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AN ARGUMENT FOR RESTRICTING THE BLUE PENCIL DOCTRINE

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INTRODUCTION

When faced with an unreasonable noncompetition agreement, a court faces a choice. In some states, a court may simply refuse to enforce such an agreement. In other states, however, a court may use a legal doctrine called the blue pencil doctrine.[1] Under the blue pencil doctrine, courts are permitted to cross out overbroad provisions that make a noncompetition agreement unenforceable. The blue pencil doctrine gives courts the authority to either (1) strike unreasonable clauses from a noncompetition agreement, leaving the rest to be enforced or (2) modify the agreement to reflect the terms that the parties could have—and probably should have—agreed to.[2]

In recent years, a number of courts have criticized the continued use of the blue pencil doctrine, noting that it incentivizes employer overreach.[3] In 2015 and 2016, two state Supreme Courts explicitly rejected the use of the doctrine.[4] These and other courts have noted the potential for harm to employees, employers, and the judicial system as a whole. Despite this critique, however, the doctrine survives, buoyed by courts eager to rescue employers from their overzealous drafting.

Even worse, some state legislatures mandate the use of the blue pencil doctrine. In these states, legislatures have proved willing to encroach on judicial independence and discretion. These legislatures require courts to modify unreasonable agreements so as to make them reasonable.

As I will discuss below, the blue pencil doctrine harms employees, employers, and ultimately, society as a whole. Use of the blue pencil doctrine upsets a balance in the system. Courts already use a test to determine enforceability and that balancing test is designed to recognize an employer's interest in retention, while at the same time, encouraging employers to set reasonable restrictions. Reasonable restrictions prevent unfair competition while protecting employee mobility. Use of the blue pencil doctrine frees employers from the need to make difficult decisions, knowing they may rely on the court system to correct any contracting mistakes.

In the first part of this article, I review the peculiar nature of the noncompetition agreement. The noncompetition agreement exists as a unique contractual agreement, one that is subject to requirements that go beyond that of an ordinary employment agreement. Next, I examine the blue pencil doctrine, a legal device that permits a court to disregard the express language of the agreement and modify the terms to make the agreement reasonable. The blue pencil doctrine permits a court to use its equitable powers to impose

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1. 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)).

2. *Id.*

3. *See* Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompetition Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 142–45 (2008); *see infra* Part III.

4. *See* Unlimited Opportunity, Inc. v. Waddah, 861 N.W.2d 437, 441 (Neb. 2015); Golden Rd. Motor Inn, Inc. v. Islam, 376 P.3d 151, 153 (Nev. 2016).

terms that neither employee nor employer agreed to. In the final section of the paper I review the many reasons that some courts have rejected the use of the blue pencil. I then conclude with the multiple reasons to restrict the use of the blue pencil doctrine.

I. AN OVERVIEW OF THE NONCOMPETITION AGREEMENT

A. A Noncompetition Agreement Restricts Employee Mobility

A noncompetition agreement represents "[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."[5] The noncompetition agreement has other names, most notably "covenant not to compete," a "restrictive covenant," or a "noncompetition clause."[6] 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.[7]

In the employment context, noncompetition agreements are generally directed at four discrete areas: "(1) general noncompetition; (2) customer (or client) non-solicitation; (3) employee non-solicitation; and (4) nondisclosure."[8] Though the nomenclature differs, non-solicitation provisions, whether aimed at customer or employee solicitation, are forms of noncompetition agreements. The same legal standard of enforceability applies to each.[9] 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.[10] Sometimes, however, these four different

5. *Covenant Not to Compete*, BLACK'S LAW DICTIONARY (10th ed. 2014).

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

7. *See* Reddy v. Cmty. Health Found., 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").

8. 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, 2 (2002).

9. *See* Lasership, Inc. v. Watson, 79 Va. Cir. 205, 214 (2009) (citing Foti v. Cook, 263 S.E.2d 430, 433 (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).

10. *See id.* at 215 ("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 in a field or industry for which he is best suited.").

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 do not punish the former employee.[11] Instead, noncompetition agreements protect the employer from unfair competition.[12] Noncompetition agreements arguably protect an employer's customer base, trade secrets, and other information vital to its success.[13] 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 a competitor. Logically, the employer will invest more in the employee if measures are in place to guard against the employee's movement to a competitor.

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.[14] Noncompetition agreements do not eliminate employee turnover; however, they act as a strong deterrent to employees contemplated a job change. Understandably, few employees can readily endure a period of inactivity—a term that could last up to three years based on a typical noncompetition agreement.[15] A noncompetition agreement, even if never enforced, provides a strong disincentive to leave a job.

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11. *See* Superior Gearbox Co. v. Edwards, 869 S.W.2d 239, 247 (Mo. Ct. App. 1993) (quoting Cont'l Research Corp. v. Scholz, 595 S.W.2d 396, 400 (Mo. Ct. App. 1980)) (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'").

12. *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); William M. Corrigan, Jr. & Michael B. Kass, *Non-Compete Agreements and Unfair Competition—An Updated Overview,* 62 J. MO. B. 81, 81 (2006) (quoting Wash. Cty. Mem'l Hosp. v. Sidebottom, 7 S.W.3d 542, 545 (Mo. Ct. App. 1999)) ("Non-compete agreements are enforceable only to the extent that they are 'reasonably necessary to protect narrowly defined and well-recognized employer interests.'").

13. *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).

14. *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).

15. *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.").

Moreover, an employee restrained by a noncompetition agreement will have a more difficult time finding a new place to work. Employers understand the difficulties in poaching employees who have executed a noncompetition agreement.[16] 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.[17] A company that persuades a potential hire to breach a noncompetition agreement may be liable under this theory.[18] The original 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.[19] 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.

B. The Enforcement of Noncompetition Agreements Varies

The enforcement of noncompetition agreements differs between courts, between states, and between contexts. Courts determine the enforceability of noncompetition agreements with little regard for the normal

16. *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, 279–82 (2015) (summarizing the effectiveness of noncompetition agreements in preventing employee-poaching).

17. 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 theatre 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. *See id.*

18. 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, e.g.*, 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); Lasership, Inc. v. Watson, 79 Va. Cir. 205, 217 (2009) (recognizing the plaintiff's cause of action for tortious interference, but dismissing the claim because the nonsolicitation agreement was not enforceable).

19. *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).

requirements of an enforceable contract.[20] 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.[21]Analysis of a noncompetition agreement tends not only to be fact-dependent, but location-dependent as well.[22] Some states enforce virtually all noncompetition agreements; other states refuse to enforce any noncompetition agreements.[23] Most other states inhabit a middle ground—enforcing noncompetition agreements, but only up to the limit that a court believes to be reasonable.[24]

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 constrained by geography, time, and scope.[25] To determine reasonableness, courts will measure the relative degrees of harm to be suffered by the employer and the employee, and then make enforcement decisions accordingly.[26] In measuring the potential harm and to examine the

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20. *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).

21. *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 Noncompetition Agreements in the Buckeye State: How and Why Ohio Courts Apply the Reasonableness Standard to Entrepreneurs*, 8 ENTREPREN. 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)).

22. *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).

23. *See* Estlund, *supra* note 20, at 392–93 (noting California's treatment of noncompetition agreements as being the most restrictive, holding them void as a restraint on trade).

24. *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)).

25. *See Alex Sheshunoff Mgmt. Servs. L.P. v. Johnson,* 209 S.W.3d 644, 655 (Tex. 2006) (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 promisee.'") (quoting TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2014)); McDonald, *supra* note 22, at 147 ("[G]eography must be limited in a very specific way or the contract will not be enforced at all.").

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

interests of the parties, courts consider numerous items outside the terms of the agreement.[27]

C. Enforcement Involves Weighing Policy Interests

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."[28] This general rule of noncompetition agreements presents difficulties to employers, employees, and the courts charged with enforcement.[29] It is little wonder then that the law of noncompetition agreements is "a mess."[30] Moreover, the confusion and complexity of noncompetition agreement law has worsened over time.[31]

Multiple policy reasons support the refusal to enforce noncompetition agreements. Employee mobility is important. Employee mobility has numerous benefits for employees: higher wages, increased opportunities, better retirement and medical plans, and increased satisfaction.[32] 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.

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27. *See Alex Sheshunoff*, 209 S.W.3d at 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 Noncompetition 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).

28. 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).

29. *See generally* Garrison & Wendt, *supra* note 3 (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).

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

31. *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).

32. *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).

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 determining the necessary degree of protection can prove difficult. 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, we should acknowledge and respect the freedom of parties to contract to the terms and conditions of employment without a constant threat of judicial intervention.

Little uniformity exists in the enforcement of noncompetition agreements; each state analyzes noncompetition agreements from a different perspective.[33] In a few states, a noncompetition agreement is void and unenforceable.[34] At the other end of the spectrum, some states enforce virtually all noncompetition agreements.[35] 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.[36]

A noncompetition agreement hardly rises to the level of a legally enforceable contract.[37] Often, one cannot find the traditional elements of contract formation in a noncompetition agreement—the agreements may not contain a bargained-for exchange or a meeting of the minds.[38] Consequently, parties to a noncompetition agreement are often uncertain as to whether the

33. *See generally* Sill, *supra* note 27 (providing an overview of judicial enforcement considerations to noncompetition agreements with an attention to different states' interpretations of reasonable geography and scope, protectable interests and trade secrets, and remedies available to injured parties).

34. 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 ANN. § 9-08-06 (West 2013) (prohibiting contracts that restrain anyone from conducting a lawful business). The North Dakota statute reflects North Dakota's "long-standing public policy against restraints upon free trade." Warner & Co. v. Solberg, 634 N.W.2d 65, 69–70 (N.D. 2001).

35. *See* Sill, *supra* note 27, at 369 ("Some states are employer friendly [such as Florida], while others are, clearly, more employee friendly [such as California].").

36. *See id.* at 371–73 (discussing the circumstances surrounding the agreement, the industry, and the employee, and the numerous considerations courts across the United States employ to manage the complicated issue of a restrictive covenant's enforceability).

37. *See* Garrison & Wendt, *supra* note 3, 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).

38. *See* Sill, *supra* note 27, at 394–96 (discussing the issue of past consideration and noting there are situations where noncompetition agreements are made without new consideration).

agreement will be enforced according to its terms.[39] In fact, employers may create clauses that they know to be unenforceable according to their terms.[40]

Compounding this uncertainty, courts often give little weight to the agreement as it is actually written.[41] Often, in states that permit enforcement of noncompetition agreements, the language of the agreement represents only a starting point.[42] Unlike most other contracts, enforcement of noncompetition agreements depends heavily on the circumstances of its execution: the context in which the agreement was executed, the nature of the industry or profession at stake, and the status of the restricted employee.[43] In many jurisdictions, courts routinely "blue pencil" or reform covenants that are unreasonable, as determined by a multipart test.[44] The blue pencil doctrine gives courts the authority to either (1) strike unreasonable clauses from a noncompetition 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.[45]

Courts have traditionally disfavored noncompetition agreements, believing that the agreements contravene public policy and place unfair restrictions on trade.[46] Accordingly, the common law prohibited the use of

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39. *See generally* Garrison & Wendt, *supra* note 3 (2008) (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).

40. *See* Sullivan, *supra* note 13, at 1147 (contending employers have little incentive to draft noncompetition agreements in compliance with legal requirements).

41. *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.").

42. *See* Sill, *supra* note 27, at 371–73 (2013) (revealing several states look at the language of restrictive covenants, and then only apply it where certain circumstances exist).

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

44. *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 27, 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).

45. *See* McClanahan & Burke, *supra* note 21, at 1935 (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).

46. *See* Garrison & Wendt, *supra* note 3, at 112–14 (2008) (discussing how courts initially found noncompetition agreements contrary to public policy); *see also* Ruhl v. F.A. Bartlett Tree Expert 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.").

such agreements.[47] Although the restrictions on such agreements lessened over time,[48] the common law has generally restricted their use for any purpose other than for legitimate business purposes.[49] To ensure the purpose is legitimate, the law requires that a valid noncompetition agreement meet a reasonableness requirement.[50]

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.[51] There must be 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.[52] Instead, the employer must demonstrate the existence

47. *See* Garrison & Wendt, *supra* note 3, at 113–14 (noting early common law forbade these restrictive agreements altogether).

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

49. *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, 726–27 (Kan. Ct. App. 2004) (citing Weber v. Tillman, 913 P.2d 84, 89 (Kan. 1996)) (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 contracts, 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 22, at 143 (citations omitted).

50. *See* McDonald, *supra* note 22, at 142–43 (explaining the law provides exceptions based on the "rule of reason" test).

51. *See, e.g.*, Dawson v. Temps Plus, Inc., 987 S.W.2d 722, 726 (Ark. 1999) ("[T]he law will not protect parties against ordinary competition."); Pinnacle Performance, Inc. v. Hessing, 17 P.3d 308, 311 (Idaho Ct. App. 2001) (citing McCandless v. Carpenter, 848 P.2d 444, 449 (Idaho Ct. App. 1993)); Marsh USA Inc. v. Cook, 354 S.W.3d 764, 785 (Tex. 2011) (Willett, J., concurring) (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"); 54A AM. JUR. 2D *Monopolies* § 916 (1996)) ("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."); *see also* Garrison & Wendt, *supra* note 3, 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").

52. *See* Garrison & Wendt, *supra* note 3, at 115 (contending employers may have a legitimate interest in preventing employees who have gained an unfair advantage from competing).

of "special circumstances" to justify the use of the noncompetition agreement.[53]

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."[54] 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.[55] 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.[56]

The first situation recognizes an employer's right to protect its goodwill.[57] An employee often generates goodwill through interactions 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.[58] The law protects these corporate customer relations as part of the "customer contact" theory.[59]

The second sufficient justification for a noncompetition agreement flows from the employer's right to protect confidential information.[60] When

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

54. 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).

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

56. *See* Garrison & Wendt, *supra* note 3, at 116 (listing the two primary interests courts have been willing to recognize as legitimate business interests).

57. *See, e.g.*, 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 the sale of the goodwill of a business"); Butler v. Arrow Mirror & Glass, Inc., 51 S.W.3d 787, 797 (Tex. App. 2001) (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 3, at 116 (describing the protection of goodwill as a common justification for enforcing a noncompetition agreement).

58. *See* Garrison & Wendt, *supra* note 3, at 116 (explaining how an employee, acting as an agent of the employer, generates goodwill for the business).

59. *Id.* (recognizing the relational interests of the employer are protected under the contact theory).

60. *See* Sensabaugh v. Farmers Ins. Exch., 420 F. Supp. 2d 980, 981 (E.D. Ark. 2006) (citing Duffner v. Alberty, 718 S.W.2d 111, 112 (1986)) (noting that an employer may enforce

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.[61] 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."[62]

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 from engaging in a competing business.[63] 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.[64]

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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. 1998) (citing Computer Assocs. Int'l, Inc. v. Altai, Inc., 918 S.W.2d 453, 455 (Tex.1996)) ("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. . . . 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 3, at 116 (listing the protection of trade secrets as another protectable interest).

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

62. 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)) (internal citations omitted).

63. 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)).

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

An employer can utilize a number of other legal documents to protect these secrets.[65] 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."[66]

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.[67] Thus, the employer is able to prevent the sharing of trade secrets before the disclosure ever takes place.[68] 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 protected. The employee wishes to preserve his mobility, the employer wishes to protect itself from unfair competition, and society wishes to maintain a balanced 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.

D. A Reasonable Noncompetition Agreement Must Be Restricted

Establishing the existence of a legitimate protected business interest represents only a threshold requirement that an employer must meet to create an enforceable agreement.[69] The scope of the noncompetition agreement must not be greater than what is necessary to protect that business interest.[70]

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65. *See* Garrison & Wendt, *supra* note 3, at 116 ("Protecting trade secrets is the second most common justification for employee restrictive covenants.").

66. EarthWeb, Inc. v. Schlack, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999) (quoting Churchill Commc'ns Corp. v. Demyanovich, 668 F. Supp. 207, 211 (S.D.N.Y. 1987)) (internal citations omitted).

67. *See* Garrison & Wendt, *supra* note 3, 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.").

68. *Id.* (citing Blake, *supra* note 61, at 69–70 ("This further allows employers to prevent any improper use of secrets before it occurs rather than responding to a misappropriation, when the harm (which may be significant) is done.").

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

70. *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).

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.[71] 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, moreover, the "reasonableness" standard holds minimal value in the adjudication of noncompetition agreements.[72]

Many states provide a statutory framework for the regulation of 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 . . . ."[73] However, the statute explicitly authorizes agreements not to compete as long as they are reasonable.[74] 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

71. *Id.* at 118 (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., 298 S.E.2d 906, 910–11 (W. Va. 1982) (finding that the enforcement of noncompetition agreements are subject to the "rule of reason").

72. *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.

Id. at 911.

73. MICH. COMP. LAWS § 445.772 (2011).

74. *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, under Michigan law, should be enforced if reasonable).

> 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.[75]

The remaining states rely on the judicial system to establish guidelines for enforceability.[76] In common law jurisdictions, courts will enforce a noncompetition agreement 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."[77] 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 restriction adversely affects the interests of the public."[78]

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."[79] In Virginia, courts must consider the "function, geographic scope, and duration" of any restriction.[80]

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

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75. MICH. COMP. LAWS § 445.774(a)(1) (2011).

76. *See* Vanko, *supra* note 8, 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 1–2. 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., P.C. v. Borgiel, 715 N.W.2d 914, 918 (Mich. Ct. App. 2006) (quoting *Bristol*, 650 N.W.2d at 679).

77. 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)).

78. Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 385 (Tex. 1991); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a (A.L.I. 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).

79. Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 177 (S.D.N.Y. 2006) (quoting Karpinski v. Ingrasci, 268 N.E.2d 751, 753 (N.Y. 1971)).

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

> [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.[81]

Courts are required to examine various 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 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."[82]

Once a court determines that the noncompetition agreement protects a legitimate business interest, it will then examine the agreement to ensure that it does not exceed the minimum restraint necessary to protect that interest.[83] 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."[84] In common law jurisdictions, courts generally view noncompetition agreements as reasonable if they 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.[85]

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

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

83. *See* Garrison & Wendt, *supra* note 3, at 118 ("[C]ourts . . . are reluctant to allow noncompetition 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.").

84. Palmer & Cay, Inc. v. Marsh & McLennan Cos., 404 F.3d 1297, 1303 (11th Cir. 2005) (quoting White v. Fletcher/Mayo/Assocs., Inc., 303 S.E.2d 746, 748 (Ga. 1983)).

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

Thus, to be enforceable, agreements must be reasonable in three ways: scope (referring to the subject matter of the agreement), duration, and geography.[86]

E. Limitations

1. Limitations on Scope of Activity

There are two general types of "scope of activity" limitations: those that prohibit the employee from soliciting the employer's customers and those that prohibit the employee from engaging in any competitive business.[87] With respect to customer solicitation, "reasonable" limitations are valid and enforceable.[88] 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."[89] Thus, noncompetition

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86. *See* UARCO Inc. v. Lam, 18 F. Supp. 2d 1116, 1121 (D. Haw. 1998) (quoting Technicolor, Inc. v. Traeger, 551 P.2d 163 (1976)) (noting the parameters of a reasonableness inquiry); *see also* Pinnacle Performance, Inc. v. Hessing, 17 P.3d 308, 311 (Idaho Ct. App. 2001) (explaining the three factors considered in a reasonableness inquiry).

87. *See* Garrison & Wendt, *supra* note 3, 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 protected . . . . In the protection of trade secrets, noncompetition 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. (citing Blake, *supra* note 61, at 670) (citation omitted).

88. *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); Inv'rs Diversified Servs., Inc. v. McElroy, 645 S.W.2d 338, 339 (Tex. App. 1982) (determining the limitation against soliciting customers with whom the employee dealt or had contact during employment was reasonable).

89. *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

agreements that only limit solicitation of those customers with whom the employee had daily contact on a personal level would likely be deemed reasonable.[90]

2. Limitations on Time

The duration of the restriction also determines the reasonableness of the restraint.[91] Restraints with an indefinite duration are almost always unreasonable.[92] However, it is necessary to consider the particular industry at issue to determine whether the particular restraint's duration is reasonable.[93] Some courts weigh the specific value of the protected information.[94] For instance, in New York, the "durational reasonableness of

party who was a client of the Firm as of the termination date or became such a client during the twenty-four-(24)-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. Inc. v. Staffeldt, 800 S.W.2d 349, 351 (Tex. App. 1990) (stating the agreement not to compete 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. 1988) (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).

90. *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)).

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

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

93. *See* Bob Pagan Ford, Inc. v. Smith, 638 S.W.2d 176, 178 (Tex. App. 1982) (describing the discretionary standard for trial courts to find noncompetition covenants 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.*

94. *See* Reddy v. Cmty. Health Found., 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).

a non-compete agreement is judged by the length of time for which the employer's confidential information will be competitively valuable."[95]

The courts' inconsistent analyses 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 helpful when drafting clauses.[96]

A review of case law indicates most courts usually uphold time limitations of one or two years.[97] 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.[98]

3. Limitations on Geography

The geographical limitation in noncompetition agreements must be definite.[99] An indefinite description of the geographical area should render

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95. 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.").

96. 1 KURT H. DECKER, COVENANTS NOT TO COMPETE 127 (2d ed. 1993).

97. *See* 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); Inv'rs Diversified Servs., Inc. v. McElroy, 645 S.W.2d 338, 339 (Tex. App. 1982) ("The one year restraint involved here is certainly reasonable . . . ."); 1 DECKER, *supra* note 96, 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.").

98. Texas cases provide a representative array of decisions. *Compare* Prop. Tax Assocs., Inc. v. Staffeldt, 800 S.W.2d 349, 350 (Tex. App. 1990) ("The courts of this state have upheld restrictions ranging from two to five years as reasonable."), *and Inv'rs Diversified*, 645 S.W.2d at 339 ("Two to five years have repeatedly been held to be reasonable."), *with Bob Pagan Ford*, 638 S.W.2d at 178–79 (upholding trial court's decision to reform the restricted period under an employment agreement from three years to six months).

99. *See* Gomez v. Zamora, 814 S.W.2d 114, 118 (Tex. App. 1991) ("Indefinite descriptions of the area covered by a non-competition covenant render them unenforceable as written.").

the agreement unenforceable as written.[100] Nevertheless, even a worldwide restriction may, under the right circumstances, reach the required standard of reasonableness.[101] The particular nature of the employer's business may cover a wide geographic limitation that would otherwise appear to be hopelessly overbroad.[102]

Numerous courts have held a reasonable area consists of the territory in which the former employee worked while employed.[103] Beyond this general rule, however, what constitutes a reasonable geographical area invariably depends upon the facts of the specific case.[104]

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.[105] As such, courts have held geographic restraints are reasonable where "the area of the restraint is no broader than the territory

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100. *See* Butts Retail, Inc. v. Diversifoods, Inc., 840 S.W.2d 770, 774 (Tex. App. 1992) (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).

101. *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).

102. *See, e.g.*, Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 181 (S.D.N.Y. 2006) ("[B]road 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 restrictions were reasonable "given the international nature of [the employer's] business").

103. Once again, Texas decisions provide a representative example. *See* Zep Mfg. Co. v. Harthcock, 824 S.W.2d 654, 660 (Tex. App. 1992) (citing Justin Belt Co. v. Yost, 502 S.W.2d 681, 685 (Tex. 1973)) (internal citations omitted) ("[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. 1988) (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. 1984) (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. 1983) (internal citations omitted) (citing Gillen v. Diadrill, Inc., 624 S.W.2d 259, 263 (Tex. App. 1981)) ("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.").

104. *See Martin*, 671 S.W.2d at 709 (noting Texas courts have reformed non-compete 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").

105. *See Justin Belt*, 502 S.W.2d at 685 ("[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. 2001) (upholding the trial court's reformation of a covenant not to compete to include only the counties in which the employee interacted with his former employer's customers).

throughout which the employee was able to establish contact with his employer's customers during the term of his employment."[106]

II. COURTS MAY USE THE BLUE PENCIL DOCTRINE TO MODIFY UNREASONABLE AGREEMENTS

A. Explaining the Blue Pencil Doctrine

At common law, courts rarely enforced unreasonable agreements only in part.[107] An agreement made unreasonable by an employer's attempt to overextend its prohibitions would be either invalidated or the offending passage would be severed.[108] The blue pencil doctrine is a "judicial standard for deciding whether to invalidate the whole contract or only the offending words."[109] This doctrine is based, in large part, on the "understanding that there is not necessarily a sinister purpose behind an overbroad restrictive covenant."[110] Courts can and do look to the good faith of the employer when determining whether to use the blue pencil doctrine.[111]

Use of the blue pencil doctrine differs from state to state. Among those states that enforce noncompetition agreements, three schools of thought

106. 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 HOUS. BUS. & TAX L.J. 207, 225 (2003) (citation omitted). *Compare* Curtis v. Ziff Energy Grp., 12 S.W.3d 114, 119 (Tex. App. 2000) ("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, 233 (Tex. App. 1998) (holding unreasonable a restraint which had "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").

107. *See* Garrison & Wendt, *supra* note 3, at 118 ("Under the common law, courts were reluctant to partially enforce unreasonable postemployment restrictions.").

108. *Id.* at 118–19 ("An overbroad agreement was either void per se or subject to severance under the 'blue pencil' doctrine.").

109. *Blue Pencil Test*, BLACK'S LAW DICTIONARY (10th ed. 2014).

110. *See* Reddy v. Cmty. Health Found., 298 S.E.2d 906, 914 (W. Va. 1982) (explaining why the court will allow the blue pencil doctrine in some situations). "In 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)).

111. *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.*

exist.[112] As the United States Court of Appeals for 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 faith or deliberate overreaching" on the part of the employer.[113]

As noted above, some states follow a "no modification" approach to noncompetition agreements.[114] Also known as the "all or nothing" rule, this approach precludes the use of the blue pencil doctrine.[115] Courts adhering to this approach refrain from either rewriting or striking overbroad provisions in noncompetition agreements.[116] 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 will instead refuse to enforce the agreement at all.[117]

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.[118] If a court strictly applies the blue pencil doctrine, "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."[119] 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 it is reasonably limited after the overbroad provisions have been removed.[120]

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112. 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)).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *See* Diversified Human Res. Grp., Inc. v. Levinson-Polakoff, 752 S.W.2d 8, 12 (Tex. App. 1988).

118. *See* Deustche Post Glob. Mail, Ltd. v. Conrad, 292 F. Supp. 2d 748, 754 (D. Md. 2003) (citing Fowler v. Printers II, Inc., 598 A.2d 794, 802 (1991)) (explaining that the strict approach is "limited to removing the offending language without supplementing or rearranging the remaining language").

119. *Blue Pencil Test*, BLACK'S LAW DICTIONARY (10th ed. 2014).

120. *See* Broadway & Seymour, Inc. v. Wyatt, 944 F.2d 900 (4th Cir. 1991) (contrasting the strict North Carolina blue pencil rule with the liberal Florida approach).

Finally, other states have adopted a liberal form of the blue pencil doctrine: the "reasonable modification" approach.[121] Some courts refer to this as the "equitable modification" rule.[122] These states permit a court to rewrite an overbroad noncompetition agreement to reasonably limit the restrictions found in it.

B. The No-Modification States

The blue pencil doctrine, although used in a majority of states, is not universal. Certain states, notably Virginia and Wisconsin, follow the "no-modification" rule. This rule recognizes the inequities inherent in a rule that imposes an agreement on the parties that was not part of the original bargained-for agreement.

Courts in Virginia evaluate the noncompetition agreement as written without revising or eliminating provisions. Virginia courts lack the authority to "'blue pencil' or otherwise rewrite the contract" to eliminate any illegal overbreadth.[123] Ambiguous language susceptible to two or more differing interpretations, one of which is functionally overbroad, renders the entire noncompetition agreement unenforceable. This remains true even though the agreement may be reasonable in the context of the factors present.[124]

Wisconsin has codified its "no blue pencil rule" in section 103.465 of the Wisconsin Statutes. According to the statute, "[a]ny covenant [not to compete] . . . imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint."[125]

C. The Strict Blue Pencil States

The strict blue pencil doctrine permits only the removal of unreasonable contractual provisions. The court is not permitted to revise or add language to the agreement. The strict blue pencil doctrine attempts to restrict employer overreaching by removing the offending provisions and leaving an otherwise enforceable agreement.[126] Courts use the strict blue pencil rule to strike an unreasonable restriction "to the extent that a

121. *See, e.g.*, Steiner v. Am. Friends of Lubavitch (Chabad), 177 A.3d 1246 (D.C. 2018).

122. *See, e.g.*, Graham v. Cirocco, 69 P.3d 194, 200 (Kan. Ct. App. 2003).

123. *See* Pais v. Automation Prods., Inc., 36 Va. Cir. 230, 239 (1995).

124. Lanmark Tech. Inc. v. Canales, 454 F. Supp. 2d 524, 529 (E.D. Va. 2006).

125. WIS. STAT. § 103.465 (2019).

126. Deustche Post Glob. Mail, Ltd. v. Conrad, 292 F. Supp. 2d 748, 754 (D. Md. 2003) (citing Fowler v. Printers II, Inc., 598 A.2d 794, 802 (1991)) (The strict approach is "limited to removing the offending language without supplementing or rearranging the remaining language.").

grammatically meaningful reasonable restriction remains after the words making the restriction unreasonable are stricken."[127]

Indiana provides an example of a jurisdiction that uses the strict blue pencil doctrine. When reviewing noncompetition agreements, Indiana courts have historically enforced reasonable restrictions but have also struck unreasonable restrictions, provided they are divisible.[128] Although the practice is long-standing, Indiana courts did not use the label "blue pencil doctrine" until 1982.[129]

Under Indiana law, "when an employer drafts an overly broad covenant, the price of over-reaching is that the restriction cannot be enforced at all, even if it would have been possible to draft and enforce a narrower, more reasonable restriction."[130] Even in those cases where the equities of the situation might suggest enforcement, courts have no alternative but to reject the overly broad clause rather than modify it.[131] If, however, the noncompetition agreement is clearly separated into parts, and if some parts are reasonable and others are not, the offending clauses may be severed so that the reasonable portions may be enforced.[132] The court is constrained in that it may apply only the terms within the contract and cannot add terms.[133]

Similarly, in Arizona, although courts will not add terms or rewrite provisions of covenants,[134] they will blue pencil restrictive covenants,

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127. A.N. Deringer, Inc. v. Strough, 103 F.3d 243, 247 (2d Cir. 1996) (quoting Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 36 (Tenn. 1984)). In Beit v. Beit, 63 A.2d 161 (Conn. 1948), the court stated:

There is undoubtedly a strong tendency on the part of courts to regard as divisible restraints of trade which are unreasonable in the extent of area covered and to hold them invalid only so far as necessary for the protection of the covenantee, where the terms of the promise permit that to be done without clearly violating the intent of the parties. . . . A restrictive covenant which contains or may be read as containing distinct undertakings bounded by different limits of space or time, or different in subject matter, may be good as to part and bad as to part. But this does not mean that a single covenant may be artificially split up in order to pick out some part of it that it can be upheld. Severance is permissible only in the case of a covenant which is in effect a combination of several distinct covenants. Where the covenant is intended by the parties to be an entirety, it cannot properly be so divided by a court that it will be held good for a certain area but invalid for another; indeed . . . this would be to make an agreement for the parties into which they did not voluntarily enter.

Id. at 165–66 (internal citations and quotation marks omitted).

128. *See* Wiley v. Baumgardner, 97 Ind. 66, 69 (1884); Beard v. Dennis, 6 Ind. 200, 203–05 (1855); Bennett v. Carmichael Produce Co., 115 N.E. 793, 795–96 (Ind. App. 1917).

129. *See* Seach v. Richards, Dieterle & Co., 439 N.E.2d 208, 215 (Ind. Ct. App. 1982).

130. Dearborn v. Everett J. Prescott, Inc., 486 F. Supp. 2d 802, 809 (S.D. Ind. 2007); *see also* Young v. Van Zandt, 449 N.E.2d 300, 304 (Ind. App. 1983) ("If the covenant is not reasonable as written, the court may not create a reasonable restriction under the guise of interpretation, since this would subject the parties to an agreement they had not made.").

131. Donahue v. Permacel Tape Corp., 127 N.E.2d 235, 241 (Ind. 1955).

132. Licocci v. Cardinal Assocs., Inc., 445 N.E.2d 556, 561 (Ind. 1983) ("[I]f the covenant is clearly separated into parts and some parts are reasonable and others are not, the contract may be held divisible.").

133. *Id.*

134. Valley Med. Specialists v. Farber, 982 P.2d 1277, 1286 (Ariz. 1999).

"eliminating grammatically severable, unreasonable provisions."[135] In the case of severable clauses, an Arizona court can enforce the lawful parts and ignore the unlawful parts.[136] Even though Arizona courts are permitted to prune contracts, they cannot rewrite them for the parties.[137] The strict blue pencil doctrine will not save those documents that would require the court to rewrite the durational requirement or add geographic limitations.[138] In short, the strict blue pencil doctrine in Arizona permits courts to consider separate clauses separately, but without severable language to excise to render an agreement reasonable, courts are without power to enforce the agreement.

Notably, in strict blue pencil states, if the agreement fails to meet the standard of reasonableness in any of the three areas—scope, duration, or geography—the court will find the entire agreement unenforceable. For instance, in *Valley Medical Specialists v. Farber*,[139] the Arizona Supreme Court addressed the enforceability of a non-compete clause prohibiting a departing physician from practicing medicine within a five-mile radius of any of three specific clinic locations for a period of three years.[140] The contract also had a reformation clause that allowed a court, if necessary, to amend the non-compete provision to make it enforceable.[141] Despite the reformation clause, the court held that the non-compete was unenforceable because both the scope of the activity prohibited and duration were unreasonable.[142] Thus, the reformation clause did not permit the appellate court to rewrite the non-compete provision "in an attempt to make it enforceable."[143] The court explained that, under Arizona law, courts may blue-pencil a covenant by "eliminating grammatically severable, unreasonable provisions," but they are prohibited from adding or rewriting provisions.[144]

Some courts in strict blue pencil states have indicated that they prefer not to narrow the scope of a clause because the parties did not agree to new terms.[145] The strict blue pencil rule holds that a court may not, under the guise of interpretation, redraft a noncompetition agreement to make it more reasonable or narrow.[146]

The Georgia Supreme Court explained the proper use of the strict blue pencil doctrine. The court explained that under such an approach, "[t]he

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135. *Id.*

136. Olliver/Pilcher Ins., Inc. v. Daniels, 715 P.2d 1218, 1221 (Ariz. 1986).

137. *Id.* (citing E. Bus. Forms, Inc. v. Kistler, 189 S.E.2d 22, 24 (S.C. 1972)) (internal citations omitted).

138. *Id.*

139. *Valley Med. Specialists*, 982 P.2d 1277.

140. *Id.* at 1279.

141. *Id.* at 1285 n.2.

142. *Id.* at 1284–85.

143. *Id.* at 1286.

144. *Id.*

145. *See* Dicen v. New Sesco, Inc., 839 N.E.2d 684, 689 (Ind. 2005); Burk v. Heritage Food Serv. Equip., Inc., 737 N.E.2d 803, 811–12 (Ind. Ct. App. 2000).

146. *See* Licocci v. Cardinal Assocs., Inc., 445 N.E.2d 556, 561 (Ind. 1983).

'blue pencil' marks, but does not write."[147] The United States Court of Appeals of the Eleventh Circuit has explained that in a strict blue pencil jurisdiction, courts "cannot rewrite . . . restrictive covenants, inserting clauses and providing sufficient limitations so as to render the restrictions reasonable and enforceable . . . ."[148]

West Virginia courts follow a similar approach regarding the enforcement of noncompetition agreements.[149] These courts follow a "rule of reason" that determines the enforceability of any noncompetition covenant.[150] Under this rule, the courts should approach restrictive covenants with "grave reservations."[151] In West Virginia, therefore, a covenant that is unreasonable on its face is utterly void and unenforceable.[152] For instance, an excessively broad covenant with respect to time or geographic scope is unreasonable on its face.[153]

The West Virginia Supreme Court attempted to distinguish the difference between a threshold reasonableness analysis and a subsequent approach. In determining whether a covenant is unreasonable on its face, the court must keep in mind that such a determination is a threshold question:

> Our courts should approach the available authority with respect to time and area limitations with caution. Most other courts fail to use the distinction we have adopted between a threshold inquiry as to the reasonableness of the covenant and a "rule of best result" within the general ambit of the rule of reason. Those courts use rule of reason language well past the threshold inquiry, and their standard of reasonableness for purposes of shaving the covenant to reasonable proportions should not be confused with a standard of "reasonableness on its face" for the purpose of deciding whether the covenant merits further scrutiny.[154]

In North Carolina, an unreasonably broad provision also renders the entire covenant unenforceable. Under North Carolina law, "equity will

147. New Atlanta Ear, Nose & Throat Assocs., P.C. v. Pratt, 560 S.E.2d 268, 273 (Ga. Ct. App. 2002) (quoting Hamrick v. Kelley, 392 S.E.2d 518, 519 (Ga. 1990)); *see* Watson v. Waffle House, Inc., 324 S.E.2d 175, 177 (Ga. 1985); Richard P. Rita Pers. Servs. Int'l, Inc. v. Kot, 191 S.E.2d 79, 80 (Ga. 1972).

148. Donovan v. Hobbs Grp., LLC, 181 F. App'x 782, 783 (11th Cir. 2006) (quoting *New Atlanta*, 560 S.E.2d at 273).

149. *See* Pancake Realty Co. v. Harber, 73 S.E.2d 438, 440–43 (W. Va. 1952).

150. Reddy v. Cmty. Health Found., 298 S.E.2d 906, 915 (W. Va. 1982).

151. *Id.*

152. *Id.* ("No court should trouble itself to rewrite an inherently unreasonable covenant to bring the covenant within the rule of reason.").

153. *Id.*

154. *Id.* at 915 n.7.

neither enforce nor reform an overreaching and unreasonable covenant."[155] More specifically, while North Carolina's blue pencil rule severely limits what the court may do to alter an unenforceable covenant, a court "may choose not to enforce a distinctly severable part of a covenant in order to render the provision reasonable."[156]

D. The Liberal Blue Pencil States

The liberal blue pencil doctrine permits a court greater leeway to substantively change an agreement. Courts may use the blue pencil doctrine to modify an unreasonable noncompetition agreement and enforce the agreement only to the extent that it is reasonable.[157] A court may thus use the liberal blue pencil approach to modify the covenant so that it is no broader than what is reasonably necessary to protect the employer.[158]

In Minnesota, a liberal blue pencil state, courts face few limits on their equitable powers. In the case of *Klick v. Crosstown State Bank of Ham Lake, Inc.*,[159] for instance, the court stated that it had the power and discretion to modify an employment contract or not, depending upon equitable considerations and the particular facts of the case.[160]

Illinois also follows the liberal blue pencil rule, allowing courts "to modify . . . unreasonable terms of an agreement in order to make it reasonable."[161]

New Jersey is another example of a jurisdiction that applies the blue pencil rule liberally. There, when restrictive covenants are found to violate the reasonableness test, rather than deem the covenants void *ab initio*, courts will enforce them to the extent that is reasonable under the circumstances.[162] This principle of partial enforcement does not depend upon mechanical divisibility of a contract clause, but rather asks whether or not "partial enforcement is possible without injury to the public and without injustice to the parties."[163]

Likewise, Pennsylvania courts also view the blue pencil doctrine liberally. Even when confronted with a "limitless" restriction that would render a noncompetition clause inherently unreasonable, a court may still

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155. Hartman v. W.H. Odell & Assocs., Inc., 450 S.E.2d 912, 917 (N.C. Ct. App. 1994) (quoting Beasley v. Banks, 368 S.E.2d 885, 886 (N.C. Ct. App. 1988)).

156. *Id.* at 920.

157. Bess v. Bothman, 257 N.W.2d 791, 794 (Minn. 1977).

158. *Id.*

159. 372 N.W.2d 85 (Minn. Ct. App. 1985).

160. *Id.* at 88–89.

161. Joy v. Hay Grp., Inc., No. 02C4989, 2003 WL 22118930, at *10 (N.D. Ill. Sept. 11, 2003).

162. *See* Hudson Foam Latex Prods., Inc. v. Aiken, 198 A.2d 136, 140 (N.J. Super. Ct. App. Div. 1964) (citing Chas. S. Wood & Co. v. Kane, 125 A.2d 872, 876 (N.J. Super. Ct. App. Div. 1956)).

163. Solari Indus. Inc. v. Malady, 264 A.2d 53, 57 (N.J. 1970) (citing Ceresia v. Mitchell, 242 S.W.2d 359 (Ky. 1951)) (internal citations omitted).

save the agreement.[164] Under Pennsylvania law, a court sitting in equity may grant enforcement of an overbroad covenant and, to cure the overbreadth, has the power to craft a restriction to make it reasonable and enforceable.[165]

Massachusetts and New Hampshire also follow the liberal blue pencil doctrine. In Massachusetts, "courts will not invalidate an unreasonable noncompetition covenant completely but will enforce it to the extent that it is reasonable."[166] In New Hampshire, "[e]ven if the trial court determines that the covenant is unreasonable, the employer nonetheless may be entitled to equitable relief in the form of reformation or partial enforcement of an overly broad covenant upon a showing of his exercise of good faith in the execution of the employment contract."[167]

Maine follows the most unusual method of applying the liberal blue pencil doctrine. In Maine, the courts completely disregards the agreement as drafted and agreed to by the parties.[168] Instead, courts consider the scope of the covenant only as the employer seeks to enforce it.[169] In essence, the alleged bargained-for exchange between the parties lacks all meaning. This unique interpretation of the blue pencil doctrine was developed in *Chapman & Drake v. Harrington*,[170] in which the Supreme Judicial Court of Maine wrote the following: "Since the reasonableness of the noncompetition agreement depends upon the specific facts of the case . . . we assess that agreement only as . . . [the plaintiff] has sought to apply it and not as it might have been enforced on its plain terms."[171]

III. MANY STATE COURTS DISFAVOR THE BLUE PENCIL

In recent years, many state courts have criticized the use of the blue pencil doctrine. I review those cases below.

Nevada

In July 2016, the Nevada Supreme Court confirmed that noncompetition agreements that go "beyond what is necessary" to protect the former employer's interests are unreasonable and unenforceable.[172] In *Golden Road Motor Inn, Inc. v. Islam*,[173] the court further urged "exercise of

164. Hillard v. Medtronic, Inc., 910 F. Supp. 173, 177 (M.D. Pa. 1995).

165. *Id.*; Sidco Paper Co. v. Aaron, 351 A.2d 250, 254 (Pa. 1976).

166. L.G. Balfour Co. v. McGinnis, 759 F. Supp. 840, 845 (D.D.C. 1991) (citing All Stainless, Inc. v. Colby, 308 N.E.2d 481, 485 (Mass. 1974)) (internal citations omitted).

167. Smith, Batchelder & Rugg v. Foster, 406 A.2d 1310, 1311 (N.H. 1979).

168. *See* Brignull v. Albert, 666 A.2d 82, 84 (Me. 1995).

169. Everett J. Prescott, Inc. v. Ross, 383 F. Supp. 2d 180, 190 (D. Me. 2005); *Brignull*, 666 A.2d at 84.

170. 545 A.2d 645 (Me. 1988).

171. *Id.* at 647 (citing Am. Sec. Servs., Inc. v. Vodra, 385 N.W.2d 73, 79 (Neb. 1986)).

172. Golden Rd. Motor Inn, Inc. v. Islam, 376 P.3d 151, 153 (Nev. 2016).

173. *Id.* at 151.

judicial restraint when confronted with the urge to pick up the [blue] pencil."[174]

In that case, the employee, Sumona Islam, executed several documents, including a noncompetition agreement, with her employer, Atlantis Casino.[175] The agreement prohibited Islam from employment at, or in association with, any other gaming establishment within 150 miles of the Atlantis Casino.[176] The restriction called for a term of one year from the termination of employment.[177]

Three years later, Islam left her job to take a position with a competitor, Grand Sierra Resort. Before leaving, however, she altered and concealed the contact information of eighty-seven players in the Atlantis electronic database.[178] She also copied the names of casino players, their contact information, level of play, game preferences, credit limits, and other proprietary information from the Atlantis database into her personal notebook. Shortly after starting her position with her new employer, Islam placed the information that she copied from the Atlantis database into the Grand Sierra database. Because it believed that Islam's information came from previous relationships, Grand Sierra marketed its casinos to the Atlantis clients.

Despite the unusual circumstances, the Nevada Supreme Court found that Islam's noncompetition agreement was unreasonable, given that it restricted more than what is necessary to protect Atlantis's interests.[179] The court also held that the agreement, which restricted her ability to find employment, unduly burdened Islam.[180]

The court refused to take up the blue pencil and modify or strike terms from the agreement to make it reasonable. The court stated, "[r]ightfully, we have long refrained from reforming or blue-penciling" private parties' contracts.[181] The *Golden Road* court noted the potential for abuse by employers of the blue pencil doctrine. The court cited with favor the Georgia Supreme Court's opinion in *Richard P. Rita Personnel Services International, Inc. v. Kot*.[182] In that case, the court warned of the consequences of a court's modification of a noncompetition agreement, cautioning that "if severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and

174. *Id.* at 157.
175. *Id.* at 153.
176. *Id.*
177. *Id.*
178. *Id.* at 154.
179. *Id.* at 155–56.
180. *Id.* at 156.
181. *Id.* ("This would be virtually creating a new contract for the parties, which . . . under well-settled rules of construction, the court has no power to do.").
182. *Id.* at 157 (citing Richard P. Rita Pers. Servs. Int'l, Inc. v. Kot, 191 S.E.2d 79, 81 (Ga. 1972).

enforced when the facts of a particular case are not unreasonable . . . ."[183] As the *Golden Road* court noted,

> For every covenant that finds its way to court, there are thousands which exercise an in terrorem effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors.[184]

The Nevada Supreme Court criticized the blue pencil doctrine by noting three negative aspects of the doctrine: (1) the modification of a contract creates the possibility of "trampling the parties' contractual intent"; (2) the need to preserve judicial resources; and (3) the requirement to take notice of the employer's superior bargaining position.[185]

The court reiterated that its decision to show restraint "is sound public policy. Restraint avoids the possibility of trampling the parties' contractual intent."[186] The court noted that committing any trespass on the parties' intent, even a slight one, "is indefensible, as our use of the pencil should not lead us to the place of drafting."[187] Instead, the court noted that the judicial system should refrain from creating new agreements. "Drafting would simply be inappropriate public policy as it conflicts with the impartiality that is required of the bench."[188]

Second, a court's restraint preserves judicial resources. Restraint is consistent with basic principles of contract law that hold the drafter to a higher standard.[189] The court recognized that re-drafting a contract wastes time and resources. Expending the time and energy of the court on such drafting "is unwarranted and blurs the line between the bench and the bar."[190] Courts lack the power to make private agreements. "Such actions are simply not within the judicial province."[191]

Third, and perhaps most importantly, the court emphasized the disparity in bargaining power between the employer and its employee. "A contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language."[192] Courts apply a strict test of reasonableness to restrictive covenants in

183. *Kot*, 191 S.E.2d at 81.

184. *Golden Rd.*, 376 P.3d at 157 (quoting *Kot*, 191 S.E.2d at 81).

185. *Id.* at 157–58.

186. *Id.* at 157 (citing Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 674 (2008)).

187. *Id.*

188. *Id.*

189. *Id.* at 157–58 (citing Pivateau, *supra* note 186, at 674).

190. *Id.* at 159

191. *Id.*

192. *Id.* at 158 (quoting Williams v. Waldman, 836 P.2d 614, 619 (Nev. 1992)).

employment cases because of the nature of the employee–employer relationship. As the *Golden Road* court noted, "one who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any terms of the contract of employment offered to him, so long as the wages are acceptable."[193] Thus, the contract terms should be construed against the employer.

Use of the blue pencil to amend an agreement favors the employer. The employer

> holds a superior bargaining position, and . . . drafts a contract that is greater than required for its protection and is thereafter rewarded with the court's legal drafting aid, as the other party faces economic impairment, restrained in his trade. In the context of an agreement that is in restraint of trade, a good-faith presumption benefiting the employer is unwarranted.[194]

The court found that its refusal to modify any unreasonable agreement discourages employers from getting the benefits of a "free ride," secure in the knowledge that a court will correct their mistakes.[195]

Nebraska

In 2015, the Nebraska Supreme court had a similar opportunity to decide whether or not Nebraska courts should utilize the blue pencil doctrine to modify unreasonable noncompetition agreements. In *Unlimited Opportunity, Inc. v. Waadah*,[196] the court analyzed a noncompetition clause contained in a franchise agreement between the franchisor, Jani-King, and franchisee, Waadah. The agreement contained a clause that barred its franchisees from competing with Jani-King following termination of the agreement. The clause prohibited a franchisee from operating the same or a similar business within the territory of the agreement for two years.[197] The clause further prohibited a franchisee from operating for a period of one year a competing business in any other territory in which a Jani-King franchise operated.[198]

The trial court objected to the scope of the territorial restraint. The court found that the limitation was unreasonable because it prevented Waadah from working "in any other territory in which a Jani-King franchise operates."[199] Because Jani-King did business around the world, the court

193. *Id.* (quoting Menter Co. v. Brock, 180 N.W. 553, 555 (Minn. 1920)).
194. *Id.*
195. *Id.* (citing Pivateau, *supra* note 186, at 690).
196. 861 N.W.2d 437 (Neb. 2015).
197. *Id.* at 439.
198. *Id.* at 439–40.
199. *Id.* at 440.

found the geographic limitation to be unreasonably large, given that it prevented, in theory at least, Waadah from competing anywhere in the world. Jani-King appealed, claiming that the noncompetition agreement was not unreasonable, because it had never attempted to enforce it. The Nebraska appellate court ruled in favor of Waadah.[200]

In its decision, the Nebraska Supreme Court criticized the use of the blue pencil doctrine. The court stated that "it is not the function of the courts to reform a covenant not to compete in order to make it enforceable."[201] Once again, it rejected the blue pencil rule, stating that "we must either enforce [a covenant] as written or not enforce it at all."[202] The court cited "important public policy considerations" to justify their finding.[203] The court rejected contract reformation "because it creates uncertainty in employees' contractual relationships with franchisors, increases the potential for confusion by parties to a contract, and encourages litigation of noncompete clauses in contracts."[204]

New York

Other courts have recently cautioned against the use of the blue pencil. For example, the New York Court of Appeals, New York's highest court, warned employers that courts may refuse to blue pencil restrictive covenants if their formation involved the "coercive use of dominant bargaining power."[205] In *Brown & Brown, Inc. v. Johnson*, the court noted that the employee at issue was not employed at the time that she signed the covenant.[206] This raised questions as to whether that "caused her to feel pressure to sign the agreement rather than risk being unemployed."[207] The *Brown* court noted that a "case-specific analysis" was necessary to determine these surrounding circumstances.[208] The court found that the presence of fact issues prevented summary judgment.[209]

North Carolina

North Carolina courts view noncompetition agreements with suspicion. Covenants not to compete are disfavored in North Carolina.[210]

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200. *Id.*

201. *Id.* at 441 (citing CAE Vanguard, Inc. v. Newman, 518 N.W.2d 652 (Neb. 1994)).

202. *Id.* (citing *Newman*, 518 N.W.2d at 656).

203. *Id.*

204. *Id.* (citing Pivateau, *supra* note 186, at 672).

205. Brown & Brown, Inc. v. Johnson, 34 N.E.3d 357, 362 (N.Y. 2015) (quoting BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1226 (N.Y. 1999)).

206. *Id.* at 362.

207. *Id.*

208. *Id.* (quoting *Hirshberg*, 712 N.E.2d at 1226).

209. *Id.*

210. *See* Kadis v. Britt, 29 S.E.2d 543, 546 (N.C. 1944); VisionAIR, Inc. v. James, 606 S.E.2d 359, 362 (N.C. Ct. App. 2004).

They are valid only if they are "(1) in writing; (2) made a part of the employment contract; (3) based on valuable consideration; (4) reasonable as to time and territory; and (5) designed to protect a legitimate business interest of the employer."[211] The restrictions on an employee's future employment "must be no wider in scope than is necessary to protect the business of the employer."[212] More specifically, "restrictive covenants are unenforceable where they prohibit the employee from engaging in future work that is distinct from the duties actually performed by the employee."[213]

In March 2016, the North Carolina Supreme Court rejected a lower court's modification of an overly broad noncompetition agreement. In *Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC*, the court noted that "blue-penciling is the process by which 'a court of equity will take notice of the divisions the parties themselves have made [in a covenant not to compete], and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable.'"[214] The *Beverage Systems* court, however, reaffirmed North Carolina's strict interpretation of the blue pencil rule, which permits a court to strike overbroad restrictions but not to create new ones to take their place.[215] "[W]hen an agreement not to compete is found to be unreasonable . . . the court is powerless unilaterally to amend the terms of the contract."[216]

The court was not swayed by the language of the agreement, which expressly gave to the court the power to modify the territorial restriction if the court found it to be overbroad.[217] The court noted that "parties cannot contract to give a court a power that it does not have."[218] Because striking the unreasonable territory provision resulted in "no territory left within which to enforce the covenant not to compete," the court refused to enforce the noncompetition agreement.[219]

The court criticized the notion that courts should substitute their terms for those of the parties to the contract, writing, "Courts are not at liberty

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211. Farr Assocs., Inc. v. Baskin, 530 S.E.2d 878, 881 (2000) (citing Hartman v. W.H. Odell and Assocs., Inc., 450 S.E.2d 912, 916 (N.C. Ct. App. 1994)).

212. Manpower of Guilford Cty., Inc. v. Hedgecock, 257 S.E.2d 109, 114 (N.C. Ct. App. 1979) (citing Comfort Spring Corp. v. Burroughs, 9 S.E.2d 473, 475 (N.C. 1940)).

213. Med. Staffing Network, Inc. v. Ridgway, 670 S.E.2d 321, 327 (N.C. Ct. App. 2009); *see also* CopyPro, Inc. v. Musgrove, 754 S.E.2d 188, 192 (N.C. Ct. App. 2014) ("[W]e have held on numerous occasions that covenants restricting an employee from working in a capacity unrelated to that in which he or she worked for the employer are generally overbroad and unenforceable.").

214. Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 784 S.E.2d 457, 461 (N.C. 2016) (citing Welcome Wagon Int'l, Inc. v. Pender, 120 S.E.2d 739, 742 (N.C. 1961)).

215. *Id.* at 461–62 (citing *Welcome Wagon*, 120 S.E.2d at 742).

216. *Id.* at 461 (citing Whittaker Gen. Med. Corp. v. Daniel, 379 S.E.2d 824, 828 (N.C. 1989)).

217. *Id.* at 462 (citing *Welcome Wagon*, 120 S.E.2d at 742).

218. *Id.*

219. *Id.* (quoting Penn v. Standard Life Ins. Co., 76 S.E. 262, 263 (N.C. 1912)).

to rewrite contracts for the parties. We are not their guardians, but the interpreters of their words. We must, therefore, determine what they meant by what they have said—what their contract is, and not what it should have been."[220] The court criticized the idea that the parties could "assign their drafting duties as parties to a contract."[221] Permitting this modification would reduce the court to the "role of scrivener, making judges postulate new terms that the court hopes the parties would have agreed to be reasonable at the time the covenant was executed or would find reasonable after the court rewrote the limitation."[222] The court concluded that it saw "nothing but mischief in allowing such a procedure."[223]

Similarly, in a recent case applying North Carolina law, the United States Court of Appeals for the Fourth Circuit refused to modify an overbroad agreement.[224] The employer sought to enjoin a former employee from working for a competitor, citing a noncompetition agreement that stated the employee could "not directly or indirectly participate in a business that is similar to a business now or later operated by Employer in the same geographical area."[225] The court found several problems with this language.[226] First, the scope of the restricted activity was created by reference to a competitor, thus preventing the former employee from working for a competitor in any capacity.[227] Second, the restriction applied prospectively.[228] If the employer took up an entirely new line of business, the employee would presumably be unable to work in that industry as well.[229] The court criticized the agreement, which focused not on employment that increased the risk of unfair competition, but instead on whether the new employer was similar to the old.[230] "That is not a sufficient limiting factor for a covenant not to compete."[231]

The employer urged the court "to take up North Carolina's 'blue-pencil' doctrine and strike the offending language."[232] But the Fourth Circuit refused to do so, noting the limited reach of North Carolina's blue pencil doctrine.[233] "Under this doctrine, a court 'may choose not to enforce a distinctly separable part of a covenant in order to render the provision

220. *Id.* (quoting *Penn*, 76 S.E. at 263).
221. *Id.*
222. *Id.*
223. *Id.*
224. RLM Commc'ns, Inc. v. Tuschen, 831 F.3d 190 (4th Cir. 2016).
225. *Id.* at 196.
226. *Id.* at 196–97.
227. *Id.*
228. *Id.* at 197.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* at 197–98.

reasonable.'"[234] But North Carolina's blue-pencil rule "severely limits what the court may do to alter" an overly broad covenant not to compete.[235]

Illinois

In Illinois, at least one state appellate court refused to modify an unreasonable restriction.[236] After examining the overly broad restrictions, the court found that it could not modify the agreement as the problems were "too great to permit modification."[237] The court's refusal to modify the agreement was especially noteworthy in that the agreement contained a clause expressly permitting judicial modification.[238] The court explained that "[i]n determining whether modification is appropriate, the fairness of the restraints contained in the contract is a key consideration."[239]

Wisconsin

Wisconsin courts, too, have disfavored the blue pencil. In 2018, the Wisconsin Supreme Court refused to reform a nonsolicitation agreement. In *Manitowoc Co. v. Lanning*, the court found that section 103.465 of the Wisconsin Code, which governs covenants not to compete, extends to agreements not to solicit employees.[240] Because the nonsolicitation agreement at issue did not meet the standards for a valid noncompetition agreement, the Court found the entire agreement unenforceable, "even as to any part of the covenant that would be a reasonable restraint."[241]

While Wisconsin will enforce noncompetition agreements, it does so only in limited circumstances. Section 103.465 provides that "[a] covenant . . . not to compete . . . is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal."[242] The statute further states that "[a]ny covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint."[243]

In *Kohl's Department Stores, Inc. v. Schalk*, a Wisconsin court denied Kohl's request for an injunction preventing its Chief Information

234. *Id.* at 197 (quoting Hartman v. W.H. Odell & Assocs., Inc., 450 S.E.2d 912, 920 (N.C. Ct. App. 1994)).

235. *Id.*

236. AssuredPartners, Inc. v. Schmitt, 44 N.E.3d 463 (Ill. App. Ct. 2015).

237. *Id.* at 477.

238. *Id.*

239. *Id.* (quoting Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc., 879 N.E.2d 512, 529–30 (Ill. App. Ct. 2007)).

240. 906 N.W.2d 130 (Wis. 2018).

241. *Id.* at 136.

242. WIS. STAT. § 103.465.

243. *Id.*

Officer, Janet Schalk, from joining a competitor.[244] The court refused in part because Schalk's noncompetition agreement was overly restrictive when considered in light of Schalk's role and in comparison with the noncompetition agreements of other employees.[245] The court refused to enforce the noncompetition agreement or alter it to make it reasonable, noting that the agreement was more restrictive than those noncompetition agreements of senior managers. For instance, her agreement was more restrictive than that of other senior management personnel, whom the court found to have more access to confidential and sensitive information than Schalk did.[246] The court noted that Kohl's failed to demonstrate why Schalk should be treated differently than other executives.[247]

Pennsylvania

Nor are these the only cases in which courts have cast a wary eye at the blue-pencil doctrine. In *Turnell v. CentiMark Corp*., the United States Court of Appeals for the Seventh Circuit applied Pennsylvania law to modify an unreasonably broad agreement.[248] The court stated that where "restrictions are so 'gratuitous[ly]' overbroad that they 'indicate[] an intent to oppress the employee and/or to foster a monopoly,' a court of equity may refuse to enforce the covenant at all."[249] Nevertheless, the court acknowledged that "absent bad faith, Pennsylvania courts do attempt to blue-pencil covenants before refusing enforcement altogether."[250]

Texas

Even in Texas, which has traditionally been a liberal blue pencil state, courts have been reluctant to reform overbroad agreements. In *Sentinel Integrity Solutions, Inc. v. Mistras Group, Inc.*, the court noted that the employer had attempted to enforce what it knew to be an unreasonable non-

244. No. 15CV001465, 2015 WL 11236574, at *1 (Wis. Cir. Ct. Aug. 13, 2015).

245. Alison Bauter, *Judge Denies Kohl's Call to Block Chief Information Officer's Hiring at Hudson's Bay*, MILWAUKEE BUS. J. (Aug. 11, 2015, 6:32 PM), https://www.bizjournals.com/milwaukee/news/2015/08/10/judge-denies-kohl-s-call-to-block-chief.html [https://perma.cc/24WY-GVL3].

246. *Id.*

247. See also *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 181–82 (S.D.N.Y. 2006), in which the District Court for the Southern District of New York refused to uphold a year-long non-compete agreement for an executive with the company, finding that Estee Lauder routinely permitted shorter post-separation restraints for departing executives. Given Estee Lauder's "general practice" of not enforcing other executives' non-compete agreements for the entire year, and its prior offer to shorten the defendant's agreement to four months, the court held that only a five-month restriction on employment was necessary to protect the company's interests. *Id.*

248. *See* Turnell v. CentiMark Corp., 796 F.3d 656, 663 (7th Cir. 2015).

249. *Id.* at 661.

250. *Id.* at 663 (quoting Sidco Paper Co. v. Aaron, 351 A.2d 250, 257 (Pa. 1976)).

compete agreement.[251] The court refused the appellant's request for reformation.[252]

IV. SOME STATE LEGISLATURES MANDATE THE USE OF THE BLUE PENCIL

In an effort to create a business-friendly environment, some state legislatures have begun to mandate the use of the blue pencil doctrine.

Nevada

Nevada is interesting, as the state statute mandating blue penciling arose as a legislative response to the *Golden Road* decision.[253] Rather than respecting the well-reasoned opinion of the Nevada Supreme Court, the Nevada legislature rejected the court's refusal to alter the overbroad noncompetition agreement.[254] To overturn the Nevada Supreme Court's decision, the legislature opted to revise the state's previous statute addressing noncompetition agreements, which at the time did not include any language regarding the judicial modification of unreasonable noncompetition agreements.[255]

The new statute did two things. First, it provided a new analysis to determine which noncompetition agreements in Nevada are valid and enforceable. The new law requires that agreements be evaluated using a standard different than that set forth in prior court decisions or by previous versions of the statute. The revised statute states that restrictive covenants are unenforceable unless the employer establishes that the agreement:

> (a) is supported by valuable consideration; (b) does not impose any restraint that is greater than is required for the protection of the employer for whose benefit the restraint is imposed; (c) does not impose any undue hardship on the employee; and (d) imposes restrictions that are appropriate

251. Sentinel Integrity Sols., Inc. v. Mistras Grp., 414 S.W.3d 911, 919 (Tex. App. 2013).

252. *Id.* at 921.

253. *See* Joshua Silker & Elayna Youchah, *New Law Brings Changes to Nevada's Non-Compete Law*, JD SUPRA (June 30, 2017), https://www.jdsupra.com/legalnews/new-law-brings-changes-to-nevada-s-non-52589/ [https://perma.cc/2ZFP-9AL2].

254. *See id.*

255. *See* Montgomery Y. Paek & Kelsey E. Stegall, *The Competition over Revising and Enforcing Noncompete Agreements in Nevada*, LITTLER (June 19, 2019), https://www.littler.com/publication-press/publication/competition-over-revising-and-enforcing-noncompete-agreements-nevada [https://perma.cc/8BLS-ZCUV].

> in relation to the valuable consideration supporting the noncompetition covenant.[256]

The statute also contains a legislative mandate requiring courts to use the blue pencil:

> If an employer brings an action to enforce a noncompetition covenant and the court finds the covenant is supported by valuable consideration but contains limitations as to time, geographical area or scope of activity to be restrained that are not reasonable, impose a greater restraint than is necessary for the protection of the employer for whose benefit the restraint is imposed and impose undue hardship on the employee, the court *shall revise* the covenant to the extent necessary and enforce the covenant as revised.[257]

The statute provides, "Such revisions must cause the limitations contained in the covenant as to time, geographical area and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than is necessary for the protection of the employer for whose benefit the restraint is imposed."[258]

This provision expressly rejected the Nevada Supreme Court's *Golden Road* decision.[259] Interestingly, the Nevada legislature's action went well beyond what the dissent in *Golden Road* called for.[260] In *Golden Road*, the dissenting justices argued that modification should only occur in limited circumstances.[261] But this new law robs courts of their discretion to not modify an agreement.[262] And because the court has no ability to refuse to modify the agreement, employers face little chance of sanction for requiring the employee to sign an unreasonable agreement. Rather, because courts may not make an inquiry into the motives of the employers, the new statute incentivizes an employer to overreach in the making of noncompetition agreements.[263]

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256. NEV. REV. STAT. § 613.195(1) (2017). The statute is silent as the what constitutes "valuable consideration." Moreover, the statute does not clarify which restrictions are appropriate in relation to the valuable consideration supporting the noncompetition agreement.

257. § 613.195(5) (emphasis added).

258. *Id.*

259. *See* Golden Rd. Motor Inn, Inc. v. Islam, 376 P.3d 151, 158–60 (Nev. 2016).

260. *See id.* at 162–67.

261. *Id.* at 164–65.

262. *See* Paek & Stegall, *supra* note 255.

263. *See id.*

Arkansas

Arkansas has also required courts to pick up their blue pencils and modify unreasonable agreements. Prior to 2015, Arkansas courts viewed noncompetition agreements with disfavor.[264] State courts would not enforce any part of a noncompetition agreement that they had determined was unreasonable in length of term or geographic scope.[265] Courts in Arkansas followed the strict compliance rule: If the non-compete agreement was unreasonable with respect to a particular restrictive covenant, then a court would not enforce any part of the agreement.[266] Moreover, if a court found the agreement to be unreasonable, and thus unenforceable, the employer seeking to enforce the agreement could be required to pay for the breaching employee's attorney's fees.[267]

In 2015, that approach changed. The Arkansas legislature expanded the enforceability of noncompetition agreements in Arkansas.[268] The state gave employers the ability to restrict competition after the termination of the employment relationship, even if a court found the terms of a non-compete agreement to be unreasonable.[269] The new law allows courts to enforce the reasonable parts of a non-competition agreement, while requiring courts to amend the over-broad, unenforceable provisions.[270] A court may no longer strike down the entire agreement.[271]

Arkansas courts are now required to "blue-pencil" and rewrite what is otherwise found to be unreasonable without striking down the entire agreement.[272] The statute states, "If restrictions in a covenant not to compete agreement are found to be unreasonable and impose a greater restraint than is necessary to protect the protectable business interest of the employer under subdivision (a)(1) of this section, the court *shall reform* the covenant not to compete agreement . . . ."[273] The new law orders the court to reform the agreement "to the extent necessary to: (A) Cause the limitations contained in the covenant not to compete agreement to be reasonable; and (B) Impose a restraint that is not greater than necessary to protect the protectable business interest."[274]

In essence, even if a court determines that the terms of an employer's noncompetition agreement are unreasonable, the employer does not lose the

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264. *See* Jessica Weltge, Note, *Blue Penciling Noncompete Agreements in Arkansas and the Need for a Public Policy Exception*, 2017 ARK. L. NOTES 1954 (2017).
265. *Id.*
266. *Id.*
267. *Id.*
268. ARK. CODE ANN. § 4-75-101 (2015).
269. *Id.*
270. § 4-75-101(c), (f).
271. § 4-75-101(f).
272. *Id.*
273. § 4-75-101(f)(1).
274. *Id.*

right to enforce the agreement.[275] Instead, it can enforce the agreement to the extent of the court's reformation.[276] There are seemingly no negative consequences to the employer's overreach.

The Arkansas statute further expanded the ability of employers to restrict the mobility of their employees. First, the statute provides that continued employment constitutes sufficient consideration for the employee to enter into the noncompetition agreement.[277] The statute says nothing about how long the continuation of employment must be—it seems likely that only another day of employment is required to constitute consideration.

Moreover, the Arkansas statute limits the need for a geographical restriction. If the noncompetition agreement does not contain a specific or defined geographic restriction, the absence of such provisions does not make the agreement overly broad, so long as the agreement is limited with respect to time and scope in a manner that is no greater than necessary to defend the protectable business interest of the employer.[278]

The statute also provides for a lengthy time restriction, stating that a two-year period of restraint is presumptively reasonable.[279] Unless the employee can establish that the particular facts and circumstances establish unreasonableness, the employee will remain bound.[280]

Finally, the new statute provides employers with easier enforcement of the law. The law states that, "a court may award the employer damages for a breach of a covenant not to compete agreement, appropriate injunctive relief, or both, if appropriate."[281] Additionally, the statute presumes that, to obtain injunctive relief, "The immediate harm associated with the breach of a covenant not to compete agreement shall be considered irreparable."[282]

Idaho

Idaho, too, has created rules requiring courts to blue pencil unreasonable agreements. Historically, Idaho courts hesitated to modify unreasonable agreements so as to make them reasonable. Instead, courts often simply chose to not enforce those unreasonable agreements, in whole or in part.[283] The state legislature, however, altered this approach. Idaho law now states that, in the event that a noncompetition agreement contains unreasonable restrictions, "a court shall limit or modify the agreement or covenant as it shall determine necessary to reflect the intent of the parties and

275. *Id.*
276. § 4-75-101(f)(2).
277. § 4-75-101(g).
278. § 4-75-101(c)(1).
279. § 4-75-101(d).
280. *Id.*
281. § 4-75-101(e)(1).
282. § 4-75-101(e)(2).
283. *See, e.g.*, Ins. Ctr., Inc. v. Taylor, 499 P.2d 1252, 1255–56 (Idaho 1972); Pinnacle Performance, Inc. v. Hessing, 17 P.3d 308, 314–15 (Idaho Ct. App. 2001).

render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement or covenant as limited or modified."[284]

Texas

Texas has also implemented rules designed to make it easier for employers to impose noncompetition agreements on employees. The law requires that courts modify unreasonable agreements so as to make them reasonable and enforceable.[285] The Texas statute provides that if a court determines that the restrictions in an agreement "are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee, the court shall reform the covenant to the extent necessary to cause the limitations . . . to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed . . . ."[286]

Georgia

The Georgia legislature has also recently instituted laws regarding judicial modification of unreasonable noncompetition agreements.[287] The new law overturned precedent that prevented courts from modifying unreasonable agreements.[288] The statute now expressly permits the practice.[289] The statute does not, however, mandate the use of the blue pencil. Presumably, this omission was deliberate. Years ago, the Georgia legislature attempted to mandate the use of the blue pencil doctrine and require courts to reform unreasonable agreements.[290] The Georgia Supreme Court objected, however, to the legislative attempt to undermine the court's role in determining the enforceability of unreasonable agreements and found the statute unconstitutional.[291] In 2009, the Georgia court reiterated its stance, writing, "[T]his Court has rejected a legislative attempt to usurp the application of standards of reasonableness to noncompetition covenants in employment agreements."[292]

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284. IDAHO CODE § 44-2703 (2018).

285. TEX. BUS. & COM. CODE § 15.51(c) (West 2019).

286. *Id.*

287. GA. CODE ANN. § 13-8-53(d) (West 2010); GA. CODE ANN. § 13-8-2.1 (repealed 2009).

288. § 13-8-53(d); *see* Christopher D. David, Note, *When a Promise is Not a Promise: Georgia's Law on Non-Compete Agreements, as Interpreted by the Eleventh Circuit in* Keener v. Convergys Corporation*, Gives Rise to Comity and Federalism Concerns*, 11 J. INTELL. PROP. L. 395, 398 (2004).

289. § 13-8-53(d).

290. § 13-8-2.1 (repealed 2009).

291. Jackson & Coker, Inc. v. Hart, 405 S.E.2d 253, 255 (Ga. 1991).

292. Atlanta Bread Co. Int'l v. Lupton–Smith, 679 S.E.2d 722, 724–25 (Ga. 2009).

V. AN ARGUMENT FOR RESTRICTING THE BLUE PENCIL

The widespread use of the blue pencil, by both courts and state legislatures, should be restricted. Three arguments support this conclusion.

A. The Blue Pencil Harms Employees

A legislative mandate to amend unreasonable noncompetition agreements encourages employers to draft broad agreements, secure in the knowledge that mistakes in drafting not only *can* be corrected but *must* be corrected by a court. The blue pencil doctrine permits employers to overreach, and in so doing, harms employees.[293] Employers may enter into unreasonable agreements, whether intentionally (or negligently), secure in the knowledge that bad faith (or lack of care) will be excused by a court. The employer can take advantage of a free ride on a contractual provision that the employer knew (or should have known) would never be enforced. In the words of one commentator, "[t]his smacks of having one's employee's cake, and eating it too."[294]

Perhaps the Georgia court in *Rita Personnel Services International, Inc. v. Kot*[295] said it best:

> For every covenant that finds its way to court, there are thousands which exercise an in terrorem effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction.[296]

Blue-penciling of the employment agreement creates an "in terrorem effect on an employee, who must try to interpret the ambiguous provision to decide whether it is prudent, from a standpoint of possible legal liability, to accept a particular job or whether it might be necessary to resist plaintiff's efforts to assert that the provision covers a particular job."[297] The in terrorem effect of an overbroad agreement unduly restricts an employee's ability to change jobs.[298]

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293. Pivateau, *supra* note 186, at 689.

294. *Id.* at 690 (quoting Blake, *supra* note 61, at 682–83).

295. *See* Richard P. Rita Pers. Servs. Int'l, Inc. v. Kot, 191 S.E.2d 79 (Ga. 1972).

296. *Id.* at 81 (emphasis added) (quoting Blake, *supra* note 61, at 682–83).

297. Pivateau, *supra* note 186, at 690 (quoting Lanmark Tech., Inc. v. Canales, 454 F. Supp. 2d 524, 529 (E.D. Va. 2006)).

298. *See id.* at 690–91.

In a time of near-full employment, employers must compete for the best employees.[299] In a free market, employees would be able to sell their services to the employer that provided the highest wages and the best benefits.[300] By legislatively mandating the blue pencil, however, states have placed a heavy thumb on the scale—to the disadvantage of employees. Enforcement of a barely-reasonable noncompetition agreement threatens the livelihoods of employees who had little say in the original language of the agreement.[301]

Many courts have described the harmful effects of an overly broad restrictive covenant. In *Reddy v. Community Health Foundation*, the West Virginia Supreme Court criticized employers who used overly broad provisions, "where savage covenants are included in employment contracts so that their overbreadth operates, by in terrorem effect, to subjugate employees unaware of the tentative nature of such a covenant."[302]

Courts have traditionally viewed restraints on competition with suspicion.[303] The disparity in bargaining power between the employer and the employee is great. The parties are in very unequal bargaining positions. At the moment an employee contracts with his employer, the employee is aware that he must agree to almost any provision regarding the restriction of mobility, even an unreasonable one.[304] "Under a blue pencil doctrine, 'the employer then receives what amounts to a free ride on' the provision, perhaps knowing full well that it would never be enforced."[305]

It seems inevitable that use of the blue pencil doctrine, whether a result of judicial discretion or statutorily mandated, will increase the prevalence of overly broad clauses. Employers may overreach, whether negligently or on purpose. The *Rita Personnel Services* Court properly noted the negative consequences of the blue pencil doctrine.[306] The Court explained that "[i]f severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable."[307] In *Valley Medical Specialists v. Farber*, the Arizona Supreme Court criticized the use of the blue pencil doctrine, noting that "employers may therefore create ominous covenants, knowing that if the words are challenged, courts will modify the agreement to make it enforceable."[308]

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299. *Id.* at 692.

300. *See* Blake, *supra* note 61, at 648.

301. *See* Pivateau, *supra* note 186, at 691–92.

302. 298 S.E.2d 906, 916 (W. Va. 1982).

303. *See* Pivateau, *supra* note 186, at 690–91 (first citing Richard P. Pers. Servs. Int'l, Inc. v. Kot, 191 S.E.2d 79, 81 (Ga. 1972); then citing Valley Med. Specialists v. Farber, 982 P.2d 1277, 1286 (Ariz. 1999)).

304. *See* Golden Rd. Motor Inn, Inc. v. Islam, 376 P.3d 151, 158 (Nev. 2016).

305. *Id.* (citing Pivateau, *supra* note 186, at 690).

306. *Kot*, 191 S.E.2d at 80–81.

307. *Id.* at 81 (quoting Blake, *supra* note 61, at 683).

308. *Valley Med. Specialists*, 982 P.2d at 1286 (citing Blake, *supra* note 61, at 682–83).

B. The Blue Pencil Creates Confusion

Even in the absence of a legislative mandate, the blue pencil doctrine confuses employees, employers, and the court system. The doctrine prevents all parties—employees, employers, and courts—from predicting the proper construction of a noncompetition agreement.

The blue pencil doctrine builds a level of uncertainty into every employment relationship.[309] In those states that require the use of the blue pencil doctrine, an employee seeking greater opportunity will never be certain of her rights and will not know the actual terms of her noncompetition agreement.[310] This uncertainty carries a cost: "the employee who remains at his position, fearful that the blue pencil would not help his case, suffers lost opportunity costs. The employee who leaves his position may be forced to accept a reduced salary from a new employer due to the perceived risk of litigation."[311] In *Dearborn v. Everett J. Prescott, Inc.*,[312] the court captures the heart of the problem: "The restless or departing employee could have no 'clear understanding of what conduct is prohibited.' He could not secure meaningful legal advice because he could not know what the employer might want to enforce. He could not ask the employer to decide without effectively burning bridges with the employer."[313]

The blue pencil doctrine also burdens employers. The doctrine deprives employers of access to well-trained employees.[314] A company that hires an employee nominally bound by a noncompetition agreement with a former employer may face potential liability for, among other things, tortious interference with contract.[315] An employer seeking to hire a new employee must weigh the possible benefits of the hire against the possible burden of a lawsuit for tortious interference with contract by the previous employer.[316] Moreover, the blue pencil doctrine prevents an employer from ever knowing to what extent the previous noncompetition agreement will be enforced.[317] The noncompetition agreement is a double-edged sword in the context of employment: every employer that successfully restricts an employee from leaving deprives another employer from that employee's efforts.

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309. Pivateau, *supra* note 186, at 691.

310. *Id.*

311. *Id.* at 692.

312. 486 F. Supp. 2d 802 (S.D. Ind. 2007).

313. *Id.* at 816.

314. In *DP Solutions, Inc. v. Rollins, Inc.*, 353 F.3d 421 (5th Cir. 2003), the defendant hired two former employees of the plaintiff. *Id.* at 426. The plaintiff brought suit alleging tortious interference with contract. *Id.* The court awarded the plaintiff $27,000 in damages, arising out of defendant's hiring of plaintiff's ex-employees. *Id.* at 426, 430–31. The damages figure was based on testimony by the plaintiff's attorneys as to the amount of fees expended in pursuit of the tortious interference claim. *Id.* at 430–31.

315. *Id.* at 430–31.

316. Pivateau, *supra* note 186, at 692.

317. *Id.*

Finally, a legislatively-mandated blue pencil doctrine creates confusion for the judicial system. Courts that in the past have been called upon to decide questions of reasonableness must now also be charged with the responsibility of then drafting substitute noncompetition agreements.[318]

C. The Blue Pencil Represents Bad Public Policy

The compelled use of the blue pencil doctrine is bad public policy. The blue pencil doctrine creates an agreement containing terms that the parties did not agree to.[319] The power to create a contractual obligation other than what the parties agreed to should rest only with the parties.[320] A court has the responsibility of interpreting contracts and not writing them.[321] "[S]etting a precedent that establishes the judiciary's willingness to partake in drafting would simply be inappropriate public policy as it conflicts with the impartiality that is required of the bench, irrespective of some jurisdictions' willingness to overreach."[322] Delegating the drafting of employment agreements "blurs the line between the bench and the bar."[323] Courts lack the power to create such agreements.[324]

Furthermore, use of the blue pencil represents a poor use of judicial resources. It is hard to imagine a greater waste of judicial time and energy than the need to re-draft a contract that has already been negotiated and executed.

CONCLUSION

In summary, there are numerous reasons to reject or at least restrict the use of the blue pencil doctrine. Because it acts as a restraint of trade, courts and legislatures have traditionally remained suspicious of the noncompetition agreement. Common law has provided a deep body of law that sets out the circumstances under which a court should refuse to enforce a noncompetition agreement. No court will enforce an unreasonable agreement.

As such, courts should limit use of the blue pencil doctrine. Courts should modify agreements only in extraordinary situations. The blue pencil doctrine should only protect those employers who can establish their good faith and provide an excuse for the unreasonable agreement.

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318. *Id.* at 693.

319. *See* Golden Rd. Motor Inn, Inc. v. Islam, 376 P.3d 151, 157 (Nev. 2016) (citing Pivateau, *supra* note 186, at 674).

320. *Id.* at 157; *see* Reno Club v. Young Inv. Co., 182 P.2d 1011, 1016 (Nev. 1947) (concluding that creating a contractual term operates beyond the parties' intent and the court's power).

321. *Golden Rd.*, 376 P.3d at 157.

322. *Id.*

323. *Id.* at 159.

324. *Id.*

Ultimately, the blue pencil doctrine, under the guise of equitable modification, harms employees, the court system, and society as a whole. Widespread use of the doctrine by courts is not warranted. Even worse is the belief that legislatures should impose their mandated use of the doctrine onto the court system.