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## Employment Contracts: Covenants Not to Compete in Minnesota

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## EMPLOYMENT CONTRACTS: COVENANTS NOT TO COMPETE IN MINNESOTA

*Current trends in Minnesota demonstrate a liberalization in rewriting employment contract restrictive covenants. This Note summarizes the prevailing theories, examines Minnesota caselaw, and identifies the problems associated with using the liberal Massachusetts rule of interpreting employment contract restrictive covenants.*

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### I. INTRODUCTION

One of the most frequently litigated provisions of an employment contract is the covenant not to compete.<sup>1</sup> Under a covenant not to compete, or restrictive covenant,<sup>2</sup> an employee agrees, usually before employment

1. For a general background on covenants not to compete, *see generally* Blake, *Employee Agreements 'Not To Compete'*, 73 HARV. L. REV. 625 (1960); Richards, *Drafting and Enforcing Restrictive Covenants Not To Compete*, 55 MARQ. L. REV. 241 (1972); Comment, *Agreements Not To Compete*, 33 LA. L. REV. 94 (1972); Comment, *Contracts: Employee Covenants Not to Compete*, 17 WASHBURN L. J. 665 (1978); 29 ARK. L. REV. 406 (1975).

In *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 62 Ohio L. Abs. 17, 105 N.E.2d 685 (1952), a decision celebrated for its wit and analysis, *see* Blake, *supra*, at 666, Arthur Murray sought to enforce a covenant not to compete to prevent a dance instructor from working for a competing dance studio. In considering the wealth of authority on restrictive covenants, the court stated:

This is not one of those questions on which the legal researcher cannot find enough to quench his thirst. To the contrary there is so much authority it drowns him. It is a sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long. This deep and unsettled sea pertaining to an employee's covenant not to compete with his employer after termination of employment is really Seven Seas; and now that the court has sailed them, perhaps it should record those seas so that the next weary traveler may be saved the terrifying time it takes just to find them.

*Arthur Murray*, at 20-21, 105 N.E.2d at 687. The court then cited 82 law reviews and periodicals, 21 annotations, 10 encyclopedias, and 10 treatises. *Id.* at 20-21, 105 N.E.2d at 687-88.

2. These covenants are also called non-competition clauses. In this Note, all em-

commences,<sup>3</sup> that he will not work for a competitor or compete with the employer after termination of employment.<sup>4</sup> At common law, restrictive covenants were held to be void as restraints of trade.<sup>5</sup> Although an aversion to these covenants still persists,<sup>6</sup> Minnesota courts have never held them void per se.<sup>7</sup>

Rather than declaring covenants not to compete void as general restraints of trade, modern courts that enforce these covenants have created a distinction between general and partial restraints.<sup>8</sup> If a restraint reasonably protects an employer's legitimate business interests, it may be characterized as partial, and therefore enforceable.<sup>9</sup> Because every re-

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employee agreements not to compete will be referred to as restrictive covenants, even though other types of restrictive covenants may be contained in the contract of employment.

3. When the agreement has been entered into after employment has begun, a defense to its validity may be failure or lack of consideration. *See* *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626 (Minn. 1983); *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736 (Minn. 1982); *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 130 (Minn. 1980).

4. *See* *Blake*, *supra* note 1, at 626.

5. *See id.* at 629-46.

6. *See* *Jim W. Miller Constr., Inc. v. Schaefer*, 298 N.W.2d 455, 458 (Minn. 1980) ("Such covenants are looked upon with disfavor because their enforcement decreases competition in the marketplace and restricts the covenantor's right to work and his ability to earn a livelihood."). The historical aversion to covenants not to compete has been explained as a function of the social order. *National Benefit Co. v. Union Hosp. Co.*, 45 Minn. 272, 47 N.W. 806 (1891). The *National Benefit* court stated that:

[T]he courts frowned with great severity upon every contract of this kind. The reasons for this partly grew out of the English law of apprenticeship, by which, in its original severity, no person could exercise any regular trade or handicraft except after having served a long apprenticeship. Hence, if a person was prevented from pursuing his particular trade, he was practically deprived of all means of earning a livelihood, and the state was deprived of his services. No such reason now obtains in this country, where every citizen is at liberty to change his occupation at will.

*Id.* at 275, 47 N.W. at 807.

This rationale for enforcing restrictive covenants was merely dicta which has not been followed. *See* *Menter Co. v. Brock*, 147 Minn. 407, 409, 180 N.W. 553, 554 (1920) ("Equity will not enjoin the breach of a negative covenant in a contract, unless it is made to appear that irreparable injury has resulted, or will in all probability result, to complainant from such breach."). The language in *National Benefit* overlooks the fact that a change of employment by the employee might necessitate moving to a different area of the country. *See* *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 537, 134 N.W.2d 892, 900 (1965). A multitude of policy questions must be balanced in determining whether a particular restrictive covenant is enforceable. *See infra* note 12.

7. *See* *Menter Co. v. Brock*, 147 Minn. 407, 409, 180 N.W. 533, 554 (1920) (must show "irreparable injury has resulted, or will in all probability result, to complainant from such breach"). Some jurisdictions prohibit restrictive covenants by statute, *see infra* note 54, but limited protection may still be possible.

8. *See* *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 533, 134 N.W.2d 892, 898 (1965); *National Benefit Co. v. Union Hosp. Co.*, 45 Minn. 272, 274, 47 N.W. 806, 807 (1891); *RESTATEMENT OF CONTRACTS* § 516(f) (1932); *see also* *Eutectic Welding Alloys Corp. v. West*, 281 Minn. 13, 18, 160 N.W.2d 566, 570 (1968).

9. *See, e.g.*, *Heflebower v. Sand*, 71 F. Supp. 607, 611 (D. Minn. 1947) (applying

restrictive covenant case is decided on its own particular facts,<sup>10</sup> trial courts may exercise wide discretion in interpreting and enforcing such covenants<sup>11</sup> and have fashioned only general tests of validity.<sup>12</sup> Consequently, it is not possible to draft a covenant that will be reasonable in all situations.<sup>13</sup>

The Minnesota Supreme Court has granted employers unusually broad relief in two recent cases involving breaches of restrictive covenants.<sup>14</sup> In *Cherne Industrial, Inc. v. Grounds & Associates, Inc.*,<sup>15</sup> the plaintiff firm produced "Operations and Maintenance" manuals for sewage treatment systems.<sup>16</sup> The defendants entered into employment contracts with the plaintiff that required the defendants not to disclose any confidential

Minnesota law); *Eutectic Welding Alloys Corp. v. West*, 281 Minn. 13, 18-19, 160 N.W.2d 566, 570 (1968); *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 533, 134 N.W.2d 892, 898 (1965); *Standard Oil Co. v. Bertelsen*, 186 Minn. 483, 487, 243 N.W. 701, 703 (1932); *Granger v. Craven*, 159 Minn. 296, 299, 199 N.W. 10, 11-12 (1924) ("Courts scrutinize carefully all contracts limiting a man's natural right to follow any trade or profession anywhere he pleases and in any lawful manner."); *Menter Co. v. Brock*, 147 Minn. 407, 412, 180 N.W. 553, 555 (1920).

10. *See Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 535, 134 N.W.2d 892, 899 (1965); *Standard Oil Co. v. Bertelsen*, 186 Minn. 483, 484, 243 N.W. 701, 702 (1932); *Menter Co. v. Brock*, 147 Minn. 407, 410, 180 N.W. 553, 554 (1920).

11. *See Hedberg v. State Farm Mut. Auto. Ins. Co.*, 350 F.2d 924, 932-33 (8th Cir. 1965) (applying Minnesota law; trial court's decision rarely disturbed on appeal); *Cherne Indus., Inc. v. Grounds & Assocs.*, 278 N.W.2d 81, 91 (Minn. 1979); *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 260 Minn. 499, 504, 110 N.W.2d 348, 351 (1961).

12. The most common test is balancing the employer's interest in preventing unfair competition against the employee's interest in working in his chosen profession. *See Jim W. Miller Constr., Inc. v. Schaefer*, 298 N.W.2d 455, 458 (Minn. 1980).

In *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 62 Ohio L. Abs. 17, 105 N.E.2d 685 (1952), the court mentions 13 factors to be considered in any restrictive covenant case:

[F]reedom of contract, freedom of trade, sanctity of contract, individual liberty, protection of business, right to work, making of training available to employee, earning a livelihood for one's self and family, utilization of one's skill and talent, continued productivity, betterment of one's status, avoidance of one's becoming a public charge, encouragement of competition and discouragement of monopoly.

*Id.* at 28, 105 N.E.2d at 692 (citations omitted). Most of these factors are historical. *See generally Blake, supra* note 1, at 629-46. Professor Blake presents an excellent analysis of the early English cases involving restrictive covenants.

13. *See generally Blake, supra* note 1, at 646-86. In *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W.2d 892 (1965), the court stated:

It may be fairly said that the merits of a dispute arising from the provisions of a restrictive clause in an employment contract cannot always be determined by an examination of the contract itself. The validity of the contract in each case must be determined on its own facts and a reasonable balance must be maintained between the interests of the employer and the employee.

*Id.* at 535-36, 134 N.W.2d at 899-900.

14. *See Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127 (Minn. 1980); *Cherne Indus., Inc. v. Grounds & Assocs.*, 278 N.W.2d 81 (Minn. 1979).

15. 278 N.W.2d 81 (Minn. 1979).

16. *See id.* at 85.

information which they acquired while employees, nor take this information with them upon termination of employment.<sup>17</sup> The agreement also restricted the employees' right to compete with plaintiff for two years after termination of employment.<sup>18</sup> The defendants breached the covenants, took confidential information, and started their own competing business before the two-year period had expired.<sup>19</sup> Before plaintiff could obtain judicial relief for the breach, the two-year period expired. The court extended the temporal limitation<sup>20</sup> for two years after judgment was entered.<sup>21</sup> Until *Cherne*, the expiration of the original temporal limitation was considered to make the issue of whether an employer qualified for injunctive relief moot.<sup>22</sup>

In *Davies & Davies Agency, Inc. v. Davies*,<sup>23</sup> an insurance agency employee agreed not to compete with his employer within a radius of fifty miles of three named cities for five years after termination.<sup>24</sup> Over a period of years the employee gained expertise in the sale of probate and court bonds. Gradually, the plaintiff employer phased himself out of this area of the business and relied solely on the defendant for this part of the agency's operation. When disputes arose between plaintiff and defendant concerning their working relationship, defendant was relieved of his duties. Apparently the defendant began competing with plaintiff. Plaintiff then filed an action to enforce the restrictive covenant.<sup>25</sup>

Since the defendant did little work in one of the named cities, the court held that it could strike out the offending geographic elements and enforce the covenant to the extent that it was reasonable.<sup>26</sup> The *Davies* decision represents another advantage to employers: no longer will restrictive covenants fail merely because the geographic limitation, as cited in the contract, is unreasonable.

The *Cherne* and *Davies* cases illustrate a clear liberalization of the court's attitude toward restrictive covenants which may significantly decrease an employee's ability to successfully challenge the validity of even unreasonable restraints.<sup>27</sup> This Note will examine the historical foundations of the common law of restrictive covenants in Minnesota. It will

17. *See id.* at 86.

18. *Id.*

19. *Id.* at 86-87.

20. For a discussion of temporal limitations, see *infra* notes 113-26 and accompanying text.

21. 278 N.W.2d at 93.

22. *See Walker Employment Serv., Inc. v. Parkhurst*, 300 Minn. 264, 267, 219 N.W.2d 437, 439 (1974); *Eutectic Welding Alloys Corp. v. West*, 281 Minn. 13, 17-18 n.6, 160 N.W.2d 566, 569 n.6 (1968).

23. 298 N.W.2d 127 (Minn. 1980).

24. *Id.* at 129.

25. *See id.* at 130.

26. *See id.* at 131-32.

27. *See infra* notes 106-12 & 153-57 and accompanying text.

also discuss the elements and requirements for valid restrictive covenants and remedies for their breach. Most importantly, it will discuss recent Minnesota cases that may have a significant impact on the drafting and enforcement of restrictive covenants in Minnesota.

## II. THE EARLY MINNESOTA CASES

*National Benefit Co. v. Union Hospital Co.*<sup>28</sup> is the leading Minnesota case to set forth the general requirements for a valid restrictive covenant.<sup>29</sup> In *National Benefit*, both parties sold medical insurance.<sup>30</sup> The parties agreed that plaintiff would sell only to railroad employees in Minnesota, Wisconsin, and northern Michigan for three years and that defendant would pay plaintiff for the right to sell to all others in this area.<sup>31</sup> Plaintiff brought an action to force payment when defendant refused to pay under the contract. Although *National Benefit* involved a sale of a business rather than an employment contract,<sup>32</sup> the decision is instructive in assessing the validity of employment contracts containing restrictive covenants.

Speaking for the court, Justice Mitchell noted that the primary tension caused by restrictive covenants is between the freedom of contract and the public policy against restraints of trade.<sup>33</sup> Generally, freedom of contract will not be interfered with if the restraint is reasonable. The restraint, however, only can "afford a fair protection to the party in whose favor it is made."<sup>34</sup> The agreement cannot be designed to monopolize the market by limiting production or distribution. In addition, there must be a limitation on the geographical areas to which the covenant applies.<sup>35</sup> No limitation is considered reasonable if the business involved has a public duty.<sup>36</sup> In holding that the covenant was enforceable, the *National Benefit* court noted that the covenant was limited in space and time, and was not in general restraint of trade.<sup>37</sup>

Justice Mitchell dismissed the historical aversion to restrictive cove-

28. 45 Minn. 272, 47 N.W. 806 (1891).

29. See, e.g., *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 533-34 & n.2, 134 N.W.2d 892, 898 & n.2 (1965); *Granger v. Craven*, 159 Minn. 296, 304, 199 N.W. 10, 13 (1924).

30. 45 Minn. at 273, 47 N.W. at 806.

31. See *id.* at 274, 47 N.W. at 806.

32. See, e.g., *People's Cleaning & Dyeing Co., Inc. v. Share*, 168 Minn. 474, 210 N.W. 397 (1926); *Southworth v. Davison*, 106 Minn. 119, 118 N.W. 363 (1908).

33. See 45 Minn. at 276, 47 N.W. at 807.

34. *Id.*

35. *Id.* This last requirement was dispensed with in *Southworth v. Davison*, 106 Minn. 119, 121, 118 N.W. 363, 363 (1908) ("limitation as to both time and place is unnecessary, if the agreement in other respects be reasonable, and not in conflict with public policy or the general welfare"). Nonetheless, it is still generally considered a requirement. See *Bess v. Bothman*, 257 N.W.2d 791, 795 (Minn. 1977).

36. See 45 Minn. at 276-77, 47 N.W. at 807.

37. *Id.* at 274-75, 47 N.W. at 807.

nants, stating "every citizen is at liberty to change his occupation at will" and therefore, no one is deprived of a livelihood.<sup>38</sup> Fortunately for employees in Minnesota, this narrow reasoning has not been applied with much vigor. Until recently, subsequent to *National Benefit*,<sup>39</sup> the Minnesota Supreme Court applied different tests of validity to restrictive covenants involving a sale of a business and employment contract restrictive covenants.<sup>40</sup>

The leading Minnesota case on employment contract restrictive covenants is *Menter Co. v. Brock*.<sup>41</sup> In *Menter*, plaintiff hired defendant to manage a clothing store in Minneapolis. Under the contract of employment, defendant agreed not to compete with plaintiff in that city for four years after his employment was terminated.<sup>42</sup> Two years after commencing employment, defendant resigned and opened his own clothing store several blocks from plaintiff's store. The plaintiff unsuccessfully sought to enjoin defendant from operating his business.

Refusing to enjoin defendant from competing, the supreme court distinguished covenants arising out of the sale of a business from employment contract restrictive covenants.<sup>43</sup> A plaintiff's burden for proving

38. *Id.* at 275, 47 N.W. at 807.

39. *See infra* notes 93-95 and accompanying text.

40. For example, sale of business restrictive covenants have a strong presumption of validity. *See Holliston v. Ernston*, 124 Minn. 49, 52, 144 N.W. 415, 416 (1913). The mere breach of a sale of business restriction covenant points to a finding of irreparable injury. *See Menter Co. v. Brock*, 147 Minn. 407, 409, 180 N.W. 553, 554 (1920) (dictum); *see also infra* notes 41-51 and accompanying text.

In *Peterson v. Johnson Nut Co.*, 204 Minn. 300, 283 N.W. 561 (1939), which involved a sale of business restrictive covenant, the court cites the *Menter* decision only for the proposition that employment restrictive covenant cases are irrelevant in sale of business cases. *See id.* at 305, 283 N.W. at 565. *But see Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 131 n.1 (Minn. 1980) ("The reasons for permitting modification" of geographic and temporal limitations in sale of business cases "are equally applicable to the employment context."). In sale of business cases, the breach is the controlling factor, and a finding of irreparable injury is not important. *See Menter Co. v. Brock*, 147 Minn. at 409, 180 N.W. at 554 (1920). In *Cherne Indus., Inc. v. Grounds & Assocs.*, 278 N.W.2d 81 (1979), however, the court cites *Peterson* for its decision on the compensatory damages issue. *Id.* at 95. *Cherne* also cites *Naftalin v. John Wood Co.*, 263 Minn. 135, 147, 116 N.W.2d 91, 100 (1962), another sale of business case, for the rule that restrictive covenants are to be strictly construed and enforced only to the extent they are reasonable. 278 N.W.2d at 88-89 n.2.

41. 147 Minn. 407, 180 N.W. 553 (1920).

42. *Id.* at 408, 180 N.W. at 554. As part of the employment contract, the employee agreed to pay \$3,000 to the employer as liquidated damages if the employee breached the restrictive covenant. *Id.* at 409, 180 N.W. at 554. The *Menter* court, however, did not reach the issue of whether the liquidated damages provision was a penalty. *See id.*

43. *Id.* at 411, 180 N.W. at 555; *see, e.g., National Benefit Co. v. Union Hosp. Co.*, 45 Minn. 272, 47 N.W. 806 (1891). Several courts take the position that there is a difference between interests sought to be protected in the case of an employer and those of a purchaser of a business. *Annot.*, 41 A.L.R.2d 15 (1955). For instance, in *Purchasing Assocs. v. Weitz*, 13 N.Y.2d 267, 196 N.E.2d 245, 246 N.Y.S.2d 600 (1963), in an action by a

irreparable injury is not great in cases involving covenants arising out of the sale of a business.<sup>44</sup> The mere breach of the covenant establishes irreparable harm,<sup>45</sup> since under most circumstances, the parties to a sale of a business have equal bargaining power and the purchase price of the business includes payment for good will.<sup>46</sup> Thus, "injunctions are freely granted almost as a matter of course in such and analogous cases."<sup>47</sup>

In employment contract restrictive covenants, irreparable injury is not necessarily established by the fact that an employee breached his contract by competing with his employer. Injury must be shown.<sup>48</sup> In *Menter*, the court found that the employment contract was one-sided; many restrictions were placed on the employee and none on the employer.<sup>49</sup> For example, the employee agreed not to compete for four years after termination and agreed to pay liquidated damages of \$3,000 if he breached the contract. The employer, on the other hand, did "not agree to keep [the employee] in its employ for a single day."<sup>50</sup> The court concluded that an injunction should be granted only where the employee's name carries with it the goodwill of the employer's business, or when trade secrets have been obtained, the disclosure of which would lead to

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corporation to restrain a former employee from violating a covenant against competition, the court discussed the differences in the two kinds of covenants. *Id.* at 272, 196 N.E.2d at 247-48, 246 N.Y.S.2d at 604. In a sale of business, courts will enforce an incidental covenant by the seller not to compete with the buyer after the sale. The *Weitz* court found this rule to be grounded "on the premise that a buyer of a business should be permitted to restrict his seller's freedom of trade so as to prevent the latter from recapturing and utilizing, by his competition, the good will of the very business which he transferred for value." *Id.* at 271, 196 N.E.2d at 247, 246 N.Y.S.2d at 603.

As pointed out by the *Weitz* court, a covenant given by an employee that he will not compete with his employer does not involve the element of goodwill or its transfer. For this reason and because there are considerations of public policy which "militate against sanctioning the loss of a man's livelihood," the courts display a much stricter attitude to covenants of this type. *Id.*; see, e.g., *Kaumagraph Co. v. Stampagraph Co.*, 197 A.D. 66, 188 N.Y.S. 678 (1921), *aff'd*, 235 N.Y. 1, 138 N.E. 485 (1923) ("In contradistinction to the sale of a business an employee ordinarily receives no consideration other than the fact of present employment; his labor is a full return for his wages."); *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 62 Ohio L. Abs. 17, 105 N.E.2d 685 (1952) (there is more freedom of contract between seller and buyer than between employer and employee); *Morgan's Home Equip. Corp. v. Martucci*, 390 Pa. 618, 630-31, 136 A.2d 838, 845-46 (1957) ("general covenants not to compete which are ancillary to the sale of a business serve a useful economic function. . . . Quite different reasons motivate the upholding of covenants not to compete which are ancillary to employment.").

44. See 147 Minn. at 411, 180 N.W. at 555; see also *Peterson v. Johnson Nut Co.*, 204 Minn. 300, 305, 283 N.W. 561, 565 (1939).

45. See *supra* note 40.

46. See *People's Cleaning & Dyeing Co. v. Share*, 168 Minn. 474, 477-78, 210 N.W. 397, 398 (1926); *Williams v. Thompson*, 143 Minn. 454, 456, 174 N.W. 307, 308 (1919).

47. *Holliston v. Ernston*, 124 Minn. 49, 52, 144 N.W. 415, 416 (1913).

48. *Menter*, 147 Minn. at 410, 180 N.W. at 554.

49. *Id.* at 408, 180 N.W. at 554.

50. *Id.*



irreparable injury to the employer. Thus no injunction was granted.<sup>51</sup>

The greater degree of proof required to show irreparable injury in employment contract restrictive covenant cases seems to be based upon a fundamental difference between the two types of covenants.<sup>52</sup> Seldom will anyone purchase an ongoing business without an assurance that the vendor will not compete after the sale. That the employer expects his employee not to compete is not as apparent. Absent a valid restrictive covenant, a terminated employee may compete with his ex-employer.<sup>53</sup>

51. *Id.* at 413, 180 N.W. at 556.

52. It has been said that a different measure of "reasonableness" is used. *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 534, 134 N.W.2d 892, 899 (1965); *see also* *Original Vincent & Joseph, Inc. v. Schiavene*, 144 Del. Ch. 531, 134 A.2d 843 (1957) (courts of equity are less prone to enforce restriction against competition in case of a mere employment contract than in a case where such restriction is part of a contract for sale of a business); *Insurance Center, Inc. v. Hamilton*, 218 Ga. 597, 129 S.E.2d 801 (1963) (In determining reasonableness of a restrictive covenant, greater latitude is allowed in those covenants relating to the sale of a business than in those ancillary to employment).

Route salesmen traditionally are treated differently from other types of employees, in terms of unfair competition. As stated by the Minnesota Supreme Court in *Sanitary Farm Dairies v. Wolf*, 261 Minn. 166, 112 N.W.2d 42 (1961):

[T]he authorities distinguish so-called "route" cases from other types of employment involving solicitations and sales. In actions of this kind the rights and obligations of the employer and employee are to be determined on the basis of the contribution each party has made to building the business and to enhancing the goodwill of the patronage involved.

*Id.* at 169, 112 N.W.2d at 45. *See generally* *Annot.*, 28 A.L.R.3d 7 (1969).

53. *See* *Jones v. Ernst & Ernst*, 172 La. 406, 134 So. 375 (1931); *see also* *Boone v. Krieg*, 156 Minn. 83, 194 N.W. 92 (1923). This assumption naturally flows from examining cases where the court has refused to enforce a restrictive covenant as in *Menter Co. v. Brock*, 147 Minn. 407, 180 N.W. 553 (1920). *See also* *RESTATEMENT OF CONTRACTS* § 516 comment h (1932 & Supp. 1979).

In *Boone*, defendant had been employed by plaintiff for eight years. After terminating employment, defendant actively competed with plaintiff in the letter multigraphing business. Since there was neither a restrictive covenant nor a question about trade secrets, the court held that defendant could not be enjoined from competing even though the employer found the competition vexing. 156 Minn. at 84, 194 N.W. at 92. A different result might occur where the employee solicits customers on established business routes of his former employer.

Where trade secrets are involved, however, the employee might have a common law duty not to disclose confidential information. *See* *Cherne Indus., Inc. v. Grounds & Assoes.*, 278 N.W.2d 81, 92 (Minn. 1979).

Section 396 of the *RESTATEMENT (SECOND) OF AGENCY* (1958) has been cited by several courts for the protection of trade secrets in the absence of a valid restrictive covenant. *See* *Eastern Marble Prod. Corp. v. Roman Marble, Inc.*, 372 Mass. 835, 842, 364 N.E.2d 799, 803 (1977); *Travenol Laboratories, Inc. v. Turner*, 30 N.C. App. 686, 228 S.E.2d 478 (1976) (although employment contract was void under a California statute, injunction to prevent disclosure affirmed).

Section 396 reads:

Using Confidential Information After Termination of Agency.

Unless otherwise agreed, after the termination of the Agency, the agent:

- (a) has no duty not to compete with the principal;
- (b) has a duty to the principal not to use or disclose to third persons, on his

Indeed, some jurisdictions have prohibited employment contract restrictive covenants by statute.<sup>54</sup>

Nevertheless, where the character of the employee's services are such that the employee carries or develops goodwill for the employer, such as in the case of a route salesman, a restrictive covenant may be essential if the employer desires to be protected from competition after the employee is terminated. Without such an agreement, the employee may be free to solicit the employer's customers.<sup>55</sup>

The covenant in *Menter* purported to be in consideration of the employment opportunity, the knowledge defendant gained about plaintiff's method of doing business, and trade secrets defendant would acquire.<sup>56</sup> The court found the consideration inadequate and the information gained by the employee to be so common and so well known in the industry that no protection was available. No irreparable injury was proved, therefore,<sup>57</sup> and dismissal of the action by the lower court was affirmed.<sup>58</sup> The *Menter* decision made it clear that the court is hesitant to enforce restrictive covenants that represent an overreaching by employ-

account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty. The agent is entitled to use general information concerning the method of business of the principal and the names of customers retained in his memory, if not acquired in violation of his duty as agent;

(c) has a duty to account for profits made by the sale or use of trade secrets and other confidential information, whether or not in competition with the principal;

(d) has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation.

RESTATEMENT (SECOND) OF AGENCY § 396 (1958).

Where the employee schemes to divert the employer's business after termination by copying down confidential customer lists, the employer may be entitled to injunctive relief, absent a written or oral restrictive covenant. See *Equipment Advertiser, Inc. v. Harris*, 271 Minn. 451, 459, 136 N.W.2d 302, 307 (1965).

54. See CAL. BUS. & PROF. CODE § 16600 (West 1964 & Supp. 1981); MONT. CODE ANN. §§ 28-2-703 to -705 (1979 & Supp. 1981); N.D. CENT. CODE § 9-08-06 (1959). Other jurisdictions merely regulate restrictive covenants, or restraints on trade, by statute. See ALA. CODE § 8-1-1 (1975 & Supp. 1981); FLA. STAT. § 542.33 (1983); LA. REV. STAT. ANN. § 23.921 (West 1964 & Supp. 1981); MICH. COMP. LAWS ANN. § 445.761 (West 1967 & Supp. 1981); N.C. GEN. STAT. §§ 75-1 to -4 (1981); S.D. CODIFIED LAWS ANN. §§ 53-9-8 to -11 (1979) (void if geographic limitation exceeds 25-mile radius); WIS. STAT. ANN. § 103.465 (West 1974 & Supp. 1981) (only permitted if necessary for protection of employer or principal).

55. See *Sanitary Farm Dairies, Inc. v. Wolf*, 261 Minn. 166, 172, 112 N.W.2d 42, 46 (1961). Even without a restrictive covenant, an injunction may reach a rival company which induces an employee to leave his present employer, and take valuable trade secrets with him. See *Elaterite Paint & Mfg. Co. v. S.E. Frost Co.*, 105 Minn. 239, 117 N.W. 388 (1908).

56. 147 Minn. 407, 408, 180 N.W. 553, 554 (1920).

57. *Id.* at 410, 180 N.W. at 554. In *Menter*, business actually increased after defendant terminated. *Id.* at 409, 180 N.W. at 554.

58. *Id.* at 413, 180 N.W. at 556.

ers. The court stated that "such a covenant finds its way into an employment contract not so much to protect the business as to needlessly fetter the employee, and prevent him from seeking to better his condition by securing employment with competing concerns."<sup>59</sup>

In several other early cases, the Minnesota Supreme Court found that the character of the employee's services was a determining factor in analyzing the reasonableness of the restriction.<sup>60</sup> In *Granger v. Craven*,<sup>61</sup> a doctor with an established medical practice in Rochester hired defendant, another doctor, to treat patients with ear, nose, or throat problems. The written employment contract stipulated that defendant agreed not to engage in the practice of medicine or surgery within twenty miles of the Rochester, Minnesota, for three years after termination. Several days after serving notice of termination, defendant opened an office in Rochester and began competing.<sup>62</sup> Affirming the issuance of an injunction restraining the defendant from competing, the supreme court distinguished *Granger* from *Menter*.<sup>63</sup> The court held that the injunction could issue without a showing by plaintiff of irreparable injury, since it could be presumed that, because of the nature of the employer's business, patients would follow the terminated doctor as a matter of course.<sup>64</sup> Thus, where the nature of the employment is such that the employee acquires a personal hold upon the employer's customers, the court uses a sale of business presumption of irreparable harm and will grant relief without a showing of actual or potential irreparable harm.<sup>65</sup> This presumption has been applied to other professions such as accountants,<sup>66</sup> ophthalmologists,<sup>67</sup> and veterinarians.<sup>68</sup>

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59. *Id.* at 411, 180 N.W. at 555; *see also* *Eutectic Welding Alloys Corp. v. West*, 281 Minn. 13, 160 N.W.2d 566 (1968). In *Eutectic*, the court stated: "Restrictive covenants that serve primarily to prevent an employee from working for others or for himself in the same competitive field so as to discourage him from terminating his employment constitute a form of industrial peonage without redeeming virtue in the American enterprise system." *Id.* at 20, 160 N.W.2d at 571.

60. *See, e.g.*, *Andrews v. Cosgriff*, 175 Minn. 431, 221 N.W. 642 (1928); *Granger v. Craven*, 159 Minn. 296, 199 N.W. 10 (1924); *infra* note 73, and accompanying text.

61. 159 Minn. 296, 199 N.W. 10 (1924).

62. *Id.* at 297-98, 199 N.W. at 11.

63. *Id.* at 302-03, 199 N.W. at 13.

64. *See id.* at 303, 199 N.W. at 13; *see also infra* notes 66-68 and accompanying text.

65. *See Granger v. Craven*, 159 Minn. 296, 303, 199 N.W. 10, 13; *cf.* *Lessner Dental Laboratories, Inc. v. Kidney*, 16 Ariz. App. 159, 162, 492 P.2d 39, 42 (1971) (the court found it "difficult to believe" that defendant dental technician could draw customers from plaintiff).

66. *See, e.g.*, *Faw, Casson & Co. v. Cranston*, 375 A.2d 463 (Del. Ch. 1977). *See generally* Note, *Covenant Not to Compete Between Professionals—Severance and Enforcement of Only that Portion of Covenant Which is Reasonable in Scope*, 40 *FORDHAM L. REV.* 430 (1971). *But cf.* *Dwyer v. Jung*, 133 N.J. Super. 343, 348 A.2d 208 (1975) (*per curiam*) (covenant not to compete by lawyer void against public policy and Disciplinary Rule 2-108(a) of the Model Code of Professional Responsibility).

67. *See Gibson v. Angros*, 30 Colo. App. 95, 491 P.2d 87 (1971).

### III. ELEMENTS OF RESTRICTIVE COVENANTS

Historically, in order to be judicially enforceable restrictive covenants had to express three limitations:<sup>69</sup> geographic,<sup>70</sup> temporal,<sup>71</sup> and compositional.<sup>72</sup> The rule in Minnesota, and in many other jurisdictions, has been that the absence or unreasonableness of any of these elements makes the covenant unenforceable as a restraint of trade.<sup>73</sup> Recent Minnesota cases have called into question whether this rule is still followed.<sup>74</sup> Although each of the elements can be analyzed separately, courts look at the impact of all three limitations as a whole. There is some overlapping, therefore, in the analysis of each limitation.

#### A. *The Geographic Limitation*

Geographic limitations have been expressed as restraining competition within a particular city,<sup>75</sup> state,<sup>76</sup> groups of political entities,<sup>77</sup> or a radius around the employer's business.<sup>78</sup> Restrictive covenants that do not contain a geographic limitation usually fall into the prohibited category of a general restraint of trade, and are not enforceable.<sup>79</sup> Some jurisdic-

68. *See Moore v. Dover Veterinary Hosp., Inc.*, 116 N.H. 680, 367 A.2d 1044 (1976).

69. *See* RESTATEMENT OF CONTRACTS § 515 comment c (1932).

70. *See infra* notes 75-112 and accompanying text.

71. *See infra* notes 113-26 and accompanying text.

72. *See infra* notes 127-39 and accompanying text.

73. The rule in these jurisdictions is explained by Professor Williston as: "[These courts] refuse to alter the express terms of the covenant by interpretation and will strike down the entire restraint rather than 'rewrite the contract for the parties.'" 14 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 1638 (3d ed. 1972).

A court might not enforce a restrictive covenant unless the restraint is set out clearly. "If such competition is to be restrained upon termination of employment, the employer should be held to a strict requirement that it express the same in unambiguous language." *Combined Ins. Co. of America v. Bode*, 247 Minn. 458, 468, 77 N.W.2d 533, 539 (1956); *accord Puritan/Churchill Chem. Co. v. Eubank*, 245 Ga. 334, 265 S.E.2d 16 (1980); *see also Knoebel Mercantile Co. v. Siders*, 165 Colo. 393, 439 P.2d 355 (1968) (restrictions to be valid must be reasonable, not impose undue hardship, and be no wider than necessary to afford required protection).

74. *See Cherne Indus., Inc. v. Grounds & Assocs.*, 278 N.W.2d 81 (Minn. 1979) (temporal limitation extended by court); *Bess v. Bothman*, 257 N.W.2d 791 (Minn. 1977) (temporal and geographic limitations added by court).

75. *See Menter Co. v. Brock*, 147 Minn. 407, 180 N.W. 553 (1920) (City of Minneapolis).

76. *See Thermorama, Inc. v. Buckwold*, 267 Minn. 551, 125 N.W.2d 844 (1964).

77. *See Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127 (Minn. 1980); *Knoebel Mercantile Co. v. Siders*, 165 Colo. 393, 439 P.2d 355 (1968). *See generally* Note, *Restraints on Trade—Covenants in Employment Contracts not to Compete within the Entire United States*, 49 N.C.L. REV. 393 (1971).

78. *See Eutectic Welding Alloys Corp. v. West*, 281 Minn. 13, 160 N.W.2d 566 (1968); *Marso v. Mankato Clinic, Ltd.*, 278 Minn. 104, 153 N.W.2d 281 (1967); *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W.2d 892 (1965); *Granger v. Craven*, 159 Minn. 296, 199 N.W. 10 (1924).

79. *National Benefit Co.*, 45 Minn. 272, 47 N.W. 806 (1891).

tions will supply the geographic limitation if the covenant is otherwise reasonable.<sup>80</sup> Critics argue that to supply a missing geographic limitation abrogates the general rule that restrictive covenants, as restraints of trade, must be strictly construed. For the courts to supply this element invades the right of the parties to contract.<sup>81</sup>

In the typical case, a court must decide whether a restrictive covenant that contains a geographic limitation, is enforceable when the geographic area is so broad that it is unreasonable.<sup>82</sup> In jurisdictions that follow a strict construction approach, the entire covenant is declared void.<sup>83</sup> Some jurisdictions have rejected this approach as too harsh,<sup>84</sup> and instead, have developed two theories for modifying overly broad geographic limitations: the traditional blue pencil doctrine, and the Massachusetts rule, as used in Minnesota.

### 1. *The Blue Pencil Doctrine*

The blue pencil doctrine is an equitable device by which a court eliminates any offending provision by striking a distinct portion of the restriction.<sup>85</sup> For example, consider an employer seeking to enforce an otherwise valid restrictive covenant encompassing the states of Minnesota and Wisconsin. If the employee's sales territory includes only Minnesota, the blue pencil doctrine would allow the court to enforce the covenant to prevent competition in Minnesota but not in Wisconsin. This example illustrates the requirements necessary for application of the doctrine. The covenant must contain distinct and severable areas.<sup>86</sup> If the restriction is a 300-mile radius around the City of Minneapolis, the doctrine would not apply since the only thing that could be penciled out

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80. *See, e.g.*, *Hill v. Central West Public Serv. Co.*, 37 F.2d 451 (5th Cir. 1930); *John Roane, Inc. v. Tweed*, 33 Del. Ch. 4, 89 A.2d 548 (1952); *McQuown v. Lakeland Window Cleaning Co.*, 136 So. 2d 370 (Fla. Dist. Ct. App. 1962); *Metropolitan Ice Co. v. Ducas*, 291 Mass. 403, 196 N.E. 856 (1935); *Redd Pest Control Co. v. Heatherly*, 248 Miss. 34, 157 So. 2d 133 (1963); *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 264 A.2d 53 (1970); *Igoe v. Atlas Ready Mix, Inc.*, 134 N.W.2d 511 (N.D. 1965); *Ramey v. Combined Am. Ins. Co.*, 359 S.W.2d 523 (Tex. Civ. App. 1962); *Wood v. May*, 73 Wash. 2d 307, 438 P.2d 587 (1968); *Fullerton Lumber Co. v. Torborg*, 270 Wis. 133, 70 N.W.2d 585 (1955).

81. *See Boldt Mach. & Tools, Inc. v. Wallace*, 469 Pa. 504, 519-21, 366 A.2d 902, 910-11 (1976) (Manderino, J. dissenting) ("It is not a difficult task for an employer to write a legal restrictive covenant into the employment contract. Employers have no incentive to do so, of course, so long as this court says to such employers: 'Write any covenant you wish—if it is illegal we'll act as your counsel and rewrite it.'"); *Blake, supra* note 1, at 682-83.

82. *See Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127 (Minn. 1980).

83. *See, e.g.*, *Timenterial, Inc. v. Dagata*, 29 Conn. Supp. 180, 277 A.2d 512 (1971).

84. *See infra* notes 85-92 and accompanying text.

85. *Timenterial, Inc. v. Dagata*, 29 Conn. Supp. 180, 184, 277 A.2d 512, 514 (1971).

86. *See id.* *But see Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 131 n.1 (Minn. 1980) (court declares any reasonable modification by the trial court permitted by the blue pencil doctrine).

would be the "300-mile radius" language.<sup>87</sup> The court must be able to erase one or more parts of the area, leaving an area in which the covenant's application is reasonable.<sup>88</sup> The court will not add language to the contract to make the geographic limitations sufficiently narrow.

The rationale underlying the blue pencil doctrine is that a court is "merely enforcing the legal parts of a divisible contract."<sup>89</sup> Advocates of a strict construction approach have found this doctrine to be oppressive to employees for several reasons. First, there is an obvious *in terrorem* effect visited upon both the employee and prospective employers if the employee is contractually bound not to compete with his ex-employer, even when the restrictive covenant would not be judicially enforceable.<sup>90</sup> Second, "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."<sup>91</sup> One critic has characterized this situation as smacking of "having one's employee's cake, and eating it too."<sup>92</sup>

## 2. The Minnesota Approach

Minnesota subscribes to the most liberal approach to modifying overly broad geographic limitations.<sup>93</sup> Under this approach, the court may modify an overbroad geographic limitation, whether or not the limitation is severable.<sup>94</sup> Until recently, the Minnesota Supreme Court ap-

87. *See* *Timenterial, Inc. v. Dagata*, 29 Conn. Supp. 180, 277 A.2d 512 (1971).

88. *See id.* at 184, 277 A.2d at 515.

89. *Bess v. Bothman*, 257 N.W.2d 791, 794 (Minn. 1977). One jurisdiction has permitted blue penciling *only* in the sale of a business restrictive covenant. *See Redmond v. Royal Ford, Inc.*, 244 Ga. 711, 261 S.E.2d 585 (1979).

90. *Blake, supra* note 1, at 682-83. Professor Blake also notes three ways in which a restrictive covenant may protect the employer even from legitimate competition. First, the covenant may deter the employee from leaving his job. Second, the employee may be ordered out of the business entirely, rather than merely kept from competing. Third, the employer may be able to protect *potential* customers in the restricted area. *See id.* at 657.

91. *Id.* at 683.

92. *Id.*

93. This approach, under which the court enforces the restriction to the extent it is reasonable, is sometimes called the Massachusetts rule, apparently harking back to *Dean v. Emerson*, 102 Mass. 480 (1869). *See Timenterial, Inc. v. Dagata*, 29 Conn. Supp. 180, 185, 277 A.2d 512, 515 (1971); *Ceresia v. Mitchell*, 242 S.W.2d 359 (Ky. 1957); *Metropolitan Ice Co. v. Duras*, 291 Mass. 403, 196 N.E. 856 (1935).

94. *See Insurance Center, Inc. v. Taylor*, 94 Idaho 896, 499 P.2d 1252 (1972); *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 370, *modified*, 190 N.W.2d 413 (Iowa 1971). In *Taylor*, the Idaho court rejected the "divisibility concept" of the doctrine and the *in toto* void approach, and accepted the more liberal modifying approach. The restrictive covenant at issue, however, contained no geographic, temporal, or scope of activity limitations. The court held, as a matter of law, that it could not supply the limitations since they were essential ingredients which would protect the employee.

plied this approach only in sale of business restrictive covenant cases.<sup>95</sup>

The first Minnesota case to address the issue of partial enforcement of an overbroad, but non-severable, geographic limitation was *Alside, Inc. v. Larson*.<sup>96</sup> In *Alside*, defendant was an experienced salesman of building and siding materials. His sales territory included Minnesota, South Dakota, and Wisconsin. When plaintiff hired defendant to be a warehouse manager, defendant's new territory included much of the same area. As a condition of employment, defendant agreed not to compete for two years after termination in any territory where he had been located or employed with plaintiff. The defendant quit after working for plaintiff for nearly six years and immediately began competing. Under the terms of the restrictive covenant, broad relief could have been requested; plaintiff, however, asked the trial court to limit the injunction to a six-county area around Minneapolis and St. Paul.<sup>97</sup> On appeal, the Minnesota Supreme Court discussed the similarity between Ohio law, which follows the blue pencil doctrine,<sup>98</sup> and Minnesota law. The court held that it was permissible to pare down the original, overbroad geographic limitation. After *Alside*, it appeared that Minnesota would follow the blue pencil doctrine.

Three years after *Alside*, however, in *Bess v. Bothman*,<sup>99</sup> which involved a sale of business restrictive covenant,<sup>100</sup> the Minnesota Supreme Court rejected the blue pencil doctrine as being too formalistic. In *Bess*, defendant sold two tow trucks and leased a parking lot for one year to plaintiff. The defendant agreed not to compete with plaintiff in the towing business although no geographic or temporal limitations were mentioned. Ordinarily, the lack of these limitations would render the covenant void as a restraint of trade under the rule of *National Benefit Co.*

95. See, e.g., *Bess v. Bothman*, 257 N.W.2d 791 (Minn. 1977).

96. 300 Minn. 285, 220 N.W.2d 274 (1974). Arguably, Minnesota applied the liberal approach in *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127 (Minn. 1980), even though in *Davies* the court termed it "blue pencilling."

97. *Alside, Inc. v. Larson*, 300 Minn. at 289, 220 N.W.2d at 277. Thus, the injunction would cover only those areas where defendant had not worked before he was employed by plaintiff.

98. *Id.* at 293, 220 N.W.2d at 279; see *Extine v. Williamson Midwest, Inc.*, 176 Ohio St. 403, 200 N.E.2d 297 (1964). The court in *Alside* cited *Bennett v. Storz Broadcasting Co.*, 270 Minn. 252, 134 N.W.2d 892 (1965) and *Eutectic Welding Alloys Corp. v. West*, 281 Minn. 13, 160 N.W.2d 566 (1968), as indicative that Minnesota law is similar to that of Ohio, despite the fact that those cases make no mention of the blue pencil doctrine. See *Alside*, at 29, 220 N.W.2d at 280. Further, *Bennett* and *Eutectic* dealt with a geographic limitation expressed as a radius around the employer's business. The blue pencil doctrine does not apply to this type of a limitation. See *supra* note 87 and accompanying text. The view that the blue pencil doctrine is identical to the Massachusetts rule, however, has continued in the court's analysis. See *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 131 (Minn. 1980).

99. 257 N.W.2d 791 (Minn. 1977).

100. *Id.* at 794-95.

*v. Union Hospital Co.*<sup>101</sup> Plaintiff sought an injunction to enforce the covenant after defendant violated the covenant by competing within a year after the sale. Because the necessary elements for application of the blue pencil doctrine were not present, the restrictive covenant could be enforced only if the court supplied reasonable restraints. The trial court supplied restrictions, limiting the covenant to a small area around the plaintiff's business for a five-year period.<sup>102</sup> On appeal, the supreme court stated that no previous Minnesota cases had dealt with the partial enforcement of a covenant which unreasonably restrained trade, apparently rejecting the *Alside* decision,<sup>103</sup> and affirmed the trial court's modification.

In the sale of business context, the result in *Bess* seems equitable; there was no evidence of unequal bargaining power between the parties,<sup>104</sup> and the defendant could give no reason for prohibiting the court from giving the covenant its intended effect.<sup>105</sup>

Unfortunately, *Bess* was applied in *Davies & Davies Agency, Inc. v. Davies*.<sup>106</sup> In *Davies*, the plaintiff insurance agency, the stock of which was solely owned by its president, hired one of the president's sons. Four months after the employment relationship began,<sup>107</sup> defendant, the president's son, signed a restrictive covenant agreement whereby he agreed not to compete with the agency for five years within a fifty-mile radius of Minneapolis, St. Paul, or Duluth upon termination of employment.<sup>108</sup> Over the years, defendant became the agency's specialist in the sale of probate and court bonds. After conflicts arose between the agency's president and defendant, defendant terminated his employment and began to compete with plaintiff. The court found that the restriction of competition within a fifty-mile radius around the named cities was unreasona-

101. 45 Minn. 272, 47 N.W. 806 (1891).

102. *Bess*, 257 N.W.2d at 794.

103. In *Alside*, the geographic limitation was pared down considerably at the request of the employer. *Id.* at 289, 220 N.W.2d at 277; see also *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W.2d 892 (1965).

104. See *Bess*, 257 N.W.2d at 794 n.1.

105. See *id.*

106. 298 N.W.2d 127, 131 (Minn. 1980).

107. In *Davies*, the court found that the mere continuation of employment could constitute the consideration necessary to uphold a restrictive covenant where the agreement provided the employee with real advantages. 298 N.W.2d at 131. The court determined that *Davies* would not have advanced to the high position he obtained if he had not signed the agreement. *Id.* This position was followed in *Medtronic v. Gibbons*, 527 F. Supp. 1085, 1093 (D. Minn. 1981), *aff'd*, 684 F.2d 565 (8th Cir. 1982). Recent Minnesota cases have held that adequacy of consideration depends upon the particular facts of each case and have found that noncompetition agreements entered into after the employee had begun employment were invalid because they were not supported by independent consideration. See *National Recruiters v. Cashman*, 323 N.W.2d 736 (Minn. 1982); *Jostens, Inc. v. National Computer Sys.*, 318 N.W.2d 691 (Minn. 1982).

108. 298 N.W.2d at 129.



ble because the employee did little business outside of Hennepin County. Although the court purported to apply the blue pencil doctrine,<sup>109</sup> it really applied the more liberal Massachusetts rule.<sup>110</sup> Even if the court severed the cities of Duluth and St. Paul from the agreement, enforcing the covenant within a fifty-mile radius around the city of Minneapolis would include an area too broad to be reasonable.<sup>111</sup> The supreme court held, nevertheless, that the defendant could be enjoined from competing within a fifty-mile radius of Minneapolis. *Davies* clearly rejects the traditional blue pencil doctrine and substitutes a rule of judicial reconstruction. Apparently, the court will now write its own geographic limitations based not on the language the parties used in the contract, but on what seems reasonable at some later date after a breach has occurred.<sup>112</sup>

### B. Temporal Limitations

Most employment contract restrictive covenants state a time period during which the employee agrees not to compete with his former employer after termination.<sup>113</sup> This temporal limitation must be reasonable.<sup>114</sup> If the temporal limitation is too broad, indefinite, or non-existent, courts follow the same approaches used when the geographic limitation is unreasonable.<sup>115</sup> Minnesota has yet to address the issue of

109. *See id.* at 131.

110. Under the Massachusetts rule, the restrictive covenant is rewritten by the court so that the reasonable portion is enforceable. *See Timenterial, Inc. v. Dagata*, 29 Conn. Supp. 180, 185, 277 A.2d 513, 515 (1971) ("even though the territory is not divisible in the wording of the contract it will be enforced as to so much of the area included as would have been a reasonable area for the application of the restrictive covenant.").

111. 298 N.W.2d at 131.

112. *See id.* n.1.

113. *See H. Walker Employment Serv. v. Parkhurst*, 300 Minn. 264, 219 N.W.2d 437 (1974) (one year); *Granger v. Craven*, 159 Minn. 296, 199 N.W. 10 (1924) (three years); *Menter Co. v. Brock*, 147 Minn. 407, 180 N.W. 553 (1920) (four years). The restraint can only extend as far as absolutely necessary. *See Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 534, 134 N.W.2d 892, 899 (1965); *Combined Ins. Co. v. Bode*, 247 Minn. 458, 469, 77 N.W.2d 533, 536 (1956) (applying Illinois law).

114. *See cases cited supra* note 113; *see also Hedberg v. State Farm Mut. Auto. Ins. Co.*, 350 F.2d 924, 932 (8th Cir. 1965) (applying Minnesota law; court found one-year temporal limitation reasonable under all the circumstances).

115. *See generally supra* notes 75-116 and accompanying text. There are a variety of reasons why temporal limitations have been changed. *See, e.g., Styles v. Lyon*, 87 Conn. 23, 86 A. 564 (1913) (employee permitted to compete after employer went out of business); *McQuown v. Lakeland Window Cleaning Co.*, 136 So. 2d 370 (Fla. Dist. Ct. App. 1962) (five-year restriction reduced to one year according to statute); *see also Slade Gorton & Co. v. O'Neil*, 355 Mass. 4, 242 N.E.2d 551 (1968); *Schmidl v. Central Laundry & Supply Co.*, 13 N.Y.S.2d 817 (Sup. Ct. 1939).

In one case, the parties agreed in the contract that if the time restriction should be deemed unreasonable, the period would be for a time deemed reasonable. *See Credit Bureau Management Co. v. Huie*, 254 F. Supp. 547, 549 (E.D. Ark. 1966).

If the limitation is unlimited with respect to time, some courts will impose a reasonable restraint. *See, e.g., Rector-Phillips-Morse, Inc. v. Vroman*, 253 Ark. 750, 489 S.W.2d

whether an employment contract restrictive covenant is enforceable when it contains no temporal limitation. The result in *Bess*,<sup>116</sup> a sale of business case, however, indicates that the court is willing to add whatever time limitation it finds reasonable.<sup>117</sup>

Whether a stated time period is reasonable depends upon the nature of the employee's work<sup>118</sup> and the time necessary for the employer to train a new employee and to allow his customers to become accustomed to the new employee.<sup>119</sup> In *Eutectic Welding Alloys Corp. v. West*,<sup>120</sup> the Minnesota Supreme Court refused to enforce a two-year limitation against an employee who was basically a salesman and was a technical representative in name only. The court found that "plaintiff had unreasonably extracted from defendant a commitment far broader than his actual functions and status could reasonably require."<sup>121</sup> The result in *Eutectic* probably would be different under present Minnesota law, in light of both *Bess*<sup>122</sup> and *Davies*.<sup>123</sup> Normally, where trade secrets are involved,<sup>124</sup> or where the services are of a "professional" character,<sup>125</sup> limitations of up to four years are held to be reasonable.<sup>126</sup>

### C. Compositional Limitations

Inevitably, employees will be exposed occasionally to business infor-

1 (1973); *Hansen v. Edwards*, 83 Nev. 189, 426 P.2d 792 (1967); *Lavey v. Edwards*, 264 Or. 331, 505 P.2d 342 (1973); *Seligman & Latz, Inc. v. Vernillo*, 382 Pa. 161, 114 A.2d 672 (1955).

116. 257 N.W.2d 791 (court supplied five-year temporal limitation).

117. In *Bess*, the covenant not to compete had been found unreasonable by the trial court. The trial judge modified the covenant to include reasonable terms and then ordered its enforcement. The supreme court affirmed this decision, thus adopting the minority position on temporal limitations. *See id.*

118. *See, e.g., Cherne Indus., Inc. v. Grounds & Assocs.*, 278 N.W.2d 81 (Minn. 1979) (defendants were engineers, sales managers, and consultants); *Alside, Inc. v. Larson*, 300 Minn. 285, 296, 220 N.W.2d 274, 280 (1974) (employee was trained by employer in business operations, and had a unique and intimate relationship with customers); *Granger v. Craven*, 159 Minn. 196, 199 N.W. 10 (1924) (doctor restrained from competition for three years). *But see Eutectic Welding Alloys Corp. v. West*, 281 Minn. 13, 19, 160 N.W.2d 566, 570 (1968) (court refused to enforce two-year restriction against ordinary salesman—employer had unreasonably extracted a commitment far broader than employee's actual functions and status could reasonably require).

119. *See Eutectic Welding Alloys Corp. v. West*, 281 Minn. 13, 19, 160 N.W.2d 566, 571 (1968); *Menter Co. v. Brock*, 147 Minn. 407, 410-11, 180 N.W. 553, 555 (1920).

120. 281 Minn. 13, 160 N.W.2d 566 (1968).

121. *Id.* at 19, 160 N.W.2d at 570.

122. 257 N.W.2d 791 (Minn. 1977).

123. 298 N.W.2d 127 (Minn. 1980) (court willing to pare down unreasonable limitations).

124. *See, e.g., Cherne Indus., Inc. v. Grounds & Assocs.*, 278 N.W.2d 81 (Minn. 1979).

125. *See supra* notes 60-78 and accompanying text.

126. *See, e.g., Gibson v. Angros*, 30 Colo. App. 95, 491 P.2d 87 (1971) (ophthalmologist restrained five years); *cf. Granger v. Craven*, 159 Minn. 296, 199 N.W. 10 (1924) (doctor restrained three years).

mation which might adversely affect the employer's competitive advantage if known to competing concerns.<sup>127</sup> Skills learned by an employee as a result of employment, generally are not protectable by restrictive covenant and the employee is free to take with him any skills learned on the job.<sup>128</sup> Nevertheless, trade secrets,<sup>129</sup> goodwill,<sup>130</sup> customer lists,<sup>131</sup> and other types of confidential information are commonly the subjects of restrictive covenants and can be protected under certain circumstances even in jurisdictions that prohibit restrictive covenants by statute.<sup>132</sup>

The phrase "trade secrets" has generated a plethora of cases construing its meaning.<sup>133</sup> The Minnesota court has accepted the Restatement of Torts definition of a trade secret. A trade secret is:

Any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula or a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.<sup>134</sup>

Although this definition might seem to subsume all confidential information under the heading of trade secrets, the Minnesota Supreme Court has concluded that trade secrets are different.

In *Cherne Industries, Inc. v. Grounds & Associates, Inc.*,<sup>135</sup> the court synthe-

127. See Blake, *supra* note 1, at 627.

128. See Jim. W. Miller Constr., Inc. v. Schaefer, 298 N.W.2d 455 (Minn. 1980); accord Lessner Dental Laboratory, Inc. v. Kidney, 16 Ariz. App. 159, 492 P.2d 39 (1971). See generally C. KAUFMAN, CORBIN ON CONTRACTS § 1391B (Supp. 1984). The owner of the real estate firm should not be able to enjoin competition by an ex-salesman merely because the employee was incoherent and inarticulate when first hired and "since developed a crackerjack high-pressure technique that could sell an outhouse to a movie star." *Id.*

129. See Eutectic Welding Alloys Corp. v. West, 218 Minn. 13, 160 N.W.2d 566 (1968); Menter Co. v. Brock, 147 Minn. 407, 180 N.W. 553 (1920).

130. See Alside, Inc. v. Larson, 300 Minn. 285, 220 N.W.2d 274 (1974). In order to have goodwill for purposes of enforcing a restrictive covenant, the employer must establish that his business involves repeat customers. See also National Hearing Aid Center, Inc. v. Avers, 2 Mass. App. 285, 311 N.E.2d 572, 577-78 (1974) (hearing aid sales do not usually involve repeat sales, so restrictive covenant held unreasonable); C. KAUFMAN, *supra* note 128, § 1391B.

131. See, e.g., Hedberg v. State Farm Mut. Auto. Ins. Co., 350 F.2d 925 (8th Cir. 1965) (applying Minnesota law); *Cherne Indus., Inc. v. Grounds & Assocs.*, 278 N.W.2d 81 (Minn. 1979).

132. See, e.g., Winston Research Corp. v. Minnesota Mining & Mfg. Co., 350 F.2d 134, 140 n.4 (9th Cir. 1965); State Farm Mut. Auto. Ins. Co. v. Dempster, 174 Cal. App. 2d 418, 425-26, 344 P.2d 821, 825-26 (1959).

133. See, e.g., Electro-Craft Corp. v. Controlled Motion, 332 N.W.2d 890 (Minn. 1983); *Cherne Indus., Inc. v. Grounds & Assocs.*, 278 N.W.2d 81, 89-90 (Minn. 1979). See generally MINN. STAT. §§ 325C.01-.08 (1982) (Uniform Trade Secrets Act); A. TURNER, THE LAW OF TRADE SECRETS (1962).

134. RESTATEMENT OF TORTS § 757 comment b (1939), cited with approval in *Cherne Indus., Inc. v. Grounds & Assocs.*, 278 N.W.2d 81, 89-90 (Minn. 1979).

135. 278 N.W.2d 81 (Minn. 1979).

sized definitions of trade secrets and confidential information and set forth a four-prong test to determine whether matters recited in a restrictive covenant were protectable.<sup>136</sup> First, is the information generally known or easily ascertainable? The court found that the information taken by defendants from plaintiff was not easily ascertainable, although it was provided in part by state and federal agencies, since plaintiff's information was more detailed.<sup>137</sup> Second, does the information provide a demonstrable competitive advantage? The court found that this test was met because defendants must have considered the information valuable or they would not have bothered to take it.<sup>138</sup> Third, was it gathered at the expense of the employer? Plaintiff spent several years developing the information and the business actually lost money while the information was being developed. The court thus found this requirement to have been met. Fourth, is the information such that the employer intended to keep it confidential? The court found that all of the tests were met and the information was therefore protectable under the restrictive covenant.<sup>139</sup> The four-prong test does not offer any new insights regarding whether given information is protectable, nor probably should it. No simple analysis or test is likely to be generally accepted as long as courts continue to decide each case on its particular facts, balancing together temporal, geographic, and compositional limitations.

#### IV. REMEDIES

The remedy most frequently sought by employers for breach of a restrictive covenant is an injunction restraining the terminated employee from competing, disclosing, or using confidential information.<sup>140</sup> Other forms of possible relief include an accounting for profits,<sup>141</sup> and damages.<sup>142</sup> Injunctive relief is, however, almost always sought.<sup>143</sup> The nor-

136. *Id.* at 90. The Minnesota court has applied the four-prong test in two recent cases. *See* *Electro-Craft Corp. v. Controlled Motion*, 332 N.W.2d 890 (Minn. 1983); *see* *Jostens, Inc. v. National Computer Sys.*, 318 N.W.2d 691 (Minn. 1982).

137. 278 N.W.2d at 90; *cf.* *Menter Co. v. Brock*, 147 Minn. 407, 409, 180 N.W. 553, 554 (1920) (information found not to be trade secrets where widely known throughout the industry). Although a restrictive covenant is not enforceable, an employer may still recover confidential information taken by a former employee. *See* *Combined Ins. Co. of America v. Bode*, 247 Minn. 458, 77 N.W.2d 533 (1956) (applying Illinois law).

138. *Cherne*, 278 N.W.2d at 90.

139. *Id.* at 91.

140. This is considered the only effective remedy. *See* 14 S. WILLISTON, *supra* note 73, § 1636 at 103. One unsuccessful defense against an employer's action is the claim that an injunction is akin to an action for specific performance. Under the so-called "negative doctrine of mutuality" the employee argues that because he does not have the benefit of enforcing the contract by injunction, neither should the employer. *See* *Peterson v. Johnson Nut Co.*, 204 Minn. 300, 283 N.W. 561 (1939).

141. *Cherne Indus., Inc. v. Grounds & Assocs.*, 278 N.W.2d 81, 94-95 (Minn. 1979); *Peterson v. Johnson Nut Co.*, 209 Minn. 470, 477, 297 N.W. 178, 182 (1941).

142. Both liquidated damages, *see* *Menter Co. v. Brock*, 147 Minn. 407, 180 N.W. 553

mal requirements of injunctive relief apply in restrictive covenant cases: the employer must have no adequate remedy at law,<sup>144</sup> show actual or threatened irreparable injury,<sup>145</sup> and show the existence of a valid restrictive covenant.<sup>146</sup> The discretion to grant or deny the relief rests solely with the trial court, whose decision is rarely disturbed on appeal.<sup>147</sup>

In Minnesota, the approach in establishing the basis for injunctive relief is set forth in *Menter Co. v. Brock*.<sup>148</sup> In *Menter*, defendant agreed not to compete with his employer in the city of Minneapolis for four years after termination of employment. In denying injunctive relief, the court held that the employer failed to meet its burden of proof because no irreparable injury was shown. The court stated that the employer must show that the employee misappropriated either the business' goodwill<sup>149</sup>

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(1920), and punitive damages, *see* *Cherne Indus., Inc. v. Grounds & Assocs.*, 278 N.W.2d 81, 95-97 (Minn. 1979), have been sought. Other remedies which have been sought are replevin, *see* *Hedberg v. State Farm Mut. Auto. Ins. Co.*, 350 F.2d 924 (8th Cir. 1965); and an injunction seeking to prevent an employee from representing that he is working for the employer. *See* *Combined Ins. Co. of America v. Bode*, 247 Minn. 458, 462, 77 N.W.2d 533, 535 (1956). If specified in the contract, the employee may forfeit his contribution to the employee's profit sharing plan account. *See* *Courington v. Birmingham Trust Nat'l Bank*, 347 So. 2d 377 (Ala. 1977). Further, an employee may bring an action for tortious interference with contract. *See* *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W.2d 892 (1965).

143. The popularity of injunctive relief is not surprising, because it is the only effective way an employer can prevent disclosure or use of confidential information or use of goodwill by a terminated employee. *See* *Thermorama, Inc. v. Buckwold*, 267 Minn. 551, 552, 125 N.W.2d 844, 845 (1964) ("there is inherent in a situation of this kind damage which is not susceptible of precise proof.").

144. *See* *Cherne Indus., Inc. v. Grounds & Assocs.*, 278 N.W.2d 81, 92 (Minn. 1979).

145. *See* *Menter Co. v. Brock*, 147 Minn. 407, 409, 180 N.W. 553, 554 (1920). *Compare* *Holliston v. Ernston*, 124 Minn. 49, 52, 144 N.W. 415, 416 (1913) (sale of business) ("injunctions are freely granted almost as a matter of course.") *with* *Menter Co. v. Brock*, 147 Minn. 407, 180 N.W. 553 (1920) (employment contract; injury must be shown beyond the mere fact that the employee left and now is competing). In *Thermorama, Inc. v. Buckwold*, 267 Minn. 551, 125 N.W.2d 844 (1964), irreparable harm was *inferred* from the breach of an employment contract restrictive covenant.

146. This issue is frequently subject to a defense of lack of consideration. The court looks at several factors to determine whether the contract is supported by consideration. Among these are whether there was an increase in wages after signing, whether the employment is at will or for a term, and whether the employee receives additional benefits. *See* *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626 (Minn. 1983); *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736 (Minn. 1982); *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127 (Minn. 1980).

147. *See* *Menter Co. v. Brock*, 147 Minn. 407, 412, 180 N.W. 553, 555 (1920) ("Injunction will not be granted to enforce the provisions of a contract unless the court is satisfied that the enforcement will be just and equitable and will not work hardship or oppression.").

148. *Id.*

149. *Id.* at 409, 180 N.W. at 554.

or trade secrets.<sup>150</sup> Unlike sale of business restrictive covenants, the courts do not presume irreparable injury when a restrictive employment covenant is breached.<sup>151</sup> Yet, where the employer has met his burden of proof, the court has tailored relief in ways which, at first glance, seem to go beyond the terms of the contract.<sup>152</sup>

In *Cherne*,<sup>153</sup> the general rule that “injunctive relief based on a contract must be coextensive with the terms of the contract”<sup>154</sup> was disregarded, giving employers a significant advantage over employees in the enforcement of restrictive covenants. Plaintiff sought to enjoin several former employees from competing. Under the terms of the former employees’ employment contracts, they agreed not to compete for two years after termination. The two-year period had elapsed, however, between the time the employees terminated and the time of trial. The court disregarded the “coextensive relief” rule and looked beyond the four corners of the restrictive covenants to give effect to what it considered the intent of the parties at the time they entered into the contracts.<sup>155</sup> The court analyzed the relief sought not in terms of the written covenants not to compete, but rather in terms of preventing defendants from breaching common law duties not to use or disclose confidential information.<sup>156</sup> Since enforcement of the written covenants was sought after the contractual temporal limitation had already expired, strict construction of the restrictive covenants would have required denial of injunctive relief.<sup>157</sup>

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150. *Id.*; see *supra* notes 133-39 and accompanying text.

151. See *supra* notes 46-47 and accompanying text; see also *Menter Co. v. Brock*, 147 Minn. 407, 180 N.W. 553 (1920). In denying relief to the employer, the court in *Menter* stated:

[C]ourts are and should be cautious in complying with the request of an employer to enjoin a former servant who has violated a covenant of this sort from earning a livelihood. It may well be surmised that such a covenant finds its way into an employment contract not so much to protect the business as to needlessly fetter the employee, and prevent him from seeking to better his condition by securing employment with competing concerns.

*Id.* at 411, 180 N.W. at 555; cf. *Thermorama, Inc. v. Buckwold*, 267 Minn. 551, 125 N.W.2d 844 (1964). Compare *Holliston v. Ernston*, 124 Minn. 49, 52, 144 N.W. 415, 416 (1913) (injunctions freely granted in sale of business restrictive covenant cases) with *Menter Co. v. Brock*, 147 Minn. 407, 180 N.W. 553 (1920) (in employment contract restrictive covenant case, injury must be shown beyond the mere fact that employee left and is now competing).

152. See *infra* notes 153-56 and accompanying text.

153. 278 N.W.2d 81 (Minn. 1979).

154. *Id.* at 93.

155. *Id.*; accord *American Eutectic Welding Alloys Sales Co. v. Rodriguez*, 480 F.2d 223 (1st Cir. 1973); *Premier Indus. Corp. v. Texas Indus. Fastener Co.*, 450 F.2d 444 (5th Cir. 1971). *Contra*, *Boldt Mach. & Tools, Inc. v. Wallace*, 469 Pa. 504, 515 n.8, 366 A.2d 902, 908 n.8 (1976).

156. See *Cherne*, 278 N.W.2d at 94.

157. See *Hedberg v. State Farm Mut. Auto. Ins. Co.*, 350 F.2d 924, 931 (8th Cir. 1965) (“these agreements are to be strictly construed and the restraint imposed no further than the language of the contract absolutely requires”). Further, restrictive covenants are to be

To prevent unjust enrichment, however, the Minnesota Supreme Court upheld the trial court's decision to grant an injunction for two years from the date of the judgment. The trial court's focus upon enforcing common law duties not to disclose confidential information was, in effect, a rewriting of the contract by the court.

In defense of the court's decision, it was the intention of the employer when entering into the contracts that it be protected from competition by defendant-employees for two years after termination. As a practical matter, where, as in *Cherne*, employees conspire to compete while still employed, the employer will not receive the benefit of the full contractual temporal limitation, because an action to enforce the covenant against competing employees might not be commenced or discovered until some or all of the temporal period has expired. Where the employee competes without detection for a long period of time, an application of the rule in *Cherne* will give effect to the parties' original intention, although, under some circumstances, as where the confidential information has been disclosed, even this extended relief will not adequately redress the employer's injury.<sup>158</sup>

## V. CONCLUSION

Minnesota cases on enforcement of restrictive covenants demonstrate the court's willingness to modify otherwise unreasonable restraints. The impact of the latest decisions cannot be determined precisely, since each case is decided on its own particular facts. The trend is, however, away from the traditional strict construction approach. As the determination of validity in the employment contract setting steadily approaches the analysis used in interpreting and enforcing sale of business restrictive covenants, the contract placed before a new employee, who has little bargaining power over its contents, becomes more and more a contract of adhesion. With the availability of judicial modification, an increased willingness on the part of employers to litigate unreasonable covenants is expected.

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construed against the drafter. *See* *Combined Ins. Co. of America v. Bode*, 247 Minn. 458, 464, 77 N.W.2d 533, 536 (1956).

158. *See* *Eutectic Welding Alloys Corp. v. West*, 281 Minn. 13, 160 N.W.2d 566 (1968).