St. Mary's Law Journal

Volume 19 | Number 3 Article 2

1-1-1988

Common Callings and the Enforcement of Postemployment Covenants in Texas Symposium - Business Tort Litigation.

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"COMMON CALLINGS" AND THE ENFORCEMENT OF POSTEMPLOYMENT COVENANTS IN TEXAS

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I. INTRODUCTION

Texas law recognizes two general types of covenants not to compete:[1] agreements specifying that the seller of a business will not compete with the buyer,[2] and agreements providing that an employee,

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1. "Covenants not to compete" are popularly known as "noncompetition agreements," or "noncompetitive agreements." All three terms will be used synonomously throughout this article.

2. *See* Daniel v. Goesl, 161 Tex. 490, 494-95, 341 S.W.2d 892, 895-96 (1960)(distinguish-

after discharge, will not compete with his former employer.[3] The Texas Supreme Court has recently limited the enforceability of post-employment covenants.[4] This article will first introduce the concept of the postemployment noncompetition covenant as it has developed in other states, and present arguments for and against its enforceability. Second, the article will analyze, within this framework, two recent Texas Supreme Court opinions. Finally, the article will explore some alternatives for the future course of this changing Texas law.

I. AN OVERVIEW OF THE LAW AND POLICIES GOVERNING RESTRICTIVE POSTEMPLOYMENT COVENANTS

A. The Advantages of Postemployment Covenants Not To Compete

Covenants in which employees agree not to compete with their employers for a period of time after termination of employment are widely used[5] and potentially serve a number of interests. Such covenants can encourage employers to invest in the human capital of their employees by providing training that enhances (1) the productivity of labor, (2) the value of the employee and, (3) ultimately, his wage.[6] If employees possessed perfect information and unlimited resources, they might be willing to pay for, perhaps by accepting lower wages in the short run, training that increased their value in the labor market to the extent that it ultimately enabled them to achieve a higher wage.[7] However, employees do not have access to unlimited re-

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ing restrictive covenants involving discharged employees and those involving sales of businesses).

3. *See* Justin Belt Co. v. Yost, 502 S.W.2d 681, 682 (Tex. 1974)(noncompetitive covenants between employers and employees enforceable).

4. *See* Bergman v. Norris of Houston, 734 S.W.2d 673, 674-75 (Tex. 1987)(noncompetitive covenants between hair stylists and salon found unenforceable); Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 170-71 (Tex. 1987)(noncompete covenant between employee/franchisee and employer/franchisor found unenforceable).

5. Although empirical data on the extent of usage of postemployment noncompetition clauses in the American economy seems to be lacking, such clauses are utilized extensively. An armchair survey of the state cases decided each year reveals that much. Furthermore, reason exists to believe that the number of decisions reported constitutes only the proverbial iceberg's tip.

Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade*, 1977 U. ILL. I. F. 621, 622-23.

6. *See* Rubin & Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 96-97 (1981)(discussing types and importance of human capital).

7. *See* G. BECKER, HUMAN CAPITAL 11 (1964)(defining as "general" training useful "in

sources[8] and cannot always afford to pay for training by accepting reduced wages. This is especially true when such training involves access to trade secrets not only valuable to many other firms, but also worth millions of dollars to the firm owning such information. In such situations, covenants which restrict postemployment activity guarantee an employer the full value of his human capital investment and prevent competing firms from appropriating talents for which they have not paid.[9] These agreements can significantly affect an employer's willingness to train workers, especially in firms that are heavily engaged in technological innovation. Just as the patent system aims to protect investments in knowledge through somewhat arbitrary rules,[10] postemployment covenants might serve to encourage the creation of training programs.[11] Such covenants may also afford employees the choice of increased, rather than decreased, wages in exchange for restricting their future employment plans.[12]

Noncompetition covenants also allow firms to select the least expensive means of protecting confidential or otherwise sensitive infor-

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many firms besides those providing it"). By contrast, firms may be willing to pay for "specific training," that is, "training that increased productivity more in firms providing it," because, by definition, there is only one firm that can fully utilize the skills of the specifically trained worker. *See id.* at 18.

8. *See* Stigler, *Imperfections in the Capital Market*, 75 J. POL. ECON. 287, 287 (1967)(discussing difficulties of borrowing when using human capital as collateral).

9. *See* Rubin & Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. at 96-97.

10. *See generally* Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813, 1813 (1984).

11. Robert Reich traces American industry's failure to meet foreign competition in part to its inability to protect its investments in human capital:

> For many American firms, buying complex parts from the Japanese was more economical than training their own employees to make them, precisely because firms could not guarantee themselves any harvest from investing in experience. Why go to the expense of giving your design and production engineers such valuable experience if, as studies show, almost half of them will leave the firm within two years?

Reich, *Enterprise and Double Cross: At the Heart of America's Industrial Decline is a Culture of Mistrust*, WASH. MONTHLY, Jan. 1987, at 15. Reich also notes that research and development is discouraged when domestic firms prey upon each other's innovations. Recently, for example, after the Manville Corporation had spent nine million dollars over seven years to develop expertise in fiberglass insulation, Guardian Industries simply hired away six Manville employees who knew how to produce the material. *See id.* (employees in high-tech Silicon Valley often walk off with considerable expertise). Reich further observes that by the mid-1980's, "[i]t was not uncommon to throw a goodbye dinner for a key employee one night, and then serve legal papers on him the next morning." *Id.*

12. For a discussion of the importance of on-the-job training in explaining earnings patterns, see J. MINCER, SCHOOLING, EXPERIENCE, AND EARNINGS 1 (1974).

mation. For example, if a secret process requires three steps, secrecy may be maintained either by: (1) allowing one employee to learn all three steps, but contractually binding him not to use the acquired information elsewhere, or (2) teaching three separate employees one of the steps individually, so that no single employee will have sufficient knowledge to compete with the firm.[13]

Finally, postemployment covenants protect the proprietary interests of an employer in its good will.[14] In many industries, the customer regards the salesperson, rather than the employer, as the one with whom he conducts business. An example of such an industry is the personal insurance business.[15] In such cases, covenants prevent employees from converting to personal benefit the good will that they were paid to develop for the firm.[16] As will be discussed later, employees are either not compensated for good will because it is considered to have been developed for the employer's benefit, or because such compensation is considered to violate some ethical norm to allow employees to sell this aspect of their personality.[17]

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13. Rubin & Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, at 97. *See generally* Posner, *The Right of Privacy*, 21 GA. L. REV. 393, 393 (1978)(discussing alternate means by which secrecy may be maintained).

14. *See* 6A A. CORBIN, CORBIN ON CONTRACTS § 1394, at 100 n.83 (1962)(employer entitled not to have customers taken away by ex-employee); *see also* Meeker v. Stuart, 188 F. Supp. 272, 275 (D.D.C. 1960)(good will asset of business representing customers with which business deals).

15. Comment, *Economic and Critical Analyses of the Law of Covenants Not to Compete*, 72 GEO. L.J. 1425, 1427 (1984); *see also* 6A A. CORBIN, CORBIN ON CONTRACTS § 1394, at 89.

16. Comment, *Economic and Critical Analysis of the Law of Covenants Not to Compete*, 72 GEO. L.J. at 1427.

17. Flaws in the labor market mean that individuals are often compensated only on the basis of factors that are easily ascertainable and readily measurable, such as seniority, completion of a training course, and credentials in the form of educational degrees. An extroverted personality and other qualities important to a salesman in developing customer contacts are often ignored in compensation decisions. *See* L. REYNOLDS, S. MASTERS & C. MOSER, ECONOMICS OF LABOR 182-84 (1987)(noting importance of custom and prevailing wage structures in job evaluation decisions). This is probably especially true for relatively low-skill or nonspecialized jobs—those most likely to be deemed "common callings." *See id.* at 181 (discussing "outside markets" in which company-to-company transfer easy, and market participants able to discern prevailing wage rates); *see also* G. SHULTZ, A NONUNION MARKET FOR WHITE COLLAR LABOR, in Aspects of Labor Economics 107-08, 141-46 (Nat'l Bureau of Economic Research Report 1962)(noting standardization of salaries for female clerical occupations in Boston). For this reason, intangible personal qualities should ordinarily not be considered the property of the employer for purposes of noncompetition covenants. In addition, ethical norms may counsel against permitting individuals to sell vital elements of their personality. *See* Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1888-98 (1987)(ex-

B. *The Validity of Postemployment Covenants Not To Compete*

Historically, not all postemployment covenants have been valid.[18] Even today, some states prohibit by statute all or most forms of re-

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amining arguments of Mill, Hegel, economics, and author's own pluralist vision of human flourishing as bases for policy of inalienability).

18. At early common law, postemployment noncompetition agreements were disallowed as unreasonable restraints on trade and livelihood. *See, e.g.,* Colgate v. Bacheler, 78 Eng. Rep. 1097, 1097 (Q.B. 1602)(voiding noncompetition covenant even though of limited duration and geographic scope and could be removed by payment); The Dyer's Case, Y.B. Mich. 2 Hen. 5., f.4, pl. 26 (C.P. 1414); *see also* Carpenter, *Validity of Contracts Not to Compete*, 76 U. PA. L. REV. 244, 244-45 (1928); Kreider, *Trends in the Enforcement of Restrictive Covenants*, 35 U. CIN. L. REV. 16, 16-17 (1966). Professor Blake stresses the importance of the guild system to the medieval economy in shaping courts' initial harsh reaction to covenants not to compete. *See* Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 632-34 (1960). Milton Handler and Daniel Lazaroff contend that the strict per se rule against noncompetitive contracts existed because the Black Death had eradicated so much of the work force in fourteenth century England that the economy simply could not afford such restrictions on the alienability of labor. *See* Handler & Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 722-23 (1982).

By the eighteenth century, the apprentice system of the guilds was disappearing and the economic consequences of noncompetitive covenants had diminished. *See* Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. at 638. In *Mitchel v. Reynolds* the court replaced the per se rule with a reasonableness inquiry. *See* Mitchel v. Reynolds, 24 Eng. Rep. 347, 353 (Q.B. 1711). The court upheld a contract in which the lessor of a bake shop agreed to pay the lessee fifty pounds if the lessor breached the agreement and engaged in the baking trade within the specified parish at any time during the five year lease. *See id.* at 347-48. The court found that restraints which prohibited the practice of a trade throughout the entire kingdom "must be void, being of no benefit to either party." *Id.* at 348. However, limited restraints were permissible if supported by sufficient consideration: "a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade; and part with it to another in a particular place." *Id.* at 349.

The issue in *Mitchel* was a restrictive covenant incident to a sale of business, not postemployment activities. The court in fact cautioned that the latter type of contracts are subject to "great abuses . . . from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come up to set up for themselves." *Id.* at 350. Nevertheless, the reasonability test was soon applied in the employment context as well and, indeed, the "*Mitchel v. Reynolds* approach has survived virtually unchanged to the present day." Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 709 (1985). One legacy of *Mitchel*'s employment covenant dictum remains; most courts scrutinize the reasonableness of employee covenants not to compete more stringently than the reasonableness of covenants incident to the sale of a business. *See, e.g.,* Alexander & Alexander, Inc. v. Wohlman, 578 P.2d 530, 538 (Wash. Ct. App. 1978)(unreasonable employee covenant might have been reasonable if incident to sale of business); Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685, 703-04 (Ohio C.P. 1952)(discussing reasons for different treatment and noting weight of authority recognizes distinction between restrictive employee covenants and restrictive sale of business covenants); *see also* Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade*, 1977 U. ILL. L. F. 621, 624.

strictive covenants.[19] However, most jurisdictions enforce those restrictions which they find "reasonable,"[20] a test which depends on the particular facts and circumstances of the individual case.[21] The reasonableness standard requires the courts to consider three factors:[22] (1) whether the restraint is "overbroad" because it is greater than necessary to protect the employer's legitimate interests,[23] (2) whether it imposes undue hardship on the employee,[24] and (3) whether it is injurious to the public.[25] For many years, Texas used a balancing test to

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19. *See, e.g.,* ALA. CODE § 8-1-1 (1984); CAL. BUS. & PROF. CODE § 16600 (Deering 1976); COLO. REV. STAT. § 8-2-113 (1985)(permitting noncompetition covenants to be used to recover costs of training and education or when employee is executive or staff member of executive); LA. REV. STAT. ANN. § 23-921 (West 1987)(permitting maximum two year restriction if employer trained or advertised for employee); N.D. CENT. CODE § 9-08-06 (1987); OKLA. STAT. ANN. tit. 15, § 217 (West 1966); S.D. CODIFIED LAWS ANN. § 53-9-8 (1980).

20. *See, e.g.,* 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1636, at 91 (3d ed. 1967 & Supp. 1983); RESTATEMENT (SECOND) OF CONTRACTS § 186 (1981)(agreement in restraint of trade unenforceable if "unreasonably" restrains trade); Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing With Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193, 1196 (1973).

21. *See* 54 AM. JUR. 2D *Monopolies* § 512 (1971 & 1987 Supp.).

22. The first Restatement of Contracts specifies that a restraint is unreasonable if it: (1) is greater than required for the protection of the person for whom it is imposed; (2) imposes undue hardship on the person being restricted; (3) tends to create, or has as its purpose to create, a monopoly; or (4) is based on a promise to refrain from competition and is not ancillary to a sale of business or employment contract. *See* RESTATEMENT OF CONTRACTS § 515, at 989 (1932). The Restatement (Second) of Contracts specifies two criteria for unreasonableness: (1) if the restraint is greater than needed to protect the promisee's legitimate interest, or (2) if the need of the promisee is "outweighed by the hardship to the promisor and the likely injury to the public." *See* RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981). The second Restatement has attracted criticism for introducing an overt balancing test into the determination of reasonableness. *See id.* comment a (acknowledging that in applying test courts will be confronted with task of balancing competing interests). Although the first Restatement refers to "undue hardship" as an element to be considered, it has been noted that courts usually refrain from weighing the employer's interests against the injury to the employee if the covenant otherwise satisfies the common law requirements for reasonableness. *See* Handler & Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 677 (1982).

23. *See, e.g.,* Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685, 691 (Ohio C.P. 1952)(overbreadth one factor in determining if noncompetitive employment covenant reasonable).

24. *See, e.g.,* Smith, Batchelder & Rugg v. Foster, 406 A.2d 1310, 1313 (N.H. 1979)(noting that courts "closely examine" noncompetitive covenant's effect on employee); Pemco Corp. v. Rose, 257 S.E.2d 885, 891 (W. Va. 1979)(noncompetitive employment covenant viewed in light most favorable to employee to prevent undue restraint).

25. *See, e.g.,* Unishops, Inc. v. May's Family Centers, Inc., 399 N.E.2d 760, 764 (Ind. Ct. App. 1980)(public policy prohibits enforcement of noncompetitive employment covenant which unduly restrains trade); Pemco Corp. v. Rose, 257 S.E.2d 885, 890 (W. Va. 1979)(court held covenant unreasonably restrained trade).

determine the reasonableness of a postemployment covenant. A restraint of trade would be held to be undesirable and unenforceable "if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship on the person restricted."[26]

One category of noncompetition employment covenants that has been invalidated, or at least strictly policed, includes those covenants which evidence opportunistic behavior or monopoly power in the labor market on the part of employers. Once an employment covenant has been signed, for example, an employer has the incentive to claim that the covenant is less restrictive than actually intended to justify underpaying workers whose mobility is limited.[27] Courts have attempted to prevent such post facto contract manipulation by holding that covenants must be reasonable in both temporal and geographical scope.[28]

Limiting potential competition is reasonable only to the extent that a former employee has obtained information that is of value to the employer.[29] An agreement extending beyond the legitimate needs of a

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26. Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 312, 340 S.W.2d 950, 951 (1960).

27. *See* Rubin & Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 98 (1981). Exaggerating the breadth of the covenant and reducing wages are both aspects of the same phenomenon, in effect, underpaying workers by transferring training costs to them. *See id.* For an illustration of the inefficient exercise of monopoly power, see Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 100-04 (1978).

28. *See, e.g.*, Orkin Exterminating Co. v. Walker, 307 S.E.2d 914, 916 (Ga. 1983); Harwell Enter. v. Heim, 173 S.E.2d 316, 318-19 (N.C. 1970); Justin Belt Co. v. Yost, 502 S.W.2d 681, 685 (Tex. 1973); Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 313-14, 340 S.W.2d 950, 952 (1960)(applying balancing-of-interests analysis); Robbins v. Finlay, 645 P.2d 623, 627 (Utah 1982). In *Orkin Exterminating Co. v. Walker,* the Georgia Supreme Court stated:

> Covenants against competition which are contained in employment contracts are considered to be in partial restraint of trade and will be upheld only if they are strictly limited in time and territorial effect, and are otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee.

Orkin Exterminating Co. v. Walker, 307 S.E.2d at 916. In *Robbins*, the Utah Supreme Court, refusing to enforce a one year, statewide noncompetition clause, asserted,

> [t]he reasonableness of a covenant depends upon several factors, including its geographic extent, the duration of its limitation; the nature of the employee's duties; and the nature of the interest which the employer seeks to protect such as trade secrets, the good will of his business, or an extraordinary investment in the training or education of the employee.

Robbins, 645 P.2d at 627.

29. Rubin & Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD.

firm may indicate opportunistic behavior or the exercise of monopoly power by an employer. For instance, when the information acquired by an employee is a customer list, the permissible geographic scope of the postemployment restriction is the area containing those customers.[30] Some courts have pointed to the tendency of employers to behave opportunistically and have invalidated agreements which impose "undue hardships" upon employees.[31]

The general contract doctrines of unconscionability and duress[32]

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at 104 (resources spent by employer in acquiring information regarding customer lists important factor in determining reasonableness of covenant not to compete).

30. *Cf.* Trilog Assocs. v. Famularo, 314 A.2d 287, 294 (1974), wherein the Pennsylvania Supreme Court held:

> The restrictive covenants have no limitation on territory and thus are broader than is necessary for the protection of Trilog. Famularo in effect promised not to practice his profession *anywhere for anyone* in developing a shareholders' record system . . . . Such covenants, unrestricted in territorial application, are not necessary to protect any valid interest of the former employee and are unreasonable restraints of trade.

Id. (emphasis in original). For other examples of overbroad geographic covenants, see, e.g., American Hot Rod Ass'n v. Carrier, 500 F.2d 1269, 1279 (4th Cir. 1974); On line Sys. v. Staib, 479 F.2d 308, 309 (8th Cir. 1973); Rector-Phillips-Morse, Inc. v. Vronman, 489 S.W.2d 1, 4 (Ark. 1973); Britt v. Davis, 238 S.E.2d 881, 883 (Ga. 1977); Howard Shultz & Assocs. v. Broniec, 236 S.E.2d 265, 268 (Ga. 1977); Fuller v. Kolb, 234 S.E.2d 517, 518 (Ga. 1977). Texas law, before the *Hill* and *Bergman* cases, dictated that the noncompetitive covenant must be confined to territory actually covered by the former employee in his work for his former employer. *See, e.g.*, Cross v. Clem-Air S., 648 S.W.2d 754, 757 (Tex. App.—Beaumont 1983, no writ); Cawse-Morgan v. Murray, 633 S.W.2d 348, 350 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.); Gillen v. Diadrill, Inc., 624 S.W.2d 259, 263 (Tex. App.—Corpus Christi 1981, no writ); AMF Tuboscope v. McBryde, 618 S.W.2d 105, 108 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.); American Speedwriting Academy v. Holst, 496 S.W.2d 133, 136 (Tex. Civ. App.—Beaumont 1973, no writ); Martin v. Kidde Sales & Serv., 496 S.W.2d 714, 718-19 (Tex. Civ. App.—Waco 1973, no writ).

31. *See, e.g.*, Smith, Batchelder & Rugg v. Foster, 406 A.2d 1310, 1313 (N.H. 1979)(examining harm to employee caused by covenant not to compete); Kennedy v. Wackenhut Corp., 599 P.2d 1126, 1133 (Or. Ct. App. 1979)(noncompetitive covenant prohibiting employee from working in his profession in almost all major United States cities unreasonable restraint of trade); Oak Cliff Ice Delivery Co. v. Peterson, 300 S.W. 107, 111 (Tex. Civ. App.—Dallas 1927, no writ)(special scrutiny necessary to avoid "industrial servitude"); Pemco Corp. v. Rose, 257 S.E.2d 885, 891 (W. Va. 1979)(noncompetitive covenant imposed by employer on employee is restraint of trade); *see also* Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 708, 719 n.63 (1985)(citing cases). In addition, an individual's later frustration at having "made a bad deal" by agreeing to a noncompetition clause at the outset of employment may impose significant social costs by breeding dissatisfaction and ultimately lowering productivity. *Cf.* R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 162-80 (1984)(proposing "exit voice/response" theory that unions may enhance productivity by providing grievance mechanism and reducing dissatisfaction).

32. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW §§ 4.6, 4.8 (2d ed. 1977)(discussing relationship between bargaining power and duress and unconscionability).

are appropriate mechanisms for protecting employees in circumstances where judicial scrutiny of restrictive covenants is justified.[33] An agreement, for example, that "shocks the conscience" cannot be enforced in a court of equity.[34] One Texas court has stated that two types of abuses may lead to a finding of unconscionability: (1) an "abuse which may arise in the contract formation, such as the non-bargaining ability of one party," or (2) an "abuse" concerning substantive contract terms, such as boilerplate or form contracts.[35] The modern notion of unconscionability is codified in section 2-302 of the Uniform Commercial Code, where the commentary suggests as a test "whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[36] In *Williams v. Walker-Thomas Furniture Co.*,[37] the United States Court of Appeals for the District of Columbia described unconscionability as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[38] Unconscionability can thus be interpreted to approximate the common law concept of assent, which requires that each party freely agree to the provisions of a contract in order to be bound.[39]

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33. Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. at 725 (established principles governing contracts should apply to postemployment non-competitive agreements).

34. *See* Marks v. Gates, 154 F. 481, 483 (9th Cir. 1907)(court of equity will not specifically enforce contract if it works hardship on one litigant); *see also* Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293, 301-15 (1975)(criticism of unconscionability as means of reviewing substantive fairness of contract terms).

35. Wade v. Austin, 524 S.W.2d 79, 86 (Tex. Civ. App.—Texarkana 1975, no writ).

36. U.C.C. § 2-302 comment 1 (1978); *see also* Tri-Continental Leasing v. Law Office, 701 S.W.2d 604, 609-10 (Tex. App.—Houston [1st Dist.] 1985, no writ). Although limited by its terms to sales transactions, section 2-302 has been extended by analogy to invalidate other types of contracts. *See, e.g.*, Weaver v. American Oil Co., 276 N.E.2d 144, 146-48 (Ind. 1971)(gas station lease); Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370, 1375-77 (Mass. 1980)(franchise agreement). To the author's knowledge, Texas courts have expressly applied the rule to all contracts, and not simply those governed by the Uniform Commercial Code and the Deceptive Trade Practices-Consumer Protection Act. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

37. 350 F.2d 445 (D.C. Cir. 1965).

38. *Id.* at 449; *see also* Allen v. Michigan Bell Tel. Co., 171 N.W.2d 689, 692 (Mich. Ct. App. 1969). The Michigan Court of Appeals asserted, "[i]mplicit in the principle of freedom of contract is the concept that at the time of contracting each party has a realistic alternative to acceptance of the terms offered." *Allen*, 171 N.W.2d at 692.

39. *See* Hillman, *Debunking Some Myths About Unconscionability: A New Framework for*

The mere existence of unequal bargaining power, however, should not serve to invalidate a covenant. Agreements between competent persons are routinely enforced without regard to the relative shrewdness and negotiating position of the parties.[40] As with all contracts, both parties to employment contracts expect to benefit from the contract or else they would not agree to it, regardless of their respective bargaining power.[41] Given the fact that employees have relatively little bargaining power in many employment contracts, it is difficult to imagine why courts would use the doctrine of unconscionability, rather than unreasonableness, to invalidate restrictive postemployment covenants.[42]

Another category of presumptively invalid noncompetition agreements includes those covenants which threaten to create a monopoly in a product market or unduly restrain competition in the labor market.[43] All postemployment covenants, for example, restrict the flow of information essential to a competitive economy and reduce labor mobility by discouraging workers from leaving their present employment.[44] When this effect is severe, courts have invalidated the cove-

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U.C.C. Section 2-302, 67 CORNELL L. REV. 1, 4-5 (1981)(arguing that courts should apply common law doctrine of assent to contracts involving bargaining misconduct).

40. *See* 1 A. CORBIN, CORBIN ON CONTRACTS § 127 (1962)(courts will refuse to inquire into adequacy of consideration and will enforce contracts as written unless fraud, mistake, or undue influence shown); *see also* F.A. FARNSWORTH, CONTRACTS § 4.1, at 212 (1982). Ironically, many employees currently covered by restrictive covenants are engineers and innovators in high technology industries—relatively sophisticated bargainers in little need of the court's protection. *See* Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 721-22 (1985).

41. *See* Rubin & Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 100 (1981)(according to economic theory of contracts, employer and employee both intend to benefit from employment contract).

42. *See* Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 727 (1985).

43. *See* Dynamics Research Corp. v. Analytic Sciences Corp., 400 N.E.2d 1274, 1282 (Mass. App. Ct. 1980)(allowing employee to use experience, skill acquired during prior employment in subsequent employment increases national supply of skill and knowledge); Reed, Roberts Assocs., Inc. v. Strauman, 353 N.E.2d 590, 593 (N.Y. 1976)(labor market depends on uninhibited flow of talent, services, ideas).

44. *See* Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 646-51 (1960)(purpose of covenant not to compete is to prevent competition's use of information pertaining to employer and acquired by employee). During the Black Death, when England faced an acute labor shortage, the courts were motivated to void covenants which restricted competition in the labor market. *See* Handler & Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 722-23 (1982); Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. at 724.

nants as contrary to public policy.[45]

Although the public interest in preventing restraints on competition is reflected in antitrust law, courts have rarely applied federal antitrust law to noncompetition agreements.[46] Section 1 of the Sherman Act prohibits "every contract . . . in restraint of trade or commerce among the several states."[47] However, this restriction cannot be interpreted literally because, as Justice Brandeis recognized, "[e]very agreement concerning trade . . . restrains."[48] While the literal language of the Sherman Act seems to support an argument that enforcement of postemployment restraints is illegal, nearly all such covenants litigated under antitrust law have been upheld.[49] Individ-

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45. *See, e.g.,* Odess v. Taylor, 211 So. 2d 805, 809 (Ala. 1968)(covenant preventing ear, nose, and throat specialist from practicing within fifty miles of city held invalid as against public interest); Dynamics Research Corp. v. Analytic Sciences Corp., 400 N.E.2d at 1282 (restricting use of postemployment restraints "promotes the public interest in labor mobility and the employee's freedom to practice his profession and in mitigating monopoly"); Reed, Roberts Assocs., Inc. v. Strauman, 353 N.E.2d at 593 ("[O]ur economy is premised on the competition engendered by the uninhibited flow of services, talents, and ideas."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 188 comment (c) (1981)("[T]he likely injury to the public may be too great if it is seriously harmed by the impairment of [the employee's] economic mobility or by the unavailability of skills developed in his employment.").

46. *See, e.g.,* Bradford v. New York Times Co., 501 F.2d 51, 59 (2d Cir. 1974); Frackowiak v. Farmers Ins. Co., 411 F. Supp. 1309, 1318 (D. Kan. 1976); Alders v. AFA Corp., 353 F. Supp. 654, 656 (S.D. Fla. 1973), *aff'd without op.*, 490 F.2d 990 (5th Cir. 1974); Miller v. Kimberly-Clark Corp., 339 F. Supp. 1296, 1296-97 (E.D. Wis. 1971). Professor Blake, in his landmark study of postemployment covenants, relegated to footnote status the applicability of antitrust laws. *See* Blake, *Employee Covenants Not to Compete*, 73 HARV. L. REV. at 628 n.8. Since Blake's study, discussions on the topic have proliferated. *See generally* Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193, 1193 (1973)(postemployment restraints cognizable under section 1 of Sherman Act); Janssen, *Antitrust Considerations in Proceedings Against Former Employees Who Compete Against Their Former Employer*, 31 BUS. LAW 2063, 2063 (1976)(developing antitrust causes of action for both employers and employees); Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade*, 1977 U. ILL. L. F. 621, 621 (antitrust law should reduce scope of permissible covenants by viewing skeptically legitimacy of employer interests and insisting upon use of less restrictive means of protecting those interests).

47. 15 U.S.C. § 1 (1982).

48. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); *see also* Standard Oil v. United States, 221 U.S. 1, 59-60 (1910)(inferring rule of reason from language of section 1 of Sherman Act).

49. *See, e.g.*, Bradford v. New York Times Co., 501 F.2d at 59 (noncompetitive covenant not per se violation of section 1 of Sherman Act); Frackowiak v. Farmers Ins. Co., 411 F. Supp. at 1318 (same); Alders v. AFA Corp., 353 F. Supp. at 656; Miller v. Kimberly-Clark Corp., 339 F. Supp. at 1297-98 (noncompetitive covenant exempt from antitrust laws). A challenge to a covenant not to compete, using the federal antitrust laws, was initially successful in *Lektro-Vend Corp. v. Vendo Co.* *See* Lektro-Vend Corp. v. Vendo Co., 403 F. Supp. 527,

ual postemployment covenant cases rarely pose the type of issues concerning market power in a properly defined geographic and product market which justify the intervention of the antitrust laws under the modern "rule of reason."[50] Consequently, the formal policy analysis of antitrust is inapplicable to covenants not to compete. This, however, was not always the case.

In *United States v. Addyston Pipe & Steel Co.*,[51] Judge, and future president, Taft carefully analyzed the common law antecedents of antitrust in an opinion which continues to influence antitrust law.[52] Taft recognized that the common law generally invalidates covenants restricting the employment of tradesmen because such covenants could disable a man "from earning a livelihood with the risk of becoming a public charge, and deprive the community of the benefit of this labor."[53] On the other hand, Judge Taft recognized that the common law would uphold a postemployment covenant if it were *merely ancillary* to an agreement to protect "from the danger of loss to the employer's business caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business."[54] Taft summarized this exception as follows: "The contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary."[55] Judge Taft distinguished such covenants from a market division agreement which has as its very purpose the avoidance of competition.[56] In modern antitrust parlance, that kind of restriction would be referred to as a "naked restraint,"[57] a category into which postemployment covenants could never fit.[58]

532-33 (N.D. Ill. 1975), *aff'd*, 545 F.2d 1050 (7th Cir. 1976), *rev'd on other grounds and rem.*, 433 U.S. 623 (1977). However, on remand, the challenge was unsuccessful. *See* Lektro-Vend Corp. v. Vendo Co., 500 F. Supp. 332, 355 (N.D. Ill. 1980).

50. *See* Graphic Prods. Distribs. v. Itek Corp. 717 F.2d 1560, 1568 (11th Cir. 1983). The rule of reason, focusing on the anti-competitive effects of vertical restraints, requires plaintiffs attacking a vertical restraint to establish defendants' market power. *See id.*

51. 85 F. 271 (6th Cir. 1898).

52. *See id.* at 278-82.

53. *Id.* at 279.

54. *Id.* at 281.

55. *Id.* at 282.

56. *Id.* at 282-94 (noncompetitive covenant merely ancillary to main contract).

57. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 74, at 198 (1977). Sullivan defines "naked restraints" as "any arrangement among competitors which, in purpose or effect, directly or indirectly inhibits price competition." *Id.*

58. *See* R. BORK, THE ANTITRUST PARADOX 30 (1978). Judge Bork correctly observed the importance of the *Addyston* case:

Most jurisdictions have used a stringent standard in considering whether the anticompetitive effect of a covenant in restraint of trade in the employer's industry amounts to a monopoly in violation of state antitrust law.[59] Because at least one other firm normally provides the same product or service as an employee's former employer, courts have typically rejected the claim that enforcement of a noncompetition agreement grants an employer a monopoly.[60] Nevertheless, by preventing employees from establishing businesses in the same area as their former employers and from competing against them in a rival's employment, covenants undeniably reduce competition in an employer's product or service market.[61]

In addition, noncompetition agreements can impair the labor market's ability to achieve the most economically efficient allocation of labor, a fact recognized by many commentators, but relatively few courts.[62] A covenant preventing an ex-employee from competing

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His doctrine of naked and ancillary restraints offered the Sherman Act a sophisticated rule of reason, a method of preserving socially valuable transactions by defining the scope of an exception for efficiency-creating agreements within an otherwise inflexible *per se* rule.

Id.

59. In many states, a noncompetitive covenant's restraining effect on commerce is judged according to the three-pronged common law test of reasonableness, although some states have passed statutes that regulate covenants under state antitrust laws. *See* CAL. BUS. & PROF. CODE §§ 16600-607 (West 1980); HAW. REV. STAT. § 480-4 (1985); MICH. STAT. ANN. § 28.31-.79(10)(Callaghan 1981); MONT. CODE ANN. § 28-2-703 (1987); N.C. GEN. STAT. § 75-2 (1985); N.D. CENT. CODE § 9-08-06 (1987); OKLA. STAT. ANN. tit. 15, §§ 217-19 (West Supp. 1988).

60. *See* Ruanno v. Weinraub, 81 N.E.2d 600, 603 (Ind. 1948)(noncompetitive covenant did not create monopoly where five other firms in similar business); Foltz v. Struxness, 215 P.2d 133, 139 (Kan. 1950)(court found noncompetitive covenant not attempt to monopolize); Ruhl v. F.A. Bartlett Tree Expert Co., 225 A.2d 288, 293 (Md. 1967)(no danger of monopoly because tree business very competitive in particular area involved); Asheville Assocs. v. Miller, 121 S.E.2d 593, 595 (N.C. 1981)(danger of monopoly by including noncompetitive covenants in employment contracts will not prejudice public); Mail-Well Envelope Co. v. Saley, 497 P.2d 364, 370 (Or. 1972)(insufficient evidence to show noncompetitive covenant strengthened employer's "monopolistic position"); *see also* Note, *Antitrust Implications of Employee Noncompete Agreements: A Labor Market Analysis*, 66 MINN. L. REV. 519, 523 (1982).

61. *See* Note, *Antitrust Implications of Employee Noncompete Agreements*, 66 MINN. L. REV. at 528-31 (discussing negative impact of noncompetitive covenants on product and labor markets).

62. *See* Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082 (2d Cir. 1977)(per se ban on noncompetitive covenants unwarranted because can serve legitimate business purpose), *cert. denied*, 434 U.S. 1035 (1978). In *Winston Research Corp. v. Minnesota Mining & Mfg.*, the court invalidated certain postemployment restrictions because they "limit the employee's employment opportunities, tie him to a particular employer, and weaken his bargaining power

against his former employer may artificially reduce the supply of labor within a particular geographic area until the covenant expires.[63] Assuming the demand for labor remained constant, the wage commanded by those in the restricted occupation would rise.[64] This process is similar to the effects of other labor cartels, such as guilds and unions.[65] If noncompetition agreements are used in an oligopolistic market, they can serve as barriers to entry by severely limiting the available labor supply and increasing costs to new entrants who have not yet procured a "loyal" workforce.[66] At least one Texas court has recognized these public policy concerns.[67]

II. THE TEXAS LAW OF RESTRICTIVE POSTEMPLOYMENT COVENANTS

A. *Recent Texas Case Law*

In two recent cases, *Hill v. Mobile Auto Trim, Inc.*, [68] and *Bergman v. Norris of Houston*,[69] the Texas Supreme Court narrowed the class of enforceable postemployment covenants. This section will briefly de-

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with that employer. [They] interfere with the employee's movement to the job in which he may most effectively use his skills." Winston Research Corp. v. Minnesota Mining & Mfg., 350 F.2d 134, 137 (9th Cir. 1965). The court found that such restrictions "diminish potential competition" and "impede the dissemination of ideas and skills throughout industry." *Id.* at 137-38; *see also* Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 650 (1960); Note, *Employee Nondisclosure Covenants and Federal Antitrust Law*, 71 COLUM. L. REV. 417, 426-27 (1971). *But see* Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 713 (1985)(maintaining that effects of postemployment covenants no different from those of any long-term contract).

63. Note, *The Antitrust Implications of Employee Noncompete Agreements: A Labor Market Analysis*, 66 MINN. L. REV. at 529-30. If several employers within a particular geographic area enforced similar agreements preventing employees engaged in a particular type of labor from competing in the labor market, the supply of such employees would be reduced. *Id.* at 530.

64. *Cf.* C. MCCONNELL, ECONOMICS 558 (3rd ed. 1966)(if only one employer of one type of labor located in restricted geographic area, then employer must pay higher wage to attract sufficient number of workers).

65. *See id.* at 560. Unions seek to increase the demand for labor because an increase in the demand for labor results in higher wage rates and a larger number of jobs. *Id.*

66. *See* Note, *The Antitrust Implications of Employee Noncompete Agreements: A Labor Market Analysis*, 66 MINN. L. REV. at 532-33.

67. *See, e.g.*, Matlock v. Data Processing Sec., 618 S.W.2d 327, 329 (Tex. 1981). "The breadth of territorial restrictions in noncompetition covenants may vary with the nature and extent of the employer's business operations. If the rule were otherwise, the public would be deprived of both the benefits of a service and the competition." *Id.*

68. 725 S.W.2d 168 (Tex. 1987).

69. 734 S.W.2d 673 (Tex. 1987).

scribe the holdings in these cases after providing a background of prior Texas law. The next section will critique the elements of reasonability as employed in *Hill* and *Bergman*.

Texas common law provides that an employment covenant will be enforced when it is reasonable.[70] A restraint on postemployment activity is unreasonable "if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted."[71] Texas courts have traditionally considered a number of factors in determining reasonability. For example, a covenant not to compete which contains no territorial limitation is unreasonable.[72] The rule is "the restrictive covenant must bear some relation to the activities of the employee."[73] In general, "[t]he test for reasonableness as to territorial restraint is whether or not [it is] confined to territory actually covered by the former employee in his work for the employer."[74] The Texas Supreme Court therefore invalidated a covenant prohibiting competition in the entire United States because the court found that the former employer did not reach or serve a market covering such an area.[75]

Temporal limitations included within the covenant must also be

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70. *See* Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 312, 340 S.W.2d 950, 951 (1960)("reasonable" covenant imposes restraint on employee which protects employer's business and good will).

71. *Id.* at 312, 340 S.W.2d at 951.

72. *See, e.g.,* Kutka v. Temporaries, Inc., 568 F. Supp. 1527, 1536 (S.D. Tex. 1983)(applying Texas law; restrictive covenant without territorial limitation unenforceable); Frankiewicz v. National Comp. Assocs., 633 S.W.2d 505, 507 (Tex. 1982)(valid competition restriction must contain reasonable territorial limitation); Campbell, 161 Tex. at 313, 340 S.W.2d at 952.

73. *Campbell*, 161 Tex. at 313, 340 S.W.2d at 952 (*quoting* Wisconsin Ice & Coal Co. v. Lueth, 250 N.W. 819, 820 (Wis. 1933)). For example, in *Tandy Brands, Inc. v. Harper*, the court found unreasonable a covenant that covered "almost all of the North American continent." Tandy Brands, Inc. v. Harper, 760 F.2d 648, 653 (5th Cir. 1985)(applying Texas law).

74. Cross v. Clem-Air S., 648 S.W.2d 754, 757 (Tex. App.—Beaumont 1983, no writ). *See, e.g.*, Cawse-Morgan v. Murray, 633 S.W.2d 348, 350 (Tex. App.—Corpus Christi 1982, no writ)(twenty-five mile limitation found overbroad); Gillen v. Diadrill, Inc., 624 S.W.2d 259, 263 (Tex. App.—Corpus Christi 1981, no writ)(limitation covering marketing areas served by employee reasonable); AMF Tuboscope v. McBryde, 618 S.W.2d 105, 108 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.)(one hundred mile territorial restriction held reasonable); American Speedreading Academy v. Holst, 496 S.W.2d 133, 136 (Tex. Civ. App.—Beaumont 1973, no writ)(reasonable territorial limitation area within which employee worked); Martin v. Kidde Sales & Serv. 496 S.W.2d 714, 718-19 (Tex. Civ. App.—Waco 1973, no writ)(limitation covering Harris County found unreasonable).

75. *See* Matlock v. Data Processing Sec., 618 S.W.2d 327, 329 (Tex. 1981).

reasonable.[76] It has been noted, "[p]eriods of five years and ten years have frequently been upheld in the Texas courts . . . ."[77] In fact, a survey of reported postemployment covenant cases during a period of about twenty years shows that two years is the average permissible limit on temporal restrictions.[78] Such restrictions must commence and cease on a date certain,[79] and if the proceeding is in equity, as when an injunction is sought, the court may reduce the duration of

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76. *See* Hi-Line Elec. Co. v. Cryer, 659 S.W.2d 118, 120-21 (Tex. App.—Houston 1983, no writ)(three year restrictive covenant found unreasonable and against public policy).

77. Spinks v. Riebold, 310 S.W.2d 668, 669 (Tex. Civ. App.—El Paso 1958, writ ref'd). *See* Investors Diversified Serv. v. McElroy, 645 S.W.2d 338, 339 (Tex. App.—Corpus Christi 1982, no writ)(noting that periods of two to five years have been found reasonable).

78. *See, e.g.,* Justin Belt Co. v. Yost, 502 S.W.2d 681, 685-86 (Tex. 1973)(seven years); Bob Pagan Ford, Inc. v. Smith, 638 S.W.2d 176, 178 (Tex. Civ. App.—Houston [1st Dist.] 1982, no writ)(six months); Leck v. Employers Casualty Co., 635 S.W.2d 450, 452, 454 (Tex. App.—Fort Worth 1982, no writ)(two years); David v. Bache Halsey Stuart Shields, Inc., 630 S.W.2d 754, 758 (Tex. App.—Houston [1st Dist.] 1982, no writ)(six months); AMF Tuboscope v. McBryde, 618 S.W.2d at 108 (two years); Garcia v. Laredo Collections, Inc., 601 S.W.2d 97, 99 (Tex. Civ. App.—San Antonio 1980, no writ)(two years); Hartwell's Office World v. System Corp., 598 S.W.2d 636, 638, 639 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.)(five years); Integrated Interiors, Inc. v. Snyder, 565 S.W.2d 350, 352 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.)(three years); Weed Eaters, Inc. v. Dowling, 562 S.W.2d 898, 902 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.)(one year); Electronic Data Sys. v. Powell, 524 S.W.2d 393, 399 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.)(three years); Middagh v. Tiller-Smith Co., 518 S.W.2d 589, 592 (Tex. Civ. App.—El Paso 1975, no writ)(one year); Coiffure Continental, Inc. v. Allert, 518 S.W.2d 942, 946 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.)(ten months); Professional Beauty Prod., Inc., v. Derington, 513 S.W.2d 236, 239 (Tex. Civ. App.—El Paso 1974, writ ref'd n.r.e.)(one year); Arevalo v. Velvet Door, Inc., 508 S.W.2d 184, 185, 187 (Tex. Civ. App.—El Paso 1974, writ ref'd n.r.e.)(three years); Royal Indus. v. Sturdivant, 497 S.W.2d 479, 480, 482 (Tex. Civ. App.—Dallas 1973, no writ)(two years); American Speedreading Academy v. Holst, 496 S.W.2d at 134, 135 (two years); Martin v. Kidde Sales & Serv., 496 S.W.2d at 719 (three years); Kidde Sales & Serv. v. Peairson, 493 S.W.2d 326, 328, 329 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ)(two years); Toch v. Eric Schuster Corp., 490 S.W.2d 618, 622 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.)(three years); National Chemsearch Corp. v. Frazier, 488 S.W.2d 545, 547 (Tex. Civ. App.—Waco 1972, no writ)(eighteen months); Whites v. Star Engraving Co., 480 S.W.2d 757, 760, 761 (Tex. Civ. App.—Corpus Christi 1972, no writ)(one year); Chenault v. Otis Eng'g Corp., 423 S.W.2d 377, 384 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.)(three years); Carl's Coiffure, Inc. v. Mourlot, 410 S.W.2d 209, 210, 211 (Tex. Civ. App.—Houston 1966, no writ)(one year); Wilson v. Century Papers, Inc., 397 S.W.2d 314, 315 (Tex. Civ. App.—Houston 1965, no writ)(two years); Holiday Hill Stone Prod., Inc. v. Peek, 387 S.W.2d 731, 733 (Tex. Civ. App.—San Antonio, 1965, no writ)(one year); John L. Bramlet & Co. v. Hunt, 371 S.W.2d 787, 788, 789 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.)(five years); Mosiman v. Employers Casualty Co., 354 S.W.2d 171, 172 (Tex. Civ. App.—Houston 1962, no writ)(two years).

79. *See* Cardinal Personnel, Inc. v. Schneider, 544 S.W.2d 845, 847-48 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ)(noncompetitive covenant time period begins on date employee terminated). *But see* Arrow Chem. Co. v. Pugh, 490 S.W.2d 628, 633 (Tex. Civ.

the noncompetition agreement to what it considers reasonable under the circumstances.[80]

In addition, postemployment covenants can be no broader than necessary to protect the legitimate interests of the employer.[81] Courts will not enforce covenants designed simply to discourage employees from using their skills or training elsewhere; employers must instead point to specific customer relations or trade secrets potentially at risk.[82] Generally, this test can be met when the employer shows that the former employee is likely to divert business because the employee enjoyed considerable "customer contact."[83] Some courts, however, have held that the fact that an ex-employee is utilizing his former employer's advertising methods and training will not, in and of itself, support the enforcement of a restrictive covenant.[84] Based on this plethora of factors, Texas courts have developed a complex mosaic, generated by the test of reasonableness, of permissible covenants not to compete.

In *Hill v. Mobile Auto Trim*[85] and *Bergman v. Norris of Houston*,[86] the Texas Supreme Court began to rewrite Texas law on postemployment covenants. In *Hill*, the court voided a franchise agreement which provided that the franchisee, Hill, would not directly or indirectly "engage, participate, or become involved in any business that is

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App.—Dallas 1972, no writ)(noncompetitive covenant's period of validity begins at termination of employment *or* date of final judgment enforcing covenant).

80. *See* Bob Pagan Ford v. Smith, 638 S.W.2d at 178-79 (reducing duration from three years to six months); Thames v. Rotary Eng'g Co., 315 S.W.2d 589, 592 (Tex. Civ. App.—El Paso 1958, writ ref'd n.r.e.). *But see* Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 172 (Tex. 1987)(refusing to modify restrictive convenant).

81. *See* Security Serv., Inc. v. Priest, 507 S.W.2d 592, 594-95 (Tex. Civ. App.—Dallas 1974, no writ)(covenant not to compete enforceable only to extent necessary to protect employer's good will and business).

82. *See* Diesel Injection Sales & Serv. v. Renfro, 656 S.W.2d 568, 572 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); Kidde Sales & Serv. v. Peairson, 493 S.W.2d 326, 330 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

83. *See* Hospital Consultants, Inc. v. Potyka, 531 S.W.2d 657, 661 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.)(if employee's relationship with customers raises substantial risk that employee may be able to divert their business elsewhere, covenant not to compete may be enforceable).

84. *See, e.g.*, Munzenreider & Assocs. v. Daigle, 525 S.W.2d 288, 292 (Tex. Civ. App.—Beaumont 1975, no writ)(use of former employer's advertising methods insufficient to enforce noncompetitive covenant); Kidde Sales & Serv. v. Peairson, 493 S.W.2d at 330 (training provided by employer insufficient to enforce covenant not to compete).

85. 725 S.W.2d 168 (Tex. 1987).

86. 734 S.W.2d 673 (Tex. 1987).

in competition in any manner whatsoever with the business" of the franchisor or any of its other franchisees.[87] The restriction extended for three years and covered seven counties.[88] The court found that the noncompetitive covenant was "plagued by a lack of reasonableness:"[89] (1) it provided no apparent consideration in exchange for the franchisee's promise not to compete;[90] (2) it protected no legitimate business interest of the franchisor because the good will and personal contacts cultivated by the franchisee belonged to him, and not to the franchisor,[91] and (3) it was oppressive to the franchisee because it prohibited him from engaging in a "common calling."[92] The court, although conceding that "[i]n the past [it] has modified restrictive covenants in order to make the time, area and scope of the covenant reasonable,"[93] refused to do so in the instant case and instead invalidated the agreement in all respects.[94]

The court in *Bergman* expanded upon the notion of a "common calling." Three hair stylists and a manager left one salon, Norris, located in Houston and, taking a large number of their clientele with them, began working at another salon which was owned by the father-in-law of one of the hair stylists and was located approximately three miles from the Norris salon.[95] The owner of the first salon sued on the employment contracts signed by the three hair stylists, which pro-

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87. *Hill*, 725 S.W.2d at 170. The court declined to adopt the suggestion of Justice Gonzalez, who urged, "[t]his case involved a *franchise relationship, not an employment relationship*," and who would have decided the case explicitly in the franchise context. *Id.* at 177 (Gonzalez, J., dissenting)(emphasis in original).

88. *Id.* at 170 (restriction covered Dallas, Tarrant, Ellis, Denton, Rockwall, Kaufmann and Collin counties).

89. *Id.* at 171. The court determined that a noncompete covenant must meet four criteria to be reasonable: (1) "the covenant must be necessary for the protection of the promisee"; (2) "the covenant must not be oppressive to the promisor"; (3) the covenant must not injure the public interest, and (4) the covenant must be supported by valuable consideration. *Id.* at 170-71.

90. *See id.* at 171.

91. *See id.* at 171-72.

92. *See id.* at 172.

93. *Id.*

94. *Id.* Justice Gonzalez was correct that such a refusal to reform unreasonable portions of covenants violated the "longstanding practice of Texas courts." *Id.* at 175 (Gonzalez, J., dissenting). *See, e.g.*, Matlock v. Data Processing Sec., 618 S.W.2d 327, 329 (Tex. 1981); Justin Belt Co., Inc. v. Yost, 502 S.W.2d 681, 685 (Tex. 1973). However, the majority insisted that even if a reformed covenant would not have "encumber[ed] the former franchisee's ability to compete for a long time or over a wide radius," it would still have impermissibly restricted "fair competition." *Hill*, 725 S.W.2d at 172.

95. *See* Bergman v. Norris, 734 S.W.2d 673, 674 (Tex. 1987).

vided that, for three years and within a fifteen mile radius, they would not "compete in any hair styling or barbering business, divulge any trade secret, or solicit or divert customers from Norris."[96] The manager's restrictive covenant was similar, except that it included all of Harris County.[97] The court, finding that "[b]arbering, however labelled, is a common calling" refused to enforce the contracts.[98] It held that the hair stylists and the manager were "engaged in a common calling and as such the covenants not to compete were unenforceable as to them, there being no sale of a business or imparting of specialized knowledge or information involved."[99]

B. *An Analysis of the Elements of Reasonability under Texas Law*

The Texas Supreme Court in *Hill v. Mobile Auto Trim, Inc.*[100] listed four criteria that a covenant must meet in order to be found reasonable and, therefore, enforceable:[101] (1) the "promisee must have a legitimate interest in protecting business [good will] or trade secrets;"[102] (2) "the covenant must not be oppressive to the promisor;"[103] (3) "the covenant must not be injurious to the public, since courts are reluctant to enforce covenants which prevent competition and deprive the community of needed goods,"[104] and (4) "the noncompetitive agreement should be enforced only if the promisee gives consideration for something of value."[105] Each of these was applied in an original manner.[106]

1. The Interest of the Employer

The definition of the first element, the interest of the employer, specifically referred only to "business [good will]" and "trade secrets."[107]

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96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* (court offered no explanation for why barbering should be deemed "common calling").
100. 725 S.W.2d 168 (Tex. 1987).
101. *See id.* at 170-71.
102. *Id.* at 171.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 173 (Gonzalez, J., dissenting)(noting that majority ignored established Texas precedent in rendering decision).
107. *Id.* at 171.

Thus, the court's test ignored the fact that enforcement of covenants might be ancillary to an investment in human capital. The *Hill* court acknowledged that "[t]o allow employees to use or sell this valuable training or knowledge upon leaving a firm would create a disincentive for employers to train or educate employees," but it found upon the facts of the case that the franchise agreement involved little actual training.[108] In *Bergman*, the court did not place much emphasis on whether the hair salon had provided valuable training to the stylists.[109]

Furthermore, the *Hill* court argued that the business good will generated by Hill as a franchisee belonged to him and not to his employer.[110] The court maintained that he had obtained clients through "some type of personal magnetism or personal [good will]," and that his "[s]hrewd employer" was seeking to "deprive" Hill of "the fruits of his good will" by enforcing the covenant.[111] This reasoning seems to presume that good will is "owned" by the employee.[112] *Bergman*

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108. *Id.* (employee/franchisee already trained as auto trim repairman before entering into agreement).

109. *See* Bergman v. Norris of Houston, 734 S.W.2d 673, 674 (Tex. 1987). The court referred to "specialized training" as a possible basis for enforcement of a covenant. *See id.* However, training, although not "specialized," may still be of value to other firms. *See* G. BECKER, HUMAN CAPITAL 11 (1964). Texas courts have sometimes held that in order for restrictive covenants to be enforceable, employees must have extended contacts with customers, take trade secrets from their employer, or possess some "unique or extraordinary skill which made them irreplaceable." *See, e.g.*, Diesel Injection Sales & Servs. v. Renfro, 656 S.W.2d 568, 572 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); Potyka, 531 S.W.2d 657, 662 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.). Thus, the mere fact that employees are trained at an employer's expense in a competitive business is not grounds for enforcing a covenant. *See, e.g.*, Hospital Consultants, Inc. v. Potyka, 531 S.W.2d at 662; Kidde Sales & Serv., Inc. v. Peairson, 493 S.W.2d 326, 330 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ); Grace v. Orkin Exterminating Co., 255 S.W.2d 279, 297 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.).

Before *Hill* and *Bergman*, the fact that the hair stylists in *Bergman* developed personal contacts with customers, and ultimately diverted them to their new business, should have been adequate grounds for enforcing the covenants. *See* Investors Diversified Serv. v. McElroy, 645 S.W.2d 338, 339 (Tex. App.—Corpus Christi 1982, no writ)(enforcing covenant where court found that ex-employee securities broker diverted customers, noting that "[t]he selling of securities is a highly competitive enterprise which depends to a large extent upon the strength of the relationship between the agent and his customer"); Leck v. Employers Casualty Co., 635 S.W.2d 450, 452-53 (Tex. App.—Fort Worth 1982, no writ).

110. *Hill*, 725 S.W.2d at 171-72.

111. *Id.* at 171.

112. Intangible personal qualities should ordinarily not be considered the property of the employer for purposes of noncompetition covenants. In addition, ethical norms may counsel against permitting individuals to sell vital elements of their personality. *See, e.g.*, Radin, *Mar-*

may mean that the employee retains good will, whoever owns it, if he engages in a "common calling."[113]

2. Oppressiveness of the Covenant to the Promisor and the Doctrine of "Common Callings"

In addition, the *Hill* court declared, "the covenant must not be oppressive to the promisor."[114] Rather than considering the factors of territorial and temporal extensiveness as evidence of monopoly power, and thus as indications of reasonableness, the court instead *assumed* that unequal bargaining power existed between Hill and Auto Trim.[115] The court found:

> [T]he covenant is oppressive to the promisor, Hill . . . . We recognize that a man's talents are his own. Absent clear and convincing proof to the contrary, there must be a presumption that he has not bargained away the future use of those talents.[116]

It should be noted that this presumption arose in the franchise context, where one expects the relationship to be better negotiated and formalized than in a typical employment setting.[117] Moreover, the court ignored the fact that even parties of different negotiating positions and strengths will still agree only to contracts that are mutually beneficial.[118]

The court borrowed the notion of "common calling" from a Utah

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ket-Inalienability, 100 HARV. L. REV. 1849, 1888-98 (1987)(discussing different philosophers' policies of inalienability).

113. In discussing the subject of good will, Justice Gonzalez noted,

> . . . the purpose of the covenant not to compete was to prevent Hill from exploiting the contacts and goodwill he made while working in his assigned franchise area. The covenant attempted to prohibit Hill from calling on any car dealerships in the entire seven-county Dallas-Fort Worth metroplex because managers from Hill's assigned area often move to other dealerships in the surrounding counties.

Hill, 725 S.W.2d at 174 (Gonzalez, J., dissenting); *see also* Gill v. Guy Chipman Co., 681 S.W.2d 264, 269 (Tex. App.—San Antonio 1984, no writ)(covenant enforced against real estate broker who "actively sought the position with the company and was aware that her new contract would include the noncompetition clause").

114. *Hill*, 725 S.W.2d at 171.

115. *See id.* at 172 (must be presumption that employee did not "bargain away" future use of talents in noncompetitive covenant).

116. *Id.* at 172.

117. *See id.* at 177 (Gonzalez, J., dissenting).

118. *See, e.g.*, Kugler v. Romain, 279 A.2d 640, 652 (N.J. 1971)(assumption that agreement results from "real bargaining" between parties); Rubin & Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 100 (1981).

case, *Robbins v. Finley*,[119] and apparently adopted *Robbins'* holding that "[c]ovenants not to compete which are primarily designed to limit competition to restrain the right to engage in a common calling are not enforceable."[120] In *Bergman*, the court again used this idea, invalidating a restrictive covenant on the ground that barbering is a "common calling."[121] Indeed, the *Bergman* court made this classification the centerpiece of its analysis.[122]

A doctrine of "common callings" may make some intuitive sense in the restrictive covenant context. This is because such agreements should be enforced only when the employer is not engaging in opportunistic behavior or exercising monopoly power, and not imposing significant negative social costs by restricting competition.[123] A covenant barring postemployment activity may be evidence of monopoly and opportunism when the cost of competition from the former employee is low because the employer's rivals are many and diffuse, or the skills taught to the employee are relatively unspecialized.[124] A law firm, for example, would not rationally decide to prevent former employees from joining other firms as messengers because there are many law firms and because messenger service usually does not involve specialized skills. Any attempt to enforce all but the most limited covenant in such a situation should therefore face heavy scrutiny.

Conversely, a firm may rationally seek to impose limits on the ability of an employee with unique training to join other firms. In such a case, a court should enforce a noncompetition agreement, unless it unduly infringes upon society's interest in maintaining open and com-

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119. 645 P.2d 623 (Utah 1982).

120. *Id.* at 627.

121. *See* Bergman v. Norris of Houston, 734 S.W.2d 673, 674 (Tex. 1987).

122. *See id.* at 674-75. Without utilizing the four criteria of reasonableness enumerated in *Hill*, the court, in *Bergman*, held that since the employees were engaged in a "common calling," the noncompetitive covenant was unenforceable against them. *See id.*

123. *See, e.g.*, Dynamics Research Corp. v. Analytic Sciences Corp., 400 N.E.2d 1274, 1282 (Mass. App. Ct. 1980)(limiting enforcement of noncompetitive covenants mitigates potential for monopoly); Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 684-85 (1960)(economic loss to society great when highly trained employee prevented from using special abilities elsewhere); Rubin & Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 99 (1981)(noncompetitive covenant may give employer incentive to underpay workers).

124. *Cf.* Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685, 691-92 (Ohio C.P. 1952)(restraint must be reasonable as to employer, employee, and public); Robbins v. Finlay, 645 P.2d 623, 627 (Utah 1982)(one of factors governing reasonableness of covenant not to compete is nature of employee's duties).

petitive markets. This is because with a large number of competing firms, the restriction on an employment with unique on-the-job training should pose no significant competitive threat. However, at the extreme, specialization of training ceases to justify the enforcement of restrictions. In fact, when an employee learns firm-specific information, no covenant may be necessary at all.[125]

The "common calling" doctrine is also useful to the extent that it assists courts in identifying when a firm's rivals are sufficiently diffuse, or if an employee's training is sufficiently nonspecialized. In such instances, competition by former employees would not usually impose a cost on the firm commensurate with the costs of restraining use of the employee's skills and his perceived loss of economic independence. The *Bergman* court held that "[w]hether an employee is engaged in a common calling is a question of law to be decided from the facts of each individual case."[126] Any test to identify those occupational settings in which noncompetition covenants will be enforceable should include at least two elements: (1) the presence of specialized employee skills or knowledge,[127] and (2) the strong likelihood of significant employer harm in the event of competition.[128] When one or both of these elements is absent, a Texas court should find that the covenant pertains to a "common calling" and is therefore unenforceable.

The first element, the "imparting of specialized knowledge or information," indicates that the employee is not engaged in a "common calling."[129] At one end of the spectrum, possession of trade secrets

125. *See* G. BECKER, HUMAN CAPITAL 18 (1964). Only one firm can fully utilize the skills of the specifically trained worker. *See id.* ("completely specific training" has no effect on value of trainees to other firms). However, the *Bergman* court's "specialization" dictum did not evidence recognition of this effect. *See Bergman*, 734 S.W.2d at 674.

126. *Bergman*, 734 S.W.2d at 674.

127. *See id.* (recognizing that noncompetitive covenants used to protect employer who has provided specialized knowledge and training enforceable).

128. *See, e.g.*, Martin v. Linen Sys. for Hosps., 671 S.W.2d 706, 709-10 (Tex. App.—Houston [1st Dist.] 1984, no writ); Hi-line Elec. Co. v. Cryer, 659 S.W.2d 118, 121 (Tex. App.—Houston [14th Dist.] 1983, no writ); Leck v. Employers Casualty Co., 635 S.W.2d 450, 453-59 (Tex. App.—Fort Worth 1982, no writ); Munzenreider & Assocs. v. Daigle, 525 S.W.2d 288, 292 (Tex. Civ. App.—Beaumont 1975, no writ)(mere training of employee insufficient to constitute harm to employer); Kidde Sales & Serv. v. Peairson, 493 S.W.2d 326, 329-30 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ)(where employer's customers' good will attaches to employee, noncompetitive covenant enforceable).

129. *Bergman*, 734 S.W.2d at 674. Texas courts have not defined how specialized skills must be in order not to be considered a "common calling."

undoubtedly will be deemed specialized knowledge,[130] but borderline cases are easy to imagine. The *Bergman* court, for example, held that barbering was a "common calling."[131] However, surely hair stylists who have studied for long periods of time, received extensive training, and developed unique approaches to styling ought to be subject to noncompetition agreements.[132]

In determining what types of skills may be properly labelled "common callings," one approach might be to focus on the degree to which a particular employee is represented in the labor market—whether his skills are widely available so that he is fungible from the employer's perspective. One commentator has argued that a noncompetition agreement should be enforced where the technique or knowledge imparted to the employee is the product of considerable time, effort, or money by the former employer.[133] This approach likewise demands that courts engage in a case- and industry-specific inquiry.[134] A court may be forced to ascertain prevailing wage patterns, learn industry recruiting practices, and determine relative skill levels among employees. For example, the Utah Supreme Court, in *Robbins*, reasoned:

> The record shows that Finlay's job required little training and is not unlike the job of many other types of salesmen. The company's investment in training him was small. In fact, he had previously worked as a Beltone salesman for other dealers in Canada. Furthermore, there is no showing that his services were special, unique, or extraordinary, even if their value to his employer was high.[135]

Closely related to this approach is the element of employer harm. Texas courts have always required that employers demonstrate a legitimate business interest in analyzing the reasonableness of a cove-

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130. *See* 54 AM. JUR. 2D *Monopolies* § 547 (1971 & 1987 Supp.)(knowledge of employer secrets).

131. *Bergman*, 734 S.W.2d at 674.

132. What of slightly more exclusive hair stylists who are available by appointment only? What of those who cater to the very affluent and, fancying themselves more artists than barbers, practice only a few time per month? At some point, the label "common calling" can no longer be used to describe these types of hair stylists.

133. *See* Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 671 (1960)(arguing that process or method which is not unique or different not reasonable basis for restraint).

134. In deciding whether an employee is engaged in a "common calling," by focusing on whether his skills are widely available, courts may be forced to ask such specific questions as: how fungible within their profession are computer programmers; or, how interchangeable are petroleum engineers?

135. Robbins v. Finlay, 645 P.2d 623, 628 (Utah 1982).

nant,[136] but this factor is also relevant to the "common calling" inquiry. New York courts, for example, have held that for an employer to make a showing of special, unique, or extraordinary skills, it must do more than simply show that an employee excels at his work or that his performance is of high value to his employer. The employer must also demonstrate that the employee is irreplaceable or that the loss of his services would cause the firm irreparable injury.[137] This requirement closely tracks one of the primary policy bases of noncompetition covenants—to encourage employers to train employees.[138] An employer will be most reluctant to educate employees precisely when the harm to him, should they later leave and compete with him, is greatest. By focusing on the probable harm to employers, the proposed two-pronged "common calling" test would not cause "a disincentive for employers to train or educate employees."[139] Without such a test, the "common calling" concept may be applied arbitrarily if it describes occupations without reference to these fundamental policy bases.[140]

Adding to the confusion, the term "common calling" has at least three separate meanings in other legal contexts. First, as used in cases interpreting the privileges and immunities clause of the United States

136. *See, e.g.*, Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 312, 340 S.W.2d 950, 951 (1960)(covenant not to compete must be reasonably necessary to protect employer's business and good will); Hospital Consultants, Inc. v. Potyka, 531 S.W.2d 657, 663 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.)(employer has burden to show noncompetitive covenant reasonable); Munzenreider & Assocs. v. Daigle, 525 S.W.2d 288, 291-92 (Tex. Civ. App.—Beaumont 1975, no writ)(same).

137. *See* Purchasing Assocs. v. Weitz, 196 N.E.2d 245, 249 (N.Y. 1963)(employer must show more than that employee performs well or that such performance is of high value to employer); *see also* Reed, Roberts Assocs., Inc. v. Strauman, 353 N.E.2d 590, 593 (N.Y. 1976)(finding services not unique or extraordinary); Sybron Corp. v. Wetzel, 403 N.Y.S.2d 931, 935 (N.Y. App. Div.)(holding that employee who accumulated skill and experience by supervising glass lining manufacturing process over number of years could not be enjoined from competing), *aff'd in part, rev'd in part*, 385 N.E.2d 1055 (1978).

138. *See., e.g.*, Rubin & Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 97 (1981)(in exchange for training from employer, employee induced to agree to covenant not to compete); Comment, *Economic and Critical Analyses of the Law of Covenants Not to Compete*, 72 GEO. L.J. 1425, 1429 (1984)(if employees allowed to freely use training or knowledge obtained from former employer elsewhere, employers would have disincentive to train employees).

139. Hill v. Mobile Auto Trim, 725 S.W.2d 168, 171 (1987).

140. As Justice Gonzalez asked, "What about the employees engaged in a 'common calling' that also have knowledge of the employer's trade secrets? Are they free to divulge the trade secrets in violation of an agreement to the contrary?" *Id.* at 176 (Gonzalez, J., dissenting).

Constitution, the term distinguishes commercial from recreational activities.[141] The United States Supreme Court has held, "[t]he pursuit of a common calling is one of the most fundamental of those privileges protected by the [privileges and immunities] [c]lause."[142] The Court has refused, however, to extend protection to activities such as hunting, on the ground that they are not commercial in nature.[143] This use of the phrase "common calling" is therefore not applicable to the noncompetition covenant context.

Second, "common calling" may be used to refer to some professions. Attorneys, for example, have been described as professionals "who follow a common calling in a spirit of public service and nonetheless so because they thereby earn their livelihood."[144] Another scholar has written:

> The term "profession," it should be borne in mind, as a rule is applied to a group of people pursuing a learned art as a common calling in the spirit of public service where economic rewards are definitely an incidental, though under the existing economic conditions undoubtedly a necessary by-product. In this a profession differs radically from any trade or business which looks upon money-making and personal gain as its primary purpose.[145]

This definition, because it focuses on altruism, is in tension with the meaning of "common calling" in the privileges and immunities context, which emphasizes the importance of the profit motive.

Closely related to the public service meaning is the historical use of "common callings" as those occupations which, because of their status, impose particular duties on those within them. For example, the

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141. U.S. CONST. art. IV, § 2, cl. 1. The privileges and immunities clause states, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.*

142. Supreme Court v. Piper, 470 U.S. 275, 280 n.9 (1985) (quoting United Bldg. & Constr. Trade Council v. Mayor & Council of Camden, 465 U.S. 208, 219 (1984)).

143. *See* Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 378-88 (1978); *see also* Powell v. Daily, 712 P.2d 356, 359 (Wyo. 1986)(contrasting "recreational activity" with "pursuing a common calling, plying a trade, and doing business"). ". . . [C]ommercial fishing like other common callings is within the purview of the Privileges and Immunities Clause. The key word is commercial which translates into livelihood and distinguishes it from recreational fishing and hunting." O'Brien v. State, 711 P.2d 1144, 1152 (Wyo. 1986).

144. Toft v. Ketchum, 113 A.2d 671, 677 (N.J.)(Jacobs, J., concurring), *cert. denied*, 350 U.S. 887 (1955).

145. State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64, 65-66 (Mo. 1981)(quoting A. CHROUST, 1 THE RISE OF THE LEGAL PROFESSION IN AMERICA x-xi (1965)), *cert. denied*, 454 U.S. 1142 (1982).

common law "attached [to various 'public' or 'common' callings] certain obligations including—at various stages of doctrinal development—the duty to serve all customers on reasonable terms without discrimination."[146] Were this the construction adopted by the Texas courts, a peculiar historical test would develop—common carriers,[147] innkeepers,[148] and public utilities[149] might be singled out as employers unable to enforce postemployment covenants. Regardless of the eventual interpretation adopted by Texas courts, it is clear that prior common law usages of the phrase "common calling" provide no guidance to Texas courts applying the concept to postemployment covenants not to compete.

3. The Effect on Economic Competition

The third element of reasonableness discussed by the *Hill* court was the covenant's effects on economic competition.[150] The Texas Supreme Court did not analyze these effects explicitly, although its refusal to enforce a reformed version of the covenant implicitly embodied a broad notion of "fair competition."[151]

4. Consideration Given by the Promisee

Finally, the *Hill* court ruled, "the non-competitive agreement should be enforced only if the promisee gives consideration for something of value."[152] The court found that there was an "absence of consideration" because Auto Trim gave nothing to Hill in return for his promise not to compete.[153] The court seemingly ignored the fact that the employment or franchise relationship itself may be consideration for the covenant.[154] Consequently, the court must be requiring

146. Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 121 (Cal.)(quoting *In re* Cox, 474 P.2d 992, 996 (Cal. 1970)(brackets in *Marina Point*)), *cert. denied*, 459 U.S. 858 (1982).

147. *See* Beck & Gregg Hardware Co. v. Assoc. Transp., 81 S.E.2d 515, 516 (Ga. 1954)(private individual may enforce performance by common carrier of certain public duties in which individual has special interest).

148. *See* Jackson v. Va. Hot Springs Co., 213 F. 969, 972-73 (4th Cir. 1914)(as general rule, innkeeper required to furnish accomodations).

149. *See* Oklahoma Natural Gas Co. v. Graham, 111 P.2d 173, 174-75 (Okla. 1941)(gas company liable to customer for wrongful disconnection of gas service).

150. *See* Hill v. Mobile Auto Trim, 725 S.W.2d 168, 171 (1987).

151. *See id.* at 172.

152. *Id.* at 171.

153. *See id.*

154. *See id.* (court noted only that special knowledge or training given by employer to employee constitutes valuable consideration).

employers to prove the fact and value of the training or confidential information supporting the covenant.[155]

III. THE PROBABLE TREND OF TEXAS LAW

Hill and *Bergman* may signal a sharp departure from traditional Texas noncompetition covenant law, but some signals indicate that the impact of the two cases on present Texas law may be much less. For example, the *Hill* majority narrowed its holding to a covenant described as, "[n]either a covenant incident to the sale of a business [n]or a postemployment covenant to prevent [Hill from] utilizing special skills or knowledge."[156] Moreover, although the court failed to adopt the suggestion of Justice Gonzalez that the case be viewed as one strictly limited to franchise agreements,[157] its opinion can be read to *support* just such an interpretation. This is because the majority maintained that "in effect, Hill paid for the use of Mobile's name and accompanying [good will]"[158]—an argument which identifies Hill as a franchisee or licensee, rather than as an employee.

Even in the wake of *Hill*, a Texas court of appeals upheld a noncompetition agreement which prohibited sales representatives of a cellular phone dealer from disclosing customer lists, calling on former customers, or competing in any other way within twenty-five miles of Harris County for a period of one year.[159] Although the court of appeals grounded much of its analysis on the fact that a noncompetition covenant is necessary to encourage employers to train their employees[160]—an effect which the *Hill* court dismissed on the facts of that case—the lower court also opined, "it would seem to be unfair compe-

155. *See id. But see, e.g.*, Arevalo v. Velvet Door, Inc., 508 S.W.2d 184, 186 (Tex. Civ. App.—El Paso 1974, writ ref'd n.r.e)("continuation of employment with payment of salary is consideration" for noncompetitive covenant); Security Serv. v. Priest, 507 S.W.2d 592, 595 (Tex. Civ. App.—Dallas 1974, no writ)(fact that employer may terminate employment contract may not prove lack of consideration for noncompetitive covenant); Carl Coiffure, Inc. v. Mourlot, 410 S.W.2d 209, 211 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.)(providing employment is valid consideration for noncompetitive covenants); Bramlett & Co. v. Hunt, 371 S.W.2d 787, 789 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.)(unilateral restriction contained on printed application for employment form enforceable where execution of form condition precedent to employment).

156. *Hill*, 725 S.W.2d at 171.

157. *See id.* at 177 (Gonzalez, J., dissenting).

158. *Id.* at 171.

159. *See* Unitel Corp. v. Decker, 731 S.W.2d 636, 641 (Tex. App.—Houston [14th Dist.] 1987, no writ).

160. *Id.* at 640.

tition to allow a former employee to use for her own benefit and profit something which is in the nature of a property right of her former employer when she expressly agreed not to do so."[161] Such an argument clashes with the *Hill* court's view of employer good will.[162] Furthermore, the court of appeals ruled that an inability to work as a cellular phone salesman within the prescribed area for one year did not constitute "undue hardship," and it declined to use the concept of a "common calling" in its analysis.[163]

Another court of appeals simply presumed an injury to the former employer when the employee's covenant was found to be incident to the sale of a business.[164] The court reasoned:

> Without such an agreement, the value of the business would be reduced, lessening the likelihood that [the defendant's] business would be purchased. The agreement was, therefore, supported by valuable consideration.
>
> Moreover, the covenant is not injurious to the public nor oppressive to the promisor because she has specialized training in another field.[165]

Note that, in balancing the interests, the court considered the usefulness of the former employee's skills in other employment not covered by the covenant in determining whether the covenant was "oppressive." Although the opinion is unclear, the former employee apparently had secretarial skills applicable outside the medical records service business, an area in which she could not compete.[166]

Ultimately, the test returns to a reasonableness inquiry, as exemplified in an opinion of the Utah Supreme Court, the original author of the "common calling" concept.[167] Even that court subsequently upheld a noncompetition covenant signed by the national sales manager of a cable television equipment manufacturer after the court found the covenant "necessary to protect the [good will] of the business" and "reasonable in its restrictions as to time and area," without embark-

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161. *Id.*

162. *Compare* Unitel Corp. v. Decker, 731 S.W.2d at 640 (good will is property right of employer) *with* Hill v. Mobile Auto Trim, 725 S.W.2d 168, 171 (Tex. 1987)(employee may divert former employer's customers due to employee's personal good will).

163. *See* Unitel Corp. v. Decker, 731 S.W.2d at 640 (court balanced necessity of protecting employer with oppressiveness of covenant to employee).

164. *See* M.R.S. Datascope Inc. v. Exchange Data Corp. Inc., No. 01-87-00401-CV at 7 (Tex. App.—Houston, Oct. 8, 1987, n.w.h.) (not yet reported).

165. *Id.* at 6 (citation omitted).

166. *Id.*

167. *See* Robbins v. Finley, 645 P.2d 623, 627-28 (Utah 1982).

ing on a "common calling" analysis.[168]

Rather than applying a "common calling" analysis, courts should first look to whether the former employer imparted valuable skills and information of a nature which enhanced the employee's earning power. Courts should then weigh whether the employee's knowledge obtained during employment is specialized and whether the employer's competitors are numerous or concentrated.[169]

Although enforcement of these contract provisions should not turn on a retrospective and, necessarily, introspective analysis of bargaining strength and sophistication, the probable benefits to employees and harm to the employer are useful factors for another reason, the court can use them to determine to what the parties agreed, or to what they would have agreed had they enjoyed perfect information and a competitive labor market. One weakness of the reasonableness inquiry is that it can lead to balancing interests on a case-by-case basis,[170] and is often vulnerable to the charge that such a fact-specific, subjective standard will ultimately produce inconsistent results.[171]

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168. System Concepts, Inc. v. Dixon, 669 P.2d 421, 426 (Utah 1983).

169. *See, e.g.*, Martin v. Linen Sys. for Hosps., 671 S.W.2d 706, 709-10 (Tex. App.—Houston [1st Dist.] 1984, no writ)(employer must provide proof of probable injury); Hi-line Elec. Co. v. Cryer, 659 S.W.2d 118, 121 (Tex. App.—Houston [14th Dist.] 1983, no writ)(refusing to enforce covenant because employer failed to show probable injury); Leck v. Employers Casualty Co., 635 S.W.2d 450, 453-54 (Tex. App.—Fort Worth 1982, no writ)(enforcing covenant where injury to employer immediate and irreparable). Trade secrets provide the clearest case of valuable information entitled to protection. *See* Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958). They must not be publicly available or readily ascertainable by independent investigation. *See* SCM Corp. v. Triplett Co., 399 S.W.2d 583, 586-87 (Tex. Civ. App.—San Antonio 1966, no writ); *see also* Gill v. Guy Chipman Co., 681 S.W.2d 264, 268 (Tex. App.—San Antonio 1984, no writ) (enforcing covenant to protect confidential "business methods and techniques" and "financial data regarding the company"). Client lists have sometimes received protection, see Hospital Consultants, Inc. v. Potyka, 531 S.W.2d 657, 662 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.), although they have often been found not confidential. *See, e.g.*, Allan J. Richardson & Assocs. v. Andrews, 718 S.W.2d 833, 837 (Tex. App.—Houston [14th Dist.] 1986, no writ); Research Equip. Co. v. Galloway, 485 S.W.2d 953, 956 (Tex. Civ. App.—Waco 1972, writ dism'd w.o.j.).

170. *See* Josten's Inc. v. Cuquet, 383 F. Supp. 295, 298-99 (E.D. Mo. 1974)(applying Minnesota law). The court sought to protect the average individual employee who faced unequal bargaining power and found himself in oppressive conditions. The court refused to enforce the covenant after balancing the respective interests: the former employee, who was sixty-two years old, had worked in his current occupation all his life and was now a sole proprietor, and the employer was a large, publicly held corporation. *See id.*

171. *Compare* Welcome Wagon, Inc. v. Morris, 224 F.2d 693, 700 (4th Cir. 1955)(refusing to enforce five year noncompetition agreement against former Welcome Wagon hostess) *and* Briggs v. Boston, 15 F. Supp. 763, 768 (N.D. Iowa 1936)(same) *and* National Hearing Aid Centers, Inc. v. Avers, 311 N.E.2d 573, 577 (Mass. Ct. App. 1974)(refusing to enforce two

Preferably, in ascertaining reasonableness, courts will determine what the parties would have done had they predicted the apparently unforeseen circumstance. The detour created by *Hill* and *Bergman* may be salutary if it affords an opportunity to re-examine and refine Texas noncompetition covenant law.

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year noncompetition agreement against hearing aid salesman) *with* Welcome Wagon Int'l, Inc. v. Pender, 120 S.E.2d 739, 742 (N.C. 1961)(enforcing five year noncompetition agreement against former Welcome Wagon hostess) *and* Briggs v. Butler, 45 N.E.2d 757, 763 (Ohio 1942)(same) *and* Sonotone Corp. v. Baldwin, 42 S.E.2d 352, 354-55 (N.C. 1947)(enforcing one year agreement against hearing aid salesman/manager after reasonableness inquiry).