Denver Law Review

Volume 52 | Issue 2 Article 3

March 2021

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NONCOMPETITION COVENANTS IN COLORADO: A STATUTORY SOLUTION?

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INTRODUCTION

Noncompetition covenants are agreements whereby one party, the covenantor, agrees not to compete with another party, the covenantee, in a particular line of business for a specified period of time and in a specified area.[1] A noncompetition agreement is a restraint of trade which is normally illegal both at common law and under state and federal antitrust statutes.[2] However, limited noncompetition covenants are sometimes lawful if they are ancillary to an otherwise legitimate agreement. Thus, a noncompetition covenant by an employee not to compete with his employer or by a seller of a business not to compete with the buyer may be enforceable.[3] The common law rule in Colorado is that a reasonable noncompetition agreement will be enforced if it is necessary for the protection of the covenantee, imposes no undue hardship on the covenantor, and does not injure the general public.[4] However, the tendency in this state has been simply

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[1] 6A A. CORBIN, CORBIN ON CONTRACT §§ 1385-95 (1962) [hereinafter cited as CORBIN]; 14 S. WILLISTON, A TREATISE ON THE LAWS OF CONTRACTS §§ 1637-44 (3d ed. 1972) [hereinafter cited as WILLISTON]. Restrictive covenants are especially useful in businesses where trade secrets or customer goodwill are important. *See* R. MILGRIM, TRADE SECRETS § 3.02 (12 BUSINESS ORGANIZATION, 1974). *See generally* WILLISTON §§ 1640-41; Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960) [hereinafter cited as Blake]; Wetzell, *Employment Contracts and Noncompetition Agreements*, 1969 U. ILL. L. FORUM 61.

[2] *See* CORBIN §§ 1387-1403; WILLISTON §§ 1645A-64B.

[3] WILLISTON § 1641. *See generally* Blake at 646-87.

[4] For cases which interpret Colorado common law on covenants not to compete, see Goldammer v. Fay, 326 F.2d 268 (10th Cir. 1964); Trans-American Collections, Inc. v. Continental Account Servicing House, Inc., 342 F. Supp. 1303 (D. Utah 1972); Jim Sprague's Aetna Trailer Sales, Inc. v. Hruz, 172 Colo. 469, 474 P.2d 216 (1970); Zeff, Farrington & Assocs. v. Farrington, 168 Colo. 48, 449 P.2d 813 (1969); Knoebel Mercantile Co. v. Siders, 165 Colo. 393, 439 P.2d 355 (1968); Fuller v. Brough, 159 Colo. 147, 411 P.2d 18 (1966); Addressograph-Multigraph Corp. v. Kelley, 146 Colo. 550, 362 P.2d 184 (1961); Mabray v. Williams, 132 Colo. 523, 291 P.2d 677 (1955); Ditus v. Beahm, 123 Colo. 550, 232 P.2d 184 (1951); Cantrell v. Lemons, 119 Colo. 107, 200 P.2d 911 (1948); Whittenberg v. Williams, 110 Colo. 418, 135 P.2d 228 (1943); Electrical Prod. Consol. v. Howell, 108 Colo. 370, 117 P.2d 1010 (1941); Weber v. Nonpareil Baking Co., 85 Colo. 232, 274 P. 932 (1929); Axelson v. Columbine Laundry Co., 81 Colo. 254, 254 P. 990 (1927); Garf v.

to enforce such agreements in accordance with their express terms, with little attention paid to the balancing requirements of the rule.[5] This judicial tendency has caused concern, particularly for the rights of employees who are often required to execute potentially harsh covenants as a condition to employment.[6] Consequently, the Colorado Legislature in 1973 amended *Colo. Rev. Stat. Ann.* § 8-2-113 (1973), to void all covenants which limit future employment except those related to the sale of a business, the protection of trade secrets, the recovery of training expenses, or the restraint of certain key personnel.[7]

Although a number of other states have attempted statutory reform in this area, the recent Colorado statutory amendment is of particular interest because it seeks to eliminate only a narrowly defined class of covenants without disturbing the common law rules applicable to most noncompetition covenants.[8] This article evaluates the statute by reviewing the general background of the law of restrictive covenants, the development of the common law in Colorado, the nature of the statutory amendment recently enacted, and current problems and prospects in light of the new statute.

I. BACKGROUND

Agreements not to compete have been known to the common law for more than 500 years.[9] The first recorded use of noncompe-

Weitzman, 72 Colo. 136, 209 P. 809 (1922); Barrows v. McMurtry Mfg. Co., 54 Colo. 432, 131 P. 430 (1913); Freudenthal v. Espey, 45 Colo. 488, 102 P. 280 (1909); Colorado Urological Assocs., P.C. v. Grossman, 529 P.2d 625 (Colo. Ct. App. 1974); Taff v. Brayman, 518 P.2d 298 (Colo. Ct. App. 1974); Flower Haven, Inc. v. Palmer, 502 P.2d 424 (Colo. Ct. App. 1972); Short v. Fahrney, 502 P.2d 982 (Colo. Ct. App. 1972); Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971); Colonial Life & Accident Ins. Co. v. Kappers, 488 P.2d 96 (Colo. Ct. App. 1971); Gulick v. A. Robert Strawn & Assocs., 477 P.2d 489 (Colo. Ct. App. 1970); Wagner v. A & B Personnel Sys., Ltd., 473 P.2d 179 (Colo. Ct. App. 1970); Jewel Tea Co. v. Watkins, 26 Colo. App. 494, 145 P. 719 (1915).

[5] *See, e.g.*, Jim Sprague's Aetna Trailer Sales, Inc. v. Hruz, 172 Colo. 469, 474 P.2d 216 (1970); Zeff, Farrington & Assocs. v. Farrington, 168 Colo. 48, 449 P.2d 813 (1969); Whittenberg v. Williams, 110 Colo. 418, 135 P.2d 228 (1943).

[6] *Hearings on H.B. No. 1215 Before the Colorado House Judiciary Comm.*, 49th Gen. Assembly, 1st Sess., Mar. 15, 1973, Channel E, Tape Top Meter 14-46-24; *Hearings on H.B. No. 1215 Before the Colorado Senate Judiciary Comm.*, 49th Gen. Assembly, 1st Sess., May 6, 1973, Channel B/C, Tape Top Meter 12-55-42.

[7] COLO. REV. STAT. ANN. § 8-2-113(2) (1973). For complete statutory language, *see* text accompanying note 108 *infra*.

[8] *See* notes 110-15 *infra* for a list of states which have enacted legislation on covenants not to compete.

[9] Dyer's Case, Y.B. Mich. 2 Hen 5, f. 5, pl. 26 (C.P. 1414) is the first reported case involving a noncompetition agreement.

tition covenants was by master craftsmen who attempted unsuccessfully to enforce agreements which prevented their apprentices from entering into post-employment competition.[10] Later, similar restrictive covenants were utilized in connection with other commercial agreements, such as leases,[11] sales agreements,[12] and franchises.[13]

Although in some early cases liquidated damages were established by requiring the covenantor to post a bond forfeitable upon breach[14] (and some modern courts still award damages in unusual circumstances),[15] today the usual remedy is the entry of an appropriate injunction against the covenantor in accordance with the terms of the covenant.[16] Equitable rules therefore govern most restrictive agreement cases, and the successful plaintiff must establish the necessary grounds for the issuance of an injunction.[17]

It has been said that the common law viewed restrictive covenants with disfavor and therefore refused to enforce them.[18] Although this statement may not be completely true,[19] it does correctly represent the reluctance of most courts to grant injunctive relief which may severely restrict the economic freedom of the covenantor and deprive the public of the benefits of competition.[20]

On the other hand, courts have long recognized that equity may require the enforcement of limited restrictions on the facts of a particular case. This is true, for instance, when an established business or professional practice is sold and the seller cove-

[10] Blake at 632. The authors have relied heavily on Professor Blake's excellent study in preparing this background section.

[11] *See, e.g.*, Mitchel v. Reynolds, 24 Eng. Rep. 347 (Q.B. 1711).

[12] *See generally* Annot., 97 A.L.R.2d 4 (1964) and Annot., 45 A.L.R.2d 77 (1956) for modern cases.

[13] Annot., 50 A.L.R.3d 746 (1973).

[14] Mitchel v. Reynolds, 24 Eng. Rep. 347 (Q.B. 1711).

[15] *See* cases cited note 81 *infra*.

[16] *See* text accompanying notes 91-100 *infra* for a discussion of the doctrine of partial enforcement, whereby an injunction in terms less broad than those of the covenant may be granted.

[17] *See* CORBIN §§ 1380, 1390; WILLISTON §§ 1630A, 1635-36, 1649B.

[18] *See* Freudenthal v. Espey, 45 Colo. 488, 102 P. 280 (1909).

[19] Blake at 632-37.

[20] There are strong public policies against any kind of restriction on competition. Such covenants are distasteful to Anglo-American law as restraints on the freedom of covenantors and as infringements on the public interest in economic competition. Any kind of restrictive agreement is probably void except to the extent it is ancillary to a legitimate agreement such as an employment contract or contract of sale. WILLISTON § 1635. *See also* Wetzell, *supra* note 1.

nants not to compete with the buyer. One of the principal assets purchased in such a transaction is the established goodwill of the business, which is often little more than the seller's personal reputation and relationships with customers. If the seller is free to violate the noncompetition agreement he can, in effect, virtually render valueless the property rights which he has sold.[21]

Restrictive covenants in employment agreements may also serve very valid purposes. For example, an employee might have access to confidential information which does not merit trade secret protection but which, nonetheless, could be used effectively and unfairly to compete with the employer.[22] Additionally, the employer may have made a substantial investment in the employee's training, which he should not be permitted to use in competition with the employer.[23] The customer relationships and reputation which an employee develops are business assets, and it is at least arguably unfair for the employee to divert such assets to his own use by entering into a competitive business.[24] Finally, there is perhaps an underlying concept that if the employee deliberately and disloyally schemes to set up his own business while being paid by the employer, equity ought to permit some reasonable restraint on his activities.

In wrestling with these considerations, the early English courts differentiated between general and particular restraints, holding that a restraint extending throughout the entire kingdom was always void but that a more limited restraint might be enforceable under the proper circumstances.[25] This rule was later

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[21] *See* Mitchel v. Reynolds, 24 Eng. Rep. 347 (Q.B. 1711).

[22] A common law action for unfair competition may exist regardless of the existence of a contractual restriction. Therefore, an ex-employee is always subject to legal action if he unfairly entices other employees to resign, interferes with the former employer's contractual relations, or utilizes his trade secrets. However, as a practical matter it is often difficult to prove an unfair competition case, and of course the procedure is less certain of success than a simple action on a restrictive covenant. *See, e.g.*, Suburban Gas of Grand Junction, Inc. v. Bockelman, 157 Colo. 78, 401 P.2d 268 (1965). With respect to use of customer lists, see generally Annot., 28 A.L.R.3d 7 (1969).

[23] Both the Louisiana and Colorado statutes applicable to restrictive agreements permit covenants in connection with the employment of individuals who have received the benefit of training or education from their employers. COLO. REV. STAT. ANN. § 8-2-113(2)(c) (1973); LA. REV. STAT. ANN. § 23:921 (1964).

[24] Allen v. Rose Park Pharmacy, 120 Utah 608, 237 P.2d 823 (1951) (the court, in upholding an injunction pursuant to a restrictive covenant, pointed out that since the employee had been paid to develop clientele for the employer, he should not be permitted to divert customer goodwill for his personal benefit); CORBIN § 1394.

[25] *See, e.g.*, Mitchel v. Reynolds, 24 Eng. Rep. 347 (Q.B. 1711), which cited earlier cases for support.

refined to apply to "reasonable" restraints, permitting covenants which extended far enough to protect the covenantee but not so far as to injure the general public. This rule was stated as follows in *Horner v. Graves*:[26]

> [W]e do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.[27]

Most American cases and later English cases added one more factor to the rule of *Horner v. Graves*, the necessity of weighing the hardship on the covenantor against the benefit to the covenantee.[28] Accordingly, the majority rule in both the United States and the United Kingdom today is reasonableness, which is determined by balancing, on the facts of each case, the following interests: (1) the legitimate needs of the covenantee for protection; (2) the interest of society in preventing monopolies or other excessive restrictions on competition; and (3) the burden placed on the covenantor.[29]

Because the modern rule is difficult to apply evenhandedly on the facts of individual cases, a vast amount of litigation has arisen in this area.[30] The courts have been particularly troubled by the difficulty of applying the rule with respect to employment contracts or other situations in which the parties have greatly disproportionate bargaining positions. At least in the employment contract context it often appears that the covenantor has little choice but to sign the restrictive agreement and often receives no clearly identifiable consideration in exchange.[31] An additional problem arises when the covenantor is uncertain whether

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[26] 131 Eng. Rep. 284 (C.P. 1831).

[27] *Id.* at 287.

[28] *See, e.g.*, Mandeville v. Harman, 42 N.J. Eq. 184, 7 A. 37 (1886); Diamond Match Co. v. Roeber, 106 N.Y. 473, 13 N.E. 419 (1887); Herreshoff v. Boutinea, 17 R.I. 3, 19 A. 712 (1890); Herbert Morris, Ltd. v. Saxelby, [1916] A.C. 688; Mason v. Provident Clothing & Supply Co., [1913] A.C. 724.

[29] *See* RESTATEMENT OF CONTRACTS § 515 (1932).

[30] *See, e.g.*, annotations cited in notes 12, 13 *supra*.

[31] For example, covenants have sometimes been enforced against employees where they were entered into after the employment contract so that employment was clearly not consideration for the covenant. *See* Annot., 51 A.L.R.3d 825 (1973).

the covenant is reasonable and lacks the courage or the resources to engage in a legal battle over its validity. Consequently, even those covenants which are never the subject of legal dispute may have a severe dampening effect, both on the individual covenantor's freedom and on the public interest in competition.[32]

As a result of these problems, a number of states have taken legislative action to declare certain kinds of covenants void or illegal.[33] The statutes in this area usually declare restrictive covenants void with certain specified exceptions. Those within the exempted classifications, such as covenants in consideration of the purchase of a business, remain subject to the judicial rules of reasonableness.

This type of drastic legislative action has not been widely adopted, and some states, having passed such statutes, have subsequently modified them to permit restrictive covenants in at least some types of employment agreements.[34] This reluctance to prohibit all restrictive covenants ancillary to employment contracts presumably results from a recognition that at least some of these covenants are reasonable and desirable.

The recent amendment to the Colorado statutes[35] represents a different legislative approach to the problem of noncompetition agreements. The Colorado law voids only those covenants which restrict future employment, thereby permitting restrictions on a covenantor's right to set up his own competitive business. The statute further expressly exempts covenants, including those affecting subsequent employment, where the covenant is related to the purchase and sale of a business, the protection of trade secrets, the recovery of training expenses by an employer, or the employment of certain key personnel. Accordingly, the Colorado

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[32] These considerations have led some courts and commentators to conclude that noncompetition agreements ancillary to employment contracts should be governed by different rules than covenants ancillary to, for example, purchase agreements. *See* Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., [1894] A.C. 535; WILLISTON at § 1643. However, it would seem more precise to formulate the distinction in terms of the relative bargaining powers of the parties and the presence of adequate consideration, which may be problems more apt to occur in an employment context but which will not be characteristic of every employment contract and which may occur occasionally in other types of agreements.

[33] *See* text accompanying notes 110-15 *infra* for a discussion of various statutes.

[34] *Id.* Alabama and Louisiana have both amended statutes to permit at least partial enforcement of employment contract covenants. ALA. CODE tit. 9, §§ 22-24 (1959). LA. REV. STAT. ANN. § 23:921 (1964).

[35] COLO. REV. STAT. ANN. § 8-2-113(2) (1973), quoted in text accompanying note 108.

statute is of interest as a legislative effort to distinguish between a narrowly defined class of covenants which are declared void and all others which continue to be governed by the common law test of reasonableness. In order to evaluate the Colorado statute it is necessary to examine the common law framework against which it was enacted.

II. Colorado Common Law

A. *Establishing the Rule*

1. The Early Cases

The first case considered by a Colorado appellate court involving a noncompetition agreement was *Freudenthal v. Espey*.[36] In that case, the plaintiff, a well-established physician in Trinidad, hired a young doctor under an employment agreement which provided that upon termination of his employment the employee would not engage in " 'the practice of medicine, surgery or obstetrics, or the branches of either in the City of Trinidad . . . for the full period of five years.' "[37] The younger doctor subsequently terminated his employment and soon thereafter started a competitive medical practice in the Trinidad area.

In a thorough review of the applicable precedents and policy considerations, the Colorado Supreme Court stated that restrictive covenants had been viewed with disfavor at common law, but that the modern trend was to uphold such covenants provided that they were "reasonable." The court approvingly quoted *Horner v. Graves*[38] in what came to be viewed as the rule of *Freudenthal*: a covenant will be enforced if it is necessary to protect the covenantee and does not interfere with the interests of the public.[39] Considering the public interest in encouraging a successful medical practitioner to train and assist a younger doctor, the court determined that the covenant was reasonable and should be enforced. The opinion concluded with an unusually strong statement that equity compelled the enforcement of such a contract:

> Here there is an express covenant, with full performance by one, and certain mischief arising from its breach by the other. The mischief cannot be repaired, nor can it well be estimated. The damages are continuing and accruing from day to day. The reasonable and

[36] 45 Colo. 488, 102 P. 280 (1909).

[37] *Id.* at 490, 102 P. at 281.

[38] 131 Eng. Rep. 284 (C.P. 1831).

[39] Freudenthal v. Espey, 45 Colo. 488, 502, 102 P. 281, 285 (1909).

> fair protection to which the plaintiff is entitled can only be obtained by the parties conforming expressly and exactly to the terms of the contract. The defendant is in the wrong. He is deliberately doing what he plainly agreed not to do. The equities are with the plaintiff and the decree is accordingly affirmed.[40]

Four years later, in *Barrows v. McMurtry Manufacturing Co.*[41] the Colorado Supreme Court expanded the *Freudenthal* rule to uphold a covenant of noncompetition ancillary to a contract of sale. Stanley M. Barrows, his brother, and his sister sold substantially all of the assets of their plate glass company, including goodwill, to plaintiffs. The sellers agreed not to participate " 'in any company or corporation which in any way carries on in the state of Colorado any class of business similar to that heretofore carried on by . . .' " the purchasers.[42] Within 2 weeks after the sale, Mr. Barrows caused the incorporation of a new plate glass company in Colorado. In affirming the issuance of an injunction against Barrows, the Colorado Supreme Court noted that restrictive covenants given in consideration of the purchase of the goodwill of a business were almost universally enforced and cited the Colorado rule established in *Freudenthal*.[43] The court then analyzed in detail the public interest, evidencing particular concern with Barrows' contention that enforcement of the covenant would tend toward monopoly. Prior to the sale Barrows had been selling plate glass at a lower price than his competitors, and plate glass prices had risen in Colorado subsequent to the purchase of his business. While acknowledging these facts, the court determined that Barrows had operated at a loss, that this was detrimental to competition, and that the public interest would be better served by the higher prices and greater economic stability which existed subsequent to his sale.[44]

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[40] *Id.* at 506-07, 102 P. at 286.

[41] 54 Colo. 432, 131 P. 430 (1913).

[42] *Id.* at 434, 131 P. at 431.

[43] *Id.* at 441, 131 P. at 433-34.

[44] While it is doubtless true that competition is the life of trade, it is also equally true that competition of a certain sort almost inevitably leads to disaster, not alone to those immediately concerned, but to the public as well. It is safe to say that the general welfare is best served by healthy competition, which allows business enterprise, when conducted with energy and skill, to gather fair returns upon the ability, industry and capital employed. While ruinous competition, which demoralizes an industry and business, and prevents reasonable returns on the investment, may sometimes bring temporary gain to the public, must (sic), in the very nature of things, finally result in general and permanent loss and disaster.

Id. at 448, 131 P. at 436.

The *Barrows* court also intensified the crusade for contractual sanctity declared in *Freudenthal*. It declared that public policy demanded that noncompetition covenants be upheld whenever possible:

> It may not be amiss to here suggest that there can be no sound and wholesome public policy, which operates in the slightest degree to lend approval to the open disregard and violation of personal contracts entered into in good faith, upon good consideration. It is quite as important, as a matter of public interest and welfare, that individuals are not allowed, with impunity, to transgress their solemn undertakings, advisedly entered upon, as it is that the public have protection in other respects. Where one is so lost to a sense of moral obligation as to accept the full consideration for his stock in trade and good-will, upon express condition that he refrain from again entering that business for a limited time, within a certain territory, and then immediately, having pocketed the fruits of the agreement, deliberately and wilfully ignores the controlling condition thereof, courts should certainly not hunt for legal excuse to uphold him in such moral delinquency. On the contrary, in the interest of the general public, and to discourage bad faith conduct of that sort, wherever, without violation of legal principles and public policy, it may be done, contracts like the one under discussion should be rigidly upheld and enforced.[45]

The rule of *Freudenthal* and *Barrows* was simple: a noncompetition agreement would be enforced if it was reasonable, was necessary to protect a valid interest of the covenantee, and imposed no undue hardship on society at large.[46] This is a stern rule, with no consideration for the degree of hardship imposed on covenantors. When only the interests of the covenantee and the public are weighed, and the public is deemed adequately served by such covenants, most covenants will be enforced. When one adds to this the strong language of both *Freudenthal* and *Barrows* for enforcing covenants whenever possible, it is clear that Colorado law has favored the covenantee.

2. Defining "Reasonable"

The key word in the Colorado rule is "reasonable." Having made this the pivotal point in *Barrows*, the Colorado courts then had to decide how to determine reasonableness. It appears that the courts tend toward a two-step approach to reasonableness.

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[45] *Id.* at 447, 131 P. at 436.

[46] Although *Freudenthal* mentions that the covenant should not be oppressive to the covenantor and discusses whether there is adequacy of consideration and mutuality, reasonableness to the covenantor is not incorporated in its rule. 45 Colo. at 502, 102 P. at 285.

First, they decide whether *any* covenant is reasonably necessary to protect the legitimate needs of the covenantee. Second, they determine whether the *particular* covenant before them is reasonable with respect to time, space, and type of activity.[47]

In determining the reasonableness of a noncompetition covenant, the Colorado courts consider whether: (i) the covenantor had frequent contacts with the customers or clients of the covenantee;[48] (ii) the covenantee's business relied to a substantial degree on trade secrets to which the covenantor had access;[49] (iii) the covenantee provided training to the covenantor;[50] (iv) the covenantee's business was highly technical or complex;[51] (v) the covenantee's business was highly competitive;[52] (vi) the covenantor, while employed by the covenantee, was a key employee, for example, in a managerial position;[53] (vii) the covenantor provided unique services while employed by the covenantee.[54] The courts then turn their attention to whether or not the particular covenant being considered is reasonable; that is, does it exceed with respect to time, space, and type of activity what is reasonably required to give the covenantee the protection to which he is entitled.

No covenant has ever been found unreasonable in Colorado on the basis of a time restriction although covenants reviewed have ranged from a term of 6 months to perpetuity.[55] A number

[47] For an articulation of this reasoning, see Gulick v. A. Robert Strawn & Assocs., 477 P.2d 489, 492 (Colo. Ct. App. 1970).

[48] Knoebel Mercantile Co. v. Siders, 165 Colo. 393, 439 P.2d 355 (1968); Electrical Prod. Consol. v. Howell, 108 Colo. 370, 117 P.2d 1010 (1941); Gulick v. A. Robert Strawn & Assocs., 477 P.2d 489 (Colo. Ct. App. 1970).

[49] Zeff, Farrington & Assocs. v. Farrington, 168 Colo. 48, 449 P.2d 813 (1969); Knoebel Mercantile Co. v. Siders, 165 Colo. 393, 439 P.2d 355 (1968); Addressograph-Multigraph Corp. v. Kelley, 146 Colo. 550, 362 P.2d 184 (1961); Colonial Life & Accident Ins. Co. v. Kappers, 488 P.2d 96 (Colo. Ct. App. 1971).

[50] Jim Sprague's Aetna Trailer Sales, Inc. v. Hruz, 172 Colo. 469, 474 P.2d 216 (1970); Whittenberg v. Williams, 110 Colo. 418, 135 P.2d 228 (1943).

[51] Electrical Prod. Consol. v. Howell, 108 Colo. 370, 117 P.2d 1010 (1941); Barrows v. McMurtry Mfg. Co., 54 Colo. 432, 131 P. 430 (1913); Freudenthal v. Espey, 45 Colo. 488, 102 P. 280 (1909).

[52] Goldammer v. Fay, 326 F.2d 268 (10th Cir. 1964); Electrical Prod. Consol. v. Howell, 108 Colo. 370, 117 P.2d 1010 (1941).

[53] Trans-American Collections, Inc. v. Continental Account Servicing House, Inc., 342 F. Supp. 1303 (D. Utah 1972); Knoebel Mercantile Co. v. Siders, 165 Colo. 393, 439 P.2d 355 (1968).

[54] Knoebel Mercantile Co. v. Siders, 165 Colo. 393, 439 P.2d 355 (1968).

[55] *See, e.g.*, Axelson v. Columbine Laundry Co., 81 Colo. 254, 254 P. 990 (1927) (employment contract—6 mos.); Jewel Tea Co. v. Watkins, 26 Colo. App. 494, 145 P. 719 (1915) (employment contract—1 yr.); Trans-American Collections, Inc. v. Continental

of covenants have, however, been found unreasonable because of the scope of the geographic area involved.[56] The courts have provided little explanation of the basis for such determinations. On the other hand, in one case, a Utah federal district court applying Colorado law enforced a nationwide territorial restriction. The court found that (1) the plaintiff-employer had provided national exposure to the defendant-employee by reproducing his sales presentations at sales clinics throughout the country and inviting him to speak at a national sales convention; (2) the employee, who had been in a managerial position, had been trained by the agency and had had numerous customer contacts which would have enabled him to set up a competing business easily; (3) the competitive activity to be restrained was only the relatively narrow activity of selling flat-rate account collection letters; and (4) the former employee could apply his sales expertise in other noncompetitive activities without great hardship.[57]

The courts have never modified the terms of a covenant with respect to the type of activity restrained, although in one case the court narrowly construed its terms. Where a salesman agreed not

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Account Servicing House, Inc., 342 F. Supp. 1303 (D. Utah 1972) (employment contract—2 yrs.); Zeff, Farrington & Assocs. v. Farrington, 168 Colo. 48, 449 P.2d 813 (1969) (employment contract—3 yrs.); Cantrell v. Lemons, 119 Colo. 107, 200 P.2d 911 (1948) (sale of a business—5 yrs.); Flower Haven, Inc. v. Palmer, 502 P.2d 424 (Colo. Ct. App. 1972) (sale of a business—5 yrs.); Ditus v. Beahm, 123 Colo. 550, 232 P.2d 184 (1951) (sale of a business—50 yrs.); Weber v. Nonpareil Baking Co., 85 Colo. 232, 274 P. 932 (1929) (sale of a business—in perpetuity). *But see* Taff v. Brayman, 518 P.2d 298 (Colo. Ct. App. 1974) in which the trial court determined that a 2-year restriction was excessive but the appellate court reversed apparently because the defendant failed to show that the period was excessive. *See generally* Annot., 41 A.L.R.2d 15 (1955) for a discussion of reasonable time as defined by other jurisdictions.

[56] *See, e.g.*, Gulick v. A. Robert Strawn & Assocs., 477 P.2d 489, 490 (Colo. Ct. App. 1970) (territorial restriction reduced from "within a radius of thirty-five (35) miles of SNELLING'S office, or within a radius of thirty-five (35) miles of any city in which a 'Snelling and Snelling' office is located" to within 10 miles from the boundaries of Denver); Wagner v. A & B Personnel Sys., Ltd., 473 P.2d 179, 180 (Colo. Ct. App. 1970) (territorial restriction reduced from "within fifty (50) miles of any city in which Agency is doing business" to within 50 miles of Denver); Whittenberg v. Williams, 110 Colo. 418, 419, 135 P.2d 228 (1943) (worldwide territorial restriction reduced to "that portion of Colorado south of the northern boundary of the City and County of Denver and east of the Rocky Mountains"). Covenants were enforced in Axelson v. Columbine Laundry Co., 81 Colo. 254, 254 P. 990 (1927) (territorial restriction of City and County of Denver); Jewel Tea Co. v. Watkins, 26 Colo. App. 494, 145 P. 719 (1915) (territory that employee worked); Ditus v. Beahm, 123 Colo. 500, 232 P.2d 184 (1951) (50-mile radius); Barrows v. McMurtry Mfg. Co., 54 Colo. 432, 131 P. 430 (1913) (State of Colorado); Trans-American Collections, Inc. v. Continental Account Servicing House, Inc., 342 F. Supp. 1303 (D. Utah 1972) (entire United States). *See generally* Annot., 41 A.L.R.2d 15 (1955).

[57] Trans-American Collections, Inc. v. Continental Account Servicing House, Inc., 342 F. Supp. 1303 (D. Utah 1972).

to compete in soliciting, taking, and delivering orders for "teas, coffees, baking powder, extracts, spices, cocoa *or other merchandise*,"[58] the court stated that if "other merchandise" included all other merchandise, the activity restraint might be too broad. Therefore, the court read "other merchandise" to mean other merchandise of the same or similar type and upheld the covenant on the grounds that a covenant, when ambiguous, should be interpreted to make it reasonable.[59] The result has been, then, a determination of reasonableness on the facts of each case.

B. *Balancing Conflicting Interests*

The general rule has sometimes been stated that a "reasonable" covenant is one that gives the protected party its due without unfair harm to others, including society as a whole.[60] This is not, however, the formulation which has been applied in Colorado. The very first Colorado case stated that, aside from the issue of reasonableness, the court must analyze the interests of the covenantee and the concerns of the general public.[61] Although two Colorado cases have discussed the public interest in specific noncompetition covenants[62] and many cases have declared that the public has an interest in seeing contracts enforced as written,[63] no covenant in this state has ever been rejected as offending public policy. It therefore appears that the concerns of society at large have had little real effect on noncompetition decisions in Colorado.

The early statements of Colorado law were later brought into closer accord with the generally accepted modern rule. In

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[58] Jewel Tea Co. v. Watkins, 26 Colo. App. 494, 495, 145 P. 719, 720 (1915).

[59] In a few rare cases the covenant itself has restricted activity to a narrow area. *See* Colonial Life & Accident Ins. Co. v. Kappers, 488 P.2d 96 (Colo. Ct. App. 1971) in which the employee was merely prohibited from selling certain specified insurance policies to customers with whom he dealt while in the employ of the covenantee.

[60] RESTATEMENT OF CONTRACTS § 515 (1932); Blake at 648-49.

[61] Freudenthal v. Espey, 45 Colo. 488, 102 P. 280 (1909).

[62] Barrows v. McMurtry Mfg. Co., 54 Colo. 432, 131 P. 430 (1913) (the public would be served by the raising of plate glass prices); Freudenthal v. Espey, 45 Colo. 488, 102 P. 280 (1909) (it would be useful to the public to have a young doctor excluded from practice in Trinidad). *See* text accompanying notes 36-46 *supra*.

[63] Jim Sprague's Aetna Trailer Sales, Inc. v. Hruz, 172 Colo. 469, 474 P.2d 216 (1970); Zeff, Farrington & Assocs. v. Farrington, 168 Colo. 48, 449 P.2d 813 (1969); Mabray v. Williams, 132 Colo. 523, 291 P.2d 677 (1955); Whittenberg v. Williams, 110 Colo. 418, 135 P.2d 228 (1941); Barrows v. McMurtry Mfg. Co., 54 Colo. 432, 131 P. 430 (1913); Freudenthal v. Espey, 45 Colo. 488, 102 P. 280 (1909); Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971); Wagner v. A & B Personnel Sys., Ltd., 473 P.2d 179 (Colo. Ct. App. 1970).

Whittenberg v. Williams[64] the court recognized that consideration should also be given to hardship of the covenantor:

> Such restrictions to be valid must be reasonable, not impose undue hardship, be no wider than necessary to afford the required protection, and that each case must stand upon its own facts.[65]

The reference to hardship in the *Whittenberg* opinion is dictum; the court proceeded to grant partial enforcement of the covenant without reference to the effect this might have on the covenantor. The *Whittenberg* case quoted the *Barrows* language to the effect that there was a duty to enforce contracts against those who signed them as if this were the principal basis of the decision.[66] However, the recognition of the interests of covenantors has remained and although it has sometimes been followed, it seems more honored in the breach than in the observance.[67]

In at least two cases, *Goldammer v. Fay*[68] and *Knoebel Mercantile Co. v. Siders*,[69] courts have weighed the hardship on the covenantor against the benefit to the covenantee and then decided against enforcement. These cases deserve careful attention as illustrations of how the Colorado rule works when thoroughly applied. In *Goldammer* the various plaintiffs had sold a franchise to the Fays to operate a Dairy Queen business in Colorado Springs. The franchise agreement contained a 2-year restrictive covenant whereby Mr. and Mrs. Fay agreed not to "directly or indirectly engage in any competitive business"[70] in the Colorado Springs area. The franchise operation was unsuccessful, the Fays

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[64] 110 Colo. 418, 135 P.2d 228 (1943).

[65] *Id.* at 420, 135 P.2d at 229. The court said that this statement, which was put forth by the defendant, "is unquestionably the law." *Id.* This rule was first discussed in Electrical Prod. Consol. v. Howell, 108 Colo. 370, 117 P.2d 1010 (1941). However, subsequent cases refer to it as "the rule of *Whittenberg*."

[66] 110 Colo. at 422, 135 P.2d at 229.

[67] *See* Goldammer v. Fay, 326 F.2d 268 (10th Cir. 1964) (covenant not enforced because of undue harm to covenantor); Knoebel Mercantile Co. v. Siders, 165 Colo. 393, 439 P.2d 355 (1968) (covenant not enforced because of undue harm to salesman who would have to leave region or forego life-time work); *cf.* Trans-American Collections, Inc. v. Continental Account Servicing House, Inc., 342 F. Supp. 1303 (D. Utah 1972) (covenant enforced because, among other considerations, no undue harm to salesman would result); Electrical Prod. Consol. v. Howell, 108 Colo. 370, 117 P.2d 1010 (1941) (summary judgment in favor of defendant reversed because undue hardship is a question of fact). Contrast these cases with the puzzling dictum in Flower Haven, Inc. v. Palmer, 502 P.2d 424 (Colo. Ct. App. 1972): "Under these circumstances, the fact that hardship will result from enforcement of the covenant is not a defense to a willful and deliberate violation of a reasonable covenant." *Id.* at 426.

[68] 326 F.2d 268 (10th Cir. 1964).

[69] 165 Colo. 393, 439 P.2d 355 (1968).

[70] 326 F.2d at 268.

terminated the franchise, and they converted the facilities, which they owned, to an establishment known as "Fays Drive-In." The business was operated primarily as a coffee shop, but ice cream was sold along with other products.

The trial court refused to issue an injunction, and the Tenth Circuit affirmed, emphasizing that an injunction is to be granted only when necessity is clearly established.[71] The court found that the Fays terminated the franchise because it was not profitable; that they had attempted in good faith to differentiate their new operation from Dairy Queen; that they had a substantial investment in the new business; that the competition which they presented to Dairy Queen was no different in kind from that of many other establishments in Colorado Springs; and that consequently, to grant an injunction would be an undue hardship on the Fays with no comparable benefit to the Goldammers.

Four years later in *Knoebel* the Colorado Supreme Court used similar reasoning. Siders had executed a restrictive covenant with the Knoebel Mercantile Co., agreeing not to compete for a period of 2 years

> in the institutional food, paper and supply business, bakery supply business, and janitorial supply business, or any part thereof in all or any part of the State of Colorado, Wyoming, Montana, New Mexico, Nebraska, Kansas, So. Dakota, and any other State in which Employer transacts its business at any time up to the date of such employment termination.[72]

The court emphasized that it was not until Siders reported for work at Knoebel that he realized his job was conditional upon signing the noncompetition agreement. After working for Knoebel in the Colorado Springs area for over 2 years, Siders terminated his employment and went to work for another company which was at least partially competitive with Knoebel. The undisputed evidence showed that in his new job Siders solicited some Knoebel customers but that there was nothing unique either about the services he rendered while working for Knoebel or the customer and merchandise information he acquired at Knoebel. The trial court determined, and the supreme court agreed, that the contractual restriction on Siders was unreasonable under all the pertinent circumstances and cited language from *Goldammer* that an injunction would not benefit the plaintiff and would be a

[71] *Id.* at 270.

[72] 165 Colo. at 395, 439 P.2d at 356.

serious detriment to the defendant.[73]

The *Knoebel* decision represents a sound statement of the general rules applicable to restrictive covenants. It does not, however, seem perfectly compatible with such cases as *Addressograph-Multigraph Corp. v. Kelley*[74] and *Whittenberg v. Williams*[75] which had preceded it. The *Knoebel* court, for example, ignored earlier statements that covenants should be enforced wherever possible simply as a matter of public policy and morality.[76] The application of the rules in *Knoebel* may therefore be subject to criticism both as being too lenient to the employee and as being less than totally consistent with prior decisions under Colorado law. Both *Knoebel* and *Goldammer* demonstrate, however, an attempt to balance the hardship to the covenantor against the legitimate needs of the covenantee in determining whether or not an injunction should issue. It must be emphasized that *Knoebel* and *Goldammer* are unique both in the results reached and in the careful balancing analyses of the competing interests of the covenantor and covenantee. While they cannot be relied on as the final word, they do illustrate the potential for fairness which exists in the Colorado common law rule.

C. *Enforcement of Covenants*

Knoebel and *Goldammer* notwithstanding, the definite tendency in Colorado has been to enforce a noncompetition covenant by granting an appropriate injunction. Colorado courts have ruled that a covenant should be construed in the manner most likely to make it enforceable,[77] that assignees may enforce covenants not to compete,[78] that the burden of proof in establishing unreasonableness rests on the covenantor,[79] and that the existence of a noncompetition covenant may be shown through parol evidence.[80] Two particular problems in the area of enforcement

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[73] *Id.* at 398, 439 P.2d at 359.

[74] 146 Colo. 550, 362 P.2d 184 (1961) (enforcing covenant ancillary to employment contract prohibiting competition in exterminating business for 5 years).

[75] 110 Colo. 418, 362 P.2d 184 (1961) (enforcing covenant ancillary to salesman's employment contract prohibiting competition within 100 miles of Denver for 1 year).

[76] *See, e.g.*, discussion of *Barrows* in text accompanying notes 40-45 *supra*.

[77] *See* Jewel Tea Co. v. Watkins, 26 Colo. App. 494, 145 P. 719 (1915).

[78] *See* Cantrell v. Lemons, 119 Colo. 107, 200 P.2d 911 (1948); Flower Haven, Inc. v. Palmer, 502 P.2d 424 (Colo. Ct. App. 1972).

[79] Taft v. Brayman, 518 P.2d 298 (Colo. Ct. App. 1974); *see* Jim Sprague's Aetna Trailer Sales, Inc. v. Hruz, 172 Colo. 469, 474 P.2d 216 (1970).

[80] *See* Cantrell v. Lemons, 119 Colo. 107, 200 P.2d 911 (1948).

warrant special attention: the grounds for which a court may issue an injunction and the circumstances in which a court may partially enforce a covenant.[81]

1. Basis for Injunctive Relief

One of the most marked developments in Colorado law has been the tendency to grant an injunction almost automatically once a valid covenant is established. This approach is set forth most explicitly in *Ditus v. Beahm*,[82] an action brought by partners to enforce a noncompetition agreement entered into by their ex-partner in connection with his sale of partnership assets to them. The court properly cited the general rule:

> Where an established business has been sold with its goodwill and there is a valid covenant not to compete, a breach is regarded as the controlling factor and injunctive relief follows almost as a matter of course. In such cases, the damage is presumed to be irreparable and the remedy at law is considered inadequate. It is not necessary that the buyer first prove special pecuniary damages or show an actual loss of customers who might in any event have discontinued their patronage. Injunctive relief may be given, even though only nominal damages are shown, or although no actual damage is shown.[83]

Thus, if a valid covenant is established, an injunction follows as a matter of course, without further inquiry into irreparable harm or other equitable considerations. While this may be entirely reasonable where the covenant has been bargained for and consideration has been given, as in a covenant ancillary to a contract of sale, it is not defensible in the typical employment contract situation where the employee does not have full understanding or adequate bargaining power and where no consideration is given for the covenant. Nonetheless, the same rule has often been followed in employment contract cases.[84]

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[81] Damages for breach of a noncompetition covenant have been sought in 12 of the 26 Colorado cases and have been awarded only in Wagner v. A & B Personnel Sys., Ltd., 473 P.2d 179 (Colo. Ct. App. 1970), Colorado Urological Assocs., P.C. v. Grossman, 529 P.2d 625 (Colo. Ct. App. 1974), and in Trans-American Collections, Inc. v. Continental Account Servicing House, Inc., 342 F. Supp. 1303 (D. Utah 1972).

[82] 123 Colo. 550, 232 P.2d 184 (1951).

[83] *Id.* at 551-52, 232 P.2d at 185, *quoting* 43 C.J.S. *Injunctions* § 84 at 566-67 (1945). The court does not refer to Freudenthal v. Espey, 45 Colo. 488, 102 P. 280 (1909), in which it was determined that an injunction does not automatically follow a finding that the covenant at issue is reasonable, but *Freudenthal* is arguably distinguishable because it involved a covenant ancillary to an employment agreement.

[84] Addressograph-Multigraph Corp. v. Kelley, 146 Colo. 550, 362 P.2d 184 (1961); Mabray v. Williams, 132 Colo. 523, 291 P.2d 677 (1955); Whittenberg v. Williams, 110 Colo. 418, 135 P.2d 228 (1943). These courts, however, did not cite *Ditus* as authority for their action. Rather, they apparently relied on the language of Barrows v. McMurtry Mfg.

This approach was modified by the Tenth Circuit in *Goldammer v. Fay*,[85] in which the court refused to grant an injunction absent a showing of irreparable harm, and distinguished the Colorado cases on the ground that the equitable considerations were different. The Colorado state courts, though, have ignored *Goldammer*, returning in *Flower Haven, Inc. v. Palmer*[86] to the *Ditus* rule.[87]

The *Ditus* rule, however, may be rationalized. In determining whether a covenant not to compete is reasonably necessary to protect the covenantee, the court takes into account the same factual considerations necessary to conclude that the covenantee has an inadequate remedy at law and will suffer irreparable harm if the injunction does not issue.[88] Similarly, when the court balances the needs of the covenantee and the public against those of the covenantor, it is merely balancing the equities.[89] Hence, it may be argued that in finding that a covenant is reasonable or valid, a court simultaneously determines that an equitable remedy is appropriate. A separate consideration of the validity of the covenant and the availability of an equitable remedy is then unnecessary since both often involve the same considerations. However, some Colorado decisions appear to take a short cut by simply assuming that if the restrictive agreement was validly entered into, it is valid, hence reasonable, and hence enforceable.[90]

2. Partial Enforcement

The Colorado courts have on occasion reduced the geographic area of a noncompetition covenant because the larger area was unnecessary to protect the legitimate needs of the coven-

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Co., 54 Colo. 432, 448-94, 131 P. 430, 436 (1913). *See* text accompanying note 45 *supra*.

In fairness, there were defensible grounds for granting an injunction on the facts of each of the cases which used the *Ditus* approach. Thus, in *Addressograph* the defendants admitted doing business with persons they had dealt with while employed by plaintiff; in *Mabray* the appellate court was merely affirming a trial court injunction and observed that the record was insufficient to require a reversal of that injunction.

[85] 326 F.2d 268 (10th Cir. 1964) (an action by a franchisor to enforce a covenant against a franchisee).

[86] 502 P.2d 424, 426 (Colo. Ct. App. 1972).

[87] *See* text accompanying notes 82-84 *supra*.

[88] *See* Ditus v. Beahm, 123 Colo. 550, 232 P.2d 184 (1951); Freudenthal v. Espey, 45 Colo. 488, 102 P. 208 (1909). *See also* cases cited in note 84 *supra*.

[89] For a general discussion of equitable considerations relevant to the issuance of an injunction, see D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES §§ 2.4, .5 (1973).

[90] *See, e.g.*, Jim Sprague's Aetna Trailer Sales, Inc. v. Hruz, 172 Colo. 469, 474 P.2d 216 (1970); Whittenberg v. Williams, 110 Colo. 418, 135 P.2d 288 (1943).

antee.[91] The court in *Barrows*, for example, observed that even though a contract is unreasonable as to its terms, the contract should be enforced "wherever it is possible to so divide it as to declare it binding over such territory as is necessary for the protection of the purchaser."[92] Commonly known as the "blue pencil doctrine," this approach can be used only if the unreasonable restrictions are severable from the reasonable restrictions. Corbin describes the doctrine as follows:

> [I]f the promise is so worded that the excessive restraint can be eliminated by crossing out a few of the words with a blue pencil while at the same time the remaining words constitute a complete and valid contract, the contract as blue penciled will be enforced.[93]

In subsequent cases the "blue pencil" language was dropped by the Colorado courts and the doctrine of partial enforcement, which would enforce contracts to the extent that they were reasonable regardless of the terms, was adopted.[94] Thus, in *Whittenberg* and several subsequent cases[95] the court in effect

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[91] Whittenberg v. Williams, 110 Colo. 418, 135 P.2d 228 (1943) (limited contract specifying no territorial limitation to that portion of Colorado south of the northern boundary of the City & County of Denver and east of the Rocky Mountains); Gulick v. A. Robert Strawn & Assocs., 477 P.2d 489 (Colo. Ct. App. 1970) (limited contract which precluded competition within 35 miles of any city in which Snelling & Snelling office is located to within 10 miles from the boundary of Denver); Wagner v. A & B Personnel Sys., Ltd., 473 P.2d 179, 180 (Colo. Ct. App. 1970) (limited contract prohibiting competition within "50 miles of any city in which agency was doing business" to within 50 miles of agency's location in downtown Denver).

[92] Barrows v. McMurtry Mfg. Co., 54 Colo. 432, 438, 131 P. 430, 432 (1913), *quoting* A. EDDY, THE LAW OF COMBINATIONS § 681 (1901).

[93] CORBIN § 1390 at 67.

[94] This view has been advocated by leading commentators, *id.*; WILLISTON at §§ 1647A-47B; Wetzell, *supra* note 1, at 66; Comment, *Contracts — Partial Enforcement of Restrictive Covenants*, 50 N.C.L. REV. 689 (1972); it has also been adopted by a growing minority of states. *See* McQuown v. Lakeland Window Cleaning Co., 136 So. 2d 370 (Fla. Dist. Ct. App. 1962); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971); Hopkins v. Crantz, 334 Mich. 300, 54 N.W.2d 671 (1952); Conforming Matrix Corp. v. Faber, 108 Ohio App. 8, 146 N.E.2d 447 (1957); Jacobson & Co. v. International Environment Corp., 427 Pa. 439, 235 A.2d 612 (1967).

[95] *See* cases cited note 91, *supra*. Gulick v. A. Robert Strawn & Assocs., 477 P.2d 489 (Colo. Ct. App. 1970) is the only Colorado case to cite authority for its partial enforcement. *Gulick* refers to Wood v. May, 73 Wash. 2d 307, 438 P.2d 587 (1968) and Kelite Prod., Inc. v. Brandt, 206 Ore. 636, 294 P.2d 320 (1956). In *Wood*, the court quoted heavily from Williston and Corbin as follows:

> Professor Corbin, in approving the latter test, says:
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> > An agreement restricting competition may be perfectly reasonable as to a part of the territory included within the restriction but unreasonable as to the rest. Will the courts enforce such an agreement in part while holding the remainder invalid? It renders no service to say that the answer depends upon whether or not the

reformed the contract to cover a lesser area than that provided for in the restrictive covenant.

The argument often presented against partial enforcement is that it encourages employers in particular to write overly broad covenants secure in the knowledge that the courts will enforce them to the maximum degree considered justifiable. This has a dampening effect on covenantors, especially those who cannot afford a legal fight, and it places the courts in the position of having to rewrite contracts for the parties.[96] On the other hand, it is argued that so long as a valid covenant does exist between the parties, the court should grant relief based on what the court

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> contract is "divisible." "Divisibility" is a term that has no general and invariable definition; instead the term varies so much with the subject-matter involved and the purposes in view that its use either as an aid to decision or in the statement of results tends to befog the real issue.
>
> With respect to partial illegality, the real issue is whether partial enforcement is possible without injury to the public and without injustice to the parties themselves. It is believed that such enforcement is quite possible in the great majority of cases. If a seller whose business and good will do not extend beyond the city limits of Trenton promises not to open a competing business anywhere within the state of New Jersey, the restriction is much greater than is reasonable. This is a good reason for refusing to enjoin the seller from doing business in Newark; but it is not a good reason for permitting him to open up a competing store within the same block in Trenton. 6A Corbin, Contracts § 1390 at 66 (1962).

And, at 104:

> As in the case of contracts restraining the seller of a business with its good will, the fact that the restriction on an employee goes too far to be valid as a whole does not prevent a court from enforcing it in part insofar as it is reasonable and not oppressive. The injunction may be made operative only as to reasonable space and time; *** 6A Corbin, Contracts § 1394 (1962).

Professor Williston's comments on the subject are as follows:

> If a sharply defined line separated a restraint which is excessive territorially from such restraint as is permissible, there seems no reason why effect should not be given to a restrictive promise indivisible in terms, to the extent that it is lawful. If it be said that the attempt to impose an excessive restraint invalidates the whole promise, a similar attempt should invalidate a whole contract, though the promises are in terms divisible. Questions involving legality of contracts should not depend on form. Public policy surely is not concerned to distinguish differences of wording in agreements of identical meaning. 5 Williston, Contracts § 1660 (rev. ed. 1937).

73 Wash. 2d 307, 313-14, 438 P.2d 587, 591 (1968).

[96] Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 374 (Iowa 1971) (Becker, J., dissenting); Hamilton v. Wosepka, 261 Iowa 299, 154 N.W.2d 164 (1967); Comment, *Contracts—Partial Enforcement of Restrictive Covenants*, 50 N.C.L. REV. 689 (1972).

determines is just under the circumstances, thereby preventing a party from totally abandoning his contractual obligation.[97]

The most striking aspect of the Colorado treatment of partial enforcement is the failure of the state's highest court to follow the doctrine in *Knoebel Mercantile Co. v. Siders*, [98] a situation in which it seemed ideally appropriate. In that case, Siders took a job in the Colorado Springs area, signed a noncompetition agreement with Knoebel which covered virtually the entire Rocky Mountain area and then left to join a Colorado Springs competitor.[99] Partial enforcement in Colorado Springs would have fully protected Knoebel and considerably lessened the potential hardship on Siders, but it appears that the court simply decided that no covenant was justified under the circumstances, no matter how reasonable its terms.[100] This case then suggests the possibility that Colorado courts may practice a kind of selective partial enforcement so that in a close case an overly broad covenant may result in no enforcement at all.

D. *Critique of Colorado Common Law*

In *Zeff, Farrington & Associates v. Farrington*,[101] decided a few months after *Knoebel*, the court backed away from the balancing approach of *Knoebel* and *Goldammer*[102] and returned to its practice of enforcing restrictive covenants with little attention to competing interests. The court stated:

> The rule is well-settled in Colorado that reasonable covenants not to compete will be enforced and that what is reasonable depends

[97] Corbin, *A Comment on* Beit v. Beit, 23 CONN. B.J. 43 (1949); Williston, *A Note on* Beit v. Beit, 23 CONN. B.J. 40 (1949); *see* Fullerton Lumber Co. v. Torborg, 270 Wis. 133, 70 N.W.2d 585 (1955).

[98] 168 Colo. 48, 449 P.2d 813 (1968). *See* text accompanying notes 72-73 *supra*.

[99] NOW, THEREFORE, in consideration of Employer's hiring Employee and for other good and valuable consideration, Employee promises and agrees that in the event of the termination of his said employment for any reason whatsoever, for a period of two years from and after the date of such termination he will not, directly or indirectly, either as an owner, officer, employee, agent or otherwise, engage in the institutional food, paper and supply business, bakery supply business, and janitorial supply business, or any part thereof in all or any part of the State of Colorado, Wyoming, Montana, New Mexico, Nebraska, Kansas, So. Dakota, and any other State in which Employer transacts its business at any time up to the date of such employment termination. . . .

165 Colo. at 394-95, 439 P.2d at 356.

[100] *Cf.* Gulick v. A. Robert Strawn & Assocs., 477 P.2d 489 (Colo. Ct. App. 1970) where the court used similar analysis.

[101] 168 Colo. 48, 449 P.2d 813 (1969).

[102] *See* text accompanying notes 68-80 *supra*.

> upon the facts of each case. We deem it significant that in 9 out of 10 cases cited, the court upheld the enforceability of the noncompetitive covenant. This substantial precedent evinces the court's unwillingness to search out legal excuses for a willful and deliberate violation of a reasonable covenant not to compete. We here declare renewed approval of this precedent.[103]

The court then proceeded, after a relatively sketchy analysis of the covenantor's experience and access to confidential information, to declare that an agreement restricting competition for 3 years within a 200-mile radius of Denver was reasonable, giving no explicit consideration to the potential hardships that were thereby imposed on the defendant.

The next, and most recent decision of the Colorado Supreme Court, *Jim Sprague's Aetna Trailer Sales, Inc. v. Hruz*,[104] embodied all that is objectionable in the Colorado common law and demonstrates why legislative reform seemed necessary. In that case the trial court had denied both damages and an injunction to a mobile home company in an action brought pursuant to a noncompetition covenant against an ex-salesman. The covenantor, Hruz, left his job with Jim Sprague's Aetna Trailer Sales after 4 months and went to work for a rival company. During the first 2 months on his new job in which he sold a total of 7 or 8 trailers, he dealt with one customer who knew him from his previous position. The court placed some emphasis on the fact that Hruz was a retired military man who had very little sales experience and no mobile home sales experience prior to working for the plaintiff. The Colorado Supreme Court reversed the trial court, which had denied the issuance of an injunction, and remanded with instructions to enter an injunction in conformity with the covenant.

While there were factual distinctions between *Knoebel* and *Jim Sprague's*,[105] the court failed to note, much less discuss, the significance of such distinctions. Instead, it rested its decision on three bases: (1) the territorial and chronological limits of the Hruz covenant were less than those which had been approved in other cases; (2) Hruz failed as a matter of law to carry the burden of proving that the covenant was unreasonable; and (3) Hruz

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[103] 168 Colo. at 50, 449 P.2d at 814 (citations omitted).

[104] 172 Colo. 469, 474 P.2d 216 (1970).

[105] For example, Siders was an experienced salesman, while Hruz was not. For a discussion of *Knoebel*, see text accompanying notes 72-73 *supra*.

signed a valid covenant with full knowledge of its significance. The *Jim Sprague's* decisions is also puzzling because the lower court's denial of monetary damages was affirmed, leaving one to wonder how the likelihood of irreparable harm was established if no actual damages had resulted from an extended period of breach.

Since the *Jim Sprague's* decision, eight other cases have been decided under Colorado law, none of which have denied injunctive relief on substantive grounds. The courts have continually emphasized that each case must be determined on its own facts and circumstances; but even where such facts and circumstances are relatively similar, the courts have sometimes arrived at different conclusions. For instance, in *Wagner v. A & B Personnel Systems, Ltd.*,[106] the court limited the enforcement of a restrictive covenant to an area within 50 miles of Denver. In the same year, another division of the court of appeals[107] considered a noncompetition covenant which restrained an employee in the same line of business from competing within a radius of 35 miles of any of the employer's offices. The court modified the territorial restriction to enforce the covenant within an area 10 miles from the boundaries of Denver. It is difficult to explain an analysis which permits a conclusion that a 50-mile radius is reasonable for one employee and a 10-mile radius is reasonable for another engaged in the same type work.

In summary it can be said that the express Colorado rule is in accord with the *Restatement of Contracts*, although "reasonable" in Colorado often seems to be construed as meaning little more than "validly entered into." Once this determination is made, courts seem to consider little else. Only *Goldammer* and *Knoebel* exhibit an attempt to weigh the hardship on the covenantor against the benefit to the covenantee, and many cases hardly seem to consider whether the covenantee even needs the protection.

It therefore appears that there are at least two valid grounds for criticizing the Colorado cases: (1) the decisions have not been altogether consistent; and (2) there is a tendency to enforce noncompetition agreements without sufficient consideration of the rights of, and the potential hardship to, the covenantor.

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[106] 473 P.2d 179 (Colo. Ct. App. 1970).

[107] Gulick v. A. Robert Strawn & Assocs., 477 P.2d 489 (Colo. Ct. App. 1970).

III. Statutory Reform of Colorado Common Law

Against the background of the common law described above, in 1973 the legislature enacted an amendment to the Colorado statute which now provides:

> (2) Any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void, but this subsection (2) shall not apply to:
>
> (a) Any contract for the purchase and sale of a business or the assets of a business;
> (b) Any contract for the protection of trade secrets;
> (c) Any contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years;
> (d) Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.[108]

The amendment declares a narrowly defined class of covenants void, leaving all others subject to the existing judicial tests of reasonableness.[109]

Although several other states have passed statutes limiting noncompetition covenants, section 113 differs substantially in language and in substance from all of them. Five states—California, Montana, Oklahoma, North Dakota, and Michigan—have adopted statutes declaring every restrictive covenant void except when given in connection with a sale of business goodwill or the dissolution of a partnership.[110] Two other states—Florida and Alabama—have similar laws, but also permit noncompetition covenants ancillary to employment contracts.[111] Louisiana forbids restrictive covenants between employers and employees except to the extent that restrictions may be justified

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[108] Colo. Rev. Stat. Ann. § 8-2-113(2) (1973) [hereinafter referred to as section 113].

[109] As of this writing, no appellate case has interpreted section 113 and, accordingly, much of the following discussion of the statute is necessarily speculative.

[110] Cal. Bus. & Prof. Code §§ 16600-02 (West 1964) (enacted in 1872; amended in 1945 to include sale of stock by a shareholder; amended in 1963 to delineate further the nature of sales in which covenants not to compete are permissible, particularly with respect to the sale of a subsidiary); Mich. Comp. Laws Ann. §§ 445.761, .766 (1967) (enacted in 1905); Mont. Rev. Codes Ann. §§ 13-807 to 809 (1947) (derived from California Civil Code and enacted in 1895); N.D. Cent. Code § 9-08-06 (1959) (derived from California Civil Code and enacted in 1877); Okla. Stat. Ann. tit. 15, §§ 217-19 (1966) (enacted in 1890).

[111] Ala. Code tit. 9, §§ 22-24 (1958) (enacted in 1923 and amended in 1931 to provide exceptions in favor of purchaser of good will and employer); Fla. Stat. Ann. § 542.12 (1972) (enacted in 1953).

by training or advertising expenses.[112] The South Dakota statute has exemptions for sales and partnership dissolution and also permits employment covenants between practitioners who must be duly licensed by the state.[113] Wisconsin declares all noncompetition contracts which are ancillary to employment contracts void except those reasonably necessary for the protection of the employer and further abolishes partial enforcement if the contract contains unreasonable limitations.[114]

A. *Operative Language*

The differences between these statutes and Colorado's may be better appreciated by a detailed comparison between section 113 and the operative language of the Oklahoma statute, which is typical of other states:

> Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by the next two sections, is to that extent void.[115]

The operative portion of section 113 states:

> Any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void . . . .[116]

There are three significant differences between the Oklahoma statute and section 113: (1) the Oklahoma statute affects "every contract by which anyone is restrained" while section 113 voids "any covenant not to compete which restricts"; (2) the Oklahoma statute applies to restrictions on "a profession, trade, or business" while section 113 is limited to "performance of skilled or unskilled labor"; and (3) the Oklahoma statute voids any agreement which would restrain one from "exercising" specified activities while section 113 only protects the right to receive compensation from an employer.

1. Noncompetition Covenant

Is there any difference between a "covenant not to compete" and a contract by which one is restrained from engaging in certain

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[112] LA. REV. STAT. ANN. § 23:921 (1964) (enacted in 1934; 1962 amendment added a training and advertising exception; restraint limited to 2 years and employee's territory or route).

[113] S.D. COMPILED LAWS ANN. §§ 53-9-8 to -11 (1969) (enacted in 1877; employee covenant may not restrain activity for more than 10 years or for more than a 25-mile radius from employer's principal place of business).

[114] WIS. STAT. ANN. § 103.465 (1974) (enacted in 1957).

[115] OKLA. STAT. ANN. tit. 15 § 217 (1966) (footnote omitted).

[116] COLO. REV. STAT. ANN. § 8-2-113(2) (1973).

activities? A restraint includes any contractual obligation which may discourage one from entering into competitive activity. For example, it may include loss of accrued but unpaid commissions,[117] loss of retirement or profit sharing incentives,[118] and similar penalties which discourage but do not forbid one from entering into competition.[119] A "covenant not to compete," on the other hand, might be described as including only an absolute ban on engaging in competitive activity. The distinction, arguably, is between a covenant which discourages competition and a covenant which forbids competition.

A "covenant not to compete" does not have any precise legal definition. The only other state statute which uses language comparable to section 113 is that of Wisconsin which refers to "[a] covenant by an assistant, servant or agent not to compete with his employer."[120] Courts which have applied this language have concluded, with relatively little analysis, that a covenant not to compete is synonymous with a contract which restrains competition.[121] Thus, the Wisconsin courts have held that an agreement

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[117] *See, e.g.*, Buskuhl v. Family Life Ins. Co., 271 Cal. App. 2d 514, 76 Cal. Rptr. 602 (1969), which held that a covenant conditioning an insurance agent's rights to continue receiving unaccrued commissions on non-interference with his ex-employer was not a restraint of trade within the meaning of CAL. BUS. & PROF. CODE § 16600 (West 1964).

[118] *See, e.g.*, Couch v. Administrative Comm. of Defco Labs., Inc. Salaried Employees Profit Sharing Trust, 44 Mich. App. 44, 205 N.W.2d 24 (1972) (forfeiture of profit sharing benefits not restraint within Michigan statute). *But see* Muggill v. Reuben H. Donnelley Corp., 62 Cal. 2d 239, 398 P.2d 147, 42 Cal. Rptr. 107 (1965); Frame v. Merrill, Lynch, Pierce, Fenner & Smith, 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1971) (forfeiture of rights under profit sharing plan is a restraint of trade within meaning of CAL. BUS. & PROF. CODE § 16600 (West 1964)). *See also* Comment, *Forfeiture of Pension Benefits for Violation of Covenants Not to Compete*, 61 NW. U.L. REV. 290 (1966); Annot., 18 A.L.R.3d 1246 (1968). However, this issue has been resolved for plans covered by the Employee Retirement Income Security Act of 1974. Section 203 of the Act requires that benefits be nonforfeitable and hence not conditioned upon the post-employment activities of the employee. Pub. L. No. 93-406, § 203 (Sept. 2, 1974), to be codified as 29 U.S.C. § 1053.

[119] Mackie v. State Farm Mut. Auto. Ins. Co., 13 Mich. App. 556, 164 N.W.2d 777 (1968) (loss of special benefits upon competition is a restraint within the Michigan statute); Union Central Life Ins. Co. v. Balistrieri, 19 Wis. 2d 265, 129 N.W.2d 126 (1963) (requirement to return advances if covenantor subsequently competes is restraint within Wisconsin statute). *Contra*, Geiss v. Northern Ins. Agency, 153 N.W.2d 688 (N.D. 1967) (payment of renewal commissions conditioned on noncompetition is not restraint within North Dakota statute).

[120] WIS. STAT. ANN. § 103.465 (1974).

[121] Schroeder v. Gateway Transp. Co., 53 Wis. 2d 59, 191 N.W.2d 860 (1971) (amendment of noncontributory pension plan, eliminating eligibility of retired employees who subsequently work for competitors held to be an unreasonable covenant not to compete); Holsen v. Marshal & Ilsley Bank, 52 Wis. 2d 281, 190 N.W.2d 189 (1971) (amendment to profit sharing and retirement plan, providing that participating employee who intended

depriving a former employee of pension or other retirement rights as a result of subsequent competitive activities is void under the Wisconsin statute.[122] The Wisconsin view is reasonable because the policy of the statute to avoid unwarranted interferences with freedom of employment is enforced by voiding all covenants which indirectly restrict that freedom even though the covenants do not amount to complete prevention of competitive activity. It is likely that a Colorado court would reach a similar decision under section 113(c), the indirect restraint of the recovery of training expenses. This one indirect restraint implies that other indirect restrictions are not permissible.[123]

2. Skilled or Unskilled Labor

The term "skilled or unskilled labor" is not found in any other statute which affects restrictive covenants. Since "skilled or unskilled labor" is not defined anywhere in section 113,[124] one must look outside of the statute for a definition. There are vastly different definitions of the term labor. For example, labor has been defined as signifying "physical or mental labor under any circumstances, and in its broadest sense the term is not confined to physical or manual labor, but includes every possible human exertion, mental or physical, and even spiritual."[125] On the other hand, the term "has been defined as purely physical toil."[126] It does not appear useful to discuss the various definitions which might be used and which are generally derived from fields as diverse as workmen's compensation, labor relations law, and taxation.[127] What is of significance in defining the scope of section

to engage in competitive activity should receive only 50% of his vested participating interest in plan, violated statute); Union Cent. Life Ins. Co. v. Balistrieri, 19 Wis. 2d 265, 120 N.W.2d 126 (1963) (insurance agent's employment contract requiring agent who competes upon termination of employment to repay all advances by employer on commissions held invalid under statute).

[122] Schroeder v. Gateway Transp. Co., 53 Wis. 2d 59, 191 N.W.2d 860 (1971); Holsen v. Marshal & Ilsley Bank, 52 Wis. 2d 281, 190 N.W.2d 189 (1971).

[123] House Hearings, *supra* note 6, infer that pension plans would not be affected by section 113.

[124] But see COLO. REV. STAT. ANN. § 8-16-101(2) (1973), which defines skilled labor and unskilled labor for purposes of classifying workmen, mechanics and laborers in connection with certain public contracts.

[125] 51 C.J.S. *Labor* at 544 (1967).

[126] 48 AM. JUR. 2d *Labor & Labor Relations* § 1 at 49 (1970).

[127] Buckley v. Gibney, 332 F. Supp. 790 (S.D.N.Y. 1971) (Immigration & Nationality Act, 8 U.S.C. § 1153(a)(6) (1970); Addicott v. Upton, 26 Mich. App. 523, 182 N.W.2d 790 (1970) (action against stockholders by former employees to recover unpaid wages under MICH. COMP. LAWS ANN. § 600.2908 (1968); Gabin v. Skyline Cabana Club, 54 N.J. 550, 258 A.2d 6 (1969) (child labor law, N.J. STAT. ANN. §§ 34: 2-21.1, .17 (1965); People v.

113 is the intent and purpose of the statute taken as a whole. The reports of the committee hearings on section 113 indicate that, although the committee was primarily concerned with skilled workers such as plumbers and electricians, the words used were intended to cover a much wider range of activities.[128] More significantly, in considering the original proposal for section 113 the committee added subsection (e) exempting "executive and management personnel and officers and employees who constitute professional staff" from the treatment of the main section.[129] This exception would serve no purpose unless executive and management personnel and professional staff would otherwise be included in the coverage of the statute. It therefore appears that a broad definition of "skilled and unskilled labor" is justified. This is, however, an area of some question, subject to definitive judicial construction.

3. Compensation . . . Employer

The only contracts which are invalidated by section 113 are those which would restrain one from "receiving compensation for performance of skilled or unskilled labor for any employer." The Oklahoma language, "engaging in a lawful profession, trade or business," is clearly broader for the statute also protects the right of the covenantor to enter into a partnership, to become an investor, director or officer, or to participate in any other way, directly or indirectly, in a competitive business. The Colorado statute therefore applies to a much narrower set of circumstances.

There are ambiguities and problems even here however. For example, could an individual subject to an otherwise valid restrictive covenant, set up a family owned corporation, cause the corporation to employ him and then claim the protection of the statutory provision voiding any covenant which forbids him from entering "the performance of skilled or unskilled labor for an employer"? It is unlikely that a Colorado court would permit the

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Aliprantis, 8 App. Div. 2d 276, 187 N.Y.S.2d 477 (1959) (Sunday closing law, N.Y. PENAL CODE OF 1909 § 2143 [repealed N.Y. PENAL CODE § 500.05 (1967)]); San Marco Constr. Corp. v. Gilbert, 15 Misc. 2d 208, 178 N.Y.S.2d 137 (1958) (mechanic's lien, N.Y. LIEN LAW §§ 2, 9(7), (12)(a) (McKinney Supp. 1966); Kline v. Federal Ins. Co., 60 Ohio Op. 2d 445, 152 N.E.2d 911 (C.P. 1958) (contractor's bond statute, OHIO REV. CODE ANN. § 153.54 (Page 1969).

[128] *See* House Hearings, *supra* note 6. It is important to note, however, that the draft under discussion at that time contained the additional words "or provision of other services." Therefore, it may be argued that the inclusion of professions such as physicians was included in "other services" and not "skilled and unskilled labor."

[129] *See* Senate Hearings, *supra* note 6.

intent of section 113 to be circumvented so easily.[130] More difficult cases may arise, however, where the covenantor puts himself into the position of being, at least in a technical legal sense, an employee in an effort to take advantage of the statutory protection.

B. *Specific Exceptions*

1. Purchase and Sale Exception

Subparagraph (b), the exemption of covenants in connection with the sale of business goodwill, resembles the exception which is almost universally included in other restrictive covenant legislation. While the thrust of section 113 is similar to that of most other statutes, the language and the effect are different. For example, the Oklahoma law provides as follows:

> *Restraint of trade—Exception as to sale of good-will.*
> One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city or part thereof, so long as the buyer, or any person deriving title to the good-will from him carries on a like business therein.[131]

The exemption in the Colorado statute is broader because it applies to the purchase and sale of a business or business assets instead of to a sale of goodwill only. Thus, the sale of the physical assets of a discontinued business not involving goodwill might fall within the scope of subparagraph (a) of section 113. Similarly, while the typical statutes apply only to sales, section 113 refers to purchases and sales, suggesting that the vendee as well as the vendor could be bound by a noncompetition covenant.[132]

The primary ambiguity of this exemption is the scope of the language "purchase and sale." For example, a question arises whether a noncompetition covenant may be enforced in connection with the dissolution of a partnership, a corporate reorganization which amounts to a transfer of corporate assets, a lease,

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[130] For an example of a Colorado court refusing to allow a covenantor to circumvent the law see Weber v. Nonpareil Baking Co., 85 Colo. 232, 274 P. 932 (1929). After signing a covenant restraining him from engaging in the retail bakery business, Weber organized a family corporation, capitalized it, entered its employ, solicited business for it, advised as to its management, held himself out to the public as a party in interest, and participated in its profits. The court found that by so doing, he had completely circumvented the contract and enjoined him from all of the above activities.

[131] OKLA. STAT. tit. 15, § 218 (1966).

[132] It is not clear, however, to what extent the common law would enforce a covenant against a vendee. Possible situations might include covenants in conjunction with the purchase of stock by a corporate employee or the purchase of a franchise by a franchisee.

franchise, license, or similar agreement. Neither the statutory language nor the existing case law provides much guidance in this area. It may be argued that the test should be whether the transaction is substantially equivalent to the sale of a business or business assets. For example, the withdrawal of a partner from a partnership should be analyzed on the facts of the particular case.[133] If one partner were to sell substantial assets in conjunction with a restrictive covenant, the covenant should probably be enforced. On the other hand, if the withdrawing partner were to have a relatively minor interest in the partnership assets so that his position was more like that of an employee, his withdrawal should not be considered substantially equivalent to a sale.[134] Similarly, if a corporate merger or reorganization were considered an acquisition by one company of the assets of another, the owners of the acquired corporation should be treated like any other sellers and a covenant pursuant to the merger should be enforced.[135]

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[133] *See* Brown v. Stough, 292 P.2d 176 (Okla. 1956), in which the court held that the sale of a withdrawing physician/partner to new partners *and* repurchase of his interests by remaining partners were sales within meaning of Oklahoma statute exempting sale of the goodwill of a business. While it seems clear that a withdrawal of one partner from the partnership and the consequent sale of his interest is within section 113, the final dissolution of a partnership and distribution of its assets to all of the partners is probably not. Significantly, most other statutes have separate exemptions for sales and for partnership dissolutions. If dissolution were considered a sale, the separate dissolution exception would be unnecessary. *But see*, Jenson v. Olson, 144 Mont. 224, 395 P.2d 465 (1964).

[134] Bernstein, Bernstein, Wile & Gordon v. Ross, 22 Mich. App. 117, 177 N.W.2d 193 (1970) (repurchase by accounting partnership of 5 percent interest in partnership *held* not sale of good will within Michigan statute as withdrawing partner, having no clients or separate business of his own, had no goodwill to sell); *cf.* Buckhout v. Witwer, 157 Mich. 406, 122 N.W. 184 (1909); Key v. Perkins, 173 Okla. 99, 46 P.2d 530 (1935); Public Opinion Publishing Co. v. Ransom, 34 S.D. 381, 148 N.W. 838 (1914). *Contra* Bessel v. Bethke, 56 N.D. 1, 215 N.W. 868 (1927); Vogue Cleaners & Dyers, Inc. v. Berkowitz, 292 Mich. 575, 291 N.W. 12 (1940) (corporation's purchase of 26 shares of its own stock held sale within MICH. COMP. LAWS ANN. § 445.766 (1967)). *See also* CAL. BUS. & PROF. CODE §§ 16600-02 (West 1964), which was amended in 1945 to include a stock transfer in its "sale" exemption.

[135] Farren v. Autoviable Serv. Inc., 508 P.2d 646 (Okla. 1973) held that a covenant not to compete, executed by an employee of a merged corporation prior to the merger was pursuant to a "sale." Disregarding definitions of sales from other contexts, the court said:

> We do not believe that an actual cash sale of good will was the paramount reason for inclusion of this statute in the law of this State. We believe that the purpose of this statute is to allow the parties to the transfer of a going business to mutually agree, as a part of the value of the business transferred, that the transferee will be protected from his transferor who might use his previously acquired experience, contacts and expertise to promote his own interests in the same field of business in competition with his transferee (citation omitted).
>
> In this case there was a corporate merger. The good will of Farren Com-

A more difficult problem is posed by the typical franchise agreement. The sale of a franchise is substantially equivalent to a sale of business assets; the franchisor sells to the franchisee the right to use a trade name, goodwill, and the benefits of advertising in a specified area. The franchisee should therefore have rights similar to a vendee in a classic purchase agreement to enforce a noncompetition covenant against the franchisor. On the other hand, the franchisor should have a right similar to that of an employer to prevent competition to the extent that it is based on training, trade secrets, or goodwill acquired from the franchisee.[136] The latter seems to be the approach taken by the court in *Goldammer v. Fay*.[137]

2. Training and Education Exception

Another exemption in the Colorado statute which has a parallel in another statute is subparagraph (c), excepting "any contractual provision providing for recovery of the expense in educating and training an employee who has served an employer for a period of less than two years."[138] This somewhat resembles the provision of the Louisiana statute which voids restraints on competition except, among other things, "where the employer incurs an expense in the training of the employee."[139]

There are two distinctions between the Colorado statute and the Louisiana statute which are of crucial importance. First, the effect of the Colorado statute is limited to the initial 2-year period of employment. An employee who terminates his employment after such 2-year period is unaffected by this provision. Second, and most important, Colorado apparently does not permit the general enforcement of post-employment restraints merely because the employer has incurred training expenses, but permits the use of such restraints only as a sanction to the extent neces-

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pany with Farren's consent was included in the corporate entity that merged with Autoviable, the surviving corporation, and thus transferred to it. We believe that this is a "sale" of the good will within the meaning of 15 O.S.1971 § 218.

508 P.2d at 648. On the other hand, assignments and leases are probably not sales within the meaning of section 113(a). *See* Shawnee Compress Co. v. Anderson, 209 U.S. 423 (1908) (dictum that lease not sale within Oklahoma statute); E.W. Smith Agency v. Sanger, 350 Mich. 75, 85 N.W.2d 84 (1957) (assignment of right to receive commissions).

[136] *See* Annot. 50 A.L.R.3d 746 (1973) supporting the view that a franchise agreement is similar to an employment contract. *See also* Blake at 666.

[137] 326 F.2d 268 (10th Cir. 1964). *See* text accompanying notes 68-71 *supra*.

[138] COLO. REV. STAT. ANN. § 8-2-113(2)(c) (1973).

[139] LA. REV. STAT. ANN. § 23:921 (1964).

sary to compel the employee to repay such expenses. Once the employee-convenantor reimburses his former employer he is free of the bonds of the noncompetition covenant.

Louisiana courts have split drastically in their interpretation of what kind of training is required to bring an employment relationship within the exception to the general avoidance law, and the Louisiana Supreme Court has not yet resolved the differences among its lower courts. At the present time, the federal courts and one of the intermediate appellate courts in Louisiana have interpreted the provision to apply only where the expenses incurred by the employer are of an unusual nature and perhaps only where the training has the effect of making the employee a specialist in his field.[140] The other three Louisiana intermediate appellate courts have held that almost any expenditure will bring the employee within the statutory exception.[141]

The Louisiana minority position appears to represent the better view for almost any employee receives at least some initial training by his supervisors. Moreover, the structure of section 113, which only permits enforcement of the covenant as a penalty for failure to reimburse the employer's expenses, suggests that such expenses must be readily identifiable. Thus, for example, an employer could recover the cost of sending an employee to a company-run school, but it is doubtful that the employer could establish with certainty the amount of training and education expenses which constitute that part of the employer's general administrative overhead.

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[140] Otis Eng'r Corp. v. Guimbellot, 450 F.2d 870 (5th Cir. 1971) (20 days schooling costing roughly $2,000 insufficient to justify enforcement of 5-year covenant not to compete within 100-mile radius of place of employment); Theatre Time Clock, Inc. v. Stewart, 276 F. Supp. 593 (E.D. La. 1967) (training expenses of on-the-job training for 2 weeks insufficient to justify enforcement of 3-year noncompetition clause); Standard Brands, Inc. v. Zumpe, 264 F. Supp. 254 (E.D. La. 1967) (covenant not enforcible because no substantial training expenses shown); National Motor Club v. Conque, 173 So. 2d 238, 242 (La. Ct. App. 3d Cir. 1965) (training expenses, described as "nominal so-called training expenses . . . incurred some 3 or 4 months after initial employment," consisting of supervision and sales meetings insufficient to justify enforcement of the covenant).

[141] Covenants not to compete were enforced in National School Studios, Inc. v. Barrios, 236 So. 2d 309 (La. Ct. App. 1970) (training expenses consisted of sending salesmen to Barrios' office to assist him on three occasions, a week's training in Memphis, and payment of salary before payment justified by earnings); World Wide Health Studios, Inc. v. Desmond, 222 So. 2d 517 (La. Ct. App. 2d Cir. 1969) (5-year covenant not to compete in 100-mile radius enforced on basis of intensive 2 weeks of training and several weeks of being a "manager trainee"); Aetna Fin. Co. v. Adams, 170 So. 2d 740 (La. Ct. App. 1st Cir. 1964) (training consisted of provision of manuals of operation, legal bulletins, and supervision of activities).

3. Trade Secrets Exception

Section 113, unlike comparable statutes in other jurisdictions, permits noncompetition covenants for the protection of trade secrets.[142] A trade secret is commonly defined as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."[143] The factors relevant in identifying trade secrets include: (1) the degree of secrecy, (2) the extent to which measures are taken to maintain secrecy, (3) the amount of effort or costs required to develop the secrets, and (4) the degree of difficulty required by others to duplicate the secrets.[144] Trade secrets were defined by the Colorado Supreme Court in *Julius Hyman & Co. v. Velsicol Corp.*[145] as follows:

> Generally it may be said that a trade secret is any plan or process known only to its owner, and those of his employees to whom it is necessary to confide it. It is not necessary that the plan or process be patentable.[146]

It has long been recognized that traditional common law remedies do not afford adequate legal protection for proprietary information because of the problems of identifying trade secrets and determining when they are being used by the competitor.[147] Therefore, the use of restrictive covenants to protect trade secrets has been accepted on the theory that if an employee is prohibited from competing or working for a competitor, he will have no opportunity to use or divulge his former employer's trade secrets.[148]

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[142] COLO. REV. STAT. ANN. § 8-2-113(2)(b) (1973). *See* text accompanying notes 108-10 *supra*. *But see* Trans-American Collections, Inc. v. Continental Acct. Servicing House, Inc., 342 F. Supp. 1303 (D. Utah 1972) where the court in dictum stated that a noncompetition covenant to protect trade secrets is valid under California statute although the statute itself does not expressly permit a trade secrets exemption.

[143] RESTATEMENT OF TORTS § 757, comment *b* at 5 (1939).

[144] *Id.*

[145] 123 Colo. 563, 233 P.2d 977 (1951).

[146] *Id.* at 605, 233 P.2d at 999. *See* Knoebel Mercantile Co. v. Siders, 165 Colo. 393, 439 P.2d 355 (1968) for an excellent discussion of what is not a trade secret.

[147] *See* Standard Brands, Inc. v. Zumpe, 264 F. Supp. 254 (E.D. La. 1967); Bender, *Trade Secret Protection of Software*, 38 GEO. WASH. L. REV. 909 (1970); Comment, *The Scott Amendment to the Patent Revision Act: Should Trade Secrets Receive Federal Protection?*, 31 WIS. L. REV. 900 (1971).

[148] *See* Schneider & Halstrom, *Trade Secret Protection in Massachusetts*, 56 MASS. L.Q. 239 (1971); Note, *Protection of Trade Secrets in Florida: Are Present Remedies Adequate?*, 24 U. FLA. L. REV. 721 (1972). For an evaluation of covenants not to compete as vehicles for protecting trade secrets see Note, *Trade Secret Protection of Non-Technical Competitive Information*, 54 IOWA L. REV. 1164 (1969). State common law, however, is not

It is possible that, as with training expenses, almost all employees have access to some trade secret information.[149] At one extreme it would be unfair to permit a mere recital of the existence of trade secrets to bring a covenant within the statutory exemption. On the other hand, it should not be necessary for a covenantee to prove that a covenantor actually took, or intends to take, or inevitably will take, trade secrets and use them improperly, for this would force the plaintiff to carry the same difficult burden of proof that he would have in a suit grounded on a trade secret theory absent any restrictive covenant.[150]

The better view of subparagraph (b) would therefore seem to be that one asserting a restrictive covenant must show some logical relationship between the existence of trade secrets in his business and the enforcement of post-employment restraints on the covenantor. This could be done by establishing (1) that there are significant trade secrets in his business, (2) that the covenantor had access to such trade secrets, and (3) that there is some likelihood that such trade secrets will be used by the covenantor if he goes into competition.

4. Management and Professional Staff Exception

The exemption set forth in subparagraph (d) applies to two classes of individuals, "executive and management personnel and officers" and the "professional staff" of management. The term officers may seem clear, although it could be rather inclusive in the case, for example, of a large bank with numerous vice presidents. The meaning of management and executive personnel may also seem relatively precise, but individuals as diverse as the

always adequate to protect trade secrets. *See* Blake at 657, 670; Note, *An Employer's Competitive Restraints on Former Employees*, 17 DRAKE L. REV. 69 (1967).

[149] For example, some but not all customer lists are trade secrets. *See* Suburban Gas of Grand Junction, Inc. v. Bockelman, 157 Colo. 78, 401 P.2d 268 (1965). However, the usual definitions of trade secrets are broad enough to create a very substantial class of employees who might fall within the ambit of subparagraph (e).

[150] *See* Standard Brands, Inc. v. Zumpe, 264 F. Supp. 254 (E.D. La. 1967), *citing* Note, *Injunctions to Protect Trade Secrets—The* Goodrich *and* DuPont *Cases*, 51 VA. L. REV. 917 (1965) which says:

> An employer seeking injunctive protection for his trade secrets prior to their disclosure generally makes one or more of the following three allegations: (1) that the defecting employee actually intends to divulge secrets in his possession; (2) that the defecting employee will inevitably reveal some trade secrets, whether consciously or not, just because of the type of work in which he will be involved; (3) that there is a substantial probability of disclosure by the defecting employee in his new employment.

51 VA. L. REV. at 922.

operating engineer of a large power plant,[151] foremen,[152] superintendents,[153] engineers,[154] chemists,[155] office managers,[156] paymasters,[157] and cashiers[158] have all been considered executive or management personnel in some cases.[159] "Professional staff" is equally ambiguous. Does this include, for example, clerks, secretaries, and stenographers, or is it directed at accountants, engineers, and the like?[160] Even aside from its obvious ambiguities, subparagraph (d) appears to be the most inexplicable provision of section 113. Its purpose is not to protect trade secrets or to recover training expenses for these matters are adequately covered in other portions of the statute. Subparagraph (d), therefore, must be intended simply to protect employers from the disruption of operations which occur upon the loss of a key executive or member of his staff.[161] It is by no means clear, either as a matter of public policy or as a matter of fairness to the individuals involved, that discrimination on this basis is justified. On the other hand, it might be argued that this exception can be justified on the basis that such individuals almost always have access to confidential information and other intangible assets which deserve protection. However, the reason for this exception, as opposed to the rationalization, seems to be that employers want to retain these key personnel because of their extreme importance to the company. If this is the case, then the use of post-employment restraints is obviously a penalty and not a legitimate effort to prevent unfair competition.

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[151] Walling v. General Indus. Co., 330 U.S. 545 (1947).

[152] Smith v. Porter, 143 F.2d 292 (8th Cir. 1944).

[153] Pugh v. Lindsay, 206 F.2d 43 (4th Cir. 1953).

[154] Allen v. Atlantic Co., 145 F.2d 761 (5th Cir. 1944).

[155] Anderson v. Federal Cartridge Corp., 72 F. Supp. 639 (D. Minn. 1947).

[156] Owin v. Liquid Carbonic Corp., 42 F. Supp. 774 (S.D. Tex. 1941).

[157] Cintron Rivera v. Bull Insular Line, 164 F.2d 88 (1st Cir. 1947).

[158] Kaczanowski v. Home State Bank, 77 F. Supp. 602 (E.D. Wis. 1948).

[159] The Colorado Senate Judiciary Committee which drafted section 113 used a chef as an example of a manager and executive. *See* Senate Hearings, *supra* note 6.

[160] In other contexts professionals have been broadly defined. *See, e.g.*, Rausch v. Wolf, 72 F. Supp. 658 (N.D. Ill. 1947) (accountant); People v. Maggi, 378 Ill. 595, 39 N.E.2d 317 (1942) (beautician); State v. Cohn, 184 La. 53, 165 So. 449 (1936) (mechanic); (Voorhees v. Bates, 308 N.Y. 184, 124 N.E. 273 (1954) (musician).

[161] This policy, however, was not articulated in either the House or Senate hearings. *See* House & Senate Hearings, *supra* note 6. One large company had apparently expressed some concern about the bill, causing the Senate committee to add subparagraphs (d) & (e). The nature of the policy supporting the concern was never discussed beyond the inconvenience to employers of the loss of such personnel.

C. *Summary of Section 113*

In summary, section 113 should be judged against the background of what it was intended to accomplish. The legislature was concerned about a limited group of working people who were required to execute noncompetition agreements for no valid purpose and were thereby subjected to severe limitations on their subsequent employment. Section 113 therefore protects only the right of one who performs skilled or unskilled labor to enter into other employment, and it contains specific exemptions which apply to virtually every situation in which a covenantee could have a legitimate interest in preventing competition. The Colorado legislature has not attempted to alter the overall policy of Colorado common law; it has simply dredged out a very limited safe harbor for certain employees.

Section 113 has a number of ambiguities which might have been avoided by more careful draftsmanship and which will ultimately have to be resolved by judicial construction. Some problems of this sort are no doubt inevitable in any statute and may well be desirable from the point of view of allowing courts flexibility in applying the statute to changing circumstances. The larger question is whether this sort of surgical approach to the common law creates more problems than it solves.

IV. PROBLEMS AND PROSPECTS

The problems for the practitioner drafting or litigating a noncompetition agreement under Colorado law[162] include both those

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[162] The conflicts of law problems relating to restrictive covenants deserve a separate article. For present purposes it should be simply noted that the standard contract clause designating applicable law will probably be ineffective. The general rule expressed by RESTATEMENT OF CONFLICTS OF LAWS § 187(2)(b) (1971) is:

> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Noncompetition statutes have been found to reflect a strong public policy, and states will not enforce covenants void under their laws regardless of the legality of said covenants under the law of the state designated by the contract. Forney Indus., Inc. v. Andre, 246 F. Supp. 333 (D.N.D. 1965); May v. Mulligan, 36 F. Supp. 596 (W.D. Mich. 1939), *aff'd*, 117 F.2d 259 (6th Cir. 1940), *cert. denied*, 312 U.S. 691 (1941); Frame v. Merrill, Lynch, Pierce, Fenner & Smith, 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1971); Auto Club Affili-

which are inherent in the preexisting case law and those which arise from the new statute. The following comments are addressed primarily to the lawyer who is drafting a noncompetition agreement, although they should also be relevant to the lawyer negotiating for the potential covenantor or for either party in litigation.

A. *Common Law Problems*

Colorado common law favors the covenantee wishing to enforce a noncompetition covenant. However, the broad thrust of decisions upholding restrictive agreements should not obscure the fact that Colorado purports to follow a conventional balancing approach which occasionally has resulted in nonenforcement. Similarly, the greater weight of Colorado authority follows the doctrine of partial enforcement, thereby encouraging the draftsman to prepare a covenant as broad as his client wishes. *Knoebel Mercantile Co. v. Siders*,[163] however, suggests the grave possibility that in an appropriate case an excessive restriction may not be enforced. Moreover, a problem exists in that Colorado law offers no clear guidelines as to what is a reasonable geographic area in a particular case.[164]

A restrictive covenant is not enforced as a penalty or as a means of forcing a covenantor to continue his employment or other association with the covenantee. Rather, the purpose is to protect the covenantee from unfair competition, such as the purchaser who is entitled to legal protection of the goodwill he has purchased and the employer who needs protection from a disloyal employee who would otherwise use training and confidential information obtained from the employer to compete with him. In drafting and enforcing a noncompetition covenant, counsel should therefore seek to insure that it is limited only to such reasonable goals.[165]

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ates, Inc. v. Donahey, 281 So. 2d 239 (Fla. Ct. App. 1973); Davis v. Ebsco Indus., Inc., 150 So. 2d 460 (Fla. Ct. App. 1963). *But cf.* Grace v. Orkin Exterminating, Inc., 255 S.W.2d 279 (Tex. Ct. Civ. App. 1953). Of course, nothing is lost by attempting to designate the applicable law.

[163] 165 Colo. 393, 439 P.2d 355 (1968). *See* text accompanying notes 72-73, 98-100 *supra*.

[164] *See* text accompanying notes 56-59 *supra*.

[165] Even though a covenant is valid under the applicable statute, it must still meet common law standards of reasonableness. *See* Holsen v. Marshall & Isley Bank, 52 Wis. 2d 281, 190 N.W.2d 189 (1971); Lakeside Oil Co. v. Slutsky, 8 Wis. 2d 157, 98 N.W.2d 415 (1959). However, section 113 shifts the burden of proof significantly. Under Colorado common law as in most jurisdictions, the burden of proving that the terms of a covenant

B. *Statutory Problems*

The lawyer always hopes that a statute will at least eliminate uncertainty. Section 113 does this to a limited degree by providing that certain covenants are clearly invalid. The extent of this coverage, however, is uncertain because of statutory ambiguities. In fact, it is not even clear whether section 113 applies to contracts entered into prior to the effective date of the statute.[166] It is more certain, however, that the attorney can draft a provision forbidding any covenantor from becoming a shareholder, partner, owner, investor, trustee, director, receiver, etc., of or in any competitive business without offending section 113.[167]

Since section 113 permits a full restrictive covenant between the seller and buyer of a business, one should consider structuring many other agreements so that the purchase and sale exception may apply. For example, one could combine a buy-sell agreement with a partnership agreement and insert a noncompetition covenant in the buy-sell provision so that the covenant is given as partial consideration for the purchase of a withdrawing partner's assets.[168] In close corporations key employees often receive stock or other ownership rights such as stock options, and a noncompe-

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are unreasonable is on the covenantor: Taff v. Brayman, 518 P.2d 298 (Colo. Ct. App. 1974); 17A C.J.S., *Contracts* § 585 (1963). Hence, the covenant is deemed valid and enforceable until the covenantor proves to the contrary. Section 113, on the other hand, voids all covenants not to compete unless the covenant is within one of its four exceptions. Therefore, the covenant is enforceable only if the covenantee meets his burden of proof that the covenant is within one of the exceptions. *See generally*, 29 AM. JUR. 2d *Evidence* § 147 (1967).

[166] The general rule is that vested rights under existing contracts will not be impaired by subsequent legislation. 17 AM. JUR. 2d *Contracts* § 171 (1964). No statute avoiding restrictive covenants has ever been applied to covenants executed before the effective date of the statute; however, it is certainly possible that a legislature acting pursuant to the state's police power could invalidate an existing contract deemed illegal and against public policy. *See, e.g.*, Jamieson v. Indiana Natural Gas & Oil Co., 128 Ind. 555, 28 N.E. 76 (1891); Heart v. East Tenn. Brewing Co., 121 Tenn. 69, 113 S.W. 364 (1908). The standard safety clause of section 113 supports the view that the statute represents an exercise of the state's police power. On the other hand, COLO. REV. STAT. ANN. § 135-1-202 (1963) provides that "a statute is presumed to be prospective in operation".

[167] This, of course, is the kind of language which is used in the usual noncompetition agreement. *See, e.g.*, Knoebel Mercantile Co. v. Siders, 165 Colo. 393, 439 P.2d 355 (1968); Electrical Prod. Consol. v. Howell, 108 Colo. 370, 117 P.2d 1010 (1941); Barrows v. McMurtry Mfg. Co., 54 Colo. 432, 131 P. 430 (1913). For standard noncompetition language see 5 J. RABKIN & M. JOHNSON, CURRENT LEGAL FORMS WITH TAX ANALYSIS Form 12.01 (1974) at 12-1004: "the Employee will not . . . directly or indirectly, own, manage, operate, control, be employed by, participate in, or be connected in any matter with the ownership, management, operations, or control . . . ."

[168] *See* note 133 *supra*.

tition agreement could be required in consideration of the exercise of such rights.[169]

The greatest uncertainty under section 113 arises in connection with agreements such as franchises,[170] licenses, and leases. Where feasible, one might structure such transactions in a way that arguably involves a purchase and sale. In such areas as licenses and franchises, there is also the possibility of using the trade secret exemption of subparagraph (b), and this, of course, should be favored since it reflects a valid justification for a noncompetition covenant in these transactions.

There is a vast category of indirect restraints that might be used in conjunction with an explicit agreement not to compete. For example, in *Colonial Life & Accident Insurance Co. v. Kappers*,[171] a salesman agreed not to solicit clients of his former employer for the purpose of selling group or franchise policies and agreed not to attempt to induce the employer's clients to cancel or fail to renew their existing policies.[172] Other indirect efforts to discourage competition include denial of pension benefits to a competing covenantor,[173] withholding of profit sharing distributions,[174] and denial of unaccrued sales commissions.[175] A court

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[169] Vogue Cleaners & Dyers, Inc. v. Berkowitz, 292 Mich. 575, 291 N.W. 12 (1940). The sale of stock by a shareholder has been held a "sale" with statutes prohibiting covenants not to compete except in connection with a sale of goodwill. *See* Buckhout v. Witwer, 157 Mich. 406, 122 N.W. 184 (1909); Key v. Perkins, 173 Okla. 99, 46 P.2d 530 (1935); Bessel v. Bethke, 56 N.D. 1, 215 N.W. 868 (1927); Public Opinion Publishing Co. v. Ransom, 34 S.D. 381, 148 N.W. 838 (1914). The California courts held to the contrary in Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 57 P. 468 (1899), necessitating an amendment to the California statute. *See* note 110 *supra*. However, none of these cases refer to *purchase* of stock.

[170] For a more detailed discussion of policy considerations in franchise agreements, see text accompanying notes 136-37 *supra*.

[171] 488 P.2d 96 (Colo. Ct. App. 1971).

[172] ***[T]he Soliciting Agent, hereby expressly covenants and agrees that after termination of this agreement, for any reason, he shall not for a period of two years thereafter, do nor shall he aid or abet others to do, any of the following things: (1) sell, or attempt to sell, any form of accident or health insurance to or on any of the Company's insureds under group or franchise policies in the territory covered by this agreement, (2) induce, or attempt to induce, any of the Company's insureds under group policies or franchise policyholders to cancel, lapse or fail to renew their policies with the Company in the territory covered by this agreement***

Id. at 97.

[173] *See, e.g.*, Schroeder v. Gateway Transport. Co., 53 Wis. 2d 59, 191 N.W.2d 860 (1971). *But see* Employee Retirement Income Security Act of 1974 § 203, Pub. L. No. 93-406, § 203 (Sept. 2, 1974), to be codified as 29 U.S.C. § 1053, which makes covered pension plans nonforfeitable regardless of subsequent acts of the employee.

[174] *See* notes 118, 121 *supra*.

[175] *See* note 117 *supra*.

might find some or all of such restraints to be, in effect, a covenant not to compete and hence void. However, some of the sanctions have been approved under other statutes which contain provisions prohibiting covenants in restraint of trade, and, therefore, might be acceptable under the arguably more narrow language of section 113.

The various covenants of a contract should be in separate clauses, and the contract should have a severability provision so that judicial avoidance of one covenant will not necessarily affect all. Recitals in the contract might state that the covenantor entered into the contract freely, for full consideration, and with full knowledge of its consequences.[176]

The remaining question is, of course, to what extent the statute will affect existing common law.[177] The purpose of section 113 is clearly remedial, and the sponsoring committee expected it to relieve employees of burdensome and unfair covenants. The Colorado courts, on the other hand, have taken the view that there is virtually a moral commandment that covenants are to be enforced in accordance with their terms whenever possible. Whether the courts will apply section 113 broadly to invalidate covenants the legislature found objectionable or whether section 113 will be strictly construed to preserve the judicial policy of upholding contracts cannot now be determined. However, the courts might do

[176] The Colorado courts have never held that full understanding of the covenant by the parties is necessary to its enforcement but have occasionally noted that the covenant in question was knowledgeably signed or that the covenantor was represented by counsel. *See* Jim Sprague's Aetna Trailer Sales, Inc. v. Hruz, 172 Colo. 469, 474 P.2d 216 (1970); Zeff, Farrington & Assocs. v. Farrington, 168 Colo. 48, 449 P.2d 813 (1969); Gulick v. A. Robert Strawn & Assocs., 477 P.2d 489 (Colo. Ct. App. 1970).

[177] A brief survey of the Colorado cases indicates that at least 10 of the 23 covenants enforced under common law would probably be enforced under section 113 either because they involve a sale of a business or a covenantor who was a manager. Sale of business cases: Cantrell v. Lemons, 119 Colo. 107, 200 P.2d 911 (1948). Weber v. Nonpareil Baking Co., 85 Colo. 232, 274 P. 932 (1929); Garf v. Weitzman, 72 Colo. 132, 209 P. 809 (1922); Barrow v. McMurtry Mfg. Co., 54 Colo. 432, 131 P. 430 (1913); Flower Haven, Inc. v. Palmer, 502 P.2d 424 (Colo. Ct. App. 1972). Sale of partnership interest cases: Fuller v. Brough, 159 Colo. 147, 411 P.2d 18 (1966); Ditus v. Beahm, 123 Colo. 550, 232 P.2d 184 (1951). Employment of manager cases: Whittenberg v. Williams, 110 Colo. 418, 135 P.2d 228 (1943); Taff v. Brayman, 518 P.2d 298 (Colo. Ct. App. 1974); Gulick v. A. Robert Strawn & Assocs., 477 P.2d 489 (Colo. Ct. App. 1970). The covenants in the other cases could also be upheld if they were necessary to protect trade secrets, to enforce recovery for training expenses, or if the statute were construed so as to make the covenantor the type of key personnel included in subparagraph (d). Unfortunately, these matters cannot be determined in the absence of judicial interpretation of section 113 and further facts about the respective cases.

well to recognize that section 113 represents a legitimate objection to the trend in Colorado common law.

CONCLUSION

The basic problem with Colorado's treatment of restrictive covenants has not been in the statement of the common law rule but in the judicial application of that rule. This judicial application has sometimes been inconsistent and has often manifested a tendency to enforce such covenants too readily.

Although section 113 provides complete protection to a covenantor who is within its coverage, it suffers from ambiguities which make the extent of that coverage uncertain and from express limitations of scope even if it is broadly construed. These problems illustrate the difficulties of trying to reform judicial policy through legislative action, and this is indeed what section 113 attempts. The statutory thrust is to abolish restraints on future employment which the legislature found to be undesirable. Yet when the legislature confronted the problem, it determined that some kinds of restrictions on future employment are legitimate and necessary.

Once it is acknowledged that a distinction between good and bad restraints had to be made, the legislature was poorly equipped to cope with the problem. All it could do was state in statutory terms the criteria which the common law rule should contain. Thus, the legislation declares restraints on future employment to be void with certain exceptions, and those exceptions turn out to be strikingly similar to the standards for "reasonableness" which the Colorado courts have already articulated.[178] The courts are still left to define the terms and their application in particular cases. If one concludes that the Colorado courts have demonstrated a tendency to define and apply the rules in a way which is in effect biased in favor of enforcement, the impact of section 113 is likely to be modest. Moreover, to the extent that section 113 provides an impregnable barrier which clearly protects some covenantors, the courts may sometimes be prevented from granting relief which equity would otherwise require.

The effect of section 113, however limited, should not be deprecated. There are certainly a significant number of cases in

[178] *See* text accompanying notes 48-54 *supra* for a discussion of the particular factors used by Colorado courts to justify enforcement of noncompetition covenants including: customer contacts, trade secrets, training, technical or complex business, degree of competition, key employee status, and uniqueness of services rendered.

which the covenantor will clearly fall within its protection.[179] To this extent section 113 should have a generally wholesome effect. Its most obvious advantage is that in some cases it will eliminate any question as to the invalidity of a covenant without the necessity of expensive litigation and thereby do away with the dampening effect that such covenants have on the covenantor's activities.

It is by no means clear that noncompetition covenants are ever defensible, at least within the context of present and future employment of the covenantor. Other common law and statutory remedies, such as those related to trade secret protection, could provide adequate, although less definite and convenient, protection to the covenantee. However, within the context of the existing Colorado rules, it appears that there is room for significant improvement in the way in which such rules are applied by the courts, and perhaps section 113 will provide some impetus for the courts to reevaluate their attitudes in the restrictive covenant area.

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[179] *See* note 177 *supra* for a discussion of the probable effect that section 113 would have had on cases previously decided under Colorado law.