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Refining Pennsylvania's Standard for Invalidating a Non-Competition Restrictive Covenant When an Employee's Termination Is Unrelated to the Employer's Protectible Business Interest

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> Remember I have done thee worthy service, told thee no lies, made thee no mistakings, serv'd without or grudge or grumblings.[1]

I. Introduction

Today, employers are more concerned than ever about safeguarding their protectible business interests that relate to special skills,[2] customers,[3] processes,[4] trade secrets,[5] inventions,[6] etc.

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1. WILLIAM SHAKESPEARE, THE TEMPEST, Act I, ii. 246.

2. *See, e.g.*, Hayes v. Altman, 266 A.2d 269 (Pa. 1970) (restrictive covenant of optometrist's employee upheld that limited competition for three years within six miles of office and city).

3. *See, e.g.*, Rapp Insurance Agency, Inc. v. Baldree, 597 N.E.2d 936 (Ill. App. Ct. 1992) (proprietary interest in employer's clients may be found permitting enforcement of restrictive covenant, where, by nature of business, employer had near permanent relationship with its clients and but for employment, employee would not have had contact with them, or where former employee learned trade secrets or acquired other confidential information while in the employer's employ and subsequently attempted to use it for the employee's benefit).

4. *See, e.g.*, SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244 (3d Cir. 1985) (non-standard information used in designing systems, which could not be ascertained by study of marketed system, entitled to protection).

5. *See, e.g.*, Ackerman v. Kimball International, Inc., 634 N.E.2d 778 (Ind. Ct.

Due to increased employer concern over the expansion of individual employee rights and the at-will employment relationship's abrogation,[7] employers must now consider refining existing

App. 1994) (former employer's customer and supplier lists and pricing information for its veneer products were protectible as trade secrets where the information was not readily ascertainable through proper means by other persons and former employer took reasonable efforts to maintain secrecy).

6. *See, e.g.*, United States v. Dubilier Condenser Corp., 289 U.S. 178 (1933) (employee who, during employment, conceives and perfects an invention for which he or she obtains a patent, must, under the Shop Right Doctrine, accord to the employer a nonexclusive right to use the invention). Generally, the Shop Right Doctrine provides that an employee who uses the employer's resources to conceive an invention or to reduce it to practice must afford the employer a nonexclusive, royalty-free, non-transferable license to make use of the invention, even though the employee subsequently obtains a patent of the invention. *See* KURT DECKER & H. T. FELIX II., DRAFTING AND REVISING EMPLOYMENT CONTRACTS, § 3.70 (1991) [hereinafter DECKER & FELIX, CONTRACTS].

7. The at-will employment relationship permits either the employee or the employer to end the employment relationship at any time, for any or no reason, with or without notice. *See* R. COVINGTON & KURT DECKER, INDIVIDUAL EMPLOYEE RIGHTS IN A NUTSHELL, chs 1, 6 (1995). *See generally* KURT DECKER, A MANAGER'S GUIDE TO EMPLOYEE PRIVACY: LAWS, PROCEDURES, AND POLICIES (1989); KURT DECKER & H.T. FELIX, II, DRAFTING AND REVISING EMPLOYMENT HANDBOOKS (1991); KURT DECKER, DRAFTING AND REVISING EMPLOYMENT POLICIES AND HANDBOOKS (1994); KURT DECKER, EMPLOYEE PRIVACY FORMS AND PROCEDURES (1988); KURT DECKER, EMPLOYEE PRIVACY LAW AND PRACTICE (1987); KURT DECKER, HIRING LEGALLY: A GUIDE FOR EMPLOYEES AND EMPLOYERS (1999); KURT DECKER, THE INDIVIDUAL EMPLOYMENT RIGHTS PRIMER (1991); KURT DECKER, PRIVACY IN THE WORKPLACE (1994); L. LARSEN & P. BOROWSKY, UNJUST DISMISSAL (1985); H. PERITT, EMPLOYEE DISMISSAL LAW (3d ed. 1992). As Professor Peritt notes:

> The most significant employment law development in the last quarter of the twentieth century has been the erosion of the employment-at-will rule and the recognition of a family of common law doctrines protecting employees against wrongful dismissal. Under these wrongful dismissal doctrines, terminated employees may be able to recover damages when they can show that their termination violated employer promises, jeopardized clear public policies, or, sometimes, when the termination did not comport with good faith and fair dealing.
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> These doctrines, or exceptions to the employment-at-will rule, were virtually unknown before 1970. Until then, an employer could dismiss an at-will employee for any reason or no reason, confident that the law provided the employee no remedy- unless one of a handful of statutes prohibiting discrimination was violated. Now, the three wrongful dismissal doctrines, more than a score of federal statutes, and scores of state statutes provide legal redress where employees can show that their dismissals fit within the factual circumstances covered by the doctrines or the statutes.

PERITT, *supra,* at 3.

Some courts have indicated that they are not institutionally capable of formulating or implementing a workable policy to address the needs of employees and employers involved in at-will employment terminations and that this is best left to the legislative process. For example, some Pennsylvania courts have taken

methods or finding new alternatives for safeguarding their protectible business interests.

Restrictive covenants are increasingly relied upon by employers to secure their protectible business interests.[8] Employers generally use two types of covenants for these purposes. These are the non-disclosure and non-competition covenants.

The non-disclosure restrictive covenant limits the dissemination of an employer's protectible business information by the former employee. This information may consist of trade secrets, inventions, confidential business practices, price lists, formulas, marketing strategies, etc. unique to the employer's business.

A non-competition restrictive covenant typically prohibits competition by a former employee for a specified time period within a designated geographical area. This covenant may be used to prevent the employee from exploiting customer contacts established during employment or working for a competitor. Although this covenant may be useful in deterring unfair competition between businesses, courts have historically viewed it as a trade restraint that prevents a former employee from earning a livelihood.[9]

Employers often mistakenly understand the restrictive covenant's proper use. They may use these covenants without observing their legal requirements.[10] Courts are not hesitant to void

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this position to limit the abrogation of the at-will employment relationship and confine its change, if any, to the legislature. *See, e.g.*, Veno v. Meredith, 515 A.2d 571, 579 n.3 (Pa. Super. Ct. 1986); Martin v. Capital Cities Media, Inc., 511 A.2d 830, 841 (Pa. Super Ct. 1986); Darlington v. General Elec., 504 A.2d 306, 309 (Pa. Super Ct. 1986); *see also* Kurt Decker, *At-Will Employment in Pennsylvania after "Banas" and "Darlington": New Concerns for a Legislative Solution,* 32 VILL. L. REV. 101 (1987); Kurt Decker, *At-Will Employment: Abolition and Federal Statutory Regulation*, 61 U. DET. J. URBAN L. 351 (1984); Kurt Decker, *At-Will Employment in Pennsylvania—A Proposal for its Abolition and Statutory Regulation*, 87 DICK. L. REV. 477 (1983); Kurt Decker, *At-Will Employment: A Proposal for its Statutory Regulation,* 1 HOFSTRA LAB. L. F. 187 (1983).

8. *See* KURT DECKER, COVENANTS NOT TO COMPETE (2d ed. 1993) [hereinafter DECKER, COVENANTS]; *see also* COVENANTS NOT TO COMPETE: A STATE BY STATE SURVEY (B. Malsberger, ed., 2d ed. 1996) [hereinafter Malsberger, COVENANTS].

9. *See* Central Monitoring Service, Inc. v. Zakinski, 553 N.W.2d 513, 516 fn.7 (S.D. 1996) (determination of whether restrictive covenant is reasonable under the RESTATEMENT (SECOND) OF CONTRACTS requires balancing of interests of employer, employee, and public and involves analyzing whether restraint is no greater than necessary to protect employer's legitimate interests, is not unduly harsh and oppressive to the employee, and is not injurious to the public).

10. *See* Comment, *Employee Restrictive Covenants: Unscrupulous Employees v. Overreaching Employers,* 27 S.D.L. REV. 220 (1982). To be enforceable, the

these covenants when not properly drafted to protect legitimate business interests.[11] Employers are not guaranteed that a court will modify an existing covenant to make it comply with the law.[12] Therefore, it is important that employers understand the proper use and drafting of these covenants.[13]

A restrictive covenant will not always be enforced even if it is supported by valid consideration and reasonably limited in time and area.[14] The employer must also show that a protectible business interest exists and that the limitation on the employee is no broader than necessary to safeguard the employer's protectible business interest involved.[15] In addition, other factors involving "blue penciling,"[16] judicial divisibility,[17] as written,[18] and statutory

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current or former employer must show that the restrictive covenant is: (1) in writing; (2) made part of an employment contract; (3) based upon reasonable consideration; (4) reasonable both as to time and territory; and (5) not against public policy. *See* Nalle Clinic Co. v. Parker, 399 S.E.2d 363 (N.C. App. Ct. 1991). Often, one or more of these essential elements for enforcement is absent. *See, e.g.*, Hartman v. W.H. Odell Associates, Inc., 450 S.E.2d 912 (N.C. Ct. App. 1994) (five-year duration of restrictive covenant was unreasonable in view of broad territory covered by clause); Statesville Medical Group v. Dickey, 418 S.E.2d 256 (N.C. App. Ct. 1992) (enforcement of restrictive covenant that prohibited endocrinologist from competing with medical group for two-year period within one county would violate public policy, as it would eliminate fee competition by granting two-year monopoly to medical group, would impede patients' access to their physician of choice, and would impair their ease of access to second opinion); *See* DECKER, COVENANTS, *supra* note 8 at §§ 3.1-3.5; *see also infra* notes 33-78 and accompanying text.

11. *See, e.g.*, George S. May International Co. v. International Profit Associates, 628 N.E.2d 647 (Ill. App. Ct. 1993) (restrictive covenants covering former employees of business consulting firm over broad and unenforceable as beyond what was necessary to protect employer's legitimate business interests).

12. *See, e.g.*, Amstell, Inc. v. Bunge Corp., 443 S.E.2d 706 (Ga. App. Ct. 1994) (court may not blue-pencil or re-write restrictive covenant ancillary to an employment contract to make it enforceable).

13. *See* DECKER, COVENANTS, *supra* note 8, at ch. 6.

14. *See id.* at ch. 4.

15. *See, e.g.*, In re Golden Distribs., Ltd., 128 B.R. 352 (Bankr. S.D.N.Y. 1991) (dismissing claims based on restrictive covenants that lacked any protectible interest where employer failed to allege that any confidential information, trade secrets, or proprietary information had been misappropriated by the former employees).

16. *See, e.g.*, Klick v. Crosstown State Bank of Ham Lake, Inc., 372 N.W.2d 85 (Minn. Ct. App. 1985) ("blue pencilling" involves removing the unreasonable part of the restrictive covenant to determine if it can still be enforced); *see also infra* note 80 and accompanying text.

17. *See, e.g.*, Mason v. Thomas W. Briggs & Co., 297 S.W. 1106 (Ky. 1927) (judicial divisibility involves re-writing the covenant by removing the offensive provision, for example, limiting enforcement to one state); *see also infra* notes 81-84 and accompanying text.

18. *See, e.g.*, WelcomeWagon, Inc. v. Morris, 224 F.2d 693 (4th Cir. 1955) (no

prohibitions[19] may be used by courts to modify or invalidate the power of covenants to protect the employer.[20]

In Pennsylvania, restrictive covenants are enforceable if: (1) they are incident to an employment relationship between the employee and employer; (2) the restrictions imposed by the covenant are reasonably necessary for the employer's protection; and (3) the restrictions imposed are reasonably limited in duration and geographic extent.[21] Courts have broad powers to modify the restrictions imposed on the former employee to include only those restrictions reasonably necessary to safeguard the employer's protectible business interests.[22] In determining whether to enforce the covenant, the court must balance the employer's protectible business interest that the employer seeks to safeguard against the employee's interest of being able to earn a livelihood in his or her chosen profession, career, trade, occupation, etc.[23]

Today, an additional court inquiry is present when a Pennsylvania employer terminates an employee and seeks to enforce a non-competition restrictive covenant. The court will examine why the employer terminated the employee.[24] Through this court inquiry, the employer will find its reasons for terminating an employee weighed against its protectible business interest to determine enforceability.[25] Even though the non-competition covenant is found valid regarding consideration, it still may not be enforced because the employer's termination reasons do not relate directly to a protectible business interest.[26] For the non-competition

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modification of restrictive covenant; it must be judged as written); *see also infra* notes 85-86 and accompanying text.

19. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 16601-16602 (West 1992) (restrictive covenants are contrary to public policy and are void); *see also infra* notes 87-89 and accompanying text.

20. *See infra* notes 79-89 and accompanying text.

21. *See* John G. Bryant Co. v. Sling Testing & Repair, Inc., 369 A.2d 1164 (Pa. 1977) (upheld salesman's restrictive covenant of three years in sales territory of company (three states) to established customers of employee); Morgan's Home Equip. Corp. v. Martucci, 136 A.2d 838 (Pa. 1957) (upheld only to extent of soliciting existing customers).

22. *See Morgan's Home Equip. Corp.*, 136 A.2d 838 (upheld only to extent of soliciting existing customers).

23. *See* All-Pak, Inc. v. Johnston, 694 A.2d 347 (Pa. Super. Ct. 1997); Insulation Corp. of America v. Brobston, 667 A.2d 729 (Pa. Super. Ct. 1995); Thermo-Guard, Inc. v. Cochran, 596 A.2d 188 (Pa. Super. Ct. 1991).

24. *See Insulation Corp.*, 667 A.2d 729 (in determining the reasonableness of enforcing a non-competition restrictive covenant between an employee and employer upon the employee's termination, the reason for the termination of the employment relationship must be considered); s*ee also All-Pak, Inc.*, 694 A.2d 347.

25. *See id.*

26. *See id.*

covenant to be enforceable when the employer terminates the employee and no protectible business interests are found, the employer may have to offer the employee additional consideration at the time of original employment, during employment, or when employment ends in exchange for the non-competition covenant.[27]

This article reviews how Pennsylvania employees may now have greater freedom in employment choices when non-competition restrictive covenants are sought to be enforced by employers who have terminated them. Employees and employers must understand how a court balances the employer's termination reasons, the employer's protectible business interests, and the employee's ability to earn a livelihood when scrutinizing a non-competition restrictive covenant's enforceability.[28] To analyze the court's additional inquiry's impact upon the enforcement of non-competition covenants when employees are terminated, the following are discussed: (1) restrictive covenant requirements;[29] (2) enforcement approaches of courts;[30] (3) employer termination reasons as a basis for not enforcing a non-competition covenant,[31] and (4) refining the court's standard for not enforcing non-competition covenants when employers terminate employees.[32]

II. Restrictive Covenant Requirements—General Principles

Where statutorily permitted,[33] employers can prevent former employees from competing with them or disclosing confidential information through valid contractual restrictions[34] or where a duty of loyalty exists.[35] A restrictive covenant is generally used to

27. *See id.*
28. *See id.*
29. *See infra* notes 33-78 and accompanying text.
30. *See infra* notes 79-89 and accompanying text.
31. *See infra* notes 90-149 and accompanying text.
32. *See infra* notes 150-179 and accompanying text.
33. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 16601-16602 (West 1992) (restrictive covenants are contrary to public policy and are void); *see also infra* notes 87-89.
34. *See, e.g.*, DECKER, COVENANTS, *supra* note 8, at §§ 3.1-3.4; 14 WILLINSTON, CONTRACTS § 1643 (3d ed. 1972); 6A CORBIN, CONTRACTS § 1394 (Supp. 1989).
35. *See* EMPLOYEE DUTY OF LOYALTY: A STATE-BY-STATE SURVEY (S. Manela & A. Pedowitz eds., 1995) [hereinafter Manela & Pedowitz, DUTY OF LOYALTY]. In addition to the duties expressly undertaken by an employee in an oral or written employment contract, the common law imposes an implied duty of loyalty upon the employee to the employer. In general, the employee is not permitted to undertake or participate in activities adverse to the employer's interests during the course of employment. Some courts have broadly described a breach of the duty of loyalty as any act contrary to the employer's interests. *See id.*

The duty of loyalty is breached when: (1) an employee competes with the present employer; (2) an employee solicits the employer's customers or diverts its

safeguard the employer's protectible business interests from disclosure and competition.

To be enforceable, the restrictive covenant must be definite, must contain its terms in clear, certain language[36] to safeguard a protectible employer business interest,[37] and must be supported by valid consideration.[38] The covenant must also be reasonably limited in scope (time and place),[39] and not harmful to the public.[40] Absent

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business; (3) an employee lures away co-workers or former co-workers to a competing enterprise; (4) an employee fails to disclose to the employer matters which are adverse to the employer and which impair the employee's fulfillment of the duty of loyalty; (5) an employee takes undisclosed payments from a third party who is doing business with the employer; or (6) the employee divulges the employer's confidential information to others. *See id.*

The law is clear that an agent owes a duty of loyalty to his or her principal. *See* RESTATEMENT (SECOND) OF AGENCY §§ 387-98 (1958); *see also* Gussin v. Shockey, 725 F. Supp. 271, 274 (D. Md. 1989), *aff'd*, 993 F.2d 1001 (4th Cir.) ("The fundamental duties of an agent include the duty not to put himself in a position where his own interests may conflict with interests of his principal"). An employee's duty of loyalty to the employer is based upon agency principles. *See* Koch v. Cochran, 307 S.E.2d 918 (Ga. 1983); Duane Jones Co., Inc. v. Burke, 117 N.E.2d 237 (N.Y. 1954); Santa Monica Ice & Cold Storage Co. v. Rossier, 109 P.2d 382 (Cal. App. Ct. 1941); Fairchild Engine & Airplane Corp. v. Cox, 50 N.Y.S.2d 643 (N.Y. Cty. Sup. Ct. 1944); RESTATEMENT (SECOND) OF AGENCY, *supra*, §§ 393-96.

The employment relationship is one of trust, confidence, and loyalty. *See* Las Luminarias of the New Mexico Council of the Bland v. Isengard, 587 P.2d 444 (N.M. App. 1978); *see also* Hudson v. Moore Business Forms, Inc., 609 F. Supp. 467 (D.C. Cal. 1985); Williams v. Pilgrim Turkey Packers Inc., 503 P.2d 710 (Or. 1972); O'Neal v. Employment Security Agency, 404 P.2d 600 (Id. 1965); World-Wide Fish Products, Inc., 100 A.D.2d 81, (N.Y. App. Div. 1984). After employment ends, an employee generally is free to use the skills he or she learned with the former employer, as long as no confidence is violated. *See* J.P. Miller Co. v. Madel, 575 P.2d 1321 (Mont. 1978).

36. *See* American Equip. Serv., Inc. v. Evans Trailer Leasing Co., 650 F. Supp. 1266 (N.D. Ga. 1986) (oral restrictive covenant unenforceable).

37. *See* Willis v. Dictograph Sales Corp., 54 N.E.2d 774 (Ind. 1944) (upheld one-year time restraint within specific territory where employee had worked); Thomas W. Briggs Co. v. Mason, 289 S.W. 295 (Ky. 1926) (upholding covenant that covered same area in which employee had worked); *see infra* notes 43-50 and accompanying text.

38. *See, e.g., In re* Monoghan, 141 B.R. 80 (Bkr.E.D. Pa. 1992) (offer of re-employment constituted adequate consideration for restrictive covenant that was executed in connection with the re-employment); *see infra* notes 51-71 and accompanying text.

39. *See, e.g.*, Sidco Paper Co. v. Aaron, 351 A.2d 250 (Pa. 1976) (upholding restrictive covenant of paper manufacturer's salesman that restricted competition for two years in specific area); *see infra* notes 73-78 and accompanying text.

40. *See, e.g.,* Gordon v. Landau, 321 P.2d 456 (Cal. 1958) (court upholding restrictive covenant in which salesperson agreed not to solicit former customers for one year after employment termination); Gordon v. Wasserman, 314 P.2d 759 (Cal. 1957) (validating restrictive covenant because it did not prevent former employee from conducting the same or any other business).

any of these requirements, former employees are free to pursue their occupations and trades at any time, in any place, for any reason, and for any person they choose,[41] unless they breach a duty of loyalty.[42]

A. Protectible Interest

Employers may not use restrictive covenants merely because they think they are a good idea, to intimidate employees, to discourage employees from looking for employment elsewhere, or from working with employers that the current employer does not favor.[43] An enforceable covenant must safeguard a protectible employer business interest.[44] Interests that can be protected through covenants include trade secrets,[45] confidential information,[46] nearly permanent customer relationships,[47] goodwill,[48] and unique or extraordinary skills.[49] If the covenant is for some other purpose, for example, eliminating competition or maintaining a proprietary interest in one's customers, the covenant will not be enforced.[50]

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41. *See, e.g.*, Hartman v. W.H. Odell & Associates, Inc., 450 S.E.2d 912 (N.C. Ct. App. 1994) (five-year duration of restrictive covenant unreasonable in view of broad territory covered by clause).

42. *See* Manela & Pedowitz, DUTY OF LOYALTY, *supra* note 35.

43. *See* DECKER, COVENANTS *supra* note 8, at § 6.2; *see also supra* note 11 and accompanying text.

44. *See id.* at ch. 4.

45. *See, e.g.*, Ackerman v. Kimball International, Inc., 634 N.E.2d 778 (Ind. Ct. App. 1994) (former employer's customer and supplier lists and pricing information for its veneer products were protectible as trade secrets where the information was not readily ascertainable through proper means by other persons and former employer took reasonable efforts to maintain secrecy).

46. *See, e.g.*, SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244 (3d Cir. 1985) (non-standard information used in designing system which could not be ascertained by study of marketed system entitled to protection).

47. *See, e.g.*, Rapp Insurance Agency, Inc. v. Baldree, 597 N.E.2d 936 (Ill App. Ct. 1992) (proprietary interest in employer's clients may be found permitting enforcement of restrictive covenant, where, by nature of business, employer had near permanent relationship with its clients and but for employment, employee would not have had contact with them, or where former employee learned trade secrets or acquired other confidential information while in the employer's employ and subsequently attempted to use it for the employee's benefit).

48. *See, e.g.*, Thomas W. Briggs Co. v. Mason, 289 S.W. 295 (Ky. 1926) (advertising company entitled to uphold restrictive covenant that covered same area in which employee had worked).

49. *See, e.g.*. Hayes v. Altman, 225 A.2d 670 (Pa. 1967) (restrictive covenant of optometrist's employee upheld that limited competition for three years within six miles of office and city).

50. *See, e.g.*, Statesville Medical Group v. Dickey, 418 S.E.2d 256 (N.C. App. Ct. 1992) (enforcement of restrictive covenant that prohibited endocrinologist

B. Valid Consideration

Consideration is crucial for a restrictive covenant's enforcement, whether the covenant is entered into prior to, during employment, or after employment ends.[51] To be valid, the covenant must be given in exchange for something, either some benefit to the employee or some detriment to the employer.[52]

There need not be separate consideration for each provision in an employment contract. If there is consideration for the contract, there is consideration for each provision within it.[53] Initial employment,[54] additional compensation,[55] a new employment benefit,[56] or change in the employee's status from at-will employ-ment to employment for a term with termination for some form of cause[57]

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from competing with medical group for two-year period within one county would violate public policy, as it would eliminate fee competition by granting two-year monopoly to medical group, would impede patients' access to their physician of choice, and would impair their ease of access to second opinion).

51. *See* DECKER, COVENANTS, *supra* note 8, at § 3.3; *see also* Gregory Jordan & Mary Hackett, *Non-Compete Agreements and Consideration - What's an Employer to do?*, 57 PA. B. Q. 76 (1996).

52. *See, e.g.*, Davis & Warde, Inc. v. Tripodi; 616 A.2d 1384 (Pa. Super. Ct. 1992) (employment contracts containing restrictive covenants, which were entered into by employees subsequent to their employment, contained sufficient consideration to support covenants where employees were offered continued employment with new responsibilities, were given cash payment, new severance package, and guarantee of certain job benefits); *but see* National Risk Management, Inc. v. Bramwell, 819 F. Supp. 417 (E.D. Pa. 1993) (continuation of employment was not sufficient for restrictive covenant even though employment relationship was terminable at-will).

53. *See* Sarnoff v. American Home Prods. Corp., 798 F.2d 1075 (7th Cir. 1986) (choice of law provision in corporation's incentive plan need not have been supported by separately stated consideration; consideration for contract supports all provisions within it); RESTATEMENT (SECOND) OF CONTRACTS § 80(2) (1979). *But see* Sheline v. Dun & Bradstreet Corp., 948 F.2d 174 (5th Cir. 1991) (the restrictive covenant and the severance compensation clause were mutually dependent promises that unenforceability of one necessarily rendered the other unenforceable for lack of consideration; i.e. the restrictive covenant must be supported by independent valuable consideration).

54. *See, e.g.*, Ruffing v. 84 Lumber Co., 600 A.2d 545 (Pa. Super. Ct. 1991) (taking of employment sufficient consideration to support restrictive covenant).

55. *See, e.g.*, Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324 (9th Cir. 1980) (initial employment sufficient consideration to support restrictive covenant).

56. *See, e.g.*, Wainwright's Travel Serv., Inc. v. Shmolk, 500 A.2d 476 (Pa. Super. Ct. 1985) (giving an employee an ownership interest in the business adequate consideration to support restrictive covenant).

57. *See, e.g.*, Phone Connection, Inc. v. Harbst, 494 N.W.2d 445 (Iowa 1992) (continued employment for indefinite time period provides sufficient consideration to support restrictive covenant).

are examples of consideration that will support a restrictive covenant.

Generally, commencing employment is sufficient consideration to support the restrictive covenant.[58] It may, however, not be sufficient if the employee can be terminated at-will.[59] Some courts have held that the consideration; i.e., the right to be employed, is illusory when the employer can terminate the employee with or without notice, at any time, for any or no reason.[60] An employment agreement based on illusory consideration will not support a covenant.[61] The same rationale applies to nominal consideration.[62]

Continued employment presents special problems when the restrictive covenant is introduced into the employment relationship sometime after employment has commenced. Although some courts have held that an employer's continued agreement to pay the employee can constitute valid consideration for the employee's restrictive covenant,[63] especially if the employee cannot be terminated at-will, other courts maintain that continued employment can never be the sole consideration given in exchange for a covenant, at least not if the employee is already bound to a definite employment term.[64] Because the employee has a prior right to be employed, simply continuing this right does not provide anything new. For there to be valid consideration, the employer must give the employee something new in addition to continued employment, for example, more money,[65] greater responsibility,[66] or a new

58. *See, e.g.*, Capital Bakers v. Townsend, 231 A.2d 292 (Pa. 1967) (taking of employment sufficient consideration to support restrictive covenant).

59. *See, e.g.*, Super Maid Cook-Ware Corp v. Hamil, 50 F.2d 830 (5th Cir.), *cert. denied*, 284 U.S. 677 (1931) (employment that did not guarantee one day of regular work or pay not sufficient consideration for restrictive covenant); Ridley v. Krout, 180 P.2d 124 (Wyo. 1947) (same). *But see* Records Ctr., Inc. v. Comprehensive Management, Inc., 525 A.2d 433 (Pa. Super. Ct. 1987) (employment relationship, not written contract, is all that has to be shown).

60. *See id.*

61. *See, e.g.*, Markson Bros. v. Redick, 66 A.2d 218 (Pa. Super. Ct. 1949) (changing an employee's status from at-will to week-to-week not sufficient consideration).

62. *See, e.g.*, George W. Kistler, Inc. v. O'Brien, 347 A.2d 311 (Pa. 1975) (noting that $1.00 nominal consideration is insufficient).

63. *See, e.g.*, Tasty Box Lunch Co. v. Kennedy, 121 So.2d 52 (Fla. App. Ct. 1960); *see also* Knight, Vale & Gregory v. McDaniel, 680 P.2d 448 (Wash. App. Ct. 1984).

64. *See, e.g.*, Schneller v. Hayes, 28 P.2d 273 (Wash. 1934); Bilec v. Auburn & Assoc., Inc. Pension Trust, 588 A.2d 538 (Pa. Super. Ct. 1991); Stevenson v. Parsons, 384 S.E.2d 291 (N.C. App. Ct. 1989); Kadis v. Britt, 29 S.E. 2d 543 (N.C. App. Ct. 1944).

65. *See, e.g.*, Insulation Corp. of America v. Brobston, 667 A.2d 729 (Pa. Super. Ct. 1995) ($2,000 annual raise plus change from at-will to term employment

position.[67] Continued employment for a substantial period of time may be adequate consideration for a covenant.[68]

A change in the terms of the continued employment, for example, from employment at-will to termination for cause, is adequate consideration for a restrictive covenant.[69] Giving an employee an ownership interest in the business is also adequate consideration to support a covenant.[70] However, if an employee has an existing right to receive a benefit, the employer cannot condition that right on an employee's willingness to sign a covenant.[71]

C. Restriction's Reasonableness

A restrictive covenant will not always be enforced even though it is written to safeguard a protectible employer business interest[72] and is supported by sufficient consideration.[73] The covenant's restrictions must also be reasonable.[74]

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constituted sufficient consideration).

66. *See, e.g.*, Davis & Warde, Inc. v. Tripodi, 616 A.2d 1384 (Pa. Super. Ct. 1992) (sufficient consideration existed where employees were offered continued employment, new employment responsibilities, cash payment, new severance package, and guarantee of certain job benefits).

67. *See, e.g.*, Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324 (9th Cir. 1980) (change in employment status required to enforce restrictive covenant); Maintenance Specialties, Inc. v. Gottus, 314 A.2d 279 (Pa. 1974) (same); Jacobson & Co. v. International Env't Corp., 235 A.2d 612 (Pa. 1967) (same).

68. *See* Rollins v. American State Bank, 487 N.E.2d 842 (Ind. Ct. App. 1986); Ranch Hand Foods, Inc. v. Polar Pak Foods, Inc., 690 S.W.2d 437 (Mo. Ct. App. 1985); *see also* McRand, Inc. v. Van Beelen, 486 N.E.2d 1306 (Ill. App. Ct. 1985). *But see* Bilec v. Auburn & Assocs., Inc. Pension Trust, 588 A.2d 538 (Pa. Super. Ct. 1991) (mere continued employment is not adequate consideration).

69. *See, e.g.*, Rogers v. Runfola & Assoc., Inc., 565 N.E.2d 540 (Ohio Ct. App. 1991) (promise to terminate at-will employee only for cause sufficient consideration).

70. *See, e.g.*, Wainwright's Travel Serv., Inc. v. Schmolk, 500 A.2d 476 (Pa. Super. Ct. 1985) (finding stock purchase agreement sufficient consideration to support restrictive covenant).

71. *See, e.g.*, Mason Corp. v. Kennedy, 244 So.2d 585 (Ala. 1971) (restrictive covenant's enforcement refused because the employer required the employee to sign the covenant to receive a lump sum, profit-sharing benefit to which the employee was already entitled).

72. *See infra* notes 97-113 and accompanying text.

73. *See infra* notes 97-113 and accompanying text.

74. *See* DECKER, COVENANTS, *supra* note 8, at § 3.4. The criteria used to determine whether the restrictive covenant is reasonable is set forth in RESTATEMENT (SECOND) OF CONTRACTS:

Ancillary Restraints on Competition

(1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if

Reasonableness generally relates to the geographic area in which competition or employment is restricted, as well as the restriction's time limit. The inquiry into the reasonableness of the covenant's restrictions as they relate to geographic area and time limit has three components. These are:

1. Whether the restriction is greater than necessary to protect the employer's legitimate business interests;
2. Whether the restriction is oppressive to the employee; and
3. Whether the restriction is injurious to the general public.[75]

A restriction's reasonableness depends on the scope of the employer's business and the nature of the employee's position. The

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(a) the restraint is greater than is needed to protect the promisee's legitimate interest, or

(b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.

(2) Promises imposing restraints that are ancillary to a valid transaction or relationship include the following:

* * *

(b) a promise by an employee or other agent not to compete with his employer or other principal; . . .

RESTATEMENT, *supra* note 53, § 188.

An explanation of "reasonableness" as it relates to non-competition restrictive covenants appears at *Unreasonableness of Covenant Not To Compete*, 20 AM. JUR. PROOF OF FACTS 3d 705, § 3 (Law Co-op. 1993):

In employment cases, reasonableness breaks down into three issues: (1) whether the restraint is reasonable as to the employer, (2) whether the restraint is reasonable as to the employee, and (3) whether the restraint is reasonable as to the public. More elaborately, the questions are usually propounded as follows:

- Is the restraint reasonable in the sense that it is no greater than necessary to protect the employer in some legitimate interest?
- Is the restraint reasonable in the sense that it is not unduly harsh and oppressive on the employee?
- Is the restraint reasonable in the sense that it is not injurious to the public?

Those states which have adopted the RESTATEMENT (SECOND) OF CONTRACTS view perform a balancing test in which they consider the interests of the employer, the employee, and the public in determining whether they will enforce the covenant are: Central Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513 (S.D. 1996); Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531 (Wyo. 1993); Empiregas, Inc. of Kosciusko v. Bain, 599 So.2d 971, 975 (Miss. 1992); Brockley v. Lozier Corp., 488 N.W.2d 556, 563 (Neb. 1992); Central Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 32 (Tenn. 1984); Insulation Corp. of America v. Brobston, 667 A.2d 729, 733 (Pa. Super. Ct. 1995); Bertotti v. C.E. Shepherd Co., Inc. 752 S.W.2d 648, 657 (Tex. App. Ct. 1988); Gomez v. Chua Medical Corp., 510 N.E.2d 191 (Ind. App. 1987); Showe-Time Video Rentals, Inc. v. Douglas, 727 S.W.2d 426, 433 (Mo. App. 1987); Mattison v. Johnston, 730 P.2d 286, 288 (Ariz. App. 1986).

75. *See* Hamer Holding Group, Inc. v. Elmore, 560 N.E.2d 907 (Ill. App. Ct. 1990) (customer list compiled from information on file with secretary of state, by expending $60,000, was not a trade secret).

restriction's time length[76] and the geographic area[77] encompassed by the restriction are generally involved in this analysis. However, increasingly when an employee is terminated courts also balance the employer's protectible business interest that the employer seeks to safeguard against the employee's important interest of being able to earn a livelihood in his or her chosen profession, career, trade, occupation, etc.[78]

III. Enforcement Approaches

To determine a restrictive covenant's enforceability, courts use four approaches depending on the jurisdiction.[79] The earliest approach or the *blue pencil test,*[80] was adopted from English law. Under this test, courts review the covenant's language. If the unreasonable terms of the covenant are severable from the rest of the covenant or contract, courts delete the covenant's offensive part. In theory, the court runs a "blue pencil" through the covenant's offensive part. If what remains is reasonable, it is enforced. If not, the covenant is not enforced. The blue pencil test has been equated to an implied separability clause.

A second method to determine a restrictive covenant's enforceability involves judicial interpolation of divisibility into the restrictive covenant's text. Under this approach, the court removes

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76. *See, e.g.*, Tyler Enterprises of Elwood, Inc. v. Shafer, 573 N.E.2d 863 (Ill App. Ct. 1991) (three year restrictive covenant against former general sales manager found reasonable). *But see* Boldt Machinery & Tools, Inc. v. Wallace, 366 A.2d 902 (Pa. 1976) (refusing to enforce restrictive covenant's five year time limit against salesman of industrial machinery).

77. *See, e.g.*, McAlpin v. Cowete Fayett Surgical Associates, P.C., 458 S.E.2d 499 (Ga. Ct. App. 1995) (restrictive covenant imposing 10-county geographical restriction on physician was reasonable). *But see* Magic Fingers, Inc. v. Robins, 206 A.2d 601 (N.J. Super. Ct. 1965) (court refusing to enforce restrictive covenant that had no geographic limitation).

78. *See* All-Pak, Inc. v. Johnston, 694 A.2d 347 (Pa. Super. Ct. 1997); *Insulation Corp.*, 667 A.2d 729; Thermo-Guard, Inc. v. Cochran, 596 A.2d 188 (Pa. Super. Ct. 1991).

79. *See* DECKER, COVENANTS, *supra* note 8, at § 12.2; Malsberger, COVENANTS, *supra* note 8.

80. For a general discussion of the blue pencil test's use in the United States, *see* Comment, *Severability of Employee Covenants Not to Compete,* 23 U. CHI. L. REV. 663, 663-68 (1956). For example, even though Minnesota permits partial enforcement under the blue pencil test, there is no requirement that the test be followed. Rather, it is the court's discretion whether to apply it. *See, e.g.*, Klick v. Crosstown State Bank of Ham Lake, Inc., 372 N.W.2d 85 (Minn. Ct. App. 1985) (court has discretion whether to apply the blue pencil test based on the case's facts); *see also* Lamp v. American Prosthetics, Inc., 379 N.W.2d 909 (Iowa 1986) (although court may modify restrictive covenant and enforce it to the extent that it is not unreasonable, the court declined to do so sua sponte).

the offensive provision, whether or not it could be severed in a literal, grammatical sense, and rewrites the rest of the covenant. For example, one court modified an overly broad covenant that prohibited competition within any state in the United States, except for Nevada and Arizona.[81] Because the several areas of the country were separately described, the court held that the covenant was enforceable as to the state of New Jersey.[82] In another case, a broad restriction was limited to one state.[83] In a third case, a covenant's time limit was modified from ten years to nine months.[84]

Relying on a third method, courts have refused to modify a restrictive covenant, judging it only as written. If the covenant is in any way unreasonable, it is not enforced, even if the offensive portion were severable. For example, a covenant prohibited an employee from engaging in a competing business in a variety of specified areas.[85] Although it would have been simple for the court to delete certain portions of the covenant, it held that the entire covenant was invalid, because "the restrictive covenant must be judged as a whole and must stand or fall when so judged."[86]

In contrast to these judicial approaches, some states employ a fourth method that operates through statutory prohibitions.[87] Some state statutes declare certain covenants contrary to public policy and completely void.[88] Other states have enacted less restrictive legislation, in effect codifying the common law.[89]

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81. *See* Trenton Potteries Co. v. Oliphant, 43 A. 723, 725-28 (N.J. 1899).

82. *See id.* at 728.

83. *See* Mason v. Thomas Briggs Co., 297 S.W. 1106 (Ky. 1927).

84. *See* Schmidl v. Central Laundry Supply Co., 13 N.Y.S.2d 817, 824-25 (N.Y. App. Div. 1939).

85. *See* Welcome Wagon, Inc. v. Morris, 224 F.2d 693, 696 (4th Cir. 1955).

86. *Id.* at 701.

87. *See, e.g.*, ALA. CODE § 8-1-1 (1984); CAL. BUS. & PROF. CODE §§ 16601-16602 (West 1987); COLO. REV. STAT. § 8-2-113 (1982); FLA. STAT. ANN. § 542.33 (West 1996); GA. CODE ANN. §§ 13-8-2, -2.1 (Michie 1990); HAW. REV. STAT. § 480-4 (1985); LA. REV. STAT. ANN. § 23:921 (West 1985); MICH. STAT. ANN. §§ 28.61-.70 (Law. Co-op. 1990); MONT. REV. CODE ANN. § 28-2-703 (Smith 1989); N.C. GEN. STAT. § 75-2 (1988); N.D. CENT. CODE § 9-08-6 (1987); OKLA. STAT. tit. 15, §§ 217-219 (Supp. 1999); OR. REV. STAT. § 653.295 (1989); S.D. CODIFIED LAWS ANN. §§ 53-9-8 to -11 (Michie 1990); TEX. BUS. & COM. CODE ANN. §§ 15.03, 15.05 (West Supp. 1999); WIS. STAT. ANN. § 103.465 (West 1988).

88. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 16601-16602.

89. *See, e.g.*, WIS. STAT. ANN. § 103.465.

IV. Denying Enforcement of Non-Competition Restrictive Covenants for Employer Termination Reasons Unrelated to a Protectible Business Interest

Employers terminate employees for a wide variety of reasons, regardless of whether there exists at-will employment,[90] a written employment relationship subject to termination only for cause, or something in between.[91] Some terminations occur through no fault of the employee[92] or for no reason.[93] Other terminations result from

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90. *See* PERRITT, *supra* note 7, at ch. 1.

91. *See* DECKER, COVENANTS, *supra* note 8, at § 6.27. In a written employment contract, cause may be defined restrictively making it difficult for the employer to terminate the employee or broadly making it much easier for the employer to end the employment relationship. *See* DECKER & FELIX, CONTRACTS, *supra* note 6, at §§ 3.76-3.78. Likewise, cause may be left undefined leaving it up to the factfinder for determination. Where it is left undefined, the following questions may be appropriate to determine if cause, in fact, exists:

1. Did the employer forewarn the employee orally or in writing of the possible or probable consequences of the employee's adverse action?
2. Was the employer's rule reasonably related to the orderly, efficient, and safe operation of the business and the performance that the employer might reasonably expect of the employee?
3. Did the employer, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey an employer rule or order?
4. Was the employer's investigation conducted fairly and objectively?
5. At the employer's investigation, did the employer's adjudicator obtain substantial and compelling evidence or proof that the employee was responsible or at fault as alleged?
6. Has the employer applied its rules, orders, policies, and penalties fairly and without discrimination to all employees?
7. Was the degree of discipline reasonably related to the seriousness of the offense and the employee's work performance record with the employer?

See Whirlpool Corp., 58 Lab. Arb. (BNA) 421 (1972) (Daugherty, Arb.).

A negative response to any question on the above checklist would overturn the employer's disciplinary action. *See also* A. KOVEN & S. SMITH, JUST CAUSE: THE SEVEN TESTS (2d ed. 1992). However, a court may lack authority to review an employer's determination that just cause existed when the employer reserves for itself the authority to determine whether there was just cause to discipline or terminate the employment relationship. *See* Thomas v. John Deere Corp., 517 N.W.2d 265 (Mich. Ct. App. 1994) (when the decision that just cause existed was to be made by the employee's supervisor, the supervisor's superior, and a personnel representative, no claim for breach of contract could be brought by the employee as long as the just cause determination was made by these designated persons).

92. *See e.g.*, Ashton Klinger & Associates, P.C. v. Com. Unemployment Compensation Bd. of Review, 74 Pa. Commw. 293, 561 A.2d 841 (1989) (attorneys' unsatisfactory performance did not constitute willful misconduct to preclude receipt of unemployment compensation where attorney worked to best of his ability).

93. *See, e.g.*, Little v. Federal Container Corp., 452 S.W.2d 875 (Tenn. 1969) (contract of stated duration subject to termination if employee's services prove dissatisfying is without prejudice to employer's right to terminate on grounds other

employee willful misconduct.[94] Among these termination reasons are insubordination, damaging employer property, dishonesty, theft, fights, gambling, horseplay, off-duty misconduct, unauthorized outside employment, sleeping on-duty, sexual harassment, substance abuse, and unsatisfactory performance.[95] Many of these termination reasons, however, do not relate to a protectible employer business interest involving dissemination of confidential information or competition with the former employer.

Assume an employer has a protectible business interest justifying a non-competition restrictive covenant's use. This interest is supported by adequate consideration and its restrictions relating to time period and geographical area are reasonable. What effect, if any, should the employer's termination reasons have on the non-competition covenant's enforceability? If the employer terminates the employee wrongfully or in bad faith, should the covenant be enforced?[96] Under these termination circumstances, the covenant probably should not be enforced because the employer, not the employee, has breached the employment agreement and should not be permitted to profit from the breach. However, if the employee's termination is for a legitimate reason but does not relate to a protectible employer business interest, what should the outcome be? This latter issue was reviewed in *Insulation Corp. of America v. Brobston*, where the court required an additional inquiry by limiting a non-competition covenant's enforceability to terminations involving a protectible employer business interest.[97]

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than dissatisfaction constituting cause).

94. Willful misconduct has been considered to mean conduct whereby the employee desired to bring about the result that followed or at least was aware that it was substantially certain to follow, so that the employee's desire could be implied. *See* King v. Breach, 540 A.2d 976 (Pa. Commw. Ct. 1988). For example, stealing the employer's property. *See* Wysocki v. Commonwealth Unemployment Compensation Bd. of Review, 487 A.2d 71 (Pa. Commw. Ct. 1985) (claimant who was terminated for attempting to take employer's property was guilty of willful misconduct making him ineligible for unemployment compensation).

95. *See generally* BNA EDITORIAL STAFF, GRIEVANCE GUIDE (9th ed. 1995); J. REDEKER, EMPLOYEE DISCIPLINE: POLICIES AND PROCEDURES (1989).

96. *See, e.g.*, Economy Grocery Stores v. McMenamy, 195 N.E. 747 (Mass. 1935) (court refused to enforce one year restrictive covenant); *see also* Kroeger v. Stop & Shop Co., 432 N.E.2d 566 (Mass. App. Ct.), *appeal denied*, 440 N.E.2d 1175 (Mass. 1982) (restrictive covenant modified).

97. 667 A.2d 729 (Pa. Super. Ct. 1995).

A. Insulation Corp. of America v. Brobston

Insulation Corp. of America v. Brobston arose out of a trial court's preliminary injunction enforcing a restrictive covenant's terms.[98] The restrictive covenant had two components. One clause protected the employer from non-disclosure of confidential information while the other clause protected the employer from non-competition.[99]

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98. *See id.*

99. *See id.* at 731. The relevant portion of the restrictive covenant's "non-disclosure" clause and "non-competition" clause provided as follows:

> WHEREAS, Employer is considering changing from a commodity (anyone can do) type of product to a more specialized high margin product that is far less dependent on the changes in construction activity; and
>
> WHEREAS, Employer is about to purchase equipment and computer software to design and cut Employer's products with the assistance of computer assisted design (CAD), and the resulting system requires extensive knowledge and training; and
>
> WHEREAS, Employer finds it necessary and essential to give specialized education and training to certain employees; and
>
> WHEREAS, Employee will be the recipient of information with respect to the operation of the CAD system, including requirements, design, setup, pricing and operation, and, also, the identity of customers of Employer, and Employer's sources of leads for and methods of obtaining new business, and information and training with respect to various techniques, procedures, equipment, designs, drawings, plans, engineering or test data, customer and supplier lists, cost records and other information used or developed by Employer in carrying out Employer's business; and
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> ******
>
> 4. The Employee during the term of employment under this Agreement will have access to and become familiar with various trade secrets, consisting of formulas, patterns, devises, secret inventions, processes, sales, earnings, finances and compilations of information, records and specifications and all other concerns of the Employer, which are owned by the Employer and which are regularly used in the operation of the business of the Employer. The Employee shall not disclose any of the aforesaid trade secrets, directly or indirectly, nor use them in any way, either during the term of this Agreement or at any time thereafter, except as required by the Employer in the course of the Employee's employment for the Employer.
>
> 5. On the termination of Employee's employment, for whatever reason whatsoever, the Employee shall not, directly or indirectly, within three hundred (300) miles of Allentown, Pennsylvania, enter into or engage generally in direct competition with the Employer in the business of manufacturing and/or selling expanded polystyrene insulation or packaging either as an individual on Employee's own or as a partner or joint venturer, or as an employee or agent for any person, or as an officer, director, or shareholder or otherwise for a period of three (3) years after the date of termination of Employee's employment hereunder.

The employer manufactured and sold polystyrene packaging, roofing, and insulation products.[100] In October 1982, an employee was hired. He was forty-seven years old, had worked in the insulation industry since 1977, and began employment without a written contract.[101] He began his employment as a territory sales manager, and then moved from national account manager to general manager in 1990.[102]

In July, 1992, the employer decided to expand its product line from commodity or "anyone can do" products into more specialized products through a Computer-Assisted Design (CAD) system.[103] Prior to purchasing the CAD system, the employer demanded that the employee and certain other employees sign employment contracts containing restrictive covenants or be terminated.[104]

On July 24, 1992, the employee signed the employment contract, which contained a restrictive covenant.[105] The covenant contained two components: a non-disclosure clause and a non-competition clause.[106]

The consideration for the employee's signing the restrictive covenant was a $2,000.00 increase in base salary and receipt of proprietary information concerning the CAD system, customers, and pricing.[107] In October, 1992, the employee became vice president of special products.[108] This position included responsibility for sales of CAD system products as well as commodity products.[109] The promotion to vice president of special products was, however, not part of the consideration for his agreement to be bound by the restrictive covenant.[110]

Over the next year, the employee failed to file sales calls and expense account reports properly.[111] The employee also failed to make a satisfactory number of overnight sales calls.[112] Of the

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Id. at 731-32 (citing the Employment Contract at 1-5).

100. *See id.* at 731.

101. *See Insulation Corp.*, 667 A.2d at 731.

102. *See id.*

103. *See id.* In an "anyone can do" product was described by the employee as a type of product that is a genuine product, available as a commodity item in lumberyards. *See id.* at 731 n.1.

104. *See Insulation Corp.*, 667 A.2d at 731.

105. *See id.*

106. *See id.*; *see also supra* note 99.

107. *See Insulation Corp.*, 667 A.2d at 732.

108. *See id.*

109. *See id.*

110. *See id* at 732 n.2, 733.

111. *See id.* at 732.

112. *See Insulation Corp.*, 667 A.2d at 732.

fourteen accounts in his territory, only three showed growth.[113] The others showed either flat or decreasing sales.[114]

On August 13, 1993, the employer terminated the employee.[115] On December 8, 1993, the employee was hired by Foam Plastics of New England.[116] Foam Plastics was the employer's competitor and was aware that the employee had signed the former employer's restrictive covenants.[117]

On December 17, 1993, the former employer sought injunctive relief against the employee to enjoin him from disclosing proprietary information and to restrain him from competing.[118] The trial court enforced the entire restrictive covenant.[119] It enjoined the employee under the non-disclosure covenant from disseminating the employer's trade secrets and under the non-competition covenant from competing with the employer within three hundred miles of Allentown, Pennsylvania, for a period of two years from the employee's termination date.[120] The court modified the time restriction of the non-competition covenant, however, from three years to two years.[121] As a result, the employee was placed on leave without pay by his new employer.[122]

On appeal, the employee contended that the non-competition restrictive covenant was unenforceable because it bore no reasonable relationship to the employer's protectible business interests.[123] The Pennsylvania Superior Court agreed in part with the employee. It affirmed the trial court's preliminary injunction regarding the non-disclosure covenant, however, it reversed the trial court's injunctive enforcement of the non-competition covenant against the employee.[124]

The appellate court found that injunctive enforcement of the non-disclosure covenant provided the relief necessary to protect the employer's *legitimate* business interests.[125] This covenant restrained the employee from disclosing, either directly or indirectly, the

113. *See id.*
114. *See id.*
115. *See id.*
116. *See id.*
117. *See Insulation Corp.*, 667 A.2d at 732.
118. *See id.*
119. *See id.* at 732.
120. *See id.*
121. *See id.* at 732 n.3.
122. *See Insulation Corp.*, 667 A.2d at 732.
123. *See id.* at 733.
124. *See id.* at 738.
125. *See id.*

employer's trade secrets consisting of formulae, patterns, devices, secret inventions, processes, sales, earnings, finances, compilation of information, records, and specifications owned or used by the employer or acquired by the employee during his employment.[126] The part of the injunction enforcing this covenant applied regardless of future employment, whether it was with a competitor or outside the insulation industry entirely.[127]

While the trial court did modify the restrictive covenant, it did not consider the circumstances surrounding the employee's termination and whether they related to a protectible employer business interest.[128] It simply concluded that imposing an additional burden on the employee by enforcing the non-competition covenant would tip the balance of reasonableness away from safeguarding the employer's protectible business interests to affecting the employee's ability to earn a living.[129]

The appellate court held that the trial court's enforcement of the non-competition covenant constituted error where the employee was terminated for unsatisfactory work performance.[130] The former employer made a determination that the employee was of no worth and no threat to warrant the non-competition covenant's enforcement to safeguard a protectible employer business interest.[131]

B. Significance

The issue for the Pennsylvania Superior Court's determination in *Insulation Corp. of America v. Brobston*, was whether enforcement of a non-competition restrictive covenant in light of the employee's termination for unsatisfactory performance was reasonable to safeguard a protectible employer business interest.[132]

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126. *See id.*

127. *Id. See* Morgan's Home Equipment Corp. v. Martucci, 136 A.2d at 838, 846-47 (Pa. 1957) (although former employees had obtained confidential information, the employer was adequately protected by a decree enjoining disclosure of the information, thereby preventing the former employees from benefitting from their customer contacts and knowledge; however, the "non-competition" restrictive covenants were not reasonably necessary for the employer's protection and constituted an undue hardship upon the former employees).

128. *See id.* at 848 (where the restrictive covenant places limitations more extensive than is necessary to protect employer, a court of equity may grant enforcement limited to those portions).

129. *See Insulation Corp.*, 667 A.2d at 737-38.

130. *See id.* at 736-37.

131. *See id.* at 735.

132. *See id.* at 729.

Non-competition covenants are generally subject to a more stringent test of reasonableness than covenants ancillary to the sale of a business.[133] This additional scrutiny arises from a historical reluctance of courts to enforce any contracts in restraint of free trade, particularly where they restrain an individual from earning a living.[134] This close scrutiny also stems from a recognition of the inherently unequal bargaining positions of employee and employer when entering into restrictive covenants.[135]

The determination of whether a restrictive covenant is reasonable and enforceable requires a case by case analysis. It requires a court to consider all the facts and circumstances.[136] A covenant found to be reasonable in one case may be unreasonable in another because of changed circumstances.[137]

For a non-competition restrictive covenant to be enforceable, it must relate to the employment contract, be supported by adequate consideration, and be reasonably limited in both time and territory.[138] Issues considered when determining the harshness of and oppression resulting from a non-competition covenant's enforcement include:

[1.] What is the situation of employee and his [or her] family?
[2.] What is the employee's capacity?
[3.] Is the employee handicapped or disabled in any way?
[4.] What effect will the restraint have on the employee's life?
[5.] Will [the restraint] deprive him [or her] of the opportunity of supporting himself [or herself] and his [or her] family in reasonable comfort?
[6.] Will it force him or her to give up the work for which he [or she] is best trained or be expatriated?
[7.] What are the business conditions?
[8.] Is there prevailing unemployment [in the area]?

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133. *See* Thermo-Guard, Inc. v. Cochran, 596 A.2d 188, 193 (Pa. Super. Ct. 1991).

134. *See Morgan's Home Equipment Corp.*, 136 A.2d at 846; *see also* DECKER, COVENANTS, *supra* note 8, at § 2.15.

135. *See* Reading Aviation Serv., Inc. v. Bertolet, 311 A.2d 628, 630 (Pa. 1973).

136. *See* Jacobson & Co. v. International Envtl. Corp., 235 A.2d 612, 619 (Pa. 1967).

137. *See id.*

138. *See* Davis & Warde, Inc. v. Tripodi, 616 A.2d 1384, 1387 (Pa. Super. Ct. 1992), *appeal denied*, 637 A.2d 284 (Pa. 1993); Bilec v. Auburn & Assoc., Inc. Pension Trust, 588 A.2d 538, 542 (Pa. Super. Ct.), *appeal denied*, 597 A.2d 1150 (Pa. 1991).

[9.] Was the employment terminable at the employer's will?
[10.] Did the employee work for the employer a very brief time?
[11.] What were the circumstances of termination of the employment?
[12.] Did the termination constitute a breach of contract by employer?
[13.] If not a breach, was it unreasonable?
[14.] What is the character and extent of the consideration [given to the employee for the covenant]?[139]

It is not enough merely to ask the question of whether the covenant will be oppressive. By its very nature, the test calls for a searching inquiry of: (1) all the circumstances surrounding the employment relationship *and* (2) its termination.[140]

When asked to enforce a non-competition restrictive covenant, the appellate court in *Insulation Corp.* found that the "reason for the termination" must be considered, even if the employer concealed the true reason in the belief that this would help the employee obtain another job.[141] The circumstances under which the employment relationship is terminated is an important factor in assessing both the legitimacy of the employer's protectible business interest and the employee's ability to earn a living.[142]

Generally, the determination of reasonableness of time and territory has involved weighing competing interests. It weighs the employer's need for protection against the restriction's hardship to be imposed on the employee.[143] In *Insulation Corp.*, the employee,

139. Arthur Murray Dance Studios, Inc. v. Witter, 105 N.E.2d 685 (Com. Pl. Ct. 1952) (citations omitted).
140. *See* Insulation Corp. of America v. Brobston, 667 A.2d 729 (Pa. Super. Ct. 1995).
141. *See id.* at 737.
142. *See id.*
143. *See* Morgan's Home Equip. Corp. v. Martucci, 136 A.2d 838, 846 (Pa. 1957); Thermo-Guard, Inc. v. Cochran, 596 A.2d 188, 193 (Pa. Super. Ct. 1991). These competing interests were explained by the Pennsylvania Supreme Court as follows:

> An employee may receive specialized training and skills, and learn the carefully guarded methods of doing business which are the trade secrets of a particular enterprise. To prevent an employee from utilizing such training and information in competition with his former employer, for the patronage of the public at large, restrictive covenants are entered into. They are enforced by the courts as reasonably necessary for the protection of the employer. *See* Arthur Murray Dance Studios, Inc. v. Witter, 62 Ohio L.Abs. 17, 105 N.E.2d 685, 694-99, 708-711 (1952); 3 Pomeroy, Equity Jurisprudence, § 934c (5th Ed. 1941). *A general covenant not to compete, however, imposes a greater hardship upon an*

a ten year employee, was privy to certain confidential corporate information, including overhead costs, profit margin, dealer discounts, customer pricing, marketing strategy, and customer contract terms.[144] This information was entitled to be protected by the employer through the non-disclosure restrictive covenant.[145]

The employee was terminated because he failed to increase sales, take overnight sales trips, develop business, and report sales calls and expenses.[146] The employee's termination for these reasons merited further scrutiny to determine whether a protectible employer business interest warranted enforcing the non-competition restrictive covenant.[147]

The employment contract's preamble disclosed that the employer's purpose in requiring the employee to enter into the non-competition restrictive covenant was to protect the new Computer-Assisted Design (CAD) technology the employer planned to acquire to create a niche market and obtain a competitive advantage over other insulation suppliers by producing a more specialized higher margin product.[148] However, the employee was never given the extensive knowledge and training by the employer necessary to operate the CAD system. His testimony that he never received the training went unrebutted.[149]

The employee admittedly possessed confidential customer sales and profit margin information that related to the system. A

> *employee than upon a seller of a business. An employee is prevented 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 livelihood 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. Contrariwise, the mobility of capital permits the business man to utilize his funds in other localities and in other industries.

Morgan's Home Equip. Corp., 136 A.2d at 846 (emphasis added).

144. *Insulation Corp.*, 667 A.2d 729.

145. *See Morgan's Home Equip. Corp.*, 136 A.2d at 842 (confidential customer data entitled to protection as trade secret under controlling common law) (citing Macbeth-Evans Glass Co. v. Schnelbach, 86 A. 688 (Pa. 1913)); Den-Tal-Ez, Inc. v. Siemens Capital Corp., 566 A.2d 1214, 1230 (Pa. Super. Ct. 1989) (en banc) (inventory data, projections, details, unit costs, product profit margin data are protectible trade secrets)).

146. *See Insulation Corp.*, 667 A.2d 729.

147. *See id.* at 737.

148. *See id.*

149. *See id.* at 735.

close reading of the contract revealed that this information was adequately protected by the non-disclosure restrictive covenant.[150]

At the trial court, the employer sought and received injunctive enforcement of both the non-disclosure and non-competition restrictive covenants.[151] A non-disclosure covenant is not limited by the reasonableness criteria applicable to non-competition covenants.[152] Because the employer was granted relief for the confidential information by the trial court, enforcement of the non-competition covenant was unnecessary to protect its interests and unfairly oppressive to the employee's ability to earn a living where the employer deemed the employee worthless through termination for unsatisfactory performance.[153]

The appellate court noted that there was a significant factual distinction between the hardship imposed by a non-competition restrictive covenant's enforcement on an employee who voluntarily leaves the employer and the hardship imposed upon an employee who is terminated for failing to do the job.[154] The reason for the

150. *See id.* at 736.

151. *See Insulation Corp.*, 667 A.2d at 732.

152. *See* Bell Fuel Corp. v. Cattolico, 544 A.2d 450, 458 (Pa. Super. Ct. 1988), *appeal denied*, 554 A.2d 505 (Pa. 1989).

153. *Cf. Insulation Corp.*, 667 A.2d at 739 (Del Sole, J. dissenting).

154. *See id.* at 735-36. None of the published Pennsylvania court decisions had previously addressed this issue; rather, the balance of the published decisions were under the standard set forth in *Morgan's Home Equipment Corp. v. Martucci*, 136 A.2d 838 (Pa. 1957), where the employee voluntarily terminated the employment relationship. *See* Bryant v. Sling Testing and Repair, Inc., 369 A.2d 1164 (Pa. 1977); Boldt Machinery and Tools v. Wallace, 366 A.2d 902 (Pa. 1976) (per curiam); Sidco v. Aaron, 351 A.2d 250 (Pa. 1976); Girard Investment Co. v. Bello, 318 A.2d 718 (Pa. 1974); Trilog Associates, Inc. v. Famularo, 314 A.2d 287 (Pa. 1974); Bettinger v. Carl Berke & Associates, 314 A.2d 296 (Pa. 1974); Reading Aviation Services, Inc. v. Bertolet, 311 A.2d 628 (Pa. 1973); Jacobson and Co. v. International Environment Corp., 235 A.2d 612 (Pa. 1967); Capital Bakers v. Townsend, 231 A.2d 292 (Pa. 1967); Beneficial Finance Co. of Lebanon v. Becker, 222 A.2d 873 (Pa. 1966); Albee Homes, Inc. v. Caddie Homes, Inc., 207 A.2d 768 (Pa. 1965); Barb-Lee Mobil Frame Co. v. Hoot, 206 A.2d 59 (Pa. 1965); Spring Steels, Inc. v. Molloy, 162 A.2d 370 (Pa. 1960); Pa. Funds Corp. v. Vogel, 159 A.2d 472 (Pa. 1960); Robinson Electronic Supervisory Co., Inc. v. Johnson, 154 A.2d 494 (Pa. 1959); Morgan's Home Equipment v. Martucci, 136 A.2d 838 (Pa. 1957); Davis & Warde v. Tripodi, 616 A.2d 1384 (Pa. Super. Ct. 1992), *appeal denied*, 637 A.2d 284 (Pa. 1993); Ruffing v. 84 Lumber, Inc., 600 A.2d 545 (Pa. Super. Ct. 1991), *appeal denied*, 610 A.2d 46 (Pa. 1992); Bilec v. Auburn & Assoc., Inc. Pension Trust, 588 A.2d 538 (Pa. Super. Ct. 1941); *appeal denied*, 597 A.2d 1150 (Pa. 1991); Harsco Corp. v. Klein, 576 A.2d 1118 (Pa. Super. Ct. 1990); Boyce v. Smith-Edwards-Dunlap Co., 580 A.2d 1382 (Pa. Super. Ct. 1990), *appeal denied*, 593 A.2d 413 (Pa. 1991); Rollings v. Protective Services, Inc. v. Shaffer, 557 A.2d 413 (Pa. Super. Ct. 1989); Bell Fuel Corp. v. Cattolico, 544 A.2d 450 (Pa. Super. Ct. 1988), *appeal denied*, 554 A.2d 505 (Pa. 1987); Modern Laundry and Dry Cleaning Services, Inc. v. Farrer, 536 A.2d 408 (Pa. Super. Ct. 1988); Quaker City Engine

employment relationship's termination is a factor that must be considered to determine whether enforcement is *truly* reasonable.[155] The employer admitted that it sought to conceal its reasons for terminating the employee.[156] Even if that concealment was intended to help the employee seek employment, it undercut the reasonableness of the employer's position.[157]

A salesperson terminated for poor sales performance cannot reasonably be perceived to pose the same competitive threat to the employer's protectible business interests as the salesperson whose performance is not questioned, but who voluntarily resigns to join another business in direct competition with the employer.[158] The

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Rebuilders, Inc. v. Toscano, 535 A.2d 1083 (Pa. Super. Ct. 1987); Blair Design and Construction Co., Inc. v. Kalimon, 530 A.2d 1357 (Pa. Super. Ct. 1987); Martin Industrial Supply Corp. v. Riffert, 530 A.2d 906 (Pa. Super. Ct. 1987); Records Center, Inc. v. Comprehensive Management, Inc., 525 A.2d 433 (Pa. Super. Ct. 1987); Wainwright's Travel Service, Inc. v. Schmolk, 500 A.2d 476 (Pa. Super. Ct. 1985); Robert Clifton Associations, Inc. v. O'Connor, 487 A.2d 947 (Pa. Super. Ct.1985); Gordon Wahls Co. v. Linde, 452 A.2d 4 (Pa. Super. Ct. 1982); Peripheral Dynamics, Inc. v. Holdsworth, 385 A.2d 1354 (Pa. Super. Ct. 1978) (per curiam).

155. *See Insulation Corp.*, 667 A.2d at 737 n.8. Following an exhaustive search of Pennsylvania case law, the appellate court discovered only a few cases that were even remotely similar to the circumstances presented here. The court noted that

> For example, in *Kistler v. O'Brien*, 464 Pa. 475, 347 A.2d 311 (1975), the employee was terminated by his employer and raised the grounds of wrongful discharge to test the restrictive covenant's reasonableness. However, the court invalidated the restrictive covenant for failure of adequate consideration. Further, the basis for the termination was not discussed. In *Maintenance Specialties, Inc. v. Gottus*, 455 Pa. 327, 314 A.2d 279 (1974), the employee was not terminated, but the employer filed a complaint alleging the restrictive covenant's breach. In *Trilog Associates, Inc. v. Famularo,* 455 Pa. 243, 314 A.2d 287 (1974), one employee was terminated while two others voluntarily quit. The reason for the one employee's termination was not discussed. On appeal, the restrictive covenants were held void due to unlimited time and territory restraints. In *Hayes v. Altman*, 424 Pa. 23, 225 A.2d 670 (1967), the employee was terminated for failing to sign the restrictive covenant. However, there was no dispute as to his work having been completely satisfactory.

Id.

156. *See id.*

157. As the Pennsylvania Supreme Court, in a similar case stated: "'We are approaching nearer and nearer to the conclusion [in restraint of trade cases], although we have not yet reached it, that common honesty is the true public policy.'" Plunkett Chem. Co. v. Reeve, 95 A.2d 925, 927 (Pa. 1953) (quoting Monongahela River Consolidated Coal and Coke Co. v. Jutte, 59 A. 1088, 1093 (Pa. 1904)).

158. *See* Jacobson v. International Environment Corp., 235 A.2d 612, 618 (Pa. 1967). The court stated that

> only when the novice has developed a certain expertise, which could possibly injure the employer if unleased competitively, will the employer begin to think in terms of a restrictive covenant'... It is true that a

failed salesperson is in no better position to injure the employer competitively than a novice would be. The record demonstrated that the employee had not acquired any special expertise in CAD system-produced insulation products, nor had he demonstrated that his sales skills were a competitive force warranting employer protection through the non-competition restrictive covenant.[159]

Where an employee is terminated by an employer for reasons unrelated to the employer's protectible business interests, this action clearly suggests an implicit decision on the employer's part that its competitive business interests are not required to be protected by the employee. The employer who terminates an employee for failing to perform deems the employee worthless. Once the employer makes this determination, the need to protect itself from the former employee's competition is diminished. The employee's worth to the employer is presumably insignificant.[160]

When a termination for unsatisfactory performance occurs, it is unreasonable to permit the employer to retain unfettered control over that which it has effectively terminated as worthless to safeguard its protectible business interests.[161] This conclusion would remain the same even if it were determined that the employee was legitimately terminated for economic reasons.[162] The same reasoning would apply under that scenario when an employer determines that its "bottom-line" is best protected without the employee on the payroll.[163] However, one must keep in mind that reasonableness is determined on a case-by-case basis.[164]

The circumstances in *Insulation Corp.* allegedly justified the determination that a non-competition restrictive covenant's enforceability should be influenced by economic reality.[165] Accordingly, the appellate court found that the circumstances under which the employment relationship is terminated are an important factor to consider in assessing both the employer's protectible business interests and the employee's ability to earn a living.[166] The employer's termination reasons must be reviewed as

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restrictive covenant in the novice's contract might well be held to be unreasonable as applied to the novice who remained a novice.

159. *See Insulation Corp.*, 667 A.2d at 735.

160. *See id.*

161. *See id.*

162. *See id.* at 735 n.6.

163. *See id.*

164. *See* Jacobson v. International Environment Corp., 235 A.2d 612, 619-20 (Pa. 1967).

165. *See Insulation Corp.*, 667 A.2d at 736.

166. *See id.* at 736-37. In *All-Pak, Inc. v. Johnston*, 649A.2d 347, 352 (Pa. Super.

they relate directly to the employer's protectible business interests in determining the non-competition covenant's reasonableness.[167]

V. Refining the Court's Standard for Not Enforcing Non-Competition Restrictive Covenants Where Employee Terminations are Unrelated to an Employer Protectible Business Interest

As a result of *Insulation Corp.*, not all employer termination reasons are sufficient to justify enforcement of non-competition restrictive covenants where the employer initiates the termination. If the termination reasons relate directly to the employer's protectible business interest, the non-competition covenant will be enforced.[168] Where they do not relate to a protectible employer business interest, the covenant will not be enforced.[169] This is similar yet different from those courts who have refused to permit a non-competition covenant's enforcement when an employee has been terminated wrongfully or in bad faith.[170]

Ct. 1997), the Pennsylvania Superior Court further explained its decision in *Insulation Corp.* as follows:

> In *Insulation Corp. of America v. Brobston*, an employer sought to enforce a two year restrictive covenant on an employee who had been fired for poor performance. We held that the fact that the employee was terminated, rather than quit voluntarily, was an important factor when considering the enforceability of a restrictive covenant. On the facts in that case, we determined that it was inequitable for the employer to obtain an injunction against the employee. [Footnote omitted.] We emphasized, however, that the reasonableness of enforcing such a restriction is determined on a case by case basis. Thus, the mere termination of an employee would not serve to bar the employer's right to injunctive relief. Where, for instance, an employee intentionally engaged in conduct that caused his termination, (footnote omitted) the employer's right to injunctive relief would survive. However, where an employer terminated an employee for reasons beyond the employee's control, the rule announced in *Brobston* may bar injunctive relief.

167. *See Insulation Corp.*, 667 A.2d at 735.

168. *Cf. id.*

169. *See id.*

170. Rao v. Rao, 718 F.2d 219, 222-23 (7th Cir. 1983) (a restrictive covenant is unenforceable when an employee is terminated in bad faith and without cause); Troup v. Heacock, 367 So.2d 691, 692 (Fla. Ct. App. 1979) (employer unilaterally breached contract when employer reduced employee's weekly draw from $125.00 to $50.00 and then terminated the employee without reason making restrictive covenant unenforceable); Frierson v. Sheppard Bldg. Supply Co., 154 So.2d 151 (Miss. 1963) (employee termination that is arbitrary, capricious, or in bad faith will negate restrictive covenant's enforceability); Post v. Merrill Lynch, Pierce, Fenner & Smith, 397 N.E.2d 358, 360 (N.Y. 1979) (where termination is involuntary and without cause, restrictive covenant will not be enforced); Hopper v. All Pet Animal Clinic, 861 P.2d 531, 541 (Wyo. 1993) (simple justice requires that to enforce a restrictive covenant the employer must show good faith for the

The distinction made in *Insulation Corp.*, between employees who are terminated and those who resign voluntarily has been recognized by other courts.[171] An employee's resignation in itself will not negate a restrictive covenant's enforceability. However it is not impossible that *Insulation Corp.*'s standard and rationale could be applied to a resigning employee; i.e., that the employer must meet the burden of showing that the employee's resignation related directly to a protectible employer business interest to enforce the non-competition covenant.

It is entirely foreseeable that in a given situation, an employee might try to circumvent a non-competition restrictive covenant by deliberately performing in a poor manner. The employer would hold out the hope that he or she will be terminated so that a non-competition restrictive covenant cannot be enforced. In these situations, the employee should not be permitted to profit from his or her wrongful acts and the non-competition covenant should be enforced.

Insulation Corp. goes beyond the rulings of other jurisdictions' decisions in holding that an involuntary termination not relating to an employer's protectible business interest, including termination for economic reasons, should weigh heavily against a non-competition restrictive covenant's enforcement.[172] The court held the covenant unenforceable, even though *Insulation Corp.*'s covenant was broadly worded to apply upon termination "for whatever reason whatsoever."[173]

Terminating an employee wrongfully or in bad faith should prohibit enforcement of a non-competition restrictive covenant.[174] Making the employer establish cause for the termination may also

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employee's termination); *see also* Gomez v. Chua Med. Corp., 510 N.E.2d 191 (Ind. Ct. App. 1987) (failure to establish "a *valid* reason" or "objective 'cause'" for termination does not bar enforcement of non-compete covenant).

171. *See* Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500, 502 (Iowa Sup. Ct. 1984) (whether an employee is terminated, as distinguished from resigning, is a factor opposing the grant of an injunction enforcing a non-compete restrictive covenant); Central Monitoring Service, Inc. v. Zakinski, 553 N.W.2d 513 (S.D. 1996) (same).

172. *See Insulation Corp.*, 667 A.2d 729.

173. *See id.* at 731; *see also* Frumkes v. Beasley-Reed Broadcasting, 533 So.2d 942 (Fla Dist. Ct. App. 1988) (employee who resigned was not subject to restrictive covenant which specified that it became effective only upon termination for cause); Lee & Associates v. Lee, 570 So.2d 1102 (Fla. Ct. Dist. App. 1990) (restrictive covenant was expressly conditioned on employee's terminating his employment voluntarily or being terminated for cause).

174. *See, e.g., Rao*, 718 F.2d 219 (a restrictive covenant is unenforceable when an employee is terminated in bad faith and without good cause).

be appropriate.[175] Requiring the employer to relate the employee's termination directly to a protectible employer business interest may, however, be too broad a standard.[176]

Not many employee terminations involve a direct protectible employer business interest. Terminations for protectible employer business interests are usually limited to when an employer obtains advance knowledge that the employee is leaving to form a competing business,[177] when the employee voluntarily leaves to work for a competitor,[178] when a departing employee induces co-employees to leave employment,[179] when while employed the employee prepares to steal or steals confidential information, trade secrets, or inventions,[180] when while employed the employee discloses confidential information, trade secrets, or inventions to others,[181] or when the employee embezzles employer funds.[182]

By separating the restrictive covenant's non-disclosure covenant from the non-competition covenant, the appellate court in *Insulation Corp.* arrived at a conclusion not reflected in the work-place's reality.[183] Allowing the employee to work for a competitor because the employer's termination reasons did not relate to a protectible business interest and believing that the employee will abide by the non-disclosure covenant, does not take into consideration the employment relationship's dynamics. Enforcement of the non-competition covenant is essential to protect the employer's non-disclosure interest. Both covenants work hand-in-hand to safeguard the employer's protectible business interest by

175. *See, e.g.* Sherman v. Pfeferkorn, 135 N.E. 568 (Mass. 1922) (lawful termination by an employer in an at-will employment setting allows for restrictive covenant's enforcement).

176. *See Insulation Corp.*, 667 A.2d 729.

177. *See, e.g.* Arnold's Ice Cream Co. v. Carlson, 330 F. Supp. 1185 (S.D.N.Y. 1971) (while still employed forming competing ice cream business).

178. *See, e.g.,* Unitel Corp. v. Decker, 731 S.W.2d 636 (Tex. Ct. App. 1987) (court issued temporary injunction enforcing restrictive covenant against former employees and restraining new employer from interfering with covenant).

179. *See, e.g.*, Frederick Chwid & Co. v. Marshall Leeman & Co., 326 F. Supp. 1043 (S.D.N.Y. 1971) (interference with contractual relationships where former employees attempted to solicit employees to leave former employer).

180. *See, e.g.,* Insurance Field Serv., Inc. v. White & White Inspection and Audit Serv., 384 So.2d 303 (Fla. Dist. Ct. App. 1980) (appropriating customer lists and soliciting employer's customers while still employed).

181. *See, e.g.,* In re Hallahan, 936 F.2d 1496 (7th Cir. 1991) (solicitation of customers protected as trade secret prohibited against former employees and new employer).

182. *See, e.g.*, Hlubeck v. Beeler, 9 N.W.2d 252 (Minn. 1943).

183. *See* Insulation Corp. of America v. Brobston, 667 A.2d 729 (Pa. Super. Ct. 1995).

limiting unfair employer competition and improper competitor advantages. One covenant without the other does not suffice in most employment situations.

The harm that the non-competition restrictive covenant was intended to protect; namely, working for a competitor, has been impliedly sanctioned through *Insulation Corp.'s* broad standard.[184] As the dissent asks, what is to prevent an employee secretly recruited by a competitor from purposely trying to be terminated, rather than resigning, then working for the competitor free of the covenant's constraints?[185] Likewise, once the employee begins working for the competitor it is often difficult, if not impossible, to prevent the harm that the court has permitted. In reality, the employee will be under considerable pressure to reveal confidential information to effectively perform the new position's duties. More importantly, the competitor in all likelihood would not have hired the employee if it had not thought that it could benefit from the former employer's confidential data. This is the attractiveness that the employee brings to the new employer for which the new employer hopes to obtain a competitive advantage. Not allowing the employee to work for the competitor in the first place prevents this harm to the former employer.

Insulation Corp. implies that a "Chinese Wall" or an impenetrable barrier[186] will be created between the employee and the competitor preventing confidential information from being disclosed.[187] The appellate court suggests that the former employer will have an appropriate remedy through an injunction if the disclosure occurs. This assumption is far from the reality that occurs daily in the workplace. The employee and the competitor will find a surreptitious way to obtain and convey the former employer's confidential information in a manner that the former employer will not be able to readily ascertain to prevent injury until it is too late.

Instead of looking into the employer's protectible business interests as they relate to the employee's termination, the court should examine: (1) how the employee's duties relate to the non-competition covenant at the time of termination and (2) the employer's reasons for originally requiring the non-competition covenant. When the employer has a protectible business interest in

184. *See id.*

185. *See id.* at 739 (Del Sole, J., dissenting).

186. *See* 1 THE WORLD BOOK DICTIONARY 356 (C.L. BARNHART & R.K. BARNHART, eds., 1988).

187. *See Insulation Corp.*, 667 A.2d 729.

initially requiring the non-competition covenant, whether before employment commences or during the employment relationship, and the employee's duties relate directly to these protectible business interests, the employer should only be required to establish a supportable reason for the employee's termination. For example, when an employee is privy to certain confidential corporate information, customer pricing, marketing strategy, and customer contract terms through the employee's duties at the time of termination, the non-disclosure covenant as well as the non-competition covenant should be enforced as long as a legitimate non-arbitrary, non-capricious, and non-discriminatory termination reason exists. Both these covenants work hand-in-hand to safeguard the employer's protectible business interests. One cannot be readily separated from the other. Any supportable reason for the termination should be sufficient so long as it is not arbitrary, capricious, discriminatory, wrongful, or in bad faith. This standard would relate more closely to what other courts have decided regarding a covenant's enforceability where a wrongful or bad faith termination has occurred.[188] It is a more realistic standard applicable to actual business situations that can be applied to employee resignations, terminations, and where employees attempt to compete with their former employer.

When the employer meets this standard, the employer should have the right to expect the restrictive covenant's non-competition clause's enforcement, provided all of the other factors for a valid covenant are met.[189] If the employer meets the standard, it reflects

188. *See, e.g.*, Rao v. Rao, 718 F.2d 219 (7th Cir. 1983) (a restrictive covenant is unenforceable when an employee is terminated in bad faith and without cause); Hopper v. All Pet Animal Clinic, 861 P.2d 531, 545-48 (Wyo. 1993) (simple justice requires that to enforce a restrictive covenant the employer must show good faith for the employee's termination); Post v. Merrill Lynch, Pierce, Fenner & Smith, 397 N.E.2d 358 (N.Y. 1979) (where termination is involuntary and without cause, restrictive covenant will not be enforced); Frierson v. Sheppard Bldg. Supply Co., 154 So.2d 151, 155 (Miss. 1963) (employee termination that is arbitrary, capricious, or in bad faith will negate restrictive covenant's enforceability); Troup v. Heacock, 367 So.2d 691, 692 (Fla. Dist. Ct. App. 1979) (employer unilaterally reduced employee's weekly draw from $125.00 to $50.00 and then terminated the employee without reason making restrictive covenant unenforceable); *see also* Gomez v. Chua Medical Corp., 510 N.E.2d 191 (Ind. Ct. App. 1987) (failure to establish a *valid* reason or objective cause for termination does not bar enforcement of non-compete restrictive covenant).

189. *See* Nalle Clinic Co. v. Parker, 399 S.E. 2d 363, 365 (N.C. Ct. App. 1991) (to be enforceable, the former employer must show that the restrictive covenant is: (1) in writing; (2) made part of an employment contract; (3) based upon reasonable consideration; (4) reasonable both as to time and territory; and (5) not against public policy). Where the employee's duties relate directly to the

the employment situation's realty. The employee's duties relate directly to the employer's protectible business interest. It also supports the original consideration for the covenant; i.e., initial employment, extra money, a new benefit, etc. A higher standard than a supportable reason should not be required to enforce a non-competition covenant upon termination. To find otherwise, may provide employees with an unnecessary windfall.

A review of the facts of *Insulation Corp.* indicates that by applying this revised standard that the non-competition restrictive covenant could have been enforced against the employee.[190] The employee's duties at the time the covenant was entered into and at termination related directly to the employer's protectible business interests and the employer's termination reasons were not arbitrary, capricious, discriminatory, wrongful, or in bad faith.[191]

Insulation Corp. suggests that unless an employee voluntarily resigns, a non-competition restrictive covenant will not be open to challenge unless the employer terminates the employee for a reason that directly relates to the employer's protectible business interest.[192] To enforce the non-competition covenant, the employer may almost have to establish an employee's willful misconduct. Merely beginning work for a competitor in itself after a termination may now not be sufficient to warrant the non-competition covenant's enforcement.

Until *Insulation Corp.'s* standard is refined, an additional choice may be still available to employers. At the time employment commences, during employment, or at termination, the employer could offer the employee an additional benefit to observe a non-competition restrictive covenant. This benefit would have to be something the employee was already not entitled to receive,[193] for example, an additional monetary payment above and beyond any normal severance that might be owed the employee after

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employer's business interest the court may still, however, want to review the reasonableness of the time and territory limitations. It is entirely possible that these limitations should be different or perhaps less stringent than when the employee leaves to work for a competitor. Perhaps non-competition covenants should be drafted to reflect these different factual situations by including varying time and territory limitations.

190. *See Insulation Corp.*, 667 A.2d 729 (Pa. Super. Ct. 1995).

191. *See id.*

192. *See id.*

193. *See, e.g.*, Mason Corp. v. Kennedy, 244 So.2d 585 (Ala. 1971) (restrictive covenant's enforcement refused because the employer required the employee to sign the covenant to receive a lump sum, profit sharing benefit to which the employee was already entitled).

employment ends.[194] The benefit should be specifically referenced as the consideration supporting the non-competition covenant. By paying for the non-competition covenant's observance at the time of hiring, during employment, or at termination, the employer may support the covenant's enforceability; provided that all other factors for an enforceable covenant have been met.[195] This option, however, may not be workable. Few employers are willing to give an employee anything more than what was owed when a termination occurs.

VI. Conclusions

Insulation Corp. of America v. Brobston, has added an additional inquiry for scrutinizing a non-competition restrictive covenant. In Pennsylvania, as well as in other jurisdictions where this additional inquiry is adopted,[196] employers will face an almost insurmountable hurdle in restricting a former employee's competition when the employer takes the initiative to terminate the employment relationship. Not only must the employer sustain its burden of showing a protectible business interest, valid consideration, and the reasonableness of restrictions relating to geographic area and time,[197] but it must now also establish that its reason for termination involves a protectible employer business interest.[198] In most cases, this will be difficult, if not impossible.

In effect, Pennsylvania has found that a non-competition restrictive covenant will be enforced only in a very limited case involving termination for employee misconduct directly relating to the employer's protectible business interest. Other employer business interests are not sufficient.[199] The misconduct must relate directly to a protectible employer business interest.[200] Generally,

194. *See, e.g.*, Davis & Warde, Inc. v. Tripodi, 616 A.2d 1384, 1388 (Pa. Super. Ct. 1992) (sufficient consideration existed where employees were offered continued employment, new employment responsibilities, cash payment, new severance package, and guarantee of certain job benefits).

195. *See* Nalle Clinic Co. v. Parker, 399 S.E.2d 363, 365 (N.C. Ct. App. 1991) (to be enforceable, the former employer must show that the restrictive covenant is: (1) in writing; (2) made part of an employment contract; (3) based upon reasonable consideration; (4) reasonable both as to time and territory; and (5) not against public policy).

196. *See, e.g.*, Central Monitoring Service, Inc. v. Zakinski, 553 N.W.2d 513 (S.D. 1996).

197. *See Nalle Clinic Co.*, 399 S.E. 2d at 365.

198. *See Insulation Corp.*, 667 A.2d at 735.

199. *See id.*

200. *See id.*

most employer terminations do not rise to this high standard whether or not a restrictive covenant is involved.

Employers must be aware that only in the most limited circumstances will their non-competition interests be enforced where *Insulation Corp.'s* standard is used.[201] To safeguard its interests, an employer may have to offer the employee some additional benefit at the time of hiring, during employment, or at termination to protect its non-competition interests. This additional consideration may convince a court to enforce the non-competition covenant; provided that all other factors for a valid covenant are present.[202]

The better course may be for Pennsylvania courts to refine *Insulation Corp's* standard with a more realistic one. The refined standard should equate to the business world's reality by weighing the employee's duties at the time the non-competition covenant was entered into and at termination against the employer's protectible business interests on a case-by-case basis taking into consideration whether the employee's termination was arbitrary, capricious, discriminatory, wrongful, or in bad faith.

Ultimately, the court must balance the employee's and the employer's competing interests, for which there can be no mathematical formula. It is impossible to lay down any general rule. Each case must be determined on its own particular facts. Broadly speaking, it is the territorial scope and duration, the nature of the business or profession involved, including the employee's position and duties, and the public's interests in the employee being able to continue in that field while not injuring the employer's protectible business interest that must be considered.

201. *See id.* at 729.
202. *See Nalle Clinic Co.*, 399 S.E. 2d at 365.