction were as follows:

[F]irst, that it is necessary to prevent immediate and irreparable harm which could not be compensated by damages; second, that greater injury would result by refusing it than by granting it; and third, that it properly

penwasser v. Press-Lipkowitz Dental Assocs., 5 Pa. D. & C.3d 551 (1978) (declaratory judgment action; court enforced covenant reasoning that the practice of dentistry was a business as well as a profession and therefore gave rise to protectable goodwill interests).

The opinion of the court in *Hayes v. Altman* was handed down nearly three years after the termination of Altman's employment. When Hayes applied to the county court for specific performance, Altman raised the defense that the court no longer had the power to compel specific performance, as the time for performance, i.e., three years from the date of termination, had passed. The supreme court affirmed the chancellor's refusal to grant an injunction, holding that employee noncompete agreements were no longer enforceable when the original time period restriction had expired: *Hayes v. Altman*, 438 Pa. 451, 455, 266 A.2d 269, 271 (1970). See also *Davis v. Buckham*, 280 Pa. Super. 106, 421 A.2d 427 (1980).

87. 481 Pa. 460, 392 A.2d 1383 (1978) (Eagen & Larsen, J.J., concurring) (Roberts & O'Brien, J.J., dissenting).

88. *Id.* at 462-63, 392 A.2d at 1384.

89. *Id.* at 463, 392 A.2d at 1384. See *supra* notes 38, 75-79 and accompanying text.

restores the parties to their status as it existed immediately prior to the alleged wrongful conduct.⁹⁰

The court found that greater harm would result from the issuance than from the denial of an injunction and that the plaintiff had failed to establish immediate and irreparable injury that could not be compensated in damages.⁹¹ This conclusion, the court maintained was supported by the lack of any evidence in the record of economic injury to the plaintiff, such as a decrease in the number of patients or solicitation by the defendant of plaintiff's patients.⁹²

Notice that this is the first case in which even a plurality of the justices observed that perhaps the employer's injury was something that was observable and quantifiable, requiring that evidence of the injury be submitted. Prior to this time, injury had simply been presumed. Additionally, the court considered important testimony that showed that patients had to wait as long as four months for an appointment with the plaintiff's physicians and that there was a shortage of orthopedists in Lawrence County.⁹³ The plaintiff, the court concluded, "was attempting to serve more patients than it could possibly accommodate."⁹⁴ Perhaps observations of a similar nature could have been made in other restrictive covenant cases.

The court, in *New Castle*, added to the list of factors that must be considered in restrictive covenant cases another that was never previously mentioned: the interests of society as a whole.⁹⁵ Citing cases from other jurisdictions involving neurosurgeons, radiologists and other physicians, it noted that courts of other states had often looked to whether or not there had been a shortage of medical practitioners in the area in order to decide whether society's interests would have been poorly served by the granting of an injunction.⁹⁶ As the court noted:

90. 481 Pa. at 464, 392 A.2d at 1385 (quoting *John G. Bryant Co. v. Sling Testing & Repair, Inc.*, 471 Pa. 1, 369 A.2d 1164 (1977)).

91. *Id.* at 465, 392 A.2d at 1385-86.

92. *Id.* at 466, 392 A.2d at 1386.

93. *Id.* at 467, 392 A.2d at 1387.

94. *Id.* at 467-68, 392 A.2d at 1387.

95. *Id.* at 468, 392 A.2d at 1387.

96. *Id.* at 468-69, 392 A.2d at 1387. In *Nagaraj v. Arcilla*, 20 Pa. D. & C.3d 574 (1981), the court issued a preliminary injunction to enjoin the defendant doctor from violating his covenant not to compete with his former employer. The court looked first to the *New Castle* public policy considerations, but determined that an injunction would have no adverse effects on the community because there were approximately one hundred doctors in a ten mile radius of the plaintiff doctor's family clinic. *Id.* at 586. Furthermore, the court found substantial evidence of great injury to the plaintiff combined with surreptitious dealings by

Paramount to the respective rights of the parties to the covenant, must be its effect upon the consumer who is in need of the service. This is of particular significance where equitable relief is being sought and the result of such an order or decree would deprive the community involved of a desperately needed service.⁹⁷

This society-oriented approach does not appear in any other employee anti-competition case in Pennsylvania. The court does not indicate, however, whether this principle should be applied only to doctors or also to other types of employees whose services might be equally necessary to the functioning of society.

EXECUTIVES AND OTHER BUSINESS PROFESSIONALS

There are four Pennsylvania Supreme Court decisions dealing with restrictive covenants involving executives and upper level business employees.⁹⁸ In each case, the Pennsylvania Supreme Court denied enforcement.

In *Reading Aviation Service, Inc. v. Bertolet*,⁹⁹ the employee, Bertolet, was president and chairman of the board of the plaintiff corporation. He had agreed that he would not own an interest in or engage in or assist any business that was competitive with his employer's, in the event that he should voluntarily discontinue the employment relationship. Bertolet later resigned and helped to organize a competing company located some 600 feet away from the plaintiff's place of business. The state supreme court affirmed the county court's denial of enforcement, stating that the promise was void on its face because it lacked limitations on either time or space,¹⁰⁰ and that such limitations would not be added by the court to allow enforcement.¹⁰¹

This decision is not consistent with the cases of salesmen and hairdressers. In many of the contracts of salesmen, the court simply rewrote overly broad restrictions in order to make them rea-

the defendant doctor who opened a competing family clinic around the corner while still in the plaintiff's employ. *Id.* at 583-84. *Nagaraj*, therefore, is factually distinguishable from *New Castle*, and it is probable that public policy considerations will continue to be determinative in most future suits to enforce covenants not to compete signed by medical doctors.

97. 481 Pa. at 469, 392 A.2d at 1387-88.

98. *Fox-Morris Assocs., Inc. v. Conroy*, 460 Pa. 290, 333 A.2d 732 (1975); *Girard-Inv. Co. v. Bello*, 456 Pa. 220, 318 A.2d 718 (1974); *Trilog Assocs., Inc. v. Famularo*, 455 Pa. 243, 314 A.2d 287 (1974); and *Reading Aviation Serv., Inc. v. Bertolet*, 454 Pa. 488, 311 A.2d 628 (1973).

99. 454 Pa. 488, 311 A.2d 628 (1973).

100. *Id.* at 491, 311 A.2d at 630.

101. *Id.* at 492-93, 311 A.2d at 630.

sonable.¹⁰² In *Bertolet*, the employer was likely to be injured by the competition of its former employee since this was not an ordinary employee but rather the president and chairman of the board. The court, however, did not take notice of this fact and the covenant was neither enforced nor rewritten.

Furthermore, it is likely that competition at a distance of 600 feet from the former employer's place of business would be highly injurious to the former employer if the market for aviation services were at all geographically determined. This would probably be the case, aviation being a transportation enterprise. In *Plunkett*, a salesman case discussed previously, the court had found an implied area term in a contract that lacked an express area restriction.¹⁰³ The same would have been done in this case if there were cross-occupational consistency. Instead, enforcement was totally denied.

Additionally, given the standards articulated by Professor Blake, even a time restriction could have been determined by the *Bertolet* court. The test would be the amount of time needed for the risk of injury to the previous employer to be reasonably moderated. Blake's suggestion that six month to one year restrictions are almost always reasonable¹⁰⁴ might also have been utilized here.

It is strange that, in *Pankas*¹⁰⁵ a minor hairdresser was prohibited from working within ten miles of his former workplace for two years simply because his contract so provided, but a president and chairman of the board of an aviation company could not be prevented from working 600 feet away from his former place of employment for even one day. Which form of competition would have been more injurious to the former employer? Surely the latter. A president and chairman of the board is in a position to do harm to the former employer by revealing trade secrets or inside information. Surely a hairdresser has no comparable capabilities. The maximum harm that a hairdresser could do would be to use his or

102. See *supra* notes 37, 39-74 and accompanying text.

103. See *supra* notes 62-63 and accompanying text. In *Bertolet*, the court concluded that the agreement not to compete was an "open-ended restriction" which imposed "an unconscionable burden on [Bertolet's] ability to pursue his chosen profession." The agreement was struck down as void on its face due to the lack of a limitation as to time and space, a deficiency regarded by the court as beyond the bounds of reasonableness. Citing the RESTATEMENT (FIRST) OF CONTRACTS, section 518, the *Bertolet* court held that the promise was indivisible and hence unenforceable. It distinguished several earlier cases, including *Plunkett* (which contained a one-year time limitation), as examples of "more narrowly drawn agreements." 454 Pa. at 492-93, 311 A.2d at 630.

104. Blake, *supra* note 69, at 677-78.

105. *Pankas v. Bell*, 413 Pa. 494, 198 A.2d 312 (1964); see *supra* note 37.

her personal skill and charisma to lure away patrons whose hair has been styled by the same hairdresser at the former place of employment.

All of this is not to argue that the court *should* have added its own time and area restrictions in order to enforce the Bertolet contract. Rather, it is to show that the precedent and standards existed, so that the court *could* have done so in the interests of consistency, had it wished. The superior approach, however, is not to redraft a contract for an employer (or for an employee for that matter) but instead simply to deny enforcement of any unfair or oppressive clause or clauses.

In *Trilog Associates, Inc. v. Famularo*,¹⁰⁶ the cases of three former employees of Trilog, a data processing firm, were consolidated. Famularo and Marabella had resigned from their positions with Trilog and had formed their own competing business. They hired Gawrys, who had been fired from Trilog, and the three began to perform data processing services for a former client of Trilog.¹⁰⁷

Famularo had agreed with his former employer that he would not develop or assist in the development or exploitation of any shareholders' record system on his own account or for any other party. Marabella and Gawrys had agreed that they would not enter the employ of any customer or client of Trilog for a period of two years after leaving the employ of Trilog.¹⁰⁸

Although the chancellor in equity had granted an injunction against the defendants, the Pennsylvania Supreme Court reversed, holding that the non-competition clauses in all three contracts were void.¹⁰⁹ In doing so, the court cited section 516(f) of the Restatement (First) of Contracts,¹¹⁰ stating that the restrictions upon the defendants were greater than required for the protection of the former employer, and that they constituted an undue hardship upon the former employees.¹¹¹

106. 455 Pa. 243, 314 A.2d 287 (1974).

107. *Id.* at 245, 314 A.2d at 289.

108. *Id.* at 248, 253-54, 314 A.2d at 291, 293.

109. *Id.* at 254, 314 A.2d at 293.

110. RESTATEMENT (FIRST) OF CONTRACTS, section 516 provides for several forms of bargains that do not, unless effecting or forming part of a plan to effect a monopoly, impose unreasonable restraints of trade. Subsection (f) includes: A bargain by an assistant, servant, or agent not to compete with his employer, or principal, during the term of the employment or agency, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.

Id.

111. 455 Pa. at 254, 314 A.2d at 293-94.

The court found that the restrictions were broader than those necessary for the former employer's protection in view of the lack of a limitation on territory. As Justice Manderino commented on behalf of six members of the court:

Famularo in effect promised not to practice his profession *anywhere for anyone* in developing a shareholders' record system. His promise is similar to a covenant by an attorney not to try murder cases *anywhere for anyone* because he gained experience in trying murder cases from his former employer, or a covenant by a bricklayer not to build an apartment house *anywhere for anyone* because his former employer gave him his first opportunity to use his bricklaying talent in building an apartment house. Such covenants, unrestricted in territorial application, are not necessary to protect any valid interest of the former employer and are unreasonable restraints of trade.¹¹²

Similarly, the court noted, Marabella and Gawrys would have been unable to work for any client of Trilog, anywhere and in any capacity whatsoever, even if totally unrelated to the work which they had performed for Trilog, if their restrictions had been enforced.¹¹³

It is a bit peculiar to see territorial restrictions occupying such a sacrosanct position. A restriction on the development of shareholders' records systems is comparatively narrow and carefully circumscribed. Famularo was free to perform any other type of data processing service with no time or territorial restrictions. Marabella and Gawrys were free to do anything at all, anywhere they liked, as long as they did not do it for any client of Trilog. These, too, are restrictions that could hardly be regarded as oppressive when compared to some others that have been enforced. In fact, an employee, if given a choice of various post-employment restrictions would probably *select* the types of restrictions imposed on Famularo, Marabella and Gawrys. Restrictions on the type of project or client do not force the employee to stay out of work for any period of time or to relocate. Time and area restrictions, on the other hand, usually create such hardships.

In *Girard Investment Co. v. Bello*,¹¹⁴ the defendant had been employed as the manager of a branch office of a consumer finance company. After having been transferred by his employer to a new, less desirable branch office against his will, he resigned from the plaintiff company and established his own concern with himself as president. The defendant's new business was within the plaintiff's

112. *Id.* at 254-55, 314 A.2d at 294 (emphasis in original).

113. *Id.* at 255-56, 314 A.2d at 294.

114. 456 Pa. 220, 318 A.2d 718 (1974).

"trade territory," four or five miles from the plaintiff's Logan Square branch office in Norristown where the defendant had worked when originally hired by the plaintiff. The defendant had covenanted as follows:

That for a period of one year after the termination of my employment for any reason I will not engage in any way, directly or indirectly, in any business competitive with the Employer's business, nor solicit or in any other way or manner work for or assist any competitive business, in any city or the environs or trade territory thereof in which I shall have been located or employed within one year prior to such termination.¹¹⁵

The chancellor in equity had held that the restriction was not reasonably necessary for the protection of the former employer and that it was an undue hardship on the former employee because it had overly broad geographic limitations.¹¹⁶ The Pennsylvania Supreme Court affirmed with very little explanation, except to say that the restrictions were in fact not reasonably necessary and that, in order to have been construed otherwise the employee would have had to have received special training or have learned guarded methods or trade secrets in the course of his employment with the plaintiff.¹¹⁷ The court concluded that those factors were absent, and that the covenants were therefore unenforceable.¹¹⁸

The court treated this employee comparatively favorably, in light of other decisions. The geographical area which would have been off limits to the employee had the contract been enforced was less than the size of one county. The court would not have hesitated to enforce a contract restricting a sales representative from competing in an area this small. In the cases involving salesmen, the former employees merely went to work for competitors. In *Girard Investment Company*, the defendant actually opened a competing firm within a few miles of the former employer. The court permitted him to do so, despite the terms of his contract.

Finally, in the case of *Fox-Morris Associates, Inc. v. Conroy*,¹¹⁹

115. 456 Pa. at 221-22, 318 A.2d at 719.

116. *Id.* at 222, 318 A.2d at 719.

117. *Id.* at 223-24, 318 A.2d at 720. The court in *Girard Investment* did not consider the restrictions necessary to protect the employer from a loss of "carefully guarded methods of doing business." 456 Pa. at 223, 318 A.2d at 720, quoting Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 631, 136 A.2d 838, 846 (1957). In his dissenting opinion, Justice Pomeroy noted the testimony from both parties regarding the importance of personal contacts in the consumer finance business and concluded that the restrictive covenant was necessary for the protection of the employer. 456 Pa. at 226-27, 318 A.2d at 721 (Pomeroy, J., dissenting).

118. *Id.* at 223-24, 318 A.2d at 720.

119. 460 Pa. 290, 333 A.2d 732 (1975).

the state supreme court affirmed a lower court's refusal to grant an injunction against an executive employment counselor.¹²⁰ In addition to a restriction which provided that for eighteen months following termination of employment he would not compete within a certain geographical area, the contract stipulated that the restrictions were necessary for the reasonable and proper protection of the company's business, and also that in the event that the restrictions became operative, the employee would "be able to engage in other businesses for the purposes of earning a livelihood."¹²¹ Thus, the employee was arguably waiving any defenses he might have had to the effect that the restrictions were not reasonably necessary or that their enforcement would work an undue hardship upon him by causing him to suffer a period of unemployment. The Pennsylvania Supreme Court's affirmance, however, did not mention the issue of such a waiver. The court merely referred to the limited scope of review of preliminary injunction requests, and then stated the following:

The covenant in the instant case restricted appellees from engaging in a competitive business within a one-hundred-mile radius . . . of any place where appellant had offices. Under these circumstances, the enforcement of the restrictive covenant and its implications are not susceptible to the drastic action of a preliminary injunction.¹²²

The court did not mention or discuss the possibility of partial enforcement, by which they could have restricted Conroy from competing within a one-hundred-mile radius of the office where he had actually worked. Such a compromise would hardly have been unprecedented in light of the cases dealing with sales representatives.¹²³

120. *Id.* at 293, 333 A.2d at 734.

121. *Id.* at 292, 333 A.2d at 733.

122. *Id.* at 293, 333 A.2d at 734.

123. *See supra* notes 39-74 and accompanying text. In a concurring opinion, Justice Roberts noted that courts of equity will enforce only those covenants not to compete which are reasonably necessary for the protection of the employer. In comparison, where the covenant imposes restrictions broader than necessary to protect the employer, enforcement in equity will be limited to those portions of the restrictions necessary for the protection of the employer (citing *Jacobson & Co. v. International Env't Corp.*, 427 Pa. 439, 235 A.2d 612 (1967)). Justice Roberts concurred in the result, however, because he believed there were "apparently reasonable grounds" for the chancellor's decision that the employer had failed to show that irreparable harm would result from the denial of the injunction. 460 Pa. at 294-95, 333 A.2d at 734 (Roberts, J., concurring).

SUMMARY OF CASES

This paper has dealt with some of the Pennsylvania cases which illustrate what may well be a trend, albeit heretofore unarticulated, toward deciding the enforceability of post-employment contract restrictions on competition according to the occupation of the covenantor. Hairdressers and sales representatives have generally not been permitted to operate in the trade areas of their former employers, whereas physicians, optometrists and executives have been permitted to compete with their former employers despite covenants to the contrary. The Pennsylvania Supreme Court has specifically cited an undersupply of doctors in certain geographical areas as the reason for not enforcing restrictions against them. No other appellate decision regarding restrictive covenants in Pennsylvania has inquired openly into the supply of workers in the field in question, even though such an inquiry might be helpful in determining the economic impact of such case decisions upon society. Society should not be deprived of people with important or scarce talents. Nor has there been sufficient inquiry into other economic factors such as the market in which the employee worked and the existence or non-existence of employer goodwill.

The courts are not necessarily the reason such matters have not been considered. A review of the testimony presented in some of these cases reveals that neither economists nor other experts were used as witnesses. The need to enforce the contract restrictions is typically measured only by the testimony of the employer. Employers ought to be held to a higher, more objective standard of proof than merely their own opinions, or perhaps attorneys for former employees should engage the services of expert witnesses. Furthermore, in the interest of fairness, courts should shift the burden of proving that the restrictions are reasonably necessary and not unduly burdensome to the former employer.

Another reason this area of law continues to be problematic is the inability of the Pennsylvania justices to reconcile strong differing views and reach a consensus on the subject. For example, in *Sidco*, Justice Roberts wrote the opinion of a three vote plurality, Justice Pomeroy a concurrence on behalf of himself and Chief Justice Jones, and Justices Nix and Manderino separate dissents.¹²⁴ In

124. *Sidco Paper Co. v. Aaron*, 465 Pa. 586, 351 A.2d 250 (1976). Stressing that the scope of review on an appeal from a preliminary injunctive decree was restricted to whether there were "any apparently reasonable grounds" for the lower court's decree, Justice Pomeroy, in his concurring opinion, noted that the employer had a protectable interest in the

New Castle, in 1978, Justice Nix wrote for a three vote plurality, while Justices Eagan and Larsen concurred in the result only and Justices Roberts and O'Brien dissented.¹²⁵

One thing that the justices do seem to agree on is the way to handle restrictive covenants of salesmen—enforce them. Perhaps the reason for the harsh treatment of sales representatives is an unarticulated belief on the part of the members of the Pennsylvania Supreme Court that it is in this field that competing former employees have the greatest potential for doing economic harm to their former employers, particularly by soliciting the same customers. This writer believes that the courts have been premature in

customer goodwill created by its salesmen. *Id.* at 602-03, 351 A.2d 258-59 (Pomeroy, J., concurring). He further indicated his belief that the covenant in *Sidco* could be distinguished from those with “unlimited scope,” as in *Reading Aviation Serv. Inc. v. Bertholet*, 454 Pa. 488, 311 A.2d 628 (1973), which contained neither a time nor an area limitation. The covenant in *Sidco*, Justice Pomeroy maintained, did not suggest “an abuse of superior bargaining power and a callous disregard for an employee’s interest in pursuing his chosen occupation” and, therefore, was not subject to the “extraordinary sanction” of being declared void in its entirety. 465 Pa. at 604-05, 351 A.2d at 259-60 (Pomeroy, J., concurring).

In his dissenting opinion, Justice Nix found the covenant to be “unreasonable” in its protection of *Sidco*’s business interest. While Justice Nix agreed with the majority that *Sidco* did have a protectable interest in goodwill, he nonetheless emphasized that equitable enforcement of the terms of a covenant must not be permitted to restrain the exercise of the “innate ability” of a former employee. 465 Pa. at 608-09, 351 A.2d at 261 (Nix, J., dissenting). Only those contacts established during the employment should be protected, noted Justice Nix, while the establishment of new relationships should not be prevented where they did not arise from the associations commenced during the employment. Justice Nix concluded that because the employee’s actual business contacts were easily ascertainable, a geographical limitation on the employee’s future employment was unnecessary for lack of a clear relationship between the customer contacts and the geographical area. *Id.* at 609-10, 351 A.2d at 262 (Nix, J., dissenting).

In a separate opinion, Justice Manderino also found the covenant “oppressive” to the former employee because it prohibited the employee from soliciting new customers in new locations. According to Justice Manderino, the covenant in *Sidco* failed to specify a limitation on former customers or former sales territories. Such a specifying covenant would apprise the employee of the exact limitations of his future employment. *Id.* at 611-12, 351 A.2d at 263 (Manderino, J., dissenting). Justice Manderino also noted that the restrictions of a covenant should be evaluated at the time the covenant is made and also at the time it is to be enforced. “[A] restrictive covenant, even if reasonable when made, would not be entitled to enforcement if at the time enforcement is sought, it would be unreasonable to give effect to the covenant.” *Id.* at 613-14, 351 A.2d at 264 (Manderino, J., dissenting).

125. *New Castle Orthopedic Assocs. v. Burns*, 481 Pa. 460, 392 A.2d 1383 (1978). Justice Roberts, in his dissent, emphasized the “limited scope of review in appeals from decrees granting or denying a preliminary injunction.” Quoting *John G. Bryant Co. v. Sling Testing & Repair Co.*, 471 Pa. 1, 369 A.2d 1164 (1977), Justice Roberts reaffirmed that the court shall look to the record to determine if there exists any “apparently reasonable grounds” for the lower court action. Based on the evidence of appellee’s business relationship, Justice Roberts dissented from the majority. 481 Pa. at 469-70, 392 A.2d at 1388 (Roberts, J., dissenting).

presuming such harm in the absence of proof of its existence or even its likelihood. From the horror stories of how former salesmen have brought former employers to near ruin by founding aggressive, competing firms, many courts and many lawyers now seem to believe that disaster is inevitable when a sales representative is permitted to compete freely with his former employer. Similar logic could easily be applied to hairstylists. They are also capable of taking customers with them, but so are doctors and executives.¹²⁶

There is an urgent need in Pennsylvania for a more fair, uniform and coherent approach to noncompete clauses in employment agreements. Both employers and employees have a need to know whether the agreements which they make will be enforceable. The approach taken in *New Castle* is a step toward a more rational, more predictable, more economically conscious approach to restrictive covenants.¹²⁷ But much more progress is needed. The following section of this article will explore a variety of methods by which the system could be improved.

SOLUTIONS

There are solutions, which could be incorporated into the laws of every state, solving not only the problems of Pennsylvania, but also those of other states that follow a case law approach. A variety of possible reforms will be discussed in this section of the article.

The Statutory Solution

As previously mentioned, eleven states have statutes on the subject of restrictive covenants in employment contracts.¹²⁸ These laws do not all approach the subject in the same way. The statute in Michigan renders all such agreements "illegal and void"¹²⁹ as against public policy.¹³⁰ The California statute renders only the offending anti-competition clause invalid¹³¹ and does not apply to a

126. See *supra* notes 37, 75-123 and accompanying text.

127. See *supra* notes 87-97 and accompanying text.

128. See *supra* note 31.

129. MICH. COMP. LAWS § 445.761 (1967).

130. The Michigan statute reads as follows:

All agreements and contracts by which any person, co-partnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void.

MICH. COMP. LAWS § 445.761 (1967).

131. Section 16600 of the California Business and Professional Code provides as fol-

sale of business goodwill¹³² or the dissolution of a partnership.¹³³ The California approach has been adopted in several other states.¹³⁴ South Dakota's statute is similar to the California statute, but it provides for an additional class of enforceable covenants not to compete.¹³⁵ Others, like Florida,¹³⁶ Hawaii,¹³⁷ and Wisconsin¹³⁸ apparently attempt to codify their case law.

A well-drafted statute has numerous advantages over the common law approach that is presently used by a majority of the states. The most important advantage is that good legislation is generally more certain and specific than case law, lending a higher degree of predictability to a given situation. This is an area of law where a high level of predictability is essential. After all, it deals with the question of one's ability to earn a livelihood in one's chosen profession and locale.

Workers are too often faced with the dilemma of whether to leave an undesirable job. An important factor to be considered is whether the acceptance of new employment will cause a lawsuit to be brought by the former employer. More importantly, it must be clear whether such a lawsuit would succeed. Otherwise, employees may be left with a Hobson's choice: stay in the undesirable job in order to avoid legal liability or leave at the risk of precipitating litigation. Worse still, they may suffer unemployment by virtue of an injunction, since that is the usual method by which restrictive covenants are enforced.

lows: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." CAL. BUS. & PROF. CODE § 16600 (West 1964).

132. CAL. BUS. & PROF. CODE § 16601 (West 1964).

133. CAL. BUS. & PROF. CODE § 16602 (West 1964).

134. See Alabama: ALA. CODE § 8-1-1 (1975); North Dakota: N.D. CENT. CODE § 9-08-06 (1960); and Oklahoma: OKLA. STAT. tit. 15 § 217 (1966).

135. See S.D. CODIFIED LAWS ANN. § 53-9-8 (1980). South Dakota's statute reads exactly like the California statute except that, in addition to the allowance of restrictions accompanying the sale of goodwill or dissolution of a partnership, there is an additional exception allowing covenants that do not exceed ten years or twenty-five miles. This is an addition which comes very close to nullifying the positive effects of the statute. Ten years ought to be a longer time than any diligent former employer would need to preserve his goodwill.

136. The Florida statute, FLA. STAT. § 542.33 (1980), enforces the agreement, if reasonably limited in time and area.

137. HAWAII REV. STAT. § 480-4 (1980). See *supra* note 31. Subsection (c)(4) of that statute, however, authorizes only "a covenant or agreement by an employee or agent not to use the *trade secrets* of the employer or principal" so long as the covenant follows certain principles of reasonableness. HAWAII REV. STAT. § 480-4(c)(4) (1980)(emphasis added).

138. WIS. STAT. § 103.465 (1981-82).

Furthermore, there is an argument to be made that to promote uniformity and predictability in commercial practice a uniform law¹³⁹ or federal statute should be enacted to govern the law of noncompete agreements.¹⁴⁰ It is not uncommon for a corporate employer to be located in one state but have employees in another or several other states, particularly if the principal office is located in a border state or in the nation's northeast corridor.¹⁴¹ Therefore, a uniform law would eliminate the possibility of raising entangling conflict of law issues. Again, it would desirably enhance the level of predictability for employees who need it.

A new statute on the subject of restrictive covenants, to be effective, should make it clear whether or not a restrictive covenant will be enforced. In California, for example, every contract restraining anyone from engaging in a lawful occupation is to that extent void.¹⁴² The only exceptions relate to contracts for the sale of goodwill¹⁴³ or dissolution of a partnership.¹⁴⁴ There is very little room for confusion or uncertainty as to the likelihood of enforcement of a given restrictive covenant. Furthermore, under California's statutory scheme the balance of power is properly tipped toward the employee.

Enforcement of all contracts is an alternative means of achieving certainty. But this alternative is clearly barred by the antitrust laws, most notably section 1 of the Sherman Act, which prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states or with foreign nations"¹⁴⁵ By a decision of the United States Supreme Court, only those contracts which unreasonably restrain trade constitute Sherman Act violations.¹⁴⁶ However, that brings us full circle: since some contracts would necessarily be unenforceable because they

139. This idea was suggested to the author by Dennis Kuhn, M.B.A. Director and Assistant Professor of Business Law at Villanova University.

140. There is, of course, already a federal statute that arguably regulates this area—the Sherman Act, 15 U.S.C. § 1 (1976). See *infra* notes 146-47 and accompanying text.

141. In *Sidco Paper Co. v. Aaron*, 465 Pa. 586, 351 A.2d 250 (1976), for example, the employer was a Pennsylvania corporation but its service area included Virginia, West Virginia, Maryland, Delaware, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, and the District of Columbia as well as Pennsylvania. The defendant employee in that case had worked for the company in Maryland, Delaware, Washington, D.C. and portions of Virginia and Pennsylvania.

142. CAL. BUS. & PROF. CODE § 16600 (West 1964).

143. CAL. BUS. & PROF. CODE § 16601 (West 1964).

144. CAL. BUS. & PROF. CODE § 16602 (West 1964).

145. 15 U.S.C. § 1 (1976).

146. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

would unreasonably restrain trade, a lack of certainty is once again created as to which contracts will be enforced.

The barring of the enforcement of any and all restrictive covenants against employees, as in California, would still leave employers with traditional common law protections. Intentional interference with contractual relations¹⁴⁷ and interference with prospective advantage¹⁴⁸ have long been recognized as actionable under tort law. The former prohibits not only intentional interference with the existing contracts of another, but also antitrust violations, misuse of trade secrets or of confidential information, as well as unfair competition.¹⁴⁹ The latter prohibits intentional interference with expectations of future contractual relations, such as the opportunity to obtain customers.¹⁵⁰ Injunctive relief is available to prevent future interference with contract when grounds for such relief are established and there is a threat of future similar harm.¹⁵¹ These tort actions provide an adequate remedy for the injured employer. After all, a former employer should not have the right to thwart any and all competition by former employees. On the other hand, certain behavior such as the stealing of company files or trade secrets ought to be subjected to close scrutiny by the courts. Tort liability should be imposed in appropriate cases.

A statute, then, not unlike California's, would be a viable alternative to the present vague, time-consuming reasonableness standards which have sometimes resulted in discriminatory enforcement. Such a statutory package in combination with existing intentional tort remedies would go far toward eliminating overreaching by employers as well as maximizing clarity and predictability.

The Judicial Solution

If statutory solutions do not become a reality in more states, then the judicial approach must be given serious reconsideration. Restrictive covenants are not made under the most voluntary of circumstances. The parties do not commonly have equal bargaining power. The prospective employee wants (and sometimes sorely needs) the position being offered. The result is that, when the form

147. PROSSER & KEETON, *THE LAW OF TORTS* § 129 (5th ed. 1984).

148. *Id.* at § 130.

149. *See generally id.* at § 129.

150. *See generally id.* at § 130.

151. *See generally id.* at § 129.

contract is presented, he or she simply signs on the dotted line. Seldom is there negotiation or bargaining over the inclusion of a restrictive covenant.¹⁵² Employment negotiations are, of course, a function of the supply and demand for employment opportunities. The supply of jobs, however, is chronically lower than the demand for them. It is not unlike the problem of an urban dweller who enters into an apartment lease. The parties do not quibble over terms, such as the amount of rent or security deposit or the amount of notice necessary prior to termination. The landlord simply presents a standard printed form which is offered to the tenant on a take it or leave it basis. Conscious of this inequality of bargaining power, the courts should be more circumspect about the enforcement of restrictive covenants, just as they have been in landlord-tenant disputes.¹⁵³

One harsh result that should be avoided wherever possible is the issuance of an injunction. It puts a productive person out of work, or at least out of the line or area of work where he or she is likely to have been most productive. Such hardships should not be treated lightly. The rule regarding when injunctions may issue must be taken particularly seriously in restrictive covenant cases.¹⁵⁴

First, it is traditional that injunctions are not to be granted unless there is an urgent necessity to avoid an injury which would not be compensable by damages.¹⁵⁵ The courts must not bypass this part of the process in the interest of saving time. The employer must have the burden of proving the urgency, the threat of irreparable harm and the inadequacy of the usual legal remedy of damages. He should not be permitted to short circuit needlessly a former employee's career.

Second, the employer must prove that the granting of an injunction would cause less harm than the refusal to grant one.¹⁵⁶ This is

152. Other commentators have noted the apparent inequality of bargaining power. See Closius and Schaffer, *Involuntary Nonservitute: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 540-41, 560. See also RESTATEMENT (SECOND) OF CONTRACTS § 188 comment g (1979).

153. For example, the implied warranty of habitability has been developed by the courts in order to neutralize the effect of lease clauses wherein the landlord disclaims the responsibility of making repairs on residential premises. RESTATEMENT (SECOND) OF CONTRACTS § 234 (1979). Also, courts have granted relief from unconscionable contracts for the sale of goods under 2-302 of the Uniform Commercial Code. U.C.C. § 2-302 (1977).

154. See *supra* note 38.

155. *Id.*

156. *Id.*

a difficult criterion to meet when it would mean unemployment, relocation or diminished earnings for a former employee. The harm to the employer cannot be merely inferred. It must be proven by sufficient evidence.

The concept of goodwill must be defined differently if we are to treat former employees fairly. There exists not only business goodwill but also "employee goodwill." This is clear because when certain people leave a place of business to work for another or to open a firm of their own, they are capable of taking with them a sizable number of the clients whom they had served at their previous place of employment. If they were not in possession of this personal magnetism of "employee goodwill," they would be incapable of retaining those clients or customers. There are, then, competing goodwills—the goodwill of the business and the goodwill of the employee. Savvy employers know this and seek to deprive the employee of his goodwill by requiring that he or she enter into an employment agreement containing a restrictive covenant. If the former employee is placed in the position of being unable to compete with the former employer, then his personal goodwill is effectively neutralized.

This phenomenon is generally unfair to the employee. It would be fair only if the selling of the employee's goodwill were bargained for. The employee must receive something for the goodwill that he is giving up. In the absence of a valid contract to the contrary, bargained-for and supported by consideration, the employee would have had a right to compete. He could not have taken trade secrets or engaged in any tortious method of competition, but he could have competed fairly. Therefore, the restrictive covenant should be presumed invalid, unless it can be proven that it was indeed the product of voluntary bargaining.

Courts must be more selective about which, if any, restrictive covenants to enforce. The reasonableness standard is the predominant test of enforcement used by today's courts.¹⁵⁷ The determina-

157. In addition to the Pennsylvania cases discussed in this article, see *Grant v. Carotek, Inc.*, 737 F.2d 410 (4th Cir. 1984); *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279 (4th Cir. 1974); *All Stainless, Inc. v. Colby*, 364 Mass. 773, 308 N.E.2d 481 (1974); *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 264 A.2d 53 (1970); *Columbia Ribbon and Carbon Mfg., Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 369 N.E.2d 4, 398 N.Y.S.2d 868 (1977); *Reed, Roberts Assocs., Inc. v. Strauman*, 40 N.Y.2d 303, 353 N.E.2d 590 (1976); *Karpinski v. Ingrassi*, 28 N.Y.2d 45, 268 N.E.2d 751 (1971); *Purchasing Assocs., Inc. v. Weitz*, 13 N.Y.2d 267, 196 N.E.2d 245 (1963); *Williams v. Hobbs*, 9 Ohio App. 3d 331, 460 N.E.2d 287 (1983); *Raimonde v. Van Vlerah*, 42 Ohio St. 2d 21, 325 N.E.2d 544 (1975); *Roanoke Eng'g Sales Co. v. Rosenbaum*, 233 Va. 548, 290 S.E.2d 882 (1982); *Richardson v. Paxton, Co.*, 203 Va. 790,

tion of reasonableness is made on a case by case basis and, at least with regard to employment contracts, few guidelines for its application have emerged in many years of use. Furthermore, reasonableness is generally judged in these cases by the extent of temporal and geographical restrictions which the covenant places on the employee. This carries with it the presumption that as long as it does not restrict the former employee's ability to compete for a long time or over a wide radius the covenant is somehow fair. However, "reasonable" restrictions can extend for years and cover whole states. If the reasonableness standard is retained, it must be made more rigorous. States could set statutory maximums of, for example, one year and fifty miles. Better still, the definition of reasonableness could be made to include more factors, such as the economic effect of the covenant upon the employee.

The reasonableness standard when applied to include only temporal and geographic considerations has little merit. Other tests presently in existence (although not always in use) are more meaningful. For example, the question of whether the employer really needs the restriction to protect a legitimate property right is central. If the restriction is not needed and does not really benefit the employer or reaches beyond the legitimate protection of the employer's property rights, it should not be enforced, no matter how miniscule.

CONCLUSION

A rethinking of the current majority approach to enforcement of restrictive covenants is long overdue. Employees are compromising their rights to utilize their talents when they enter into contracts containing post-employment restrictions. Those who chose to compete in defiance of such restrictions, instinctively recognizing the unfairness of the situation, often pay for their independence with a lawsuit and a subsequent injunction. Some employees in Pennsylvania, because of their occupations, are more likely to pay the price than others.

The current approach tends to turn on the reasonableness of the contractual restrictions. However, a finding of reasonableness is often made, almost reflexively, if there are time and area limitations that are not obviously excessively broad. Even when they are too broad, some states, such as Pennsylvania, would enforce them nevertheless, after paring them down. This practice must be aban-

done due to the consequences that unduly broad restrictions have upon many former employees who abide by their contract terms, despite their unreasonableness.

Also, while many states, such as Pennsylvania, give lip service to the notion of nonenforcement of restrictions that are unnecessary for the protection of the employer's legitimate business interests, there is no overt consideration given to what those interests actually are—and are not. There appears to be an assumption that if the employer perceives the restrictions to be necessary, then they must be necessary. Such an approach ignores the fact that the employer ordinarily has no right to prohibit fair competition. If fair competition will be injurious to the former employer's business, then so be it. It is but a normal effect of a free market economy.

Some states have bypassed these problems by enacting statutes which declare that they will refuse to enforce restrictive covenants themselves or contracts that contain them. Others have delineated a narrow range of circumstances under which such clauses will be enforced. The advantage of such a statutory approach is that it can eliminate uncertainty as to whether a given restriction will be enforced and afford fairer treatment to the employee while leaving the employer with the traditional protection against tortious methods of competition—the only protection to which he would have been legally entitled in the absence of a valid agreement to the contrary.

The states that retain a case law approach to this subject must begin to require strict proof that the restraints are necessary to protect legitimate employer interests without placing an undue burden on the employee. Also, there must be an acknowledgement of the inequality of bargaining power between the employer and employee, carrying with it the likelihood that the employee has not really intended to bargain away his future employment rights.

The wholesale issuance of injunctions as a remedy for breach of a restrictive covenant must be avoided at all costs. The fact that most people need to work in order to earn a living cannot be callously disregarded.

Finally, the courts must come to the recognition that the employee's talents are his own. Absent clear and convincing proof to the contrary, there must be a presumption that he has not bargained away the future use of those talents. Professor Williston referred to this concept in section 1646 of the revised edition of his

treatise on contracts,¹⁵⁸ and it is a fitting summary of the nearly forgotten notion. It is ironic that Professor Williston's statement is quoted with approval in a Pennsylvania decision, *Van Products v. General Welding*.¹⁵⁹ It reads as follows:

A man's aptitudes, his skill, his dexterity, his manual or mental ability—all those things which in sound philosophical language are not objective, but subjective—they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and to expand his powers is advantageous to every citizen and may be highly so for the country at large.¹⁶⁰

158. S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1646 (rev. ed. 1937).

159. 419 Pa. 248, 260, 213 A.2d 769, 776 (1965).

160. S. WILLISTON, *supra* note 158, at § 1646.