ARTICLE

ENFORCEMENT OF NONCOMPETITION AGREEMENTS: PROTECTING PUBLIC INTERESTS THROUGH AN ENTREPRENEURIAL APPROACH

GRIFFIN TORONJO PIVATEAU*

* J.D., Assistant Professor of Legal Studies in Business, Spears School of Business, Oklahoma State University.

I. INTRODUCTION

The enforcement of noncompetition agreements is variable, differing between courts, between states, and between contexts. Courts determine the enforceability of noncompetition agreements with little regard for the normal requirements of an enforceable contract.[1] Analysis of a noncompetition agreement tends not only to be fact-dependent, but location-dependent as well.[2] Some states enforce virtually all noncompetition agreements, while other states refuse to enforce any noncompetition agreements.[3] Most other states inhabit a middle ground, enforcing noncompetition agreements but only up to the limit that a court believes to be reasonable.[4] Courts determine reasonableness without regard to the terms of the agreement. A noncompetition agreement is a unique type of contract, as the normal contract standard of mutual agreement supported by consideration falls to the wayside. Instead, reasonableness becomes the key to enforceability.[5]

1. *See* Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 379 (2006) (explaining that these types of agreements are governed neither by ordinary contract principles nor waivable rights).

2. *See* M. Scott McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137, 146 (2003) (outlining how noncompetition agreement law varies from state to state).

3. *See* Estlund, *supra* note 1, at 392–93 (noting California's treatment of noncompetition agreements as being the most restrictive, holding them void as a restraint on trade).

4. *See, e.g.*, Coates v. Bastian Bros., 741 N.W.2d 539, 545 (Mich. Ct. App. 2007) (restating the principle under Michigan law that noncompetition agreements are enforceable if reasonable (quoting Thermatool Corp. v. Borzym, 575 N.W.2d 334, 336 (Mich. Ct. App. 1998))).

5. *See* Marsh USA Inc. v. Cook, 354 S.W.3d 764, 777 (Tex. 2011) ("The hallmark of enforcement [of covenants not to compete] is whether or not the covenant is reasonable."); Adam V. Buente, Note, *Enforceability of Noncompete Agreements in the Buckeye State: How and Why Ohio Courts Apply*

To determine reasonableness, courts will generally measure the relative degrees of harm to be suffered by the employer and the employee, and then make enforcement decisions accordingly.[6] In measuring the potential harm and to examine the interests of the parties, courts consider numerous items outside the terms of the agreement.[7] Analysis of the enforceability of a noncompetition agreement centers on the concept of reasonableness. Courts will only enforce reasonable noncompetition agreements. Reasonable noncompetition agreements are those that are constrained by geography, by time, and by scope.[8] Courts will not enforce unreasonable noncompetition agreements.

Focusing only on the interests of the parties, however, neglects an important aspect of noncompetition agreements. The impact of a noncompetition agreement falls not only on the parties to the agreement but on the general public as well. An enforced noncompetition agreement will inevitably result in at least some negative consequences to society as a whole.[9] For instance, an enforced covenant that restricts employee

the Reasonableness Standard to Entrepreneurs, 8 OHIO ST. ENTREP. BUS. L.J. 73, 80–81 (2013) ("Not all noncompete agreements are created equally. Again, the reasonableness of a noncompete agreement is determined by the particular circumstances of the case. Most courts can modify or invalidate a noncompete agreement if it is found to be unreasonable." (citing Jon P. McClanahan & Kimberly M. Burke, *Sharpening the Blunt Blue Pencil: Renewing the Reasons for Covenants Not to Compete in North Carolina*, 90 N.C. L. REV. 1931, 1933 (2012))).

6. *See, e.g.*, *Thermatool*, 575 N.W.2d at 338 (discussing the relative-degree-of-harms analysis in the context of enforcing an agreement not to compete).

7. *See* Alex Sheshunoff Mgmt. Servs., LP v. Johnson, 209 S.W.3d 644, 657 (Tex. 2006) (relying on circumstances outside a noncompetition agreement to hold in favor of its enforcement, such as the amount and proprietary nature of information obtained by the former employee during employment and the duration of the employment after execution of the agreement); *see also* Kyle B. Sill, *Drafting Effective Noncompete Clauses and Other Restrictive Covenants: Considerations Across the United States*, 14 FLA. COASTAL L. REV. 365, 371 (2013) (asserting that the common theme among various states, with respect to noncompetition agreements, is to separate them according to surrounding circumstances).

8. *See Sheshunoff*, 209 S.W.3d at 655 (recognizing that the core inquiry of Section 15.50 of the Texas Business and Commerce Code "is whether the covenant 'contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promise'" (quoting TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2014))); McDonald, *supra* note 2, at 147 ("[G]eography must be limited in a very specific way or the contract will not be enforced at all.").

9. *See Marsh*, 354 S.W.3d at 769 (recognizing that noncompetition agreements may place a burden on the general public by obstructing competition and limiting the mobility of skilled and specialized employees); RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. c (1979) (suggesting that noncompetition agreements may harm the public by forcing former employees into social welfare programs or by prohibiting the public from accessing skilled and knowledgeable laborers). *But see id.* (asserting that societal benefits may accrue when noncompetition agreements are enforced, such as increased industry-wide efficiency and increased investment in human capital and in the protection thereof).

mobility can rob society of the employee's endeavors and contributions. Society loses all the benefits of the individual who seeks to work but is contractually prevented from doing so. The restrained employee may continue to work in a lower paying job with few benefits. Even worse, the employee may become a drain on the public's resources.

Therefore, the public's interest should also be weighed, and considering the public's interest should not present a hardship to the courts.[10] Some states already encourage courts to evaluate the impact of a noncompetition agreement on the public.[11] Even in those states, however, an additional problem arises. Without suitable guidance or a uniform definition of "public interest," how can a court measure the benefit or harm to the public that might arise from enforcement of the noncompetition agreement? Case law provides little guidance in determining how the public's interest is served.

This Article proposes a new approach to enforcement of noncompetition agreements. Under this new approach, additional considerations will play a role in determining enforceability. This Article argues that courts must give greater consideration to the public interest. Courts should weigh the potential harm to society more heavily when determining whether or not to enforce noncompetition agreements.

To measure the benefit to the public that may accrue from the employee's endeavors, this Article looks to entrepreneurship to serve as a proxy for the public good. Research indicates that society benefits from entrepreneurship: the development of new ideas,[12] new processes, and new businesses.[13] Under the proposed analysis set forth in this Article, to

10. *See* Todd M. Foss, Comment, *Texas, Covenants Not to Compete, and the Twenty-First Century: Can the Pieces Fit Together in a Dot.Com Business World?*, 3 H. BUS. AND TAX L. J. 207, 208 (2003) ("As a result of . . . public policy against undue restraints of trade, employers typically insert provisions in their standard employment contracts that prohibit employees from competing with the employer once the employee's duration of service is complete."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 515 (1979) (limiting the "injury to the public" element of post-employment restraint contracts with a tendency or purpose to create a monopoly, to control prices, or to limit production).

11. *See* Kenneth J. Vanko, *"You're Fired! And Don't Forget Your Non-compete . . ." The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1, 27 (2002) ("Two primary public interests that should influence a trial judge's decision are the economic climate that is prevailing at the time of discharge and whether the community would be deprived of the employee's unique services, such as whether a comparable professional can replace the employee.").

12. *See* OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., FREQUENTLY ASKED QUESTIONS ABOUT SMALL BUSINESS 3 (Mar. 2014), https://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf ("Of high patenting firms (15 or more patents in a four-year period), small businesses produced 16 times more patents per employee than large patenting firms.").

13. *See id.* at 1 (reporting recent small-business trends and statistics in the United States). *See generally* Domingo Ribero Soriano & Ma Angeles Montoro-Sanchez, *Introduction: The Challenges of*

assist in determining the elements of the public interest, a court should examine whether the departing employee is leaving the organization to engage in entrepreneurial activity, or instead to perform the same tasks for a different employer. In light of this purpose-based approach, employees may escape the reach of an otherwise enforceable noncompetition agreement if the indicia of entrepreneurship are present in their new positions.

Part II discusses the role that the noncompetition agreement plays in business. Then, Part III analyzes the uneven rules of enforcement used by courts across the country. Next, Part IV explores the meaning of entrepreneurship. Finally, Part V provides guidelines for courts to use in determining the presence of entrepreneurship, and Part VI concludes the Article.

II. THE ROLE OF THE NONCOMPETITION AGREEMENT IN BUSINESS

A. *The Noncompetition Agreement Explained*

A noncompetition agreement is "a promise, [usually] in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer."[14] The noncompetition agreement has other names, most notably "covenant not to compete," a "restrictive covenant," or a "noncompete clause."[15] Generally, these terms are interchangeable and all refer to an employment contract or provision purporting to limit an employee's ability, upon leaving employment, to compete in the market in which the former employer does business.[16]

In the employment context, noncompetition agreements are generally directed at four discrete areas: "(1) general non-competition; (2) customer (or client) non-solicitation; (3) employee non-solicitation; and (4) non-disclosure."[17]

Though the nomenclature differs, non-solicitation provisions, whether

Defining and Studying Contemporary Entrepreneurship, 28 CAN. J. ADMIN. SCI. 297 (2011) (discussing innovation in entrepreneurship as applied in University settings and how an "enhanced understanding of entrepreneurship has potential economic benefits for society as a whole").

14. BLACK'S LAW DICTIONARY 364 (10th ed. 2014).

15. This Article will collectively refer to such covenants as "noncompetition agreements."

16. *See* Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 914 (W. Va. 1982) (discussing generally the nature of noncompetition agreements and how such agreements, through various incentives and restrictions imposed on the employee, "provide[] a mechanism consistent with the economic rational of contract law").

17. Vanko, *supra* note 11, at 2.

aimed at customer or employee solicitation, are forms of noncompetition agreements. The same legal standard of enforceability applies to each.[18] Similarly, nondisclosure agreements also resemble noncompetition agreements, with the same restrictions on enforceability. Courts subject nondisclosure agreements to the same sort of balancing tests as noncompetition agreements.[19] Sometimes, however, these four different areas are intermingled within the same document. Noncompetition agreements may, and often do, contain some or all of these protective clauses.

In theory, noncompetition agreements are not meant to punish the former employee.[20] Instead, they are meant to protect the employer from unfair competition.[21] Noncompetition agreements arguably protect an employer's customer base, trade secrets, and other information vital to its success.[22] From this perspective, noncompetition agreements encourage employers to invest in their employees. An employer does not wish to invest in an employee only to see the employee take the skills acquired, or the employer's customers, to another employer. Logically, the employer will invest more in the employee if measures are in place to guard against the employee's movement to a competitor.

18. *See* Lasership, Inc. v. Watson, 79 Va. Cir. 205, 210 (2009) (citing Foti v. Cook, 263 S.E.2d 430 (Va. 1980)) (invalidating a non-solicitation agreement that prohibited a former employee from contacting any of the employer's customers for two years because it was burdensome to expect the former employee to know every customer that had an account with the employer).

19. *See id.* ("The protection afforded to confidential information should reflect a balance between an employer who has invested time, money, and effort into developing such information and an employee's general right to make use of knowledge and skills acquired through experience . . . .").

20. *See* Superior Gearbox Co. v. Edwards, 869 S.W.2d 239, 247 (Mo. Ct. App. 1993) (invalidating a ten-year noncompetition agreement and stating that "'[p]rotection of the employer, not punishment of the employee, is the essence of the law'" (quoting Cont'l Research Corp. v. Scholz, 595 S.W.2d 396, 400 (Mo. Ct. App. 1980))).

21. *See* Deming v. Nationwide Mut. Ins. Co., 905 A.2d 623, 635 (Conn. 2006) (analyzing various provisions of a noncompetition agreement and giving particular scrutiny to a forfeiture for competition provision, whereby a former employee may be required to forfeit monetary benefits upon entering into competition with his or her former employer); *see also* William M. Corrigan & Michael B. Kass, *Non-compete Agreements and Unfair Competition—An Updated Overview*, 62 J. MO. B. 81, 81 (2006) ("Non-compete agreements are enforceable only to the extent that they are 'reasonably necessary to protect narrowly defined and well-recognized employer interests.'" (quoting Wash. Cnty. Mem'l Hosp. v. Sidebottom, 7 S.W.3d 542, 545 (Mo. Ct. App. 1999))).

22. *See* Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1148 (2009) (noting that part of the efficiency of the noncompetition agreement rests on the fact that it avoids the issue of employees having trade secrets).

B. *A Noncompetition Agreement Restricts Employee Mobility*

The noncompetition agreement discourages employee movement between employers. An enforceable noncompetition agreement will prevent an employee from working for a competitor within a specified length of time. Noncompetition agreements were once reserved for upper-level employees. In recent years, however, use of these agreements has expanded to other members of organizations.[23] Noncompetition agreements do not eliminate employee turnover; however, they act as a strong deterrent to employees contemplating a job change. Understandably, few employees can readily endure this period of inactivity—a term that could last up to three years based on a typical noncompetition agreement.[24] A noncompetition agreement, even if never enforced, provides a strong disincentive to leave a job.

Moreover, an employee restrained by a noncompetition agreement will have a difficult time finding a new place to work. Employers understand the difficulties in poaching employees who have executed a noncompetition agreement.[25] An organization seeking to hire away key employees from a competitor will be aware that those employees may not be able to start work in the near term. An employee forced to the sidelines for a year or more is considerably less desirable to another employer.

The noncompetition agreement inhibits competitors in another meaningful way. A competitor that hires an employee away from a company, knowing that the employee is under a contractual obligation to not work for the competitor, risks being sued for tortious interference with a contract.[26] A company that persuades a potential hire to breach a noncompetition agreement may be liable under this tort.[27] The original

23. *See* Norman D. Bishara & Michelle Westermann-Behaylo, *The Law and Ethics of Restrictions on an Employee's Post-Employment Mobility*, 49 AM. BUS. L.J. 1, 4 (2012) (explaining how entry level employees are sometimes forced to sign noncompetition agreements).

24. *See, e.g.*, Whirlpool Corp. v. Burns, 457 F. Supp. 2d 806, 813 (W.D. Mich. 2006) ("Courts have upheld non-compete agreements covering time periods of six months to three years.").

25. *See* Hannah Hembree, Comment, *An Employer's Relationship with Its Recruiting Firm—Something More Than an Arm's-Length Transaction*, 46 ST. MARY'S L.J. 245, 278–82 (2015) (summarizing the effectiveness of noncompetition agreements in preventing employee-poaching).

26. In *Lumley v. Wagner*, a singer under contract to sing at the plaintiff's theater was induced by the defendant, who operated a rival theater, to breach her contract. Lumley v. Wagner, (1852) 42 Eng. Rep. 687, 688 (Ch.). The court held that the plaintiff was entitled to recover monetary damages from the rival theater owner for his interference with the singer's contract, which was essentially a form of unlawful competition. *Id.* at 687. This case is the basis for the tort of inducement to breach a contract. *Id.*

27. It is implied from the judicial record that in order for a plaintiff-employer to successfully bring a cause of action for tortious interference against a former employee and her new employer, the noncompetition agreement at issue must necessarily be enforceable. *See* Lasership, Inc. v. Watson, 79

employer then may have a suit not only against its former employee for breach of the noncompetition agreement, but also against the hiring competitor for encouraging the former employee to breach her contractual obligations.[28] Without the presence of overwhelming factors in favor of hiring an individual subject to a noncompetition agreement, many organizations may simply refuse to run the risk of a lawsuit.

Multiple policy reasons support both the enforcement of noncompetition agreements as well as the refusal to enforce such agreements. This dual nature of noncompetition agreements is the core problem. On the one hand, employee mobility has numerous associated benefits for employees: higher wages, increased opportunities, better retirement and medical plans, and increased satisfaction.[29] Likewise, employee mobility can provide positives to the public through greater contributions made possible by the higher paid employee, as well as the reduced need to depend on public assistance. Finally, increased employee mobility is also a benefit for employers. When employees are freed from their restrictive covenants, they are easily able to relocate to new positions. This mobility increases the available pool of trained and experienced candidates.

At the same time, however, valid arguments remain in support of an employer's use of a noncompetition agreement to limit employee mobility. Most people would agree that an employer should be able to protect itself against unfair competition, although the necessary degree of protection is subject to debate. Furthermore, allowing an employer to limit its employees' mobility can encourage the employer to provide training opportunities—secure in the knowledge that newly acquired skills will not be used to compete against it. Finally, there is something to be said for respecting the freedom of parties to contract to the terms and conditions of employment without a constant threat of judicial intervention.

Va. Cir. 205, 210 (2009) (recognizing the plaintiff's cause of action for tortious interference but dismissing the claim because the nonsolicitation agreement was not enforceable); Omniplex World Servs. Corp. v. U.S. Investigations Servs. Inc., 618 S.E.2d 340, 340 (Va. 2005) (noting the plaintiff-employer's claim for tortious interference against a former employee, but holding in favor of the employer because the noncompetition agreement was overbroad and unenforceable).

28. *See Lumley*, 42 Eng. Rep. at 687 (allowing plaintiff, the former employer, to enforce injunction against a competitor where employee was induced by the competitor to breach her contract with the plaintiff).

29. *See generally* Grant R. Garber, *Noncompete Clauses: Employee Mobility, Innovation Ecosystems, and Multinational R&D Offshoring*, 28 BERKELEY TECH. L.J. 1079, 1102 (2013) (discussing employee mobility (or lack thereof) as a result of the enforcement of noncompetition agreements, and the various economic externalities born from such agreements).

III. THE UNEVEN ENFORCEMENT OF NONCOMPETITION AGREEMENTS

A. *The Noncompetition Agreement is Troublesome*

Agreements that act as a restraint on trade "are not favored, will be strictly construed, and, in the event of an ambiguity, will be construed in favor of the employee."[30] This general rule of noncompetition agreements presents difficulties to employers, employees, and the courts charged with enforcement.[31] It is little wonder then that the law of noncompetition agreements is "a mess."[32] Moreover, the confusion and complexity of noncompetition agreement law has worsened over time.[33]

Little uniformity exists in the enforcement of noncompetition agreements; each state analyzes noncompetition agreements from a different perspective.[34] In a few states, a noncompetition agreement is void and unenforceable.[35] At the other end of the spectrum, some states enforce virtually all noncompetition agreements.[36] Thus, a noncompetition agreement that is enforceable in one state may not be enforced at all in another state; even worse, the states that do enforce these agreements are inconsistent.[37]

30. Modern Env'ts, Inc. v. Stinnett, 561 S.E.2d 694, 695 (Va. 2002) (citing Richardson v. Paxton Co., 127 S.E.2d 113, 117 (Va. 1962)) (examining the well-settled principles surrounding the validity of restrictive covenants).

31. *See generally* Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107 (2008) (commenting on the evolving law of noncompetition agreements and noting the difficulties states have had in finding policies that align with the needs of employees and employers).

32. Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 943 (2012).

33. *See* Alan Frank Pryor, *Balancing the Scales: Reforming Georgia's Common Law in Evaluating Restrictive Covenants Ancillary to Employment Contracts*, 46 GA. L. REV. 1117, 1123 (2012) (suggesting the complexity of the laws governing restrictive covenants, through centuries of common law doctrine, has culminated in a nearly indiscernible body of law).

34. *See generally* Sill, *supra* note 7, at 365 (providing an overview of judicial enforcement considerations to noncompetition agreements with an attention to different states' interpretations of what constitutes reasonable geography and scope, protectable interests and trade secrets, and remedies available to injured parties).

35. California and North Dakota have laws making virtually all noncompetition agreements unenforceable. *See* CAL. BUS. & PROF. CODE § 16600 (West 2014) (making contracts that restrain a party from engaging in business practices generally void); N.D. CENT. CODE § 9-08-06 (West 2013) (prohibiting contracts that restrain anyone from conducting a lawful business). The North Dakota statute reflects the state's "long-standing public policy against restraints upon free trade." Warner & Co. v. Solberg, 634 N.W.2d 65, 69–70 (N.D. 2001).

36. *See* Sill, *supra* note 7, at 369 ("Some states are employer friendly, [such as Florida,] while others are, clearly, more employee friendly [such as California].").

37. *See id.* at 371–74 (discussing the circumstances surrounding the agreement, the industry, and the employee, as well as the numerous considerations courts across the United States employ to manage the complicated issue of a restrictive covenant's enforceability).

Because of the uncertainty surrounding the agreement, a noncompetition agreement seems to scarcely rise to the level of a legally enforceable contract.[38] Often, the traditional elements of contract formation are not found in a noncompetition agreement—frequently wanting of a bargained-for exchange or a meeting of the minds.[39] Consequently, parties to a noncompetition agreement are often uncertain as to whether the agreement will be enforced according to its terms.[40] In fact, employers often create clauses that they know to be unenforceable according to their terms.[41]

Compounding upon this uncertainty, courts may give little credence to the agreement as it is actually written.[42] Often, in states that permit enforcement of noncompetition agreements, the language of the agreement merely represents a starting point.[43] Unlike most other contracts, enforcement of noncompetition agreements depends heavily on the circumstances of its execution, including the context in which the agreement was executed, the nature of the industry or profession at stake, and the status of the restricted employee.[44] In many jurisdictions, courts routinely "blue pencil" or reform covenants that are unreasonable, as determined by a multipart test.[45] The blue pencil doctrine gives courts the authority to either (1) strike unreasonable clauses from a noncompetition

38. *See* Garrison & Wendt, *supra* note 31, at 135 (contending there is an emerging trend among courts and legislatures to view noncompetition agreements with heightened scrutiny, making it more difficult to enforce such agreements).

39. *See* Sill, *supra* note 7, at 394–96 (discussing the issue of past consideration, and noting there are situations where noncompetition agreements are made without new consideration).

40. *See generally* Garrison & Wendt, *supra* note 31 (exploring the wide variation among the states in their different treatment of noncompetition agreements, suggesting this complexity and divergence breeds uncertainty as to the ultimate effect of noncompetition agreements).

41. *See* Sullivan, *supra* note 22, at 1147 (contending employers have little incentive to draft noncompetition agreements in compliance with legal requirements).

42. *See id.* (noting courts typically do not enforce noncompetition agreements as written). Virginia is an important exception; Virginia courts must interpret contracts as written. *See* Lanmark Tech., Inc. v. Canales, 454 F. Supp. 2d 524, 529 (E.D. Va. 2006) ("[C]ourts applying [the Virginia Supreme Court's] three-part test must take the non-compete provision as written; there is no authority for courts to "'blue pencil" or otherwise rewrite the contract' to eliminate any illegal overbreadth." (quoting Pais v. Automation Prods., Inc., 36 Va. Cir. 230, 239 (1995))).

43. *See*, Sill, *supra* note 7, at 371–73 (revealing several states look at the language of restrictive covenants, and then only apply them where certain circumstances exist).

44. *See id.* at 373 (describing the various circumstances affecting the appropriateness of restrictive covenants).

45. *See* Deming v. Nationwide Mut. Ins. Co., 905 A.2d 623, 638 n.21 (Conn. 2006) ("The 'blue pencil' rule is used to strike an unreasonable restriction 'to the extent that a grammatically meaningful reasonable restriction remains after the words making the restriction unreasonable are stricken.'"); *see also* Sill, *supra* note 7, at 397–404 (describing the applicability of the blue pencil doctrine, the various circumstances that affect it, and the methods used by different states to apply it).

agreement, leaving the rest enforceable, or (2) modify the agreement to reflect the terms that the parties could have, and probably should have, agreed to.[46]

Courts have traditionally disfavored noncompetition agreements, believing that the agreements contravene public policy and place unfair restrictions on trade.[47] Accordingly, the common law prohibited the use of such agreements.[48] In time, the restrictions on such agreements lessened.[49] Nevertheless, the common law has generally restricted their use for any purpose other than for legitimate business purposes.[50] To ensure the purpose is legitimate, the law requires that a valid noncompetition agreement meet a reasonableness requirement.[51]

To satisfy the reasonableness requirement, the employer must establish a reason for the noncompetition agreement other than simply preventing the employee from competing with his former employer.[52] There must be

46. *See* Jon P. McClanahan & Kimberly M. Burke, *Sharpening the Blunt Blue Pencil: Renewing the Reasons For Covenants Not to Compete in North Carolina*, 90 N.C. L. REV. 1931, 1935 (2012) (identifying the strict and liberal blue pencil doctrines as a way in which courts are able to strike or modify the provisions of a noncompetition agreement).

47. *See* Garrison & Wendt, *supra* note 31, at 112–14 (discussing how courts initially found noncompetition agreements contrary to public policy); *see also* Ruhl v. F.A. Bartlett Tree Co., 225 A.2d 288, 291 (Md. 1967) ("Covenants of this nature are in restraint of trade; the test is whether the particular restraint is reasonable on the specific facts.").

48. *See* Garrison & Wendt, *supra* note 31, at 113–14 (noting early common law forbade these restrictive agreements altogether).

49. *See id.* at 114 (presenting a brief history on the trend of the common law to eventually loosen the restrictions on noncompetition agreements).

50. *See id.* ("[S]uch agreements can be legitimate if they serve business interests other than the restriction of free trade."). Courts may refuse to enforce noncompetition agreements when no legitimate business interest can be established. *See, e.g.*, Allen, Gibbs, & Houlik, L.C. v. Ristow, 94 P.3d 724, 726 (Kan. Ct. App. 2004) (holding in favor of the former employee because her training did not rise to the level of "specialized knowledge" of her employer's business interests, and noting that "[i]f the sole purpose [of the noncompetition agreement] is to avoid ordinary competition, it is unreasonable and unenforceable"). M. Scott McDonald, in his article on noncompetition agreements, notes several of these protectable business interests:

> (1) to protect trade secrets and confidential information of the company;
> (2) to protect customer goodwill developed for the company (customer relationships);
> (3) to protect overall business goodwill and assets that have been sold (noncompetes used in the sale of a business);
> (4) to protect unique and specialized training;
> (5) for situations in which the employer has contracted for the services of an individual of unique value because of who they are (e.g., performers, professional athletes); and
> (6) for pinnacle employees in charge of an organization.

McDonald, *supra* note 2, at 143 (citations omitted).

51. *See* McDonald, *supra* note 2, at 142–43 (explaining the law provides exceptions based on the "rule of reason" test).

52. *See* Dawson v. Temps Plus, Inc., 987 S.W.2d 722, 726 (Ark. 1999) ("[T]he law will not

some element to the competition that would make such competition unfair. The employer cannot base its justification on the training or experience gained while on the job because an employee has a right to acquire those skills.[53] Instead, the employer must demonstrate the existence of "special circumstances" to justify the use of the noncompetition agreement.[54]

The burden rests with the employer to show "the clause [(1)] is narrowly drawn to protect the employer's legitimate business interest; [(2)] is not unduly burdensome on the employee's ability to earn a living; and [(3)] is not against sound public policy."[55] As an initial matter, the validity of a restrictive covenant is a question of law resolved in light of the language and circumstances surrounding the specific covenant at issue.[56]

Notably, courts have acknowledged two situations that provide sufficient justification for the execution of noncompetition agreements: where an employer is (1) protecting the goodwill of its business, and (2) protecting its confidential information.[57]

The first situation recognizes an employer's right to protect its goodwill.[58] An employee often generates goodwill through interactions

protect parties against ordinary competition."); Pinnacle Performance, Inc. v. Hessing, 17 P.3d 308, 311 (Id. Ct. App. 2001) ("The burden is on the employer to prove the extent of its protectable interest. . . . The general rule is that an employer is not entitled to protection against ordinary competition."); Marsh USA, Inc. v. Cook, 354 S.W.3d 764, 784 (Tex. 2011) (noting that in order to enforce a noncompetition agreement against a former employee "[t]he evidentiary record must demonstrate special circumstances beyond the bruises of ordinary competition such that, absent the covenant, [the former employee] would possess a grossly unfair competitive advantage"); *see also* Garrison & Wendt, *supra* note 31, at 115 (discussing the common law reasonableness approach, which requires the employer to demonstrate restrictions are not just a "naked attempt to restrict free competition").

53. *See* Garrison & Wendt, *supra* note 31, at 115 (contending employers may have a legitimate interest in preventing employees who have gained an unfair advantage from competing).

54. *See id.* at 115–16 ("An employer must demonstrate 'special circumstances' that make the agreement necessary to prevent some form of unfair competition.").

55. Lanmark Tech., Inc. v. Canales, 454 F. Supp. 2d 524, 528 (E.D. Va. 2006); *see also* Modern Env'ts, Inc. v. Stinnett, 561 S.E.2d 694, 695 (Va. 2002) (holding the employer bears the burden of showing the restraints in a noncompetition agreement are for a legitimate business purpose, are not oppressive towards the employee, and are not against public policy); Roanoke Eng'g Sales Co. v. Rosenbaum, 290 S.E.2d 882, 885 (Va. 1982) (concluding the agreement was enforceable because it was no broader than necessary).

56. *See* Omniplex World Servs. Corp. v. U.S. Investigations Servs. Inc., 618 S.E.2d 340, 342 (Va. 2005) ("Each noncompetition agreement must be evaluated on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved.").

57. *See* Garrison & Wendt, *supra* note 31, at 116 (listing the two primary interests courts have been willing to recognize as legitimate business interests).

58. *See* Warner & Co. v. Solberg, 634 N.W.2d 65, 73–74 (N.D. 2001) (noting that enforcement of a noncompetition agreement to protect a business's goodwill is enforceable "if it is connected with

with clients and by fostering personal relationships with customers. That goodwill does not, however, belong to the employee who has conducted business as an agent of the employer; rather, the goodwill is an asset of the employer.[59] The law protects these corporate customer relations as part of the "customer contact" theory.[60]

The second sufficient justification for a noncompetition agreement flows from the employer's right to protect confidential information.[61] When an employee has procured special knowledge of "information pertaining especially to the employer's business[,]" the employer has an interest in protecting that information by putting reasonable restraints on the employee.[62] A covenant that is reasonable in time and geographic scope shall be enforced to the extent necessary "(1) to prevent an employee's solicitation or disclosure of trade secrets, (2) to prevent an employee's release of confidential information regarding the employer's customers, or (3) in those cases where the employee's services to the employer are deemed special or unique."[63]

Furthermore, it is not necessary that the employee make actual use of the information before he is restrained. An employee's mere ability to take advantage of the employer's confidential information, and thereby gain an unfair advantage, may be sufficient for equity to restrain the employee

the sale of the goodwill of a business"); Butler v. Arrow Mirror & Glass, Inc., 51 S.W.3d 787, 797 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (holding that the enforcement of certain provisions of a noncompetition agreement "was necessary to protect Arrow's [the employer] goodwill and business interests"); *see also* Garrison & Wendt, *supra* note 31, at 116 (describing the protection of goodwill as a common justification for enforcing a noncompetition agreement).

59. *See* Garrison & Wendt, *supra* note 31, at 116 (explaining how an employee, acting as an agent of the employer, generates goodwill for the business).

60. *See id.* (recognizing the relational interests of the employer are protected under the contact theory).

61. *See* Sensabaugh v. Farmers Ins. Exch., 420 F. Supp. 2d 980, 981 (E.D. Ark. 2006) (noting that an employer may enforce a noncompetition agreement when it has "made available trade secrets, confidential business information, or customer lists, and then only if it is found that the [former employee] was able to use information so obtained to gain an unfair competitive advantage"); Evan's World Travel, Inc. v. Adams, 978 S.W.2d 225, 231 (Tex. App.—Texarkana 1998, no pet.) ("A trade secret may consist of any formula, pattern, device, or compilation of information that is used in one's business and which gives one an opportunity to obtain an advantage over competitors who do not know or use it.") The court in *Evans World Travel* goes on to list examples of trade secrets. *Id.* ("Items such as customer lists, pricing information, client information, customer preferences, buyer contacts, market strategies, blueprints, and drawings have been shown to be trade secrets."); *see also* Garrison & Wendt, *supra* note 31, at 116 (listing the protection of trade secrets as another protectable interest).

62. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 653 (1960).

63. Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 177 (S.D.N.Y. 2006) (quoting Ticor Title Ins. Co. v. Cohen, 173 F.3d 63, 70 (2d Cir. 1999)).

from engaging in a competing business.[64] An employee's knowledge of confidential information is sufficient to justify enforcement of the noncompetition agreement when there is a substantial risk the employee will be able to divert all or part of the employer's business.[65]

An employer can utilize a number of other legal documents to protect these secrets.[66] In fact, a contract may not even be required; "an employee's use of an employer's trade secrets or confidential customer information can be enjoined even in the absence of a restrictive covenant when such conduct violates a fiduciary duty owed by the former employee to his former employer."[67]

Nevertheless, a noncompetition agreement remains useful as a form of protection against the loss of confidential information. The noncompetition agreement protects trade secrets in the best manner possible—by preventing the former employee from working for a competitor.[68] Thus, the employer is able to prevent the sharing of trade secrets before the disclosure ever takes place.[69] A noncompetition agreement serves as a prophylactic remedy that aims to prevent unwanted disclosures—rather than attempting to sue for misappropriation of trade secrets after the fact.

The reasonableness requirement should balance the interests of all entities affected by the noncompetition agreement: the employer, the employee, and society as a whole. Each entity has an interest to be

64. For example, see *North Pacific Lumber Co. v. Moore*, where the court stated:

> It is clear that if the nature of the employment is such as will bring the employee in personal contact with the patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him . . . to take advantage of such knowledge of or acquaintance with the patrons or customers of his former employer, and thereby gain an unfair advantage, equity will interfere in behalf of the employer and restrain the breach of a negative covenant not to engage in such competing business.

N. Pac. Lumber Co. v. Moore, 551 P.2d 431, 434 (Or. 1976) (emphasis added) (quoting Kelite Prods., Inc. v. Brandt, 294 P.2d 320, 329 (Or. 1956)).

65. *See id.* (describing the degree to which an employee must have obtained business information to justify restraining that employee from competition).

66. *See* Garrison & Wendt, *supra* note 31, at 116 ("Protecting trade secrets is the second most common justification for employee restrictive covenants.").

67. EarthWeb, Inc. v. Schlack, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999) (citations omitted).

68. *See* Garrison & Wendt, *supra* note 31, at 117 ("[N]oncompete agreements are used as a means of minimizing the potential for trade secret misappropriation by preventing an employee from working for a competitor or engaging in a competing enterprise.").

69. *See id.* ("This further allows employers to prevent any improper use of trade secrets before it occurs rather than responding to a misappropriation, when the harm (which may be significant) is done.").

protected. The employee wishes to preserve his mobility; the employer wishes to protect itself from unfair competition; and society wishes to balance the system that provides incentives for the development and training of employees. With such varied interests at hand, the noncompetition agreement should be sculpted to satisfy all three objectives.

B. *The Reasonableness Test Does Not Sufficiently Measure the Interests of the Public*

Establishing the existence of a legitimate protected business interest is merely a threshold requirement that an employer must meet to create an enforceable agreement.[70] The scope of the noncompetition agreement must not be greater than what is necessary to protect that business interest.[71] To measure an employer's ability to protect a business interest, almost all courts apply a standard of reasonableness in deciding whether to enforce a noncompetition agreement.[72] The reasonableness test measures the interests of the parties to the agreement. The test does not, however, adequately measure the interests of the public. Even in those states that purport to weigh the public's interest, there is no discrete list of factors whereby a court takes the public's interest into account. As discussed below, the "reasonableness" standard holds minimal value in the adjudication of noncompetition agreements.[73]

70. *See id.* ("If the employer establishes that a legitimate interest is served by an agreement not to compete, the terms of the noncompete agreement are examined to assure that it is no more extensive than necessary to serve that interest.").

71. *See id.* at 117–18 (identifying three areas in which noncompetition agreements are assessed: (1) the time period of the agreement; (2) the geographic area covered; and (3) the business activities that are restricted by the agreement).

72. *See id.* (concluding that courts will not enforce a noncompetition agreement that is broader than reasonably necessary to protect the interests of the employer); *see also* Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 910–11 (W. Va. 1982) (holding that the enforcement of noncompetition agreements are subject to the "rule of reason").

73. *See Reddy*, 298 S.E.2d at 910–12 (investigating the use of the "rule of reason" in constructing restrictive covenants). The court in *Reddy* put it best:

> Reasonableness, in the context of restrictive covenants, is a term of art, although it is not a term lending itself to crisp, exact definition. Reasonableness, as a juridical term, is generally used to define the limits of acceptability and thus concerns the perimeter and not the structure of the area it is used to describe. This general observation is nowhere more particularly true than with respect to a restrictive covenant. Once a contract falls within the rule of reason, the rule operates only as a conclusive observation and provides no further guidance. A court's manipulation of the terms of an anticompetitive covenant, where none of its provisions standing alone is an inherently unreasonable one, cannot be accomplished with reasonableness as the standard. It is like being in the jungle—you're either in or you're out, and once you're in the distinction is worthless for establishing your exact location.

Many states provide a statutory framework for regulating noncompetition agreements. In Michigan, for example, the Michigan Antitrust Reform Act prohibits any "contract, combination, or conspiracy between [two] or more persons in restraint of, or to monopolize, trade or commerce."[74] However, the statute explicitly authorizes noncompetition agreements as long as they are reasonable.[75] Section 4(a)(1) of the Act provides:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of the employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.[76]

The remaining states rely on the court system.[77] In common law jurisdictions, a noncompetition agreement will be upheld only "if the restraint imposed is not unreasonable, is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public."[78] Many states follow the test set forth in the Restatement (Second) of Contracts, which takes into consideration the following factors: (1) whether the restriction is greater than necessary to protect the business and goodwill of the employer; (2) whether the employer's need for protection outweighs the economic hardship which the covenant imposes on the departing party; and (3) "whether the

Id. at 911.

74. MICH. COMP. LAWS § 445.772 (2008).

75. *See* Coates v. Bastian Bros., 741 N.W.2d 539, 545 (Mich. Ct. App. 2007) ("Agreements not to compete are permissible under Michigan law as long as they are reasonable." (quoting Thermatool Corp. v. Borzym, 575 N.W.2d 334, 336 (Mich. Ct. App 1998))); *see also* Bristol Window & Door, Inc. v. Hoogenstyn, 650 N.W.2d 670, 678 (Mich. Ct. App. 2002) (asserting that the agreement should be enforced under Michigan law, if reasonable).

76. COMP. § 445.774(a)(1).

77. *See* Vanko, *supra* note 11, at 2 ("While nineteen states regulate restrictive covenants by statute, the rest do so by common law."). Further, even in states with a statutory framework, the common law remains important. *Id.* at 2. For example, Michigan courts have clarified "§ 4(a)(1) represents a codification of the common-law rule 'that the enforceability of noncompetition agreements depends on their reasonableness.'" St. Clair Med. v. Borgiel, 715 N.W.2d 914, 918 (Mich. Ct. App. 2006) (quoting *Bristol*, 650 N.W.2d at 679).

78. W.R. Grace & Co. v. Mouyal, 422 S.E.2d 529, 531 (Ga. 1992) (quoting Rakestraw v. Lanier, 30 S.E. 735, 738 (Ga. 1898)).

restriction adversely affects the interests of the public."[79]

A reasonable restrictive covenant "does not extend beyond what is apparently necessary for the protection of those in whose favor it runs."[80] Section 188 of the Restatement instructs:

> A promise to refrain from competition that imposes a restraint . . . is unreasonably in restraint of trade if
> (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.[81]

A post-employment restraint may impose a hardship on the employee if it "inhibits his personal freedom by preventing him from earning his livelihood if he quits."[82]

The question of reasonableness is open to interpretation. For instance, in New York, courts require an employee's noncompetition agreement to meet an analysis based on "an overriding limitation of reasonableness."[83] In Virginia, courts must consider the "function, geographic scope, and duration" of any restriction.[84]

The reasonableness requirement is designed to take the interests of the employee into account. As one New York court noted:

> [O]ur economy is premised on the competition engendered by the uninhibited flow of services, talent and ideas. Therefore, no restrictions should fetter an employee's right to apply to his own best advantage the skills and knowledge acquired by the overall experience of his previous employment.[85]

Courts are required to examine any number of factors to determine whether to enforce a noncompetition agreement. For instance, in Virginia, courts must consider a number of specific facts: "the legitimate, protectable interests of the employer, the nature of the former and subsequent employment of the employee, whether the actions of the

79. Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 385 (Tex. 1991); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a (1979) (recognizing that a noncompetition agreement may be invalid when the restraint is overly broad or when it imposes a disproportionate hardship on the employee).

80. Durapin, Inc. v. Am. Prods., Inc., 559 A.2d 1051, 1053 (R.I. 1989).

81. RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(a)–(b) (1981).

82. *Id.* § 188 cmt. c.

83. Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 177 (S.D.N.Y. 2006) (citing Karpinski v. Ingrasci, 268 N.E.2d 751 (N.Y. 1971)).

84. Simmons v. Miller, 544 S.E.2d 666, 678 (Va. 2001).

85. Reed, Roberts Assocs. v. Strauman, 353 N.E.2d 590, 593 (N.Y. 1976).

employee actually violated the terms of the non-compete agreements, and the nature of the restraint in light of all the circumstances of the case."[86]

Once a court determines that the noncompetition agreement protects a legitimate business interest it will examine the agreement to ensure that it does not exceed the minimum restraint necessary to protect that interest.[87] Courts will enforce agreements only where 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."[88] In common law jurisdictions, noncompetition agreements are enforced as reasonable if they are found to satisfy the following three elements:

> First, [the agreement] must [be] ancillary to an otherwise valid contract, transaction or relationship. Second, the restraint created must not be greater than necessary to protect the promisee's legitimate interests such as business goodwill, trade secrets, or other confidential or proprietary information. Third, the promisee's need for the protection given by the agreement must not be outweighed by either the hardship to the promisor or any injury likely to the public.[89]

Thus, to be enforceable, agreements must be reasonable in three ways: scope (referring to the subject matter of the agreement), duration, and geography.[90]

1. Limitations on Scope of Activity

There are two general types of "scope of activity" limitations: 1) those that prohibit the employee from soliciting the employer's customers, and 2) those that prohibit the employee from engaging in any competitive business.[91] With respect to customer solicitation, "reasonable" limitations

86. Modern Env'ts, Inc. v. Stinnett, 561 S.E.2d 694, 696 (Va. 2002).

87. *See* Garrison & Wendt, *supra* note 31, at 118 ("[C]ourts . . . are reluctant to allow noncompete agreements that prevent an employee from working in any position for a competitor or that prohibit an employee from engaging in business that is not directly competitive with the former employer's business.").

88. Palmer & Cay, Inc. v. Marsh & McLennan Cos., 404 F.3d 1297, 1303 (11th Cir. 2005).

89. Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 386 (Tex. 1991) (citations omitted). In Texas, the common law test was later codified in the Texas Business and Commerce Code. *Id.* at 388.

90. *See* UARCO Inc. v. Lam, 18 F. Supp. 2d 1116, 1121 (D. Haw. 1998) (noting the parameters of a reasonableness inquiry); *see also* Pinnacle Performance, Inc. v. Hessing, 17 P.3d 308, 311 (Id. Ct. App. 2001) (explaining the three factors considered in a reasonableness inquiry).

91. *See* Garrison & Wendt, *supra* note 31, at 116–17 (discussing the primary justifications for employer protection under noncompetition agreements). Garrison and Wendt note:

> Under the so called "customer contact" theory, the relational interests of the former employer

are valid and enforceable.[92] A legitimate purpose of a noncompetition agreement is to prevent "employees or departing partners from using the business contacts and rapport established during the relationship of representing [a] . . . firm to take the firm's customers with him."[93] Thus, noncompetition agreements that only limit solicitation of those customers with whom the employee had daily contact on a personal level would likely

are protected. . . .

. . . .

In the protection of trade secrets, noncompete agreements are used as a means of minimizing the potential for trade secret misappropriation by preventing an employee from working for a competitor or engaging in a competing enterprise.

Id. (citation omitted).

92. *See* Ruscitto v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 777 F. Supp. 1349, 1354 (N.D. Tex. 1991) (maintaining a restrictive covenant that merely prevented the employee from "soliciting clients whom [the employee] served or whose names became known to [the employee] while at Merrill Lynch" was reasonable), *aff'd*, 948 F.2d 1286 (5th Cir. 1991); Picker Int'l v. Blanton, 756 F. Supp. 971, 982 (N.D. Tex. 1990) (holding a limitation barring the employee from servicing MRI systems, that the employee serviced while with employer, was reasonable); Investors Diversified Servs., Inc. v. McElroy, 645 S.W.2d 338, 339 (Tex. App.—Corpus Christi 1982, no writ) (determining the limitation against soliciting customers with whom the employee dealt or had contact during employment was reasonable).

93. *Peat Marwick*, 818 S.W.2d at 387. Some customer solicitation limitations may be considered overbroad, unreasonable, and, therefore, unenforceable, at least without reformation. In *Peat Marwick*, the Texas Supreme Court held that a covenant not to compete was overbroad and unenforceable. *See id.* at 388 ("Inhibiting departing partners from engaging accounting services for clients who were acquired after the partner left, or with whom the accountant had no contact while associated with the firm, does not further and is not reasonably necessary to protect [the firm's] interest."). The covenant prohibited a former partner of an accounting firm from soliciting or doing business for clients acquired by the firm during the twenty-four-month period immediately after the partner left, or with whom the partner had no contact while at the firm. *See id.* at 383 n.3 ("Firm clients shall include any party who was a client of the Firm as of the termination date or became such a client during the twenty-four-month period thereafter, or any other party in which such clients are a principal party in interest."). For a scope-of-activity limitation of this type to be reasonable, there must be "a connection between the personal involvement of the former firm member [and] the client." *Id.* at 387. Therefore, a covenant against soliciting customers should be limited to customers the employee had contact with during the period of employment; absent such a limitation, the covenant is overbroad. *See id.* at 388 ("We hold that the provision in question here is unreasonable because it applies to clients who first become clients after the accountant has left the firm or with whom the departing partner had no contact while he was at the prior firm."). The second, and broader scope of activity limitation, is one that prohibits any competitive activity. Texas courts generally uphold such limitations when the employer is engaged in only a single type of business. *See* Prop. Tax Assocs. v. Staffeldt, 800 S.W.2d 349, 351 (Tex. App.—El Paso 1990, writ denied) (stating the noncompetition agreement was reasonable because the employer was only in one area of business). On the other hand, when an employer engages in a number of different types of business, such a limitation may be unreasonable, unless it is limited to the specific type of business in which the employee worked while employed. *See* Diversified Human Res. Grp., Inc. v. Levinson-Polakoff, 752 S.W.2d 8, 11 (Tex. App.—Dallas 1988, no writ) (holding a covenant that restrained a former employee from placing personnel in non-related fields, rather than just the field in which she had worked, was unreasonable).

be deemed reasonable.[94]

2. Limitations on Time

The duration of the restriction also determines the reasonableness of the restraint.[95] Restraints with an indefinite duration are almost always unreasonable;[96] however, it is necessary to consider the particular industry at issue to determine whether the particular restraint's duration is reasonable.[97] Some courts weigh the specific value of the protected information.[98] For instance, in New York, the "durational reasonableness of a non-compete agreement is judged by the length of time for which the employer's confidential information will be competitively valuable."[99]

The courts' inconsistent analysis under this fact-specific inquiry is frustrating. As one commentator states:

> A look at the cases finds courts upholding restrictive covenants that last as long as five or ten years, while invalidating others that last only one or two years. Moreover, courts in the same jurisdiction will uphold a three-year limitation in one case but invalidate it in another. Unfortunately, in so doing the courts seldom attempt to reconcile their decisions, except perhaps by saying that each case must be decided on its own facts. In reviewing the cases, one could decide that the decisions are totally serendipitous and would not be far wrong. However, luck and good fortune are not particularly

94. *See Peat Marwick*, 818 S.W.2d at 387 (noting provisions that are "not limited to clients whom the employee had served personally as an employee [are] unreasonable and unenforceable" (citing Fuller v. Kolb, 234 S.E.2d 517, 518 (Ga. 1977))).

95. *See Investors Diversified Servs.*, 645 S.W.2d at 339 (indicating a one-year restraint is well within reasonable bounds).

96. *See, e.g.*, Taylor v. Saurman, 1 A. 40, 41 (Pa. 1885) (declaring a covenant not to re-engage in photography void against public policy).

97. *See* Bob Pagan Ford, Inc. v. Smith, 638 S.W.2d 176, 178 (Tex. App.—Houston [1st Dist.] 1982, no writ) (describing the discretionary standard for trial courts to find noncompetition agreements reasonable).

> In determining whether a restrictive covenant is reasonable as to duration, the trial court is accorded considerable discretion, and it is appropriate for the court to consider whether the interests which the covenant was designed to protect are still outstanding and to balance those interests against the hardships which would be imposed upon the employee by enforcement of the restrictions.

Id.

98. *See* Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 914 (W. Va. 1982) (weighing the time period for a noncompetition agreement based on when an employee's training costs have been recovered).

99. Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 180 (S.D.N.Y. 2006); *see also* Bus. Intelligence Servs., Inc. v. Hudson, 580 F. Supp. 2d 1068, 1073 (S.D.N.Y. 1984) ("Within a year [the former employee's] knowledge of these matters will be outdated and of little use.").

helpful when drafting clauses.[100]

A review of case law indicates most courts usually uphold time limitations of one or two years.[101] Limitations of three to five years may be upheld in the sale of a business, but decisions conflict as to whether a three-to five-year limitation is reasonable in an employment situation.[102]

3. Limitations on Geography

The geographical limitation in noncompetition agreements must be definite.[103] An indefinite description of the geographical area should render the agreement unenforceable as written.[104] Nevertheless, even a worldwide restriction may, under the right circumstances, reach the standard of reasonableness.[105] The particular nature of the employer's business may cover a wide geographic limitation that would otherwise appear to be hopelessly overbroad.[106]

Numerous courts have held a reasonable area consists of the territory in

100. 1 KURT H. DECKER, COVENANTS NOT TO COMPETE 127 (2d ed. 1993).

101. *See id.* at 126 ("Clauses such as the following restraining competition with established customers for set periods of time have been enforced . . . [f]or a period of [twenty-four] months." (citation omitted)); *see also* Ruscitto v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 777 F. Supp. 1349, 1354 (N.D. Tex. 1991) (finding a one-year limitation on solicitation of former clients reasonable); Picker Int'l, Inc. v. Blanton, 756 F. Supp. 971, 982 (N.D. Tex. 1990) (holding a one-year limit on competition was reasonable); Investors Diversified Servs., Inc. v. McElroy, 645 S.W.2d 338, 339 (Tex. App.—Corpus Christi 1982, no writ) ("The one year restraint involved here is certainly reasonable . . . .").

102. Texas cases provide a representative array of decisions. *Compare* Prop. Tax Assocs. v. Staffeldt, 800 S.W.2d 349, 350 (Tex. App.—El Paso .1990, no writ) ("The courts of this state have upheld restrictions ranging from two to five years as reasonable."), *and Investors Diversified Servs.*, 645 S.W.2d at 339 ("Two to five years have repeatedly been held to be reasonable."), *with* Bob Pagan Ford, Inc. v. Smith, 638 S.W.2d 176, 178–79 (Tex. App.—Houston [1st Dist.] 1982, no writ) (upholding trial court's decision to reform the restricted period under an employment agreement from three years to six months).

103. *See* Gomez v. Zamora, 814 S.W.2d 114, 118 (Tex. App.—Corpus Christi 1991, no writ) ("Indefinite descriptions of the area covered by a non-competition covenant render them unenforceable as written.").

104. *See* Butts Retail, Inc. v. Diversifoods, Inc., 840 S.W.2d 770, 774 (Tex. App.—Beaumont 1992, no writ) (holding the language "'metropolitan area' of the Parkdale Mall store in Beaumont, Texas" indefinite and unenforceable); *Gomez*, 814 S.W.2d at 117–18 (holding the language "existing marketing area" and "future marketing area of the employer begun during employment" indefinite and unenforceable).

105. *See* Bus. Intelligence Servs., Inc. v. Hudson, 580 F. Supp. 1068, 1073 (S.D.N.Y. 1984) (finding a worldwide restriction on competition reasonable where the former employer's scope of business was global).

106. *See* Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 181 (S.D.N.Y. 2006) ("Broad geographic limitations have been deemed reasonable where warranted by the nature and scope of the employer's business."); *Hudson*, 580 F. Supp. at 1072–73 (concluding the worldwide restriction were reasonable "given the international nature of [the employer's] business").

which the former employee worked while employed.[107] Beyond this general rule, however, what constitutes a reasonable geographical area invariably depends upon the facts of the specific case.[108]

Traditionally, the reasonableness of a geographic limitation was directly related to the location of the territory in which the employee worked for his former employer.[109] As such, courts have held geographic restraints are reasonable where "the area of the restraint is no broader than the territory throughout which the employee was able to establish contact with his employer's customers during the term of his employment."[110]

4. The Effect of the "Blue Pencil Doctrine"

At common law, courts rarely enforced unreasonable agreements in part.[111] An agreement made unreasonable by attempting to overextend its

107. Once again, Texas decisions provide a representative example. *See* Zep Mfg. Co. v. Harthcock, 824 S.W.2d 654, 660 (Tex. App.—Dallas 1992, no writ) ("[W]hat constitutes a reasonable area generally is considered to be the territory in which the employee worked while in the employment of his employer."); Diversified Human Res. Grp., Inc. v. Levinson-Polakoff, 752 S.W.2d 8, 12 (Tex. App.—Dallas. 1988, no writ) (holding a restriction against working within fifty miles of any city where the former employer operated was overbroad, given that the employee had only worked in one of these cities during her employment); Martin v. Linen Sys. for Hosps., Inc., 671 S.W.2d 706, 709–10 (Tex. App.—Houston [1st Dist.] 1984, no writ) (upholding the trial court's modification of a noncompetition agreement, changing the restricted scope from a ten-mile radius of any customer to only a ten-mile radius of the employer's main offices); Cross v. Chem-Air S., Inc., 648 S.W.2d 754, 757 (Tex. App.—Beaumont 1983, no writ) ("The test for reasonableness as to territorial restraint is whether or not the injunction is confined to territory actually covered by the former employee in his work for the employer.").

108. *See Martin*, 671 S.W.2d at 709 (noting Texas courts have reformed noncompetition agreements to "whatever is reasonable in time and scope under the circumstances, depending largely upon the nature and extent of the employer's business operations").

109. *See* Justin Belt Co. v. Yost 502 S.W.2d 681, 685 (Tex. 1973) ("[T]he territory that is included [is an] important factor[] to be considered in determining the reasonableness of the agreement."); *see also* Butler v. Arrow Mirror & Glass, Inc., 51 S.W.3d 787, 794 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (upholding the trial court's reformation of a noncompetition agreement to include only the counties in which the employee interacted with his former employer's customers).

110. Foss, *supra* note 10, at 225 (citation omitted). *Compare* Curtis v. Ziff Energy Grp., 12 S.W.3d 114, 119 (Tex. App.—Houston [14th Dist.] 2000, no pet.) ("Based on [the former employee's] job description and responsibilities [as Vice President in charge of marketing], it was reasonable to restrict [the former employee] from working in [similar firms] in North America for a six month period, and it did not impose an unnecessary restraint."), *with* Evan's World Travel, Inc. v. Adams, 978 S.W.2d 225, 232–33 (Tex. App.—Texarkana 1998, no pet.) (holding a restraint was unreasonable because it contained "no language which tailor[ed] the geographical restrictions to keep [the former employee] from working in only geographical areas where she worked, but rather, the limitations in the agreement purport[ed] to prevent her from working anywhere [the former employer] conducted business").

111. *See* Garrison & Wendt, *supra* note 31, at 118 ("Under the common law, courts were reluctant to partially enforce unreasonable postemployment restrictions.").

prohibitions would be either invalidated or the offending passage would be deleted pursuant to the blue pencil doctrine.[112] The blue pencil doctrine is a "judicial standard for deciding whether to invalidate the whole contract or only the offending words."[113] If the blue pencil doctrine is strictly applied, "only the offending words are invalidated if it would be possible to delete them simply by running a blue pencil through them, as opposed to changing, adding, or rearranging words."[114] This doctrine is based, in large part, on the "understanding that there is not necessarily a sinister purpose behind an overbroad restrictive covenant."[115] Courts can and do look to the good faith of the employer when determining whether to use the blue pencil doctrine.[116]

Use of the blue pencil doctrine differs from state to state. Among those states that enforce noncompetition agreements, three schools of thought exist.[117] As the First Circuit summarized:

> Courts presented with restrictive covenants containing unenforceable provisions have taken three approaches: (1) the "all or nothing" approach, which would void the restrictive covenant entirely if any part is unenforceable, (2) the "blue pencil" approach, which enables the court to enforce the reasonable terms provided the covenant remains grammatically coherent once its unreasonable provisions are excised, and (3) the "partial enforcement" approach, which reforms and enforces the restrictive covenant *to the extent it is reasonable*, unless the "circumstances indicate bad

112. *See id.* at 107, 118–19 (citation omitted) ("An overbroad agreement was either void per se or subject to severance under the 'blue pencil' doctrine.").

113. BLACK'S LAW DICTIONARY 207 (10th ed. 2014).

114. *Id.*

115. *See* Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 914 (W. Va. 1982) (explaining why the court will allow the blue pencil doctrine in some situations). The court in *Reddy* commented on the motivations of employers:

> [I]n most cases, the promise is not required by the employer because he is a hardhearted oppressor of the poor. He too is engaged in the struggle for prosperity and must bend every effort to gain and to retain the good will of his customers. It is the function of the law to maintain a reasonable balance.

Id. (quoting 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1394 at 89 (1962)).

116. *See id.* at 916 (discussing whether or not the court will find a covenant void or subject it to "judicial moulding").

> If the reviewing court is satisfied that the covenant is reasonable on its face, hence within the perimeter of the rule of reason, it may then proceed with analysis leading to a 'rule of best result.' Pursuant to that analysis, the court may narrow the covenant so that it conforms to the actual requirements of the parties.

Id.

117. Ferrofluidics Corp. v. Advanced Vacuum Components, Inc., 968 F.2d 1463, 1469 (1st Cir. 1992) (citing Durapin, Inc. v. Am. Prods. Inc., 559 A.2d 1051, 1058 (R.I. 1989)).

faith or deliberate overreaching" on the part of the employer.[118]

As noted above, some states follow a "no modification" approach to noncompetition agreements.[119] Also known as the "all or nothing" rule, this approach precludes the use of the blue pencil doctrine.[120] Courts adhering to this approach refrain from either rewriting or striking overbroad provisions in noncompetition agreements.[121] Rather, in no-modification states, courts first determine whether the restrictive covenant is reasonable as written; if it is not, courts will not modify or eliminate provisions, but instead will refuse to enforce the agreement at all.[122]

The second approach is known as the "strict blue pencil" rule. The strict blue pencil rule does not allow courts to rewrite overbroad noncompetition agreements.[123] Instead, the strict approach only permits courts to strike overbroad provisions and enforce what is left of the agreement. Thus, the agreement is only enforceable if the agreement is reasonably limited after the overbroad provisions have been removed.[124]

Finally, other states have adopted a liberal form of the blue pencil doctrine: the "reasonable modification" approach.[125] These states permit a court to rewrite an overbroad noncompetition agreement to reasonably limit the restrictions found in the agreement.[126]

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Diversified Human Res. Grp., Inc. v. Levinson-Polakoff, 752 S.W.2d 8, 12 (Tex. App.—Dallas 1988, no writ).

123. *See* Deustche Post Global Mail, Ltd. v. Conrad, 292 F. Supp. 2d 748, 754 (D. Md. 2003) (explaining the strict approach is "limited to removing the offending language without supplementing or rearranging the remaining language").

124. *See generally* Broadway & Seymour, Inc. v. Wyatt, No. 91-2345, 1991 WL 179084 (4th Cir. Sept. 13, 1991) (contrasting the strict North Carolina blue pencil rule with the liberal Florida approach).

125. *See* Bess v. Bothman, 257 N.W.2d 791, 794 (Minn. 1997) ("Although the 'blue pencil' doctrine, requiring that the reasonable and unreasonable restraints be severable, still commands a slight majority of jurisdictions, a substantial minority of courts modify unreasonable restraints of trade, whether formally divisible or not, and enforce them to extent reasonable in the circumstances.").

126. *See id.* at 794–95 ("[E]nforcement of restrictive covenants remains a matter of equitable discretion and should be granted only when neither injury to the public interest nor injustice to the parties will result."); *see also Conrad*, 292 F. Supp. 2d at 757 (describing the liberal approach which allows "the court to modify the terms so as to align the reasonable expectations of the law"); Butler v. Arrow Mirror & Glass, Inc., 51 S.W.3d 787, 794 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (noting Texas follows the liberal blue pencil approach).

C. *The Public's Interest in Enforcement Should Play a Larger Role in the Reasonableness Test*

This Article argues that the public good should receive enhanced focus in the enforcement of noncompetition agreements. This stand comports with the language of the Restatement of Contracts that courts should examine "the likely injury to the public."[127] Although in language less strong—as well as more convoluted—the draft of the Restatement of Employment Law includes, among the exceptions to enforcement of noncompetition agreements: "[I]n the geographic region covered by the restriction a great public need for the special skills and services of the former employee outweighs any legitimate interest of the employer in enforcing the covenant."[128] Therefore, a basis already exists for examining the interest of the public in examining the possible enforcement of a noncompetition agreement.

In fact, many states have acknowledged that the public has an interest in the enforceability of a noncompetition agreement.[129] Although stated in different ways, some state reasonableness tests already reflect the position that the noncompetition agreement should not harm the public as a whole.[130] There are numerous instances in which courts have recognized the public's interest in enforcement. This willingness to consider the interests of the public takes different forms and has been stated in different ways.

For instance, Arkansas courts have noted that a reasonable noncompetition agreement "should not injure the public's interest."[131] In Kentucky, courts have noted the potential conflict between the employer's interest and those of the public "on consideration of the subject, nature of the business, situation of the parties and circumstances of the particular case."[132] A restrictive covenant is reasonable if it "is such only as to

127. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a (1981).

128. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 8.06(d) (Preliminary Draft No. 7, 2010).

129. *See, e.g.*, *Conrad*, 292 F. Supp. 2d at 757 (enforcing covenants is allowed if they are reasonable and lawful and do not result in injury to the public).

130. *See, e.g.*, *Bess*, 257 N.W.2d at 795 ("[E]nforcement of restrictive covenants remains a matter of equitable discretion and should be granted only when neither injury to the public interest nor injustice to the parties will result.").

131. Hardesty Co. v. Williams, 368 F.3d 1029, 1031 (8th Cir. 2004) (citing Dawson v. Temps Plus, Inc., 987 S.W.2d 722, 727 (Ark. 1999)); *see also* Sensabaugh v. Farmers Ins. Exch., 420 F. Supp. 2d 980, 985 (E.D. Ark. 2006) ("The test is whether the restraint imposed is no greater than is reasonably necessary for the protection of the [employer] and not so great as to injure a public interest." (citing Evans Labs., Inc. v. Melder, 562 S.W.2d 62, 64 (Ark. 1978))).

132. Hammons v. Big Sandy Claims Serv., Inc., 567 S.W.2d 313, 315 (Ky. Ct. App. 1978).

afford fair protection to the interests of the covenantee and is not so large as to interfere with the public interests or impose undue hardship on the party restricted."[133]

In Maryland, a noncompetition agreement may only be enforced "if the restraint is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the business of the employer and do not impose undue hardship on the employee or disregard the interests of the public."[134] In New Jersey, courts state that a reasonable noncompetition agreement is one that does "not impair public interest."[135]

Similarly, the New York Court of Appeals notes that its version of the reasonableness test includes weighing the potential harm to the public:

> A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.[136]

Under Connecticut law, restrictive covenants made in an employment agreement "may be against public policy, and, thus, are enforceable only if their imposed restraint is reasonable, an assessment that depends upon the competing needs of the parties as well as the needs of the public."[137] Courts have identified those needs as: "(1) the employer's need to protect legitimate business interests, such as trade secrets and customer lists; (2) the employee's need to earn a living; and (3) the public's need to secure the employee's presence in the labor pool."[138]

The public's interest may derive from the supposed benefit of competition. Free competition, presumably to benefit society as a whole, underlies the notion of a strict reasonableness test.[139] "[O]nce the term of an employment agreement has expired, the general public policy favoring robust and uninhibited competition should not give way merely because a particular employer wishes to insulate himself from competition."[140]

Similarly, Illinois courts refuse to permit expansive readings of

133. *Id.*

134. Ruhl v. F.A. Bartlett Tree Co., 225 A.2d 288, 291 (Md. 1967) (quoting MacIntosh v. Brunswick, Corp., 215 A.2d 222, 225 (Md. 1965)).

135. Whitmyer Bros. v. Doyle, 274 A.2d 577, 582 (N.J. 1971) (quoting Solari Indus., Inc. v. Malady, 264 A.2d 53, 61 (N.J. 1970)).

136. Natural Organics, Inc. v. Kirkendall, 860 N.Y.S.2d 142, 143 (App. Div. 2008) (quoting BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 388–89 (1999)).

137. Deming v. Nationwide Mut. Ins. Co., 905 A.2d 623, 634 (Conn. 2006).

138. *Id.*

139. EarthWeb v. Schlack, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999).

140. *Id.* (quoting Am. Broad. Co. v. Wolf, 420 N.E.2d 363, 368 (N.Y. 1981)).

restrictive covenants because more competition often serves the public interest in low prices.[141] Wisconsin considers, among other issues, whether a noncompetition agreement is reasonable, making reference to the public's interest in unrestrained competition.[142]

The states that refuse to enforce noncompetition agreements have done so, in large part, in an effort to protect the public's interest. The California statute's prohibition against the enforcement of noncompetition clauses is rooted in public policy arguments.[143] Courts have traditionally disfavored noncompetition agreements as restraints on trade, while courts have permitted them if the restraints were reasonable.[144] The California statute, however, goes beyond "disfavor" to instead eliminate the use of virtually all noncompetition agreements.[145] In *Edwards v. Arthur Andersen LLP*,[146] the California Supreme Court explained the statute as "settled legislative policy in favor of open competition and employee mobility."[147] The *Edwards* court noted: "The law protects Californians and ensures that 'every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.' It protects 'the important legal right of persons to engage in businesses and occupations of their choosing.'"[148]

North Dakota shares a common position on the enforceability of noncompetition agreements. Other than in the context of a sale of a business or dissolution of a partnership, North Dakota refuses to recognize the enforceability of noncompetition agreements: "Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void."[149] As with California, North Dakota's statute reflects the public interest in limiting the ability to restrict employee mobility. It reflects "the long-standing public policy against restraints upon free trade."[150] There is no question that public policy issues—the interests of the public—lie at the heart of

141. *See* Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc., 879 N.E.2d 512, 522 (Ill. App. Ct. 2007) (determining the reasonableness of a restrictive covenant by considering the hardship of an employee, the effect on the public, and the scope of the restrictions).

142. Chuck Wagon Catering v. Raduege, 277 N.W.2d 787, 792 (Wis. 1979).

143. Moffatt, *supra* note 32, at 945.

144. *Id.*

145. *Id.*

146. Edwards v. Arthur Andersen LLP, 189 P.3d 285 (Cal. 2008).

147. *Id.* at 291.

148. *Id.* (citations omitted) (quoting Metro Traffic Control, Inc. v. Shadow Traffic Network, 27 Cal. Rptr. 2d 573, 577 (Ct. App. 1994) and Morlife, Inc. v. Perry, 66 Cal. Rptr. 2d 731, 734 (Ct. App. 1997)).

149. N.D. CENT. CODE § 9-08-06 (2012).

150. Warner & Co. v. Solberg, 634 N.W.2d 65, 70 (N.D. 2001).

the North Dakota statute. "Although the statute may appear to protect the party against whom a contract not to compete is sought to be enforced, statutes making void contracts in restraint of trade are based upon consideration of public policy and not necessarily upon consideration for the party against whom relief is sought."[151]

The public has an interest in open access to the goods and services that the employee may produce. The North Dakota Supreme Court stated that the purpose of the statute "is to promote commercial activity by restricting the ability of individuals to form agreements which limit commercial exchange or more specifically limit agreements not to compete."[152] The Eighth Circuit, applying North Dakota law, stated that "North Dakota deems the public's access to services to be a more pressing policy concern than the details of the relationship between a particular employee and employer."[153]

The problems with noncompetition agreements are well-documented. These agreements are subject to a bewildering maze of state laws, courts that may enforce the agreement only in part or not at all, and general confusion on the part of both employer and employee. Given these problems, it seems clear that the process of enforcing a noncompetition agreement should be clarified.

IV. PROTECTING THE PUBLIC'S INTEREST BY ADOPTING AN ENTREPRENEURIAL APPROACH

A. *Entrepreneurship Is in the Public's Interest*

This Article equates the public interest with entrepreneurship. Although some may consider this a reach, logical reasons support this notion—the development of new business, new goods, and new services bring value to society. Entrepreneurship "satisfies the twin conditions for a public good: [First] [e]ntrepreneurial activities create benefits that spillover in the entire economy. [Second] [i]t is difficult, impractical[,] and cost ineffective to collect money from all those who benefit from initial entrepreneurial activities."[154] Scholars "estimate that the direct and indirect effects of small business formation accounts for more than half of gross domestic product and approximately sixty to eighty percent of the

151. *Id.*

152. Herman v. Newman Signs, Inc., 417 N.W.2d 179, 181 (N.D. 1987).

153. CDI Energy Servs. v. W. River Pumps, Inc., 567 F.3d 398, 404 (8th Cir. 2009).

154. Inder P. Nijhawan & Khalid Dubas, *Entrepreneurship: Public or Private Good?*, 13 PROC. ACAD. ENTREPRENEURSHIP, no. 2, 2007, at 49, 50.

new jobs created in this country."[155]

Entrepreneurship is a vital component to the economic health "of companies, sectors, and entire nations."[156] Entrepreneurship plays a critical role in "new economic activity—boosting innovation, wealth, growth, and employment."[157] Entrepreneurship is "an engine of economic development."[158] Entrepreneurship "strengthens competition between developed economies and supports social welfare within developing countries."[159] It is "vital for the competitiveness of enterprises in existing or emerging markets."[160] Numerous studies have established a link between increased business formation and economic growth.[161]

Similarly, entrepreneurs create employment opportunities that resonate through the economy.[162] In a 2001 study, scholars studying data from twenty-three countries demonstrated that lower levels of unemployment could result from increasing "the number of business owners per unit of labor."[163]

Moreover, some researchers argue that entrepreneurs may broaden the scope of their hires to include "individuals who might otherwise remain unemployed because they are too young or too old or lack experience, education or skills to be employed by the large or medium size firms."[164] In short, entrepreneurial activity creates spillover effects that benefit all of society.[165]

B. *The Difficulty of Defining Entrepreneurship*

Entrepreneurship provides a benefit to society and serves as a public good. To use the concept of entrepreneurship in making the decision to

155. *Id.*

156. Soriano & Montoro-Sanchez, *supra* note 13, at 297.

157. *Id.*

158. Sana El Harbi & Alistair R. Anderson, *Institutions and the Shaping of Different Forms of Entrepreneurship*, 39 J. SOCIO-ECONOMICS 436, 436 (2010).

159. Soriano & Montoro-Sanchez, *supra* note 13, at 297.

160. EUROPEAN COMM'N, MICREF USER GUIDE 10 n.11 (2010), http://ec.europa.eu/economy_finance/db_indicators/micref/documents/user_guide_en.pdf.

161. *See* Nijhawan & Dubas, *supra* note 154, at 51 ("The positive relationship between small business formation and economic growth is chronicled by a number [of] studies . . . .").

162. *Id.* at 50.

163. *Id.* For a lengthier discussion on the relationship between entrepreneurship and the labor force, see Philipp D. Koellinger & A. Roy Thurik, *Enrepreneurship and the Business Cycle*, TINBERGEN INSTITUTE 1 (Mar. 23, 2011), http://papers.tinbergen.nl/09032.pdf.

164. Nijhawan & Dubas, *supra* note 154, at 51.

165. *Id.* at 51–52.

enforce a noncompetition agreement, it is necessary to create an analytical framework to assist in determining the presence of entrepreneurial activity. This Article analyzes the presence of entrepreneurial opportunity by looking to the academic field of entrepreneurship, examining the various definitions of entrepreneurship, and creating a workable legal test.

Finding a definition of entrepreneurship that satisfies everyone is difficult. Despite the concept's seeming ubiquity, entrepreneurship remains difficult to define. Entrepreneurship is a "broad and complex concept."[166] It is difficult to find a "precise, inherently consistent, and agreed-upon definition."[167] Some may associate entrepreneurship with small businesses and sole proprietors, while others may associate the word with industry leaders such as Richard Branson and Steve Jobs.[168] Still others may not view the concept with the same affection.[169]

The "who" and "what" of entrepreneurship remains difficult to capture.[170] Who is an entrepreneur? How can someone recognize an entrepreneur or an entrepreneurial opportunity?[171] Despite a tradition of study, dating back hundreds of years,[172] creating a single description of the elements of entrepreneurship remains controversial.[173] Nevertheless,

166. Soriano & Montoro-Sanchez, *supra* note 13, at 297.

167. PER DAVIDSSON, RESEARCHING ENTREPRENEURSHIP 3 (2005).

168. *See generally* June Thomas, *Why Do TV Writers Hate Entrepreneurs?*, SLATE (Dec. 7, 2012, 5:00 PM), http://www.slate.com/blogs/browbeat/2012/12/07/entrepreneurs_on_television_why_are_they_such_dolts.html ("[A] fairly random sampling . . . [shows] new business ventures are a sign of maturity . . . [requiring] genuine thought and effort . . . . But most of television's entrepreneurs are maladjusted loafers.").

169. In the movie *The Social Network*, the story of how Facebook made the leap from a concept to a global phenomenon, one of the lead characters is in bed with his girlfriend. "So what do you do?" she asks. "I'm an entrepreneur," he replies. "You're unemployed," she retorts. AARON SORKIN, THE SOCIAL NETWORK SCREENPLAY 85 (2010), http://flash.sonypictures.com/video/movies/thesocialnetwork/awards/thesocialnetwork_screenplay.pdf.

170. *See generally* Soriano & Montoro-Sanchez, *supra* note 13, at 297 ("Even though the concept was first coined by Cantillon in 1755, basic issues such as 'who' is an entrepreneur and 'what' constitutes entrepreneurship are still widely debated.").

171. Hampering our ability to understand entrepreneurship is the media's bipolar portrayal of entrepreneurship, from the lionization of famous entrepreneurs to the denigration of small businesses. *See, e.g.*, Thomas, *supra* note 168 (illustrating how the media negatively portrays entrepreneurs).

172. The first author to give entrepreneurship an economic meaning was Richard Cantillon in *Essai sur la Nature du Commerce en Géssai.* RICHARD CANTILLON, ESSAI SUR LA NATURE DU COMMERCE EN GÉNÉRAL (Institut Coppet ed., 2011) (1755). Cantillon "outlined the principles of the early market economy based on individual property rights and economic interdependency." Hans Landström et al., *Entrepreneurship: Exploring the Knowledge Base*, 41 RES. POL'Y 1154, 1155 (2012).

173. *But see* Candida G. Brush et al., *Doctoral Education in the Field of Entrepreneurship*, 29 J. MGMT. 309, 311 (2003) (suggesting a focus on "creation" serves as the unifying element upon which entrepreneurship is based).

while entrepreneurship remains difficult to define in precise terms, the phenomenon seems to be "broadly understood."[174]

C. *Discovering Common Aspects of Entrepreneurship*

Study of entrepreneurship has yielded numerous varied definitions.[175] The difficulty of definition has even caused some to question the legitimacy of the academic study of entrepreneurship.[176]

Entrepreneurship can involve the creation of new firms.[177] Entrepreneurship can focus on activities, generally new and innovative, taken in response to perceived business opportunities.[178] Entrepreneurship is "[t]he process whereby an individual or a group of individuals use[] organi[z]ed efforts and means to pursue opportunities to create value and grow by fulfilling wants and needs through innovation and uniqueness, no matter what resources are currently controlled."[179] It is "the set of practices involving the creation or discovery of opportunities and their enactment."[180]

The many different definitions share some common elements. Certain elements often arise in discussions attempting to define entrepreneurship:

1. The *environment* within which entrepreneurship occurs.
2. The *people* engaged in entrepreneurship.
3. *Entrepreneurial behaviors* displayed by entrepreneurs.
4. The *creation of organi[z]ations* by entrepreneurs.
5. *Opportunities* identified and exploited.
6. *Innovation*, whether incremental, radical and/or transformative.
7. Assuming *risk*, at personal, organizational, and even societal levels.

174. Nadim Ahmad & Richard G. Seymour, *Defining Entrepreneurial Activity: Definitions Supporting Frameworks for Data Collection* 11 (Org. for Econ. Co-operation and Dev., OECD Statistics Working Paper No. STD/DOC(2008)1), *available at* http://www.oecd.org/officialdocuments/publicdisplay documentpdf/?doclanguage=en&cote=std/doc(2008)1.

175. For an overview of the academic study of entrepreneurship, including a list of 135 core entrepreneurship works, see Landström et al., *supra* note 172, at 1154–81.

176. *See* Margaret Kobia & Damary Sikalieh, *Towards a Search for the Meaning of Entrepreneurship*, 34 J. EUR. INDUS. TRAINING 110, 111 (2010) ("In the past decade or so, researchers and educators in this field have had and still have to confront the question 'what are we talking about when we talk about entrepreneurship?' The answer to this question . . . is unclear, delayed and overlaps with other sub fields.").

177. Sang M. Lee & Suzanne J. Peterson, *Culture, Entrepreneurial Orientation, and Global Competitiveness*, 35 J. WORLD BUS. 401, 402 (2000).

178. Patricia P. McDougall & Benjamin M. Oviatt, *International Entrepreneurship Literature in the 1990s and Directions for Future Research*, *in* ENTREPRENEURSHIP 2000, at 291 (D.L. Sexton & R.W. Smilor eds., 1997).

179. STEPHEN ROBBINS ET AL., MANAGEMENT 65 (6th ed. 2012).

180. Harbi & Anderson, *supra* note 158, at 436.

8. *Adding value* for the entrepreneur and society.[181]

D. *The Three Dimensions of Entrepreneurship*

Attempts to define entrepreneurship have focused on three areas: "the skills [and traits] that characterize the entrepreneur; using those processes and events which are part of entrepreneurship; and using those results that entrepreneurship" generates.[182] The many definitions of entrepreneurship can be categorized according to three main dimensions of entrepreneurship: processes, behaviors, and outcomes.[183]

The process dimension of entrepreneurship focuses on the development of a new business or innovative strategy: "[E]ntrepreneurship is a process by which individuals—either on their own or inside organizations—pursue opportunities without regard to the resources they currently control."[184] Entrepreneurship can also be defined as "the process of creating something new with value by devoting the necessary time and effort, assuming the accompanying financial, psychic and social risks, and receiving the resulting rewards of monetary and personal satisfaction and independence."[185]

Defining entrepreneurship as a behavior involves examination of the actions of the individual. One behavioral study proposes the following definition:

> Entrepreneurship is the manifest ability and willingness of individuals, on their own, [or] in teams, within and outside existing organizations, to:
> — perceive and create new economic opportunities (new products, new production methods, new organizational schemes and new product-market combinations) and to
> — introduce their ideas in the market, in the face of uncertainty and other obstacles, by making decisions on location, form and the use of resources and institutions.[186]

We may also define entrepreneurship by its outcome. Genuine entrepreneurship "results in the creation, enhancement, realization, and renewal of value, not just for the owners, but for all participants and

181. DAVID STOKES ET AL., ENTREPRENEURSHIP 6 (2010).

182. Kobia & Sikalieh, *supra* note 176, at 111.

183. STOKES ET AL., *supra* note 181, at 7.

184. Howard H. Stevenson & J. Carlos Jarillo, *A Paradigm of Entrepreneurship: Entrepreneurial Management*, 11 STRATEGIC MGMT. J. 17, 23 (1990).

185. ROBERT D. HISRICH, ADVANCED INTRODUCTION TO ENTREPRENEURSHIP 9 (2014).

186. Sander Wennekers & Roy Thurik, *Linking Entrepreneurship and Economic Growth*, 13 SMALL BUS. ECON. 27, 46–47 (1999) (emphasis omitted).

stakeholders."[187] There must be a concrete result of either the entrepreneurial process or the set of behaviors that characterize entrepreneurship. In other words, without actual creation of value, entrepreneurship does not exist.

E. *Creating a Legal Definition*

Entrepreneurship consists of three dimensions: process, behavior, and outcome.[188] All three dimensions of entrepreneurship are important to the creation of a legal definition. The proposed legal test should incorporate elements of each of the three dimensions to create a workable test:

1. Process: the identification, evaluation and exploitation of an opportunity.
2. Behavior: the management of a new or transformed organization so as to facilitate the production and consumption of new goods and services.
3. Outcome: the creation of value through the successful exploitation of a new idea.[189]

If we are to create a new definition of entrepreneurship, we should start with these three dimensions. What word or phrase takes into account entrepreneurship processes? *Innovation*. What word or phrase encompasses entrepreneurial behavior? *Risk*. Finally, what word or phrase incorporates the notion of entrepreneurial outcomes? *Results*. Thus, we have innovation, risk, and results—these elements will provide touchstones in developing a new legal test to determine the presence of genuine entrepreneurial opportunity.

V. DEVELOPING AN ENTREPRENEURIAL ANALYSIS

A. *The Innovation Component*

Innovation has long been an important element in the definition of entrepreneurship. In 1934, Joseph Schumpeter defined entrepreneurs as innovators who implement entrepreneurial change within markets.[190] Schumpeter's definition integrated innovation into the mainstream definition of entrepreneurship.[191] Entrepreneurial innovation reflects five

187. JEFFRY A. TIMMONS & STEPHEN SPINELLI, NEW VENTURE CREATION: ENTREPRENEURSHIP FOR THE 21ST CENTURY 47 (6th ed. 2004).

188. Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67, 102 (2013).

189. *Id.* at 103 (quoting STOKES ET AL., *supra* note 181, at 8).

190. *Id.*

191. Ahmad & Seymour, *supra* note 174, at 8.

aspects:

1. the introduction of a new (or improved) good;
2. the introduction of a new method of production;
3. the opening of a new market;
4. the exploitation of a new source of supply; and
5. the re-engineering/organization of business management processes.[192]

Schumpeter's definition equates entrepreneurship with business innovation by "identifying market opportunities and using innovative approaches to exploit them."[193] Simply put, innovation leads to new demand, and thereby creates wealth.

The entrepreneur as innovator establishes change within markets by executing new combinations. These new combinations may appear as:

1. the introduction of a new good or quality thereof,
2. the introduction of a new method of production,
3. the opening of a new market,
4. the conquest of a new source of supply of new materials or parts, and
5. the carrying out of the new organi[z]ation of any industry.[194]

Entrepreneurship represents "an attitude of helping innovative ideas become reality by establishing new business models and at the same time replacing conventional business systems by making them obsolete."[195] Thus, genuine entrepreneurship requires the presence of an opportunity for innovation. The first component in the remade worker classification test must be the opportunity for innovation.

How much innovation should be required to establish entrepreneur status for the purposes of the proposed noncompetition agreement test? This Article proposes that this element be viewed broadly. The entrepreneurial analysis will examine factors that indicate that the job requires or rewards innovation and creativity. How might the innovation analysis take place in real life? In evaluating this factor, courts might well look to many of the factors commonly designated as "control" factors.[196] The innovation analysis will focus on factors similar to the control question. The emphasis will, however, change to the employee's perspective. How much freedom does an employer give to its workers in the performance of their work? If an employee is given the freedom to

192. *Id.*

193. *Id.*

194. *Id.*

195. George M. Korres et al., *Measuring Entrepreneurship and Innovation Activities in E.U.*, 3 INTERDISC. J. CONTEMP. RES. BUS. 1155, 1156 (2011).

196. Griffin Toronjo Pivateau, *supra* note 188, at 104–05.

create newer and better productivity solutions, then the employer's ability to control the manner of the work is lessened. In essence, the innovation component is the control analysis, turned on its head.

Employers wishing to restructure their independent contractor relationships must permit their workers to create or modify their own work processes. This could include permitting work to take place at a different time or place than normal. Workers may set their own hours and work from home or from another location.

B. *The Risk Component*

The notion of risk is important to the concept of entrepreneurship. The presence of risk forms the second part of the proposed analysis. Risk-taking and profit have long been part of the key features defining entrepreneurship.[197]

The concept of risk impliedly encompasses an element of uncertainty.[198] Genuine entrepreneurship requires that an element of uncertainty exist in the venture. The entrepreneur will be uncertain of duration, uncertain as to success or failure, and uncertain as to profit or loss. Therefore, for an employer to classify a position as that of an independent contractor, there must be both the potential for loss as well as the potential for reward. Ideally, the two aspects should be proportional. The presence of actual entrepreneurial opportunity will be signaled by potentially large rewards accompanying a potentially large loss.

Under this new test the employer may be required to allow the worker to work for other companies. The employer must also assume the risk that the worker may use its innovations for the benefit of a competitor.

C. *The Results Component*

Entrepreneurship requires not just the trying, but the doing.[199] This third proposed element of the entrepreneurial test requires genuine market opportunity. In other words, to be an entrepreneur there must be an opportunity to succeed and make a profit. Effective entrepreneurship

197. *See* Ahmad & Seymour, *supra* note 174, at 8 (discussing the role of risk-taking in entrepreneurship).

198. *See* Jeffrey G. York & S. Venkataraman, *The Entrepreneur–Environment Nexus: Uncertainty, Innovation, and Allocation*, 25 J. BUS. VENTURING 449–63 (2010), http://effectuation.org/sites/default/files/research_papers/jbv-2010-nexus-york-venkat.pdf (explaining that there are risks which cannot be accurately predicted or assigned a probability).

199. Just as Master Yoda coached his student: "Do or do not . . . there is no try." STAR WARS, EPISODE V: THE EMPIRE STRIKES BACK (Twentieth Century Fox Film Corp., 1980).

requires market outcome. This third factor may prove more difficult to analyze.

It is impossible to understand entrepreneurship without understanding the market process. "Entrepreneurship consists of the competitive behaviors that drive the market process."[200] Entrepreneurship is more than merely creating new ideas or reintroducing discarded ideas. Instead, entrepreneurship, if it is to be considered entrepreneurship, must make a difference.[201] The activity must have a level of success to constitute entrepreneurship.

It may be difficult to establish the ability to make a profit, especially if the new opportunity is so new as to defy analysis. The best evidence of actual opportunity would be to present evidence of other entrepreneurs, either at the firm or in similarly situated firms, who have achieved market success. If there is actually an entrepreneurial opportunity, then someone should be able to take advantage of it. Nevertheless, even in the absence of evidence of other entrepreneurs engaged in the same or similar activity, a court should be able to make a determination of whether opportunity exists or not.

VI. CONCLUSION

In construing noncompetition agreements, courts tend to examine only those parties to the agreement, measuring the degree of harm to be suffered by the employer and the employee, and making enforcement decisions accordingly.[202] But focusing only on the parties to the agreement neglects the unique character of noncompetition agreements. The impact of noncompetition agreements falls not only on the parties to the agreement, but on the general public as well.[203] A covenant that restricts employee mobility could possibly rob the public of the employee's future endeavors and contributions, thus a new approach to enforcement of noncompetition agreements is necessary—courts must give greater consideration to the public good. When considering the public good, courts should look to the ideals of entrepreneurship. Society benefits from entrepreneurs, those who develop new ideas and new businesses.

200. DAVIDSSON, *supra* note 167, at 6 (emphasis omitted).

201. *Id.*

202. *See* On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833, 840 (2013) (reviewing the three-part inquiry that courts utilize in determining whether a noncompetition agreement should be enforced).

203. *See id.* at 835–40 (discussing the "tension between protecting and promoting the flow of information and knowledge").

This Article hopes to aid courts in determining the presence of entrepreneurship by providing guidelines on what constitutes entrepreneurship.

Given the widespread recognition of the difficulty with enforcement of noncompetition agreements, it is past time for reform. Perhaps it is time to modify the enforcement test by giving increased focus to the potential harms to society as a whole. Although there may be other measures for benefit to society, entrepreneurship should serve as an effective proxy.