Spring 2005

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I. INTRODUCTION

The employment relationship has gone through dramatic changes in the last fifty years, and, with few exceptions, the notion of company loyalty and life long employment is a thing of the past.[1] As a consequence, many employers have adopted the use of covenants not to compete in employment contracts as a mechanism

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1. Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1736–37 (2004).

to ensure protection of trade secrets, other confidential information, and investment in employee training.[2] Traditionally a contractual tool used only with highly paid, upper-level employees, the use of covenants not to compete has become common place even with rank and file employees.[3] While employers view the use of covenants not to compete as a method to protect legitimate business interests,[4] employees typically dislike them for the corresponding reasons.

Covenants not to compete curtail legitimate career expectations, as well as limit the returns on an employee's educational investments.[5] It is not surprising, therefore, that courts have been

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2. *Id.* at 1742. Covenants not to compete are most commonly included in the following types of agreements: as part of an employment contract in which an employee agrees not to compete with the employer after employment termination; in the sale of a business where the seller agrees not to compete with the buyer; and in situations where a departing partner agrees not to compete with the partnership after dissolution. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188 (2) (1981). This article focuses on the first type of agreement, primarily because in the latter two situations, the parties are more likely to employ legal counsel and have equal bargaining power in the negotiation process.

3. Matheny & Crain, *supra* note 1, at 1744. The following cases illustrate the breadth of use of covenants not to compete: Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc., 946 F. Supp. 495, 502 (E.D. Ky. 1996) (security guard); Orkin Exterminating Co. v. Etheridge, 582 So. 2d 1102, 1104 (Ala. 1991) (pest exterminator); Royal Servs., Inc. v. Williams, 334 So. 2d 154, 156 (Fla. Dist. Ct. App. 1976) (janitor); Stein Steel & Supply Co. v. Tucker, 136 S.E.2d 355, 356 (Ga. 1964) (plumbing supplier); Reardigan v. Shaw Indus., Inc., 518 S.E.2d 144, 148 (Ga. Ct. App. 1999) (carpet salesman); E. Distrib. Co. v. Flynn, 567 P.2d 1371, 1376 (Kan. 1977) (liquor deliveryman); Central Adjustment Bureau, Inc. v. Ingram Assoc., Inc., 622 S.W.2d 681, 685 (Ky. Ct. App. 1981) (collection agency employee); Hammons v. Big Sandy Claims Serv., Inc., 567 S.W.2d 313, 315 (Ky. Ct. App. 1978) (claims adjuster); Daiquiri's III on Bourbon, Ltd. v. Wandfluh, 608 So. 2d 222, 224 (La. Ct. App. 1992) (bartender); Folsom Funeral Serv., Inc. v. Rodgers, 372 N.E.2d 532, 533 (Mass. App. Ct. 1978) (undertaker); Nail Boutique, Inc. v. Church, 758 S.W.2d 206, 210–11 (Mo. Ct. App. 1998) (manicurist); Brewer v. Tracy, 253 N.W.2d 319, 321–22 (Neb. 1977) (garbage collector); Carl Coiffure, Inc. v. Mourlot, 410 S.W.2d 209, 211 (Tex. Civ. App. 1966) (cosmetician).

4. Some companies, for example, use confidentiality agreements to protect trade secrets and nonsoliciataion agreements to protect their customer base.

5. Mark A. Glick et al., *The Law and Economics of Post-Employment*

called upon to enforce, reform, or void such agreements, particularly when employees subject to such restrictive covenants leave their employment for better opportunities in the same or similar industry or field.[6] Despite common misperceptions, courts generally uphold covenants not to compete—if the covenants comply with reasonable standards.

Although negotiation is expected in employment contracts for some executive employees, those signed by most ordinary employees are form contracts drafted by the employer with little, if any, negotiation.[7] In addition to the covenant not to compete, such employment contracts typically contain employer-sided attorney fee, assignment, and choice of law provisions that further serve to constrain the employee. These contracts are generally presented shortly after employment on a *take it or leave it* basis, when the employee has little or no bargaining power.[8] Consequently, most employees have little motivation or ability to decline to sign them or to negotiate less onerous terms.

When an employee decides to leave a job, however, covenants not to compete operate as significant impediments to future employment and may even prevent employees from becoming successfully self-employed. In addition to being sued for damages,[9]

Covenants: A Unified Framework, 11 GEO. MASON L. REV. 357 (2002) [hereinafter Glick].

6. *See generally* Frank B. Harty, *Competition Between Employer and Employee: Drafting and Enforcing Restrictive Covenants in Employment Agreements*, 35 DRAKE L. REV. 261 (1986). It should be noted that most covenants not to compete are drafted in a manner that restrict post-employment activities whether or not an employee is terminated or leaves employment under their own volition.

7. Rachel Arnow-Richman, *The Role of Contract in The Modern Employment Relationship*, 10 TEX. WESLEYAN L. REV. 1, 5 (2003).

8. Rachel Arnow-Richman, *Noncompetes, Human Capital, and Contract Formation: What Employment Law Can Learn from Family Law*, 10 TEX. WESLEYAN L. REV. 155, 165–66 (2003).

9. Harty, *supra* note 6 at 285–86 (1986). Most litigation concerning covenants not to compete is between an employer seeking to enforce a covenant and an employee at-will. An employment at-will is an agreement where an employee is retained for an unspecified period of time, and the employment is subject to termination by either party. BLACK'S LAW DICTIONARY 545 (7th ed. 1999).

courts may issue injunctions that prohibit employees from engaging in conduct that violates non-competes.[10] Employers can also be held liable in hiring someone who violates an agreement with a previous employer by, for example, sharing secrets, approaching former customers, or simply for hiring such an employee.[11] In some cases, employers can recover damages from both the former employee and a new employer who has collaborated in the employee's transgressions.[12]

This article analyzes the current state of Tennessee law concerning the enforceability of contractual restrictions on post-employment competition. In order to provide the appropriate public policy framework, a brief history of the development of covenants not to compete is presented in Part II. Part II is then followed by Parts III and IV, which set forth a selected analysis of the law and policy of other jurisdictions in an effort to suggest improvement to Tennessee law. Part V concludes and offers specific recommendations.

II. HISTORICAL BACKGROUND OF COVENANTS NOT TO COMPETE

A. English Common Law Roots

During the Middle Ages, English courts found all restraints on trade to be void and unenforceable, including post-employment covenants not to compete.[13] The common law reflected the prevailing public policy which was strongly influenced by the economic, labor, and cultural identity of the early guild system.[14]

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10. Harty, *supra* note 9, at 288–90.

11. *Id.* at 288–89.

12. *Id.*

13. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 629 (1960).

14. *Id.* at 634. Restraints on future employment were determined to be void and unenforceable because they circumvented the customary rules of apprenticeship. During this period, a contractual relationship existed between the master and the apprentice. The master agreed to provide training and a relatively low wage to the apprentice, typically for a period of seven years. At the end of this period, the apprentice would be free to practice his trade as a journeyman, eventually becoming a master. Glick, *supra* note 5, at 360–61.

During this period, English courts struck down restrictive employment covenants based on the laws and traditions of this system,[15] as well as the desire to achieve commercial fairness and economic independence.[16] This trend continued even as the importance of the guild system declined,[17] due at least in part to a policy shift which promoted free trade and encouraged individual initiative.[18]

Freedom of contract emerged as capitalism became the predominant policy concern during the eighteenth and nineteenth centuries. As a result, English courts began issuing decisions which allowed limited restraints on trade.[19] One such case, *Mitchel v. Reynolds*,[20] established a new framework for analyzing restrictive covenants and ushered in the application of what became known as the "rule of reason" test for evaluating restrictive employment contracts as well.[21] Although the traditional rule remained that restraints on trade were on their face invalid, the court examined whether "some essential economic or business purpose" existed

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15. Blake, *supra* note 13, at 632.

16. 8 WILLIAM S. HOLDWORTH, A HISTORY OF ENGLISH LAW 56–57 (2d ed. 1937). *See also* Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L.J. 441, 450–560 (2001).

17. 8 HOLDSWORTH, *supra* note 16, § 2, at 56–61.

18. *Id.* at 57.

19. Blake, *supra* note 13, at 638 (discussing the "flood" of noncompete cases reaching the English courts in the eighteenth and nineteenth centuries).

20. 24 Eng. Rep. 347 (Q.B. 1711) (cited in Glick, *supra* note 5, at 366).

21. *See* 8 HOLDSWORTH, *supra* note 16, § 2, at 60–61 (discussing the fact that *Mitchel v. Reynolds* marked "the true beginning of modern law on this subject"); Blake, *supra* note 13, at 639 (discussing how courts regularly refer to *Mitchel v. Reynolds* as "the fundamental authority" to be applied). The defendant in *Mitchel v. Reynolds* assigned the lease of a bakehouse to the plaintiff. *Mitchel*, 24 Eng. Rep. at 347. Contemporaneously with the lease, the defendant agreed not to operate a bakehouse himself within the same parish. *Id.* Although the *Mitchel* court did not have before it a covenant incident to an employment agreement, the court noted that its decision would likely change if it did. *Id.* For such agreements 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 prejudice them in their custom, when they come to set up for themselves." *Id.* at 350.

behind the agreement.[22] If the contract had such legitimate economic and business purposes and "appeared to be made upon good and adequate consideration,"[23] the covenant should be upheld so long as the terms of the contract and the circumstances surrounding its making were reasonable.[24]

Gradually the "rule of reason" test was reformulated by the courts to include balancing the interests of the parties with the interests of the public.[25] In *Horner v. Graves*,[26] the English court found that the element of reasonableness was not limited only to the consideration stated in the contract, but also its potential impact on the public welfare.[27] On this point, the *Horner* court concluded that, if a restrictive covenant within an employment agreement was likely to cause undue injury to the public,[28] the covenant should be found unenforceable.

B. Development Within the United States

The development of the law of post-employment restraints in the United States followed the nineteenth century English pattern. Courts in America adopted the "rule of reason" test and the proposition that the law upholds restraints on trade if the restraints are reasonable under the circumstances,[29] ancillary to a valid transac-

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22. Glick, *supra* note 5, at 365 (paraphrasing *Mitchel*, 24 Eng. Rep. at 248, 251–52).

23. *Mitchel*, 24 Eng. Rep. at 349.

24. Glick, *supra* note 5, at 365. One important note about the *Mitchel* decision is that its author, Lord Macclesfield, did not base his opinion on concepts of freedom of contract. *Id.* The determining factor was more likely whether there was an inequality of bargaining power between the parties. *Id.* (quoting Blake, *supra* note 13, at 637).

25. Glick, *supra* note 5, at 366.

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

27. *Id.* (holding that a 100 mile restriction imposed on a dentist apprentice was unreasonable because the personal nature of dental services made it impossible for such a wide area to be serviced by only the previous employer himself).

28. *Id.* For example, if the covenant was found to deprive the public of needed services.

29. *See, e.g.*, Oregon Steam Navigation Co. v. Winsor, 87 U.S. (20 Wall.) 64 (1874). In order for a noncompetition agreement "to be reasonable, the pro-

tion or relationship,[30] and limited in duration and geographic scope.[31] Initially some courts were reluctant to enforce restraints of trade that covered an entire state,[32] but this approach changed with the United States Supreme Court's decision in *Oregon Steam Navigation Co. v. Winsor*[33] in 1874.

Not only did the *Winsor* decision change the view that state boundaries were the only relevant factor in determining the reasonableness of geographical limitations to covenants not to compete,[34] it also helped to firmly establish the "rule of reason" analysis when evaluating restraint of trade issues in American law. In the era of *Winsor*, New York, Massachusetts and Rhode Island also rendered decisions applying a "rule of reason" analysis as it pertained to state boundaries.[35]

Although the common law of restraints of trade was imported almost entirely from England to the United States, the industrial revolution and the growing public perception of a "trust problem"

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misee must have an interest worthy of protection;" therefore, such a restraint must "be subsidiary to an otherwise valid transaction or relationship that gives rise to such an interest." RESTATEMENT (SECOND) OF CONTRACTS § 187 cmt. b (1981).

30. *See* Blake, *supra* note 13, at 630–31, 637–46.

31. *See* Pyke v. Thomas, 7 Ky. (4 Bibb) 486, 488 (1817); Pierce v. Woodward, 23 Mass. (6 Pick.) 206, 206–08 (1828) (sale of grocery store with verbal agreement not to compete within certain distance); Palmer v. Stebbins, 20 Mass. (3 Pick.) 188, 193 (1825) (exclusive agreement to carry all goods of obligor and not encourage competition with boatman to carry goods); Pierce v. Fuller, 8 Mass. 223, 225 & n.[a] (1811) (purchase of stage line between Boston and Providence, Rhode Island); Nobles v. Bates, 7 Cow. 307, 309 (N.Y. 1827).

32. *See* Taylor v. Blachard, 95 Mass. (13 Allen) 370, 375 (1866); Lawrence v. Kidder, 10 Barb. 641, 655 (N.Y. App. Div. 1851).

33. 87 U.S. (20 Wall.) 64 (1874). The Court upheld a covenant that a former steamship owner would not compete with its purchaser in the state of California. *Id.* at 71. The Court reasoned that the covenant was reasonable, even though its geographic scope encompassed an entire state, because "[i]n this country . . . [s]tate lines interpose such a slight barrier to social and business intercourse." *Id.* at 67.

34. *See* Blake, *supra* note 13, at 644.

35. *Id.* (citing Morse Twist Drill & Mach. Co. v. Morse, 103 Mass. 73 (1869); Diamond Match Co. v. Roeber, 13 N.E. 419 (N.Y. 1887); Herreshoff v. Boutineau, 19 A. 712, 713 (R.I. 1890) (dictum)).

led to dissatisfaction with common law remedies which, in turn, resulted in increasing pressure for congressional action.[36] In an effort to circumvent price competition and deflation, firms engaged in destructive competition by creating trusts and stock pools.[37] This concern led to the Sherman Anti-Trust Act of 1890,[38] which rendered illegal contracts in restraint of trade.[39] However, cases that have analyzed restrictive covenants under the Sherman Act have not departed appreciably from the common law precedent.[40] In the 1898 case of *United States v. Addyston Pipe and Steel Co.*,[41] the Sixth Circuit Court of Appeals held that any restrictive covenant affecting interstate commerce that was unenforceable at common law also violated the Sherman Act.[42] On appeal, the United States Supreme Court affirmed this decision,[43] and, in a

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36. Glick, *supra* note 5, at 369. "The primary flaw of the common law of restraints in controlling the trusts was that contractual privity was required for standing (possessed only by the cartel members themselves) when the primary anticompetitive effect was borne by third parties (consumers and small businesses)." *Id.*

37. *Id.*

38. Sherman Anti-Trust Act, ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (2000)).

39. *Id.* Section one of the Sherman Anti-Trust Act states "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.*

40. *See generally* Milton Handler & Daniel E. Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669 (1982).

41. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). *Addyston* originated in the Eastern District of Tennessee. *Id.* at 271. In dictum, Judge Taft (later Chief Justice) observed that if the contract had as its main purpose the restriction of competition, the contract promoted a monopoly and was therefore void, regardless of the reasonableness of the restraint. *Id.* at 282–83, 291 (dictum). However, if the covenant restraining trade was deemed ancillary to the main contract, then the question of whether the restraint was unreasonable arose. *Id.* at 282. If the restraint oppressed the covenantor without a corresponding benefit upon the covenantee, or if the restraint suggested a monopoly, then the contract was void. *Id.*

42. *Id.* at 278–79. The court noted the rule of reason test as articulated in *Mitchel v. Reynolds*. *Id.* at 279.

43. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

later opinion, affirmed the use of the rule of reason to evaluate the impact of the challenged restraints on competitive conditions rather than to inquire into the reasonableness of the challenged restraints.[44]

III. OVERVIEW OF THE LAW OF COVENANTS NOT TO COMPETE

A. The Law in Tennessee

Following the establishment of the Sherman Anti-Trust Act, the Tennessee legislature passed legislation, as did many other states, based upon the Act to generally prohibit contracts restraining trade in interstate commerce and contracts which control the price of a product.[45] Yet, in spite of federal and state legislation prohibiting restraints in trade, both the federal courts[46] and the Tennessee courts have refused to find covenants not to compete illegal per se, choosing instead to invalidate contracts containing such covenants only when found unreasonable.[47]

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44. Nat'l Soc'y of Prof'l Eng'r v. United States, 435 U.S. 679, 688–92 (1978).

45. TENN. CODE ANN. § 47-25-101 (2004) states:

> All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void.

46. Glick, *supra* note 5, at 410–11 notes:

> [A]ll of the courts addressing the issue have held that covenants not to compete ancillary to either the sale of a business, the sale of property, a partnership agreement, or a general employment contract are not illegal per se under the Sherman Act and must be subjected to the rule of reason test.

Id.

47. Cesnick v. Chrysler Corp., 490 F. Supp. 859, 868 (M.D. Tenn. 1980)

In 1966, the Tennessee Supreme Court in *Allright Auto Parks, Inc. v. Berry*,[48] reflecting the development of the rule of reason analysis, established four factors relevant to determining whether a covenant not to compete is reasonable under the particular circumstances:

(1) the consideration supporting the agreement;

(2) the threatened danger to the employer in the absence of such an agreement;

(3) the economic hardship imposed on the employee by enforcing such a covenant; and

(4) whether or not such a covenant should be adverse to the public interest.[49]

(holding an agreement between two corporations does not violate the Sherman Anti-Trust Act where the corporation that sold one of its divisions agreed with purchasing corporation not to rehire employees of division sold to other corporation if employees refused employment with purchaser); Ramsey v. Mutual Supply Co., 427 S.W.2d 849, 854 (Tenn. Ct. App. 1968) (employment); Baird v. Smith, 161 S.W. 492, 493 (Tenn. 1913) (sale of business). *But see* Herbert v. W. G. Bush & Co., 298 S.W.2d 747, 751 (Tenn. 1957) (covenant not to compete invalidated because covenant tended to lessen full and free competition in manufacture of brick in violation of Tennessee statute).

48. 409 S.W.2d 361 (Tenn. 1966).

49. *Id.* at 463. The *Allright* court further intimated the following proviso:

> There is no inflexible formula for deciding the ubiquitous question of reasonableness, insofar as noncompetitive covenants are concerned. Each case must stand or fall on its own facts. However, there are certain elements which should always be considered in ascertaining the reasonableness of such agreements.

Id. at 363. This analysis is also consistent with that used by the RESTATEMENT (SECOND) OF CONTRACTS:

> (1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if
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> (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or
>
> (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.

RESTATEMENT (SECOND) OF CONTRACTS § 188(1) (1981). *See also* Greene County Tire & Supply, Inc. v. Spurlin, 338 S.W.2d 597, 600 (Tenn. 1960) (applying the rule of reason).

While generally courts do not inquire into the adequacy of consideration of a contract,[50] covenants not to compete are closely scrutinized for basic contractual elements like consideration.[51] In situations where the employment agreement is found not to be supported by adequate consideration, a court may hold it unenforceable without further inquiry. In Tennessee, if an employee signs a covenant not to compete before the employment actually begins, the covenant is considered ancillary to the employment agreement and the employment itself constitutes the required consideration.[52] However, problems concerning adequacy of consideration may arise if an at-will employee signs the covenant not to compete after beginning work.[53]

The consideration issue was to some extent clarified in 1984, in *Central Adjustment Bureau, Inc. v. Ingram*.[54] The Tennessee Supreme Court held that agreements signed shortly after employment begins, as well as contemporaneously with the employment agreement, were supported by adequate consideration.[55] This was

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50. *See* TENN. CODE ANN. § 47-50-103 (2004).

51. As the comment *g* to section 188 of the Restatement suggests:

> Post-employment restraints are scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through loss of his livelihood. This is especially so where the restraint is imposed by the employer's standardized printed form.

RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. g (1981). *See also* Selox, Inc. v. Ford, 675 S.W.2d 474, 476 (Tenn. 1984) (citing comment *g* with approval and weighing an employer's need to restrain competition against the fairness of such a covenant to an employee).

52. Central Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 33 (Tenn. 1984) (stating that "employment is sufficient consideration for a covenant which is part of the original employment agreement"). *See also* Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 472 (Tenn. 1984) (reaffirming the principle that employment itself may constitute sufficient consideration if made part of the original employment agreement); Levy v. Baker, 528 S.W.2d 558, 559 (Tenn. Ct. App. 1973) (same).

53. *Selox*, 675 S.W.2d at 474.

54. 678 S.W.2d 28 (Tenn. 1984).

55. *Id.* at 34. "[A] covenant signed prior to, contemporaneously with or shortly after employment begins is part of the original agreement, and that therefore . . . is supported by adequate consideration." *Id.* at 33.

a departure from previous case law established in *Associated Dairies, Inc. v. Ray Moss Farms, Inc.*,[56] which held that continued employment did not serve as adequate consideration.[57] The Tennessee Supreme Court in *Associated Dairies* reasoned that because the employer was not obligated to retain the employee and that the employee could cease work without a day's notice, continued employment did not constitute the necessary consideration.[58]

The *Ingram* court, however, held that the mere promise of actual employment would not bind an at-will employee, but a covenant not to compete is binding if there is actual performance of the promise through continued employment.[59] The court stated that whether performance is actual consideration to support a covenant not to compete depends on the facts and circumstances of the case.[60] Factors affecting whether consideration for a covenant not to compete is reasonable include the length of employment and the circumstances under which the employee leaves.[61] Although it refused to decide what time period would constitute adequate consideration, the Tennessee Supreme Court noted in dictum that "[i]t is possible, for instance, that employment for only a short period would be insufficient consideration under the circumstances."[62]

Once a court determines the existence of adequate consideration, it must evaluate the second element of the test, which is the threatened danger to the employer in the absence of a covenant not to compete.[63] Generally, employers are not entitled to protection from ordinary competition.[64] While competition from former employees may harm a former employer, the employer by contract

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56. 326 S.W.2d 458 (Tenn. 1959).

57. *Id.* at 460–61.

58. *Id.* at 461.

59. *Ingram*, 678 S.W.2d at 34.

60. *Id.* at 35.

61. *Id.* ("Although an at-will employee can be discharged for any reason without breach of the contract, a discharge which is arbitrary, capricious or in bad faith clearly has a bearing on whether a court of equity should enforce a non-competition covenant.").

62. *Id.*

63. Allright Auto Parks, Inc. v. Berry, 409 S.W.2d 361, 363 (Tenn. 1996).

64. Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 472–73 (Tenn. 1989).

cannot restrain ordinary competition.[65] The employer must demonstrate the existence of special facts, over and above ordinary competition, which would give the employee an unfair advantage over the employer.[66] Courts will evaluate whether an employee would have such an unfair advantage by looking to:

> (1) whether the employer provided the employee with specialized training; (2) whether the employee is given access to trade or business information; and (3) whether the employer's customers tend to associate the employers business with the employee due to the employee's repeated contacts with the customers on behalf of the employer.[67]

These considerations may operate individually or in tandem to give rise to a properly protectable business interest.[68]

An employer, however, does not have a protectable interest in an employee's general knowledge and skill.[69] This is true not only with respect to that knowledge and skill that the employee brings into the employment relationship, but also that which the employee gains as a result of the employment, despite whether the employer invested in expensive employee training.[70] A caveat may exist, however, where "an employer may have a protectable interest in the *unique* knowledge and skill that an employee receives through special training by his employer, at least when such training is present along with other factors tending to show a protectable interest."[71]

Employers do have a protectable business interest in their existing business relationships with customers, where an employee's ongoing contacts with a particular customer have caused the cus-

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65. *Id.* at 473.

66. *Id.*; *see also* Vantage Tech., L.L.C. v. Cross, 17 S.W.3d 637, 644 (Tenn. Ct. App. 1999).

67. *Vantage Tech.*, 17 S.W.3d at 644 (citing *Hasty*, 671 S.W.2d at 472).

68. *Id.*; *see, e.g.*, AmeriGas Propane, Inc. v. Crook, 844 F. Supp. 379, 386 (M.D. Tenn. 1993).

69. *Hasty*, 671 S.W.2d at 473; *Vantage Tech.*, 17 S.W.3d at 644.

70. *Vantage Tech.*, 17 S.W.3d at 645.

71. *Id.* (emphasis in original).

tomer to associate the employer's business with the individual employee.[72] Tennessee courts have also intimated that covenants will be held reasonable where necessary to prevent former employees from gaining an unfair advantage over their former employer through the use of the latter's customer lists.[73] As one Tennessee court recognized, good will is often created from relationships built through ongoing contacts between a business's customers and its employees.[74]

Tennessee courts will also protect an employer's information from unauthorized disclosure or appropriation by a former employee where an employer establishes that such business information constitutes protectable trade secret or confidential information.[75] "[A] trade secret may consist of any 'formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not [know or] use it.'"[76] However, under Tennessee law, "easily ascertainable information" is not protected as a trade secret.[77]

At least one Tennessee court has applied the following factors found in the Restatement of Torts,[78] when determining what constitutes a trade secret: (1) the extent to which the information is known outside of an employer's business; (2) the extent to which the information is known by employees and others involved in the

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72. *See, e.g.*, Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 472–73 (Tenn. 1989); Matthews v. Barnes, 293 S.W. 993, 994 (Tenn. 1927).

73. *Hasty*, 671 S.W.2d at 472 (citing E. L. Conwell & Co. v. Gutberlet, 429 F.2d 527, 528 (4th Cir. 1970)).

74. *Vantage Tech.*, 17 S.W.3d at 645. "Because this relationship arises out of the employer's goodwill, the employer has a legitimate interest in keeping the employee from using this relationship, or the information that flows through it, for his own benefit." *Id.* at 646.

75. *Hasty*, 671 S.W.2d at 473.

76. Hickory Specialties, Inc. v. B & L Labs., Inc., 592 S.W.2d 583, 586 (Tenn. Ct. App. 1979) (internal citations ommitted in original). *See also* RESTATEMENT OF TORTS § 757 cmt. b (1939) ("It may be a formula for a chemical compound, a process of manufacturing, . . . a pattern for a machine or other device, or a list of customers.").

77. *Vantage Tech.*, 17 S.W.3d at 645 (citing *Hickory Specialties*, 592 S.W.2d at 587).

78. RESTATEMENT OF TORTS § 757 cmt. b (1939).

employer's business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to its competitors; (5) the amount of effort or money expended by the employer in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[79]

Once the danger to the employer's protectable interests has been assessed, the court will weigh the interests against the potential hardship imposed on the employee.[80] The employee's interests include the right to work, the right to be compensated for their labor, and economic freedom to move to another employer. Tennessee courts have given little guidance regarding how such a comparison should be made, with the exception that it should "depend on the facts of the particular case."[81] It appears that the courts take into consideration the fact that a covenant not to compete is often the product of unequal bargaining power, and the extent of the restraint might not be realized by the employee at the inception of the contract.[82] There is also support for the proposition that a court should consider such factors as changes in job responsibilities and compensation,[83] type of work,[84] an employee's family situation,[85] education level,[86] ability to relocate[87] and attempts to obtain other employment[88] when determining whether to enforce a covenant not to compete.[89]

The final factor to be considered in analyzing the enforceability of a covenant not to compete is to determine its impact on the

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79. Baker v. Battershel, 1986 WL 7602, at *5 (Tenn. Ct. App. July 9, 1986) (citing Hollister, Inc. v. Tran-Sel., Inc., 223 F. Supp. 141 (E.D. Tenn. 1963)).

80. Selox, Inc. v. Ford, 675 S.W.2d 474, 475 (Tenn. 1984).

81. *Id.* at 476.

82. *Id.*; *see supra* text accompanying note 51.

83. *Selox*, 675 S.W.2d at 475 (change in sales representatives compensation package).

84. Kaset v. Combs, 434 S.W.2d 838, 840 (Tenn. Ct. App. 1968) (operator of catering truck would be forced to move to another town).

85. Levy v. Baker, 528 S.W.2d 558, 560–61 (Tenn. Ct. App. 1973).

86. *Id.* at 560.

87. *Id.*

88. *Id.* at 560–61.

89. *See also* Blake, *supra* note 13, at 685–86.

public welfare.[90] An agreement which stifles competition is void if injurious to the public interest.[91] The reasoning behind invalidating such agreements on public policy grounds is that they promote the inefficient use of valuable resources.[92] The court should determine if the public is being denied an individual's valuable skills or if the cost to the consumer is increased because of the constraint.[93] Tennessee courts, however, infrequently address this final factor.[94] Once they have balanced the employer's interest against that of the employee, the courts rarely address the possible injury to society.[95]

Only recently has a Tennessee court seriously explored the potential injury to society factor in a covenant not to compete analysis. In *Medical Education Assistance Corp. v. State ex rel.*,[96] the Tennessee Court of Appeals held that a physician's covenant not to compete against the faculty practice plan that had employed him while he taught at the medical school was enforceable on public policy grounds.[97]

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90. Allright Auto Parks, Inc. v. Berry, 409 S.W.2d 361, 363 (Tenn. 1966).

91. Bailey v. Master Plumbers, 52 S.W. 853, 855 (Tenn. 1899). *See also* State v. Burley Tobacco Growers' Coop. Ass'n, 2 Tenn. App. 674, 685 (Tenn. Ct. App. 1926) ("When the restraint of trade is such only as will afford a fair protection to the interest of the party in favor of whom it is given, and is not so large or extensive as to interfere with the interest of the public, it will be sustained.").

92. *See generally* Glick, *supra* note 5.

93. *Id.*

94. *But cf.* Selox, Inc. v. Ford, 675 S.W.2d 474, 475 (Tenn. 1984) (noting that the restraint is greater than needed, and "the employer's need is outweighed by the hardship to employee and likely injury to the public"); Herbert v. W.G. Bush & Co., 298 S.W.2d 747, 752 (Tenn. Ct. App. 1957) (observing that the public benefited substantially from invalidating covenant ancillary to sale of business, while defendants suffered little hardship by nonenforcement).

95. Blake, *supra* note 13, at 686.

96. 19 S.W.3d 803 (Tenn. Ct. App. 1999).

97. *Id.* at 816. The court explained:

> Applying the public policy considerations and special circumstances of Tennessee medical schools as described above by medical educators and administrators at ETSU to the facts of this case, we agree with the Trial Court that the covenant is enforceable against Dr. Mehta. We emphasize that this deci-

The court found that the public interest was of paramount importance in resolving this dispute.[98]

In addition to the above four factors outlined in *Allright*, Tennessee courts also require that the time and territorial limits of a covenant not to compete be no greater than is necessary to protect the legitimate business interests of the employer.[99] A broad covenant not to compete anywhere, versus a specific area, is void as against public policy.[100] However, a contract not to compete at a particular place or for a specific period of time is not invalid per se or against public policy.[101] The omission of a time restriction will not render the covenant unenforceable,[102] but, instead, the courts

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> sion is limited to the facts of this particular case, and that each situation must be decided on its own merits. The involvement of ETSU, Quillen College of Medicine, as a named third party beneficiary of the covenant not to compete, was crucial to both the Trial Court's and our determination that the covenant not to compete should be enforced against Dr. Metha. This is not a situation where a physician leaves a purely private practice group and proceeds to compete against that private practice group. We express no opinion whether or not the public's interest would mandate the enforcement or non-enforcement of a covenant not to compete involving a physician's leaving his private practice group to compete against that private practice group.

Id.

98. *Id.* The court acknowledged that the covenant not to compete was signed in 1986, prior to the enactment of TENN. CODE ANN. § 63-6-204 in 1997. The current version of this statute provides that covenants not to compete are enforceable against physicians employed by faculty practice plans. TENN. CODE ANN. § 63-6-204(e) (2004). Although the court refused to apply this statute to the defendant retroactively, they held the covenant not to compete enforceable on public policy grounds after a thorough analysis of the competing public policy claims. *Med. Educ. Assistance Corp.*, 19 S.W.3d at 816.

99. Allright Auto Parks, Inc. v. Berry, 409 S.W.2d 361, 363 (Tenn. 1966); Vantage Tech., L.L.C. v. Cross, 17 S.W.3d 637, 646 (Tenn. Ct. App. 1999).

100. Turner v. Abbott, 94 S.W. 64, 66 (Tenn. 1906); George & Chapman v. E. Tenn. Coal Co., 83 Tenn. 455, 458 (Tenn. 1885).

101. *George & Chapman*, 83 Tenn. at 455.

102. Federated Mut. Implement & Hardware Ins. Co. v. Johnson, 382 S.W.2d 214, 218 (Tenn. Ct. App. 1964).

will supply a reasonable time period.[103] What a court considers a reasonable period depends on the facts and circumstances of each case. Where the objective is to protect customer relationships, the period should be limited to that required to replace the employee and allow the employers to prove their effectiveness to their customers.[104] When the focus of protection is confidential information or trade secrets, it should be limited in time by the business significance of the covenant.[105] In deciding the reasonableness of the duration of the restriction, courts will also determine the length of time necessary to diminish the risk of harm from competition to the former employer.[106]

Likewise, the territorial restriction should only be as broad as necessary to allow the employer to protect its customers from appropriation by its former employee.[107] As a practical matter, this should limit the territorial scope to those areas where the employee had customer contact.[108] This is based on the customer-contact theory of the employer's protectable interests.[109]

Although Tennessee courts have upheld covenants not to compete which restricted former employees from conducting a competing business in territories in which they had no direct cus-

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103. *Id.*

104. Blake, *supra* note 13, at 678.

105. *Id.*

106. *See, e.g.*, Vantage Tech., L.L.C. v. Cross, 17 S.W.3d 637, 648 (Tenn. Ct. App. 1999) (upholding three year restriction); Ramsey v. Mutual Supply Co., 427 S.W.2d 849, 853 (Tenn. Ct. App. 1968) (upholding five year noncompetition); *Johnson*, 382 S.W.2d at 218 (covenant restricting employee from doing business in territory for two years). *But see* Cent. Adjustment Bureau, Inc., v. Ingram, 678 S.W.2d 28, 36 (Tenn. 1984) (holding two-year covenant not to compete unreasonable and enforced only one year); Baker v. Hooper, 50 S.W.3d 463 (Tenn. Ct. App. 2001) (holding that a six month restraint on competition was unreasonable and unduly burdensome on former employee nail technicians because nail care is high maintenance field where customers ordinarily have appointments twice per month and as such time restriction was reduced to two months).

107. Allright Auto Parks, Inc. v. Berry, 409 S.W.2d 361, 363 (Tenn. 1966).

108. *Id.* at 364.

109. *Id.*

tomer contact,[110] the Tennessee Supreme Court in *Ingram* limited such a broad scope of territorial limitations.[111] The supreme court adopted in *Ingram* the rule of reasonableness which allows judicial modification of the time and territorial restraints when a court determines that an otherwise enforceable covenant not to compete exists.[112] If the scope of the covenant is reasonable, it will be enforced as written.[113] However, if the scope is unnecessarily burdensome to the employee, it will be enforced only "to the extent that [it is] reasonably necessary to protect the employer's interest without imposing undue hardship on the employee when the public interest is not adversely affected."[114] This rule has subsequently been applied by the Tennessee Court of Appeals in *Vantage Tech.*[115] to reform the territorial limitations imposed on the former employee.[116]

B. The Federal Law

Federal courts first began analyzing post-employment covenants not to compete under the Sherman Act during the late 1950s.[117] Previously, the federal courts had applied a state court

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110. *See* William B. Tanner Co. v. Taylor, 530 S.W.2d 517, 522 (Tenn. Ct. App. 1974) (reasoning that since the former employer conducted business in forty-eight states, and the former employee was now in direct competition, that the scope of the restraint was reasonable); *Ramsey*, 427 S.W.2d at 853 ("[T]he territorial scope of a restrictive covenant not to compete is reasonable, although it covers territory in which the employee at the time of termination of the contract of employment had no business contact, if it could be reasonably anticipated that such territory might be within his coverage at some period during employment.").

111. *Ingram*, 678 S.W.2d at 28.

112. *Id.* at 36–37. The court discusses the advantages and limitations of the "all or nothing rule" and the "blue pencil rule," as applied in other jurisdictions, before adopting the rule of reasonableness as the approach to be applied by Tennessee courts in reforming time and territorial restraints. *Id.* at 37.

113. *Id.*

114. *Id.* (quoting Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 370 (Iowa 1971)).

115. Vantage Tech., L.L.C. v. Cross, 17 S.W.3d 637 (Tenn. Ct. App. 1999).

116. *Id.* at 647.

117. Glick, *supra* note 5, at 408. *See, e.g.*, Tri-Cont'l Fin. Corp. v. Tropi-

type analysis focusing on the reasonableness of restrictions imposed in terms of duration and scope and did not address the issue of consumer harm.[118] It was not until the mid to late 1970s that federal courts began to determine that covenants not to compete ancillary to a valid transaction were not illegal per se under the Sherman Act and must apply the full rule of reason analysis.[119] More modern decisions have focused on the need to clearly "define the relevant market and determine market power as part of the overall assessment of anticompetitive" behavior.[120] Once a court

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cal Mar. Enters., 265 F.2d 619, 624–25 (5th Cir. 1959) (upholding covenant restricting use of shipping vessel and effectively restricting competition as a reasonable restriction ancillary to a valid sale of real property).

118. Glick, *supra* note 5, at 409.

119. *Id.* at 410–11. *See generally* Polk Bros. v. Forest City Enters., 776 F.2d 185 (7th Cir. 1985) (applying traditional rule of reason analysis and upholding covenant not to compete in building lease and purchase agreements between large appliance dealer and building supplies dealer sharing the same building); Aydin Corp. v. Loral Corp., 718 F.2d 897 (9th Cir. 1983) (upholding post-employment covenant not to compete entered into at termination of employment finding that no anticompetitive effect of agreement was shown); Newburger, Loeb & Co. v. Gross, 563 F.2d 1057 (2d Cir. 1977) (upholding covenant not to compete contained in brokerage firm's partnership agreement holding that agreement had legitimate purpose and was reasonable and not overbroad); United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976) (upholding numerous covenants not to compete in gas company's employment contracts against Government's claims of illegality holding that there was no indication of attempts or success in monopolizing the liquid petroleum gas market and that the covenants were reasonable and served legitimate purposes); Sound Ship Bldg. Corp. v. Bethelem Steel Corp., 387 F. Supp. 252 (D. N.J. 1975) (upholding covenant ancillary to sale of harbor front property that forbid certain ship building and repair activity finding that covenant was reasonable under rule of reason test).

120. Glick, *supra* note 5, at 412. *See, e.g., Newburger*, 563 F.2d at 1082–83 (noting adverse effects covenants not to compete could potentially have on labor market, stating that "[w]hen a company interferes with free competition for one of its former employee's services, the market's ability to achieve the most economically efficient allocation of labor is impaired," and that "employee-noncompetition clauses can tie up industry expertise and experience and thereby forestall new entry," but holding that "[in] certain cases, post employment restraints do serve legitimate business purposes," and recognizing the need to look at the actual effects of the agreement on competition in assessing its legality under the Sherman Act).

finds that the covenant not to compete has the potential for an adverse effect within a relevant market, or that the covenantee has sufficient market influence to reasonably affect competition through the covenant, the court then analyzes the reasonableness of the agreement.[121]

This analytical framework was applied in *Consultants & Designers, Inc. v. Butler Service Group, Inc.*,[122] a case in which the Eleventh Circuit Court of Appeals upheld a covenant not to compete after analyzing it under the rule of reason test.[123] The court determined that the questions of relevant market and market power must be "resolved as a unit."[124] The Eleventh Circuit in *Butler Service* concluded that Butler's restrictive covenant had an impact on competition, but it also had the effect of putting the employer at a competitive disadvantage.[125] The court further decided that there was no real possibility of the covenant having an anticompetitive effect *on consumers*; thus, the restraint could not violate section one of the Sherman Act.[126] As a result, the holding of the district

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121. Glick, *supra* note 5, at 413 states:

> When a court finds a covenant not to compete to have an adverse impact on the relevant market, or when the court finds a defendant has sufficient market power to reasonably effect competition through the covenant, the court then analyzes the actual reasonableness of the agreement. Under this part of the test, the covenants must be no "greater than necessary to afford protection to the parties and not so extensive as to interfere with the interests of the public."

Id. at 413 (quoting *Sound Ship*, 387 F. Supp. at 255).

122. 720 F.2d 1553 (11th Cir. 1983). *Butler Service* involved interesting facts. Butler Service Group (Butler) was contracted by the Tennessee Valley Authority (TVA) to provide engineering and design workers for TVA's nuclear power plant program. *Id.* at 1556. When the agreement expired, TVA decided to use Consultants & Designers, Inc. (C & D), to provide the needed workers. C & D then sought to solicit Butler's TVA employees. *Id.* The issue before the court was the effect to be given a covenant found in Butler's contract with TVA that restricted employees retained by Butler from working for TVA for ninety days following expiration of Butler's agreement. *Id.*

123. *Butler Service*, 720 F.2d at 1557 (citing Allright Auto Parks, Inc. v. Berry, 409 S.W.2d 361 (Tenn. 1966)).

124. *Id.* at 1562.

125. *Id.* at 1562–64.

126. *Id.* at 1564.

court that the covenant not to compete was unenforceable under state law was reversed.[127] It appears that the federal courts have departed somewhat from the traditional state court rule of reason analysis of "covenants not to compete and have instead turned to a more sophisticated antitrust analysis."[128] While the state courts focus on harm to the contracting parties and the scope and duration of the restraint, the federal courts have turned their focus toward preventing consumer harm in a relevant market.[129]

The federal antitrust analysis should be instructive to state courts, like Tennessee, which have an antitrust statute similar to the Sherman Act. It seems entirely appropriate for state courts to adopt this analytical framework to determine if a covenant not to compete has an adverse effect within a relevant market prior to applying the rule of reason. This analysis would ensure that the state courts would weigh not only the competing claims of the contracting parties but the impact on the consumer in the relevant market as well.

C. The Law in Other States

Individual state law regarding post-employment covenants has not evolved in unison,[130] with some states addressing the issue legislatively and some entirely through the common law.[131] While the majority of state courts follow the basic framework first set out in *Mitchel v. Reynolds*,[132] enforcing covenants not to compete if reasonable, the law in some states has become distinctive, due either to judicial decision or legislative pronouncement.[133] California, for example, takes a very restrictive enforcement approach,

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127. *Id.*

128. Glick, *supra* note 5, at 417.

129. *Id.*

130. Matthew W. Finkin, *Law Reform American Style: Thoughts on a Restatement of the Law of Employment*, 18 LAB. LAW. 405, 413 (2003).

131. *Id.*

132. 24 Eng. Rep. 347 (Q.B. 1711).

133. Jason S. Wood, *A Comparison of the Enforceability of Covenants Not to Compete and Recent Economic Histories of Four High Technology Regions*, 5 VA. J.L. & TECH. 14, 16 (2000).

voiding all covenants not to compete,[134] as compared to South Dakota which has adopted a much broader methodology, approving covenants not to compete in most instances where the time frame is less than two years.[135] Although it may appear that the question of enforceability of covenants not to compete is a black and white issue, a closer analysis suggests a wide spectrum of enforcement possibilities, with most states falling somewhere between the two extremes.[136] In those states where the law governing covenants not to compete has been developed through the common law, courts have struggled with the application of traditional contract law doctrine to the facts and circumstances of the particular case. Because courts have used equitable concepts to avoid the harsh results of contract law principles, contract-based predictability has been sacrificed.[137] As a result, over time, each state has developed its own

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134. Section 16600 of the California Business & Professional Code provides that "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." CAL. BUS. & PROF. CODE § 16600 (West 2004). Few states follow the approach taken in California. 54A AM. JUR. 2D *Monopolies and Restraints on Trade* § 931 (2004).

135. South Dakota law provides:

> An employee may agree with an employer at the time of employment or at any time during his employment not to engage directly or indirectly in the same business or profession as that of his employer for any period not exceeding two years from the date of termination of the agreement and not to solicit existing customers of the employer within a specified county, first or second class municipality, or other specified area for any period not exceeding two years from the date of termination of the agreement, if the employer continues to carry on a like business therein.

S.D. CODIFIED LAWS ANN. § 53-9-11 (2004). For further discussion on this topic, see Benjamin Aaron & Matthew Finkin, *The Law of Employee Loyalty in the United States*, 20 COMP. LAB. L. & POL'Y J. 321, 325 (1999).

136. *See generally* BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (Samuel M. Brock, III & Arnold H. Pedowitz eds., 3d ed. 2004) (providing an overview of each state's laws regulating noncompetition agreements).

137. M. Scott McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137 (2003).

set of rules concerning how post-employment covenants are enforced.

For example, whether continued employment of an at-will employee is sufficient consideration to support a covenant not to compete entered into after the employment relationship has begun is an issue that is answered differently in a number of jurisdictions.[138] Common law contract analysis applied to the restrictive covenant context would require mutual assent to the terms of the agreement by the parties and the existence of consideration. [139] Continued employment is deemed consideration because the employer is refraining from exercising a legal privilege to terminate the employment. For those jurisdictions that prohibit covenants not to compete by statute, adequate consideration is not an issue.[140] However, a number of states adhere to the rule that continued employment standing alone does not provide consideration to support a covenant entered into after the inception of the employment relationship.[141] These courts appear to require additional consideration

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138. MALSBERGER, *supra* note 136, at xxv, c. (providing an index that guides the reader to the relevant state law on this issue).

139. The Restatement (Second) of Contracts states:

> (1) To constitute consideration, a performance or a return promise must be bargained for.
>
> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
>
> (3) The performance may consist of
>
> (a) an act other than a promise, or
>
> (b) a forbearance, or
>
> (c) the creation, modification, or destruction of a legal relation.

RESTATEMENT (SECOND) OF CONTRACTS § 71(1)–(3) (1981).

140. See 54A AM. JUR. 2D, *supra* note 134, for a discussion of jurisidictions that prohibit covenants not to compete by statute.

141. Mona Electric Group v. Truland Service Corp., 193 F. Supp. 2d 874, 876 (E.D. Va. 2002) (holding that continuation of employment for even a substantial period of time does not, standing alone, provide consideration for restrictive covenant executed after the inception of employment); Dick v. Dick, 355 A.2d 110 (Conn. 1974) (holding that the rationale is that past consideration cannot support the imposition of a new obligation); Freeman v. Duluth Clinic, 334 N.W.2d 626, 630 (Minn. 1983) (holding that continuation of employment alone can be used to uphold coercive agreements, but the agreement must be

to ensure that the restrictive covenant was truly a bargained for agreement. While there are a handful of states that have not addressed this issue at all, the majority follow the rule adopted by Tennessee in *Central Adjustment Bureau v. Ingram*, recognizing continued employment and receipt of additional benefits, as providing the required consideration.[142] Even under this enforcement approach, however, the sufficiency of consideration is dependent on the "facts and circumstances of each case."[143]

The question of whether courts are permitted to modify an overbroad covenant not to compete is also an issue that varies across jurisdictional lines.[144] Although courts generally refrain from substituting their judgment for that of the contracting parties, in the context of an otherwise reasonable covenant not to compete, they may modify the geographical, time or activity restraints. Such

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bargained for and provide the employee with real advantages); Forrest Paschal Mach. Co. v. Milholen, 220 S.E.2d 190, 196 (N.C. Ct. App. 1975) (observing that when the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon new consideration); Citadel Broad. Co. v. Gratz, 52 Pa. D. & C. 4th 534 (Pa. Com. Pl. 2001) (noting that when a noncompetition clause is "injected into an existing employment relationship, [it] is enforceable only if the employee received some corresponding benefit or change in status"); Labriola v. Pollard Group, Inc., 100 P.3d 791, 796 (Wash. 2004) (en banc) (requiring "independent consideration . . . at the time promises are made for a noncompete agreement when employment has already commenced"); PEMCO Corp. v. Rose, 257 S.E.2d 885, 889 (W. Va.. Ct. App. 1979) (applying Virginia Law and noting that when the relationship of employer and employee is established without a covenant not to compete, any agreement thereafter not to compete must be based on new consideration); NBZ, Inc. v. Pilarski, 520 N.W.2d 93, 97 (Wis. Ct. App. 1994) (holding that continued employment is not sufficient consideration to support a covenant not to compete when the employee is still in training); Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 541 (Wyo. 1993) (holding that a covenant not to compete made during the employment relationship cannot be supported by continued employment, it must be supported by separate consideration given contemporaneously with the making of the covenant).

142. Central Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 34–35 (Tenn. 1984).

143. *Id.* at 35.

144. *See* MALSBERGER, *supra* note 136, at xxvi, 4. (providing an index that guides the reader to the relevant state law on this issue).

limitations are designed to prevent the former employee from competing with the former employer within a given market. The primary focus of such a limitation is to prevent the former employee from using confidential information or soliciting customers that fairly belong to the former employer.

Courts have tended to apply one of three approaches to this modification issue: (1) the all or nothing rule, (2) the blue pencil rule, or (3) the rule of reasonableness.[145] Under the "all or nothing rule" the court either enforces the contract as written or voids it in its entirety.[146] Courts that employ this rule reason that courts should not have the authority to make private agreement when covenants prove excessive.[147] This rule has an effect which encourages the drafter of the covenant not to compete to be very specific about the desired prohibited activities, clearly tying them to a rational time and geographical limitation.

"The 'blue pencil rule' [advocates] that an unreasonable restriction against competition may be modified and enforced to the extent that a grammatically meaningful reasonable restriction remains after the words making the restriction unreasonable are stricken."[148] This is a simple mechanism to apply, and it prevents the courts from rewriting the agreement; however, it is often criticized for emphasizing form over substance.[149] If the covenant not to compete contains a severability clause, the court can enforce the lawful portion of the agreement and ignore the unreasonable part. The court will not, however, add terms or rewrite provisions.

Although a small number of states have not addressed this issue or have not formally adopted a rule, the vast majority of states apply the "rule of reasonableness" or some variation, when reforming the geographical and temporal restraints of a covenant not to compete.[150] This rule allows the court to modify the covenant not

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145. *Ingram*, 678 S.W.2d at 36–37.

146. *Id.* Arkansas, California, North Dakota, Virginia, and Wisconsin apply this rule. MALSBERGER, *supra* note 136, at 464, 517, 2598, 3339.

147. *Ingram*, 678 S.W.2d at 36–37.

148. *Id.* Arizona, Colorado, Connecticut, Georgia, Indiana, Missouri, Rhode Island and South Carolina apply this rule. MALSBERGER, *supra* note 136, at 425, 579, 627, 987, 1403, 1752, 2882, 2918.

149. *Ingram*, 678 S.W.2d at 37.

150. *See* MALSBERGER, *supra* note 136, at 347, 676, 783, 1139, 1225,

to compete in order to reduce the geographical limitations of the agreement, limit the activities of the former employee, or limit their contact with certain customers in order to protect the legitimate interests of the former employer. The courts may also reduce the timeframe of the restraint or void the contract in its entirety if practical business considerations so dictate.

The "rule of reasonableness," which was adopted by Tennessee in *Ingram,* allows the courts to enforce covenants not to compete to the extent necessary to protect the employer's interest without imposing an undue hardship on the employee or adversely affecting the public.[151] In the absence of bad faith by the employer, this approach, in theory, allows for partial enforcement of the terms that the parties intended.[152] This is particularly true when the agreement contains a severability clause and specifically allows for judicial modification.[153] This rule, however, does not provide an employee with any prospective guidance on how a particular covenant not to compete will be enforced absent litigating the issue.[154]

Each jurisdiction has also developed rules addressing such other varied topics as choice of law, burden of proof, damages, assignment, attorneys' fees, to name a few, that have been borrowed from other areas of state law and applied to the restrictive covenant context. In the absence of clear legislative direction, it appears that many state courts have applied these rules as an aid in resolving the particular issue before them, rather than as a reflection of the desired public policy position of the state.

IV. PUBLIC POLICY CONSIDERATIONS

The purpose, application, and effect of post-employment covenants not to compete have been a much debated topic in legal scholarship for many years. They have been analyzed from the

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1503, 1564, 1623, 1720, 1796, 1855, 1923, 1965, 2009, 2240, 2351, 2532, 2648, 2713, 2752, 2802, 2955, 2994, 3263, 3303.

151. *Ingram*, 678 S.W.2d at 37.

152. *Id.*

153. *Id.*

154. *See id.*

perspective of agency law,[155] contract law,[156] employment and labor law,[157] family law,[158] intellectual property law,[159] law and economics,[160] and statistics.[161] All make a valuable contribution to the body of knowledge surrounding the law of covenants not to compete and all suggest if not explicitly, implicitly, that the particular approach adopted is highly dependent on the type of public policy the particular jurisdiction wants to promote.

A recent article by Ronald Gilson examines the comparative success of the Silicon Valley high technology industrial district and the failure of Route 128 outside of Boston, which resulted from different patterns of inter-firm employee mobility.[162] The underlying research indicated that the Silicon Valley exhibited a greater pace of turnover among skilled employees and entrepreneurs, which was attributed to cultural differences between Cali-

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155. *See* Phillip J. Closius & Henry M. Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 533 (1984).

156. *See* M. Scott McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137 (2003); Franklin G. Snyder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33 (2003); Kathryn J. Yates, *Consideration for Employee Noncompetition Covenants In Employments At Will*, 54 FORDHAM L. REV. 1123 (1986).

157. *See* Aaron & Finkin, *supra* note 135, at 321; Finkin, *supra* note 130, at 405.

158. *See* Rachel Arnow-Richman, *Noncompetes, Human Capital, and Contract Formation: What Employment Law Can Learn From Family Law*, 10 TEX. WESLEYAN L. REV. 155 (2003).

159. *See* Benjamin A. Emmert, *Keeping Confidence with Former Employees: California Courts Apply the Inevitable Disclosure Doctrine to California Trade Secret Law*, 40 SANTA CLARA L. REV. 1171 (2000); Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L.J. 441, 450–560 (2001); Richard R. Mainland, *Contracts Limiting Competition By Former Employees: A California Law Perspective*, 340 PLI/PAT 119 (1992).

160. *See* Glick, *supra* note 5; Wood, *supra* note 133, at 16.

161. Peter J. Whitemore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 485 (1990).

162. Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999).

fornia and Massachusetts employees.[163] This mobility resulted in an increase in the pace of technological change and product innovation through the rapid dissemination of ideas and knowledge.[164] The author contends that one potential explanation for the difference in employee mobility is that post-employment covenants not to compete are prohibited in California while they are enforced in Massachusetts.[165]

Gilson acknowledges that the California statute,[166] which invalidates noncompetition clauses in employment agreements, came about through historical chance rather than as a byproduct of thoughtful public policy deliberation.[167] He also cautions other jurisdictions against trying to emulate Silicon Valley's success by legislatively creating the legal infrastructure which prohibits covenants not to compete.[168] Nevertheless, there appears to be some evidence that limiting the use of such restrictions may enhance the dissemination of knowledge and ideas through rapid employee and entrepreneurial mobility, thus creating an environment for technological and economic growth.[169] However, the same result may be accomplished through the application of the rule of reason.[170] As Gilson states it, "[in] assessing the validity of a particular covenant under this legal regime, a court balances against the employer's interest in enforcing the covenant not only the employee's interest

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163. *Id.* at 578.

164. *Id.*

165. *Id.*

166. CAL. BUS. & PROF. CODE § 16600 (West 2004).

167. Gilson, *supra* note 162, at 613–18.

168. *Id.* at 627. Like all states, California law does not protect employees who reveal trade secrets. *Id.* at 596–602.

169. *See id.* 627–28. One commentator has analyzed the enforcement of covenants not to compete along side the recent histories of four high technology regions and suggests the following factors as contributing to the success of Silicon Valley: (1) Unprecedented national economic growth during the time Gilson's study was conducted obscured the alleged advantage procured by regions disfavoring covenants not to compete; (2) Low unemployment rates allowed employees to change jobs more easily, thus providing the imperative knowledge spillovers needed for regional growth; and (3) State and local leaders made concerted efforts to reproduce the network effects and knowledge spillovers seen in Silicon Valley on a smaller scale. Wood, *supra* note 133, at 59–64.

170. Gilson, *supra* note 162, at 628.

in mobility, but also the public interest."[171] This approach allows the courts to consider the public interest in a particular industry and allows the parties to present expert testimony concerning the potential costs and benefits of imposing such restraints on the dissemination of knowledge within that industry.[172] Such an approach is more analogous to that which is applied in the federal courts.[173]

The efficient transfer of knowledge also has an impact on the rule of reason test when considering time and geographical restraints. More precisely, the "technology boom" is making it increasingly difficult for courts to enforce these covenants' time and geographical restrictions that were once considered reasonable.[174] A number of reasons explain this phenomenon. First, a business that utilizes the world wide web to advertise its goods or services is able to contact a potentially infinite number of customers on a nationwide or even global basis.[175] However, public policy considerations, as well as established rules of law, should preclude a court from enforcing a geographical restriction that prevents a former employee from communicating with such a dispersed clientele.[176] Second, the rapid pace at which business technology is evolving causes information an employee acquires on the job to be rendered obsolete in a shorter period of time.[177] Consequently, traditional time restrictions are no longer feasible in the context of high-tech business enterprises, (or even low-tech companies that apply such techniques) because such a durational restraint would

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171. *Id.*

172. *See id.*

173. As discussed earlier, federal courts assess whether a covenant not to compete has an adverse effect to the public interest by first defining the relevant market and then determining market power within that particular market as part of the overall assessment of anticompetitive behavior. This approach would invite the courts to also determine what real impact the restrictive covenant would have on the knowledge base of a particular industry, and whether such restriction is in the public interest.

174. Todd M. Foss, *Texas, Covenants Not to Compete and the Twenty-First Century: Can the Pieces Fit Together in a Dot.Com Business World?*, 3 HOUS. BUS. & TAX L.J. 207, 225 (2003).

175. *Id.* at 225–26.

176. *Id.* at 226.

177. *Id.* at 226–27.

not only unduly burden the employee but also restrict the free flow of human capital in the market.[178]

Against this contextual backdrop, it is valuable to reflect on Tennessee's current public policy as it applies to covenants not to compete. In the absence of any formal declaration by the legislature on this issue, we look to the courts to articulate this philosophy. In 1984, the Tennessee Supreme Court announced in *Hasty v. Rent-A-Driver, Inc.*,[179] that covenants not to compete "are not favored in Tennessee because they are in restraint of trade."[180] However, a subsequent decision issued by the same court just three months later has had a far more pervasive *de facto* impact on Tennessee's public policy as it pertains to such covenants. In *Central Adjustment Bureau v. Ingram*,[181] the Court ruled that "a covenant signed prior to, contemporaneously with or shortly after employment begins is part of the original agreement, and that therefore . . . it is supported by adequate consideration."[182] In this decision, the Court also announced the adoption of the "rule of reasonableness," which allows the court to modify the terms of "covenants not to compete to the extent that they are reasonably necessary to protect the employer's interests."[183]

The purpose of this Article is not to argue against the court's reasoning on this issue, but to highlight some of the unintended consequences of the decision, and its corresponding impact on Tennessee's public policy on an individual's right to work. As a practical matter, *Ingram* has the immediate effect of placing the interests of the employer above that of the employee.

To better illustrate the practical considerations of this inequality, I present the following scenario. As noted earlier, the covenant not to compete is typically presented as a form contract to an employee sometime after employment begins on a *take it or leave it* basis.[184] The employee has already terminated his relationship

178. *Id.* at 227.
179. 671 S.W.2d 471 (Tenn. 1984).
180. *Id.* at 472.
181. 678 S.W.2d 28 (Tenn. 1984).
182. *Id.* at 33.
183. *Id.* at 37.
184. *See* Selox, Inc. v. Ford, 675 S.W.2d 474, 475–76 (Tenn. 1984) (discussing the bargaining strengths of employees relative to employers).

with the former employer and, unless they are independently wealthy, they have little or no bargaining power to negotiate less onerous terms. The employee is proficient in his job and receives increases in salary and training which reflect this. Under Tennessee law, consideration has been supplied for the covenant not to compete to be enforceable.[185]

The employee now wants to change jobs or start a new business, either because the present position has limited career growth possibilities, the conditions of employment have changed through merger or market constraints, or he has the opportunity to take on additional challenges with additional compensation with another employer. Because the employment agreement was not truly a bargained-for agreement,[186] it is only now that the employee realizes that the covenant not to compete in his employment agreement may stifle his mobility. In addition to a broad restriction not to compete with the former employer, there is an attorney fee and an assignment provision contained in the contract.[187]

The former employer notifies the employee of its intent to hold them to the agreement. The former employer contacts the prospective or new employer and suggests that the subsequent employer may suffer potential liability for hiring the employee. The

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185. *Ingram*, 678 S.W.2d at 33.

186. "Courts requiring evidence of a traditional bargain stress that covenants signed soon after the start of employment are not supported by consideration." Kathryn J. Yates, *Consideration for Employee Noncompetition Covenants in Employments at Will*, 54 FORDHAM L. REV. 1123, 1137 (1986).

187. Christopher J. Soller & Benjamin J. Sweet, *Assignability of Non-Compete Covenants*, 74 PA. BAR ASS'N Q. 64 (2003). As Soller and Benjamin explain:

> Under traditional contract law principles, most rights are freely assignable, absent contractual provisions prohibiting such assignment. Recent case law suggests, however, that where the parties do not address assignability in the agreement, non-compete covenants may not be freely assignable to successor parties. Other courts require the employee to consent to the assignment before an assignee may legally enforce a non-compete covenant. In the absence of clear evidence of consent these courts have refused to enforce non-compete covenants.

Id. (citations omitted).

former employer may even file for a temporary restraining order or injunction in addition to filing a suit for breach of contract. Regardless of whether the new employer rescinds the offer of employment, the employee is facing a substantial economic dilemma. Not only will there be a cost to hiring an attorney to defend the action, but the employee faces the very real possibilities that he or she will be forced to pay the former employer's costs and attorneys fees if the employee is unsuccessful in defending the action. The former employer knows that if it can successfully prosecute the claim, its other employees will not risk leaving. After being informed that court proceedings may take a year or longer to resolve the issue, the former employee backs down, and either moves away, or takes a job outside his career field in order to avoid the dispute. This hypothetical plays out in reality more often than one would imagine. Legal action, or threats of such action occur routinely, whether or not there is genuine concern by the former employer of unfair competition

Although the majority opinion in *Ingram* recognized the potential for a former employer abusing its power over the employee,[188] it is doubtful that they foresaw the potential chilling effect that the decision could have on potential employee mobility and thus on economic and technological growth.[189] The dissent

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188. *Ingram*, 678 S.W.2d at 37. The *Ingram* court explained:

> We recognize the force of the objection that judicial modification could permit an employer to insert oppressive and unnecessary restrictions into a contract knowing that the courts can modify and enforce the covenant on reasonable terms. Especially when the contract allows the employer attorney's fees, the employer may have nothing to lose by going to court, thereby provoking needless litigation.

Id.

189. Scholars commented:

> [T]he number of litigated and reported cases may represent only a small percentage of the actual number of employment restrictions currently in force. Regardless of their validity and enforceability, covenants not to compete chill the free movement of employees and eliminate competition among actual and potential employers.

Phillip J. Closius & Henry M. Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for*

however, at least had a glimpse at this potential harm.[190] Justice Brock, writing for the dissent, observed:

> For every covenant that finds its way to court, there are thousands which exercise an in terrorem effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenator, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction. If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable. This smacks of having one's employee's cake, and eating it too.[191]

It has been over twenty years since the Tennessee Supreme Court has addressed a post-employment covenant not to compete case.[192] Given the passage of time and the benefit of experience of what has taken place both in other jurisdictions and within the lower courts in Tennessee, might it not be time for a change in Tennessee's treatment of covenants not to compete? At the very least should we not explore the opportunity to level the playing field between employer and employee, and perhaps improve the labor market and economic efficiency of resolving such disputes?[193]

Reform, 57 S. CAL. L. REV. 531, 532 (1984).

190. *Ingram*, 678 S.W.2d at 39 (3-2 decision).

191. *Id.* (citing Blake, *supra* note 13, at 682–83).

192. *Hasty v. Rent-A-Driver, Inc.*, was decided May 29, 1984; *Selox, Inc. v. Ford* was decided September 4, 1984; and *Central Adjustment Bureau, Inc. v. Ingram* was decided on September 17, 1984. *See supra* notes 179, 184, & 181.

193. Efficiency minded courts should enforce covenants not to compete when renegotiation is impossible; but otherwise they need to deter parties from agreeing to broad covenants that over compensate the employer for investment and are used to externalize training costs. *See* Eric A. Posner & George G. Tri-

A recent matter decided by the Washington State Supreme Court provides an example for leveling the playing field. In *Labriola v. Pollard Group, Inc.*,[194] the Court clarified Washington State law concerning what constitutes adequate consideration.[195] The Court held "that independent consideration is required at the time promises are made for a noncompete agreement when employment has already commenced."[196] The Court discussed in *Labriola* the importance of a *bargained-for* exchange of promises between the employer and employee. The agreement lacked consideration based on fact that the "[e]mployer did not incur additional duties or obligations from the noncompete agreement" and that "[a]fter Employee executed the noncompete agreement, Employee remained an 'at-will' employee terminable at the Employer's pleasure."[197] Justice Madsen, in a concurring opinion, stressed the fact that "[c]ontinued at-will employment is never independently sufficient to uphold a covenant not to compete."[198]

However, the value of *Labriola* extends beyond its ruling. The employee in *Labriola* was awarded attorney fees.[199] Washington State, by statute,[200] awards attorney fees to the prevailing party in those cases where the subject contract contains a one-sided attorney fee provision.[201] This statute allowed the employee to seek

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antis, *Covenants Not to Compete from an Incomplete Contracts Perspective*, U. CHI. LAW & ECON., Olin Working Paper No. 137; Univ. of Va. Law & Econ. Research Paper No. 01-08, *available at* http://ssrn.com/abstract =285805 (2001).

194. 100 P.3d 791 (Wash. 2004).

195. *Id.* at 793–97.

196. *Id.* at 796.

197. *Id.* at 795.

198. *Id.* at 797.

199. *Id.* at 796.

200. WASH. REV. CODE § 4.84.330 (2004) (providing for attorney fees to the prevailing party even if the case is voluntarily dismissed). *See also* Hawk v. Branjes, 986 P.2d. 841, 844–45 (Wash. Ct. App. 1999) (applying section 4.84.330).

201. *Labriola*, 100 P.3d at 796. The *Labriola* court explained that:

> RCW 4.84.330 states that where a contract provision allows for the awarding of attorneys fees and costs to one of the parties, 'the prevailing party, whether he is the party specified in the contract [] or not, shall be entitled to reasonable attorneys

declaratory and appellate relief, knowing that if he prevailed, reasonable fees and costs would be awarded, if the contract containing the provision was invalidated. Likewise, the statute would have provided the opportunity for the award of attorney fees, had the Employer failed in an attempt to sue for enforcement of the covenant not to compete. California and Arkansas have similar statutes,[202] while Arizona, Texas, and Florida award fees to the prevailing party in covenant not to compete cases.[203]

Such statutes have the effect of preventing the employer from perpetuating the unequal bargaining power it had over its former employee at contract inception. No longer is the departing employee taking such an economic risk by challenging an employer's claim of breach of contract under a covenant not to compete. It would appear that such a provision would also alleviate some of the fears of abuse expressed by the Tennessee Supreme Court in *Ingram*.[204]

V. CONCLUSION & RECOMMENDATIONS

The law concerning covenants not to compete has been evolving along with changes in the economy and labor market ever since *Mitchel v. Reynolds* in the early 1700s. It should be no surprise that in this information age further change is needed. Next to the family relationship, the employment relationship is arguably the most important association an individual has.[205] It should not be treated as indentured servitude.[206]

> fees in addition to costs and necessary disbursements.' Attorneys fees and costs are awarded to the prevailing party even when the contract containing the attorneys fee provision is invalidated.

Id. (alterations in original).

202. *See* ARK. CODE ANN. § 16-22-308 (Michie 1999); CAL. CIV. CODE § 1717 (West 2004).

203. ARIZ. REV. STAT. ANN. § 12-341.01 (West 2004); FLA. STAT. ANN. § 542.335 (West 2004); TEX. BUS. & COM. CODE ANN. § 15.51(c) (Vernon Supp. 2004).

204. Central Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 37–39 (Tenn. 1984).

205. Arnow-Richman, *supra* note 158, at 162.

206. Carey C. Lyon, *Oppress the Employee: Louisiana's Approach to*

From both a judicial and economic efficiency standpoint, there are some fundamental measures that can be taken to prevent such disputes from reaching the courts, particularly appellate review. Employers should be urged to use covenants not to compete sparingly, and when used, drafted narrowly. Confidentiality or proprietary information,[207] non-solicitation,[208] and no-hire agreements[209] should be used whenever possible in their place.

In the absence of a legislative public policy pronouncement pertaining to covenants not to compete, the Tennessee Supreme Court should look for opportunities to revisit the issue and perhaps take some steps to level the playing field between the interest of the employer and employee. Fundamental to this effort is the need to ensure that covenants not to compete are truly a product of a bargained for agreement. This can be partially addressed by providing clarification as to what constitutes adequate consideration to support a covenant not to compete once employment has already commenced. In addition, the Court should consider adopting where appropriate, the federal court antitrust analysis as discussed in Part III.C. of this Article. There are certainly situations where a particular employer controls sufficient market power within a relevant market, for an otherwise reasonable covenant not to compete to be unreasonable, given the employer's market presence.

At the trial court level, mediation should be recommended as soon as possible once an action has been filed. Often it is the lack of information concerning the extent of a departing employee's future work activities that causes the former employer concern. Mediation would serve the objective of returning the former employee to the workforce as quickly as possible while still protecting the legitimate business interests of the former employer. Mediation also has the potential for allowing both parties to more clearly understand what activities are perceived as a threat to competition, and it allows them to structure a more definitive agreement that hopefully both parties find advantageous. In some instances, the

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Noncompetition Agreements, 61 LA. L. REV. 605, 608–09 (2001).

207. Richard R. Mainland, *Contracts Limiting Competition by Former Employees: A California Law Perspective*, 340 PLI/PAT 119, 131–39 (1992).

208. *Id.* at 139–47.

209. *Id.* at 147–49.

new employer may play a role in helping structure a workable agreement, perhaps compensating the former employer for access to the employee's services. There may even be situations where the former employer is willing to pay the former employee to remain unemployed for a reasonable period of time.[210]

Finally, in order to give the employer a greater incentive to structure, negotiate and enforce only reasonable covenants not to compete, the Tennessee Legislature should implement a law which allows for reciprocal attorney fees in those agreements that contain such provisions which only benefit the employer.[211] It will not only equalize the bargaining power between the parties, but ultimately serve to protect the employer's interests while also enhancing employee mobility, and thereby promote economic and technological growth within the state.

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210. *See generally* Greg T. Lembrich, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291 (2002).

211. It should model the broad "Breach of Contract" statutes as implanted in: ARK. CODE ANN. § 16-22-308 (Michie 2004); CAL. CIV. CODE § 1717 (West 2004); WASH. REV. CODE § 4.84.330 (2004); or those that pertain strictly to "Covenants Not to Compete": ARIZ. REV. STAT. ANN. § 12-341.01 (West 2004); FLA. STAT. ANN. § 542.335 (West 2004); TEX. BUS. & COM. CODE ANN. § 15.51(c) (Vernon Supp. 2004).