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Comments

COVENANTS NOT TO COMPETE— ENFORCEABILITY UNDER MISSOURI LAW

I. INTRODUCTION

Our economic system, much like our legal system, is a synthesis of concepts that have proven their worth over many centuries. The heart of a capitalistic system is competition. We depend on it to regulate supply and demand which in turn sets prices and determines the optimum division of labor. However, the common law quickly discovered that there were certain types of "unfair competition" that could not be tolerated if the economic system was to function properly. As a result, certain practices were declared by the courts to be illegal per se.¹ In many other situations, the courts have left it to a party to protect himself by means of a restrictive covenant.² This comment will discuss the enforceability of such covenants and in particular those made ancillary to the sale of a business or to an employment contract. Emphasis will be placed on the Missouri law in this area and the factors which should be considered in drafting such a covenant.

II. HISTORICAL DEVELOPMENT

The covenant not to compete has not always enjoyed the respectability, or at least tolerance, that it is accorded today. In the *Dyer's Case*³ a dyer of cloth agreed that he would not practice his craft in a certain town for six months. The medieval judge called on to enforce the contract was astounded, declared it void, and stated: "By God, if the plaintiff were here he should go to prison until he paid a fine to the king."⁴ The necessity of a long apprenticeship, the difficulty of travel, and the scarcity of skilled workmen made enforcement of such contracts unthinkable.⁵

Over the centuries, the common law recognized a growing need for such covenants. The early cases applied mechanical tests for determining

1. Trade secrets, for example, have been protected against appropriation by former employees even in the absence of a prohibitory covenant. Likewise, courts will enjoin the use of customer lists of a former employer. See 2 R. CALLMAN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES §§ 52.1, 51.2 (c), 54.2 (c) (2) (3d ed. 1968).

2. *Thau-Nolde, Inc. v. Krause Dental Supply and Gold Co., Inc.*, 518 S.W.2d 5 (Mo. 1974), indicated the possibly disastrous consequences of failing to provide the protection afforded by covenants not to compete.

3. *Dyer's Case*, Y.B. Mich. 2 Hen. 5, F. 5, pl. 26 (C.P. 1415).

4. *Id.*

5. See *Arthur Murray Dance Studios v. Witter*, 62 Abs. 17, 23, 105 N.E.2d 685, 691 (C.P. Ohio 1952), for a discussion of the factors existing at that time which made the covenant unreasonable.

the validity of "contracts in restraint of trade."⁶ *Mitchel v. Reynolds*⁷ was the first case to impose reasonableness as the standard for determining the validity of covenants not to compete and to place upon the draftsman of the covenant the burden of showing that the restraint was reasonable.⁸ However, *Mitchel* did not completely abandon the older mechanical tests and stated that a covenant containing a general restraint—i.e., one unlimited as to time and/or space, was void regardless of the circumstances.⁹

Even prior to *Mitchel*, the cases treated covenants protecting an employer from unfair competition by a former employee differently from those which attempt to protect the purchaser of a going business.¹⁰ One issue debated today is whether there really is a valid distinction justifying separate treatment.¹¹ It appears that the "snow-balling weight of authority" does recognize a difference,¹² and as a result courts are prone to look with less indulgence on covenants ancillary to a contract of employment than on those accompanying the sale of a business.¹³ This judicial discrimination takes one of two forms. First, a court may require more justification for the former type of covenant before finding it to be reasonable. Alternatively, the court may declare the restraint to be reasonable, but require greater proof of irreparable harm before granting an injunction. Missouri courts have used both methods to show what appears to be a greater dislike for covenants ancillary to employment contracts.¹⁴ However, in *Haysler v. Butterfield*¹⁵ a Missouri appellate court seemed to favor abandonment of the distinction, stating: "[T]he ultimate question should be the same in both cases—what is necessary for the protection of the promisee's rights and is not injurious to the public."¹⁶

6. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960).

7. 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711).

8. *Id.* at 349. The covenantee was forced to assume the burden to prevent what the court termed the "mischief" caused by such restraints, namely, possible loss of the employee's means of earning a livelihood, loss to society of the services of a useful member, and possible monopolization.

9. 1 P. Wms. 181, 182, 24 Eng. Rep. 347, 348 (Q.B. 1711).

10. See Blake, *supra* note 6, at 630-32. But see Long v. Towl, 42 Mo. 545 (1868), and *Mitchel v. Branham*, 104 Mo. App. 480, 79 S.W. 739 (St. L. Ct. App. 1904), in which general restraints were stated to be *ipso facto* void.

11. Blake, *supra* note 6, at 637-38.

12. *Arthur Murray Dance Studios v. Witter*, 62 Abs. 17, 35, 105 N.E.2d 685, 703 (C.P. Ohio 1952).

13. *Samuel Stores, Inc. v. Abrams*, 94 Conn. 248, 108 A. 541 (1919).

14. In *Renwood Food Products, Inc. v. Schaefer*, 249 Mo. App. 939, 223 S.W.2d 144 (St. L. Ct. App. 1949), the court stated that a covenant would not be enforced merely because of competition by the former employee, but also required a knowledge of trade secrets or an influence over customers of the employer. In *Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App. 432 (St. L. Ct. App. 1897), it was held that a court of equity would not enjoin a breach of a contract for personal services unless the services rendered were unique, individual, and peculiar.

15. 240 Mo. App. 733, 218 S.W.2d 129 (K.C. Ct. App. 1949).

16. *Id.* at 130, quoting from 14 S. WILLISTON, THE LAW OF CONTRACTS § 1643 (3d ed. 1972). See, e.g., *State ex rel. Schoenbacher v. Kelly*, 408 S.W.2d 383 (St. L. Mo. App. 1966).

The essence of the distinction between covenants in employment contracts and those accompanying the sale of a business is the effect of the restraint on the covenantor.¹⁷ In the former there is seldom equal bargaining power between the employee and the employer. As a practical matter, the prospective employee is forced to sign what is placed before him and receives no extra compensation for executing his covenant not to compete. In many cases employees have been required to sign such agreements as a condition of their continued employment.¹⁸ Because the employee is in no position adequately to protect his future, the courts have done so by requiring the employer to assure the court that enforcement of the covenant will not result in an undue hardship on the employee. Such concern is not as necessary for the seller of a business. He is in a much better position to bargain than an employee and often a significant portion of the price he receives is attributable to his agreement not to compete. Thus a distinction does exist between the two types of covenants which may justify different treatment in certain circumstances.

III. REASONABLENESS AS A STANDARD

As a result of the decision in *Mitchel v. Reynolds*,¹⁹ the "rule of reason" was forever imprinted upon covenants not to compete. Reasonableness, like beauty, is in the eye of the beholder. Courts have given the term various definitions. In *Presbury v. Fisher*²⁰ the Missouri Supreme Court was first asked to decide whether a covenant against competition was void as an unreasonable restraint of trade. The court cited only *Mitchel* and upheld the covenant, stating:

The liberality of our laws, in suffering everyman to engage in any trade or occupation he may think best, without any previous apprenticeship, has blunted our perception of the utility of the principle which avoids contracts made in restraint of trade.²¹

In taking this *laissez-faire* attitude,²² the court seemed to approve the use of broad covenants not to compete. This is evidenced by the fact that another case on the subject was not brought before the court for fifteen years. In *Long v. Towl*²³ the Missouri Supreme Court gave its first interpretation of the rule of reason, indicating a partial retreat from its position in *Presbury*:

17. See pt. V of this comment, *infra*.

18. See, e.g., *R. E. Harrington, Inc. v. Frick*, 428 S.W.2d 945 (St. L. Mo. App. 1968); *City Ice and Fuel Co. v. Snell*, 57 S.W.2d 440 (St. L. Mo. App. 1933).

19. 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711).

20. 18 Mo. 50 (1853).

21. *Id.* at 51-52.

22. The court in *Presbury* went on to state:

If there is an opening for any trade or business, how little is the community affected by the agreement of one that another should not engage in it, when it is free for all others.

Id. at 52.

23. 42 Mo. 545 (1868).

The prohibition should not extend any further than will fully protect the party for whose benefit the contract is made in his occupation or business. If the prohibition extends beyond this, it is an unreasonable restraint of trade, and will render the contract void.²⁴

The early Missouri cases which followed, although attempting to apply the rule of reason, established rather mechanical tests. One of these tests was the general restraint-partial restraint distinction. It was assumed that a restraint limited as to time and place was reasonable and valid and one that was not so limited was void.²⁵ Although some Missouri courts quickly questioned the validity of this absolute rule,²⁶ many found it a convenient method to reach what was often a reasonable result.

In 1932 the *Restatement of Contracts*²⁷ attempted to define the types of contracts that were reasonable and those that were not. The draftsmen explicitly rejected the general restraint-partial restraint test²⁸ and let the reasonableness of the particular restraint turn on the facts of each case.

The difficulty inherent in all attempts to define reasonableness stems from the concept itself. Reasonableness is not a rule that can be applied mechanically, but is instead a judicial balancing of conflicting interests.²⁹ Although Missouri courts seem reluctant to abandon certain of the objective tests,³⁰ a better approach would be to weigh the interests of the covenantor, the covenantee, and the public, and to determine in light of this evaluation whether the restraint in question is reasonable. The next three parts of this comment examine these interests and attempt to explain their significance.

IV. REASONABLENESS AS TO THE COVENANTEE

The first interest to be considered in determining reasonableness is the interest of the draftsman of the restraint. The buyer of an established business generally acquires the goodwill³¹ associated with it. This goodwill is often due in large part to the efforts expended and relationships created by the individual selling the business. As such, it is susceptible to destruction should the seller enter into competition with the buyer. Similarly, the established business is continually striving to increase its goodwill, largely through the efforts of employees hired to service old customers

24. *Id.* at 549.

25. *Id.* See also *Mitchel v. Branham*, 104 Mo. App. 486, 79 S.W. 739 (St. L. Ct. App. 1904); *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 6 (St. L. Mo. App. 1899).

26. *Peltz v. Eichele*, 62 Mo. 171 (1876) (indefinite place); *Gill v. Ferris*, 82 Mo. 156 (1884) (indefinite time).

27. *RESTATEMENT OF CONTRACTS* §§ 514-516 (1932).

28. *Id.* at § 515, comment c.

29. See *Arthur Murray Dance Studios v. Witter*, 62 Abs. 17, 105 N.E.2d 685, (C.P. Ohio 1952).

30. See, e.g., *American Pamcor, Inc. v. Klote*, 438 S.W.2d 287 (St. L. Mo. App. 1969).

31. See *Whittle v. Davie*, 116 Va. 575, 82 S.E. 724 (1914), for a definition of goodwill.

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and secure new ones.³² Thus competition by a former employee can also deprive the employer of his investment in goodwill. Because of the delicate nature of goodwill, the owner of a business is allowed to contract to protect it much the same as he would contract to insure his plant and equipment.³³ However, just as one seeking insurance must have an "insurable interest"³⁴ in an asset, one seeking to protect goodwill may not contract for protection beyond its limits.³⁵ Because the threat of unfair competition³⁶ is usually limited to a given area for a given period, the factors of time and space are important.

A. *Spatial Limitations*

As a general rule, a spatial limitation may not exceed the area in which the covenantee has a business interest. Most modern businesses compete within a relatively small area, usually limited to the boundaries of a particular city. It is conceivable that as cities grow ever larger, a covenant restricting competition within a city may be beyond the needs of the covenantee;³⁷ however, in the past Missouri courts have regarded such restrictions favorably.³⁸ As businesses grew to encompass larger areas, the territorial extent of a "reasonable covenant" likewise grew. Many covenants have been drawn to prohibit competition within the city limits plus a radius of X miles from the city³⁹ to protect against suburban competition. Such restraints are also considered reasonable if the draftsman can show that his protectable interest extends to the additional area.⁴⁰

Companies operating in rural areas and those doing business in large metropolitan districts often find it impractical to use municipal

32. Trade secrets are similar to goodwill in that they are essential to achieving and maintaining a firm's competitive advantage over its rivals.

33. *House of Tools & Engineering v. Price*, 504 S.W.2d 157 (Mo. App., D. St. L. 1973); *Prentice v. Rowe*, 324 S.W.2d 457 (Spr. Mo. App. 1959).

34. *Alexander v. Griffith Brokerage Co.*, 228 Mo. App. 773, 73 S.W.2d 418 (K.C. Ct. App. 1934).

35. "It must appear that such a contract imposes no restraint upon one party that is not beneficial to the other." *Long v. Towl*, 42 Mo. 545, 549 (1868).

36. *Renwood Food Products, Inc. v. Schaefer*, 240 Mo. App. 939, 223 S.W.2d 144 (St. L. Ct. App. 1949), held that a covenant would not be enforced merely because of competition by a former employee, but required a showing of factors making such competition unfair.

37. For example, the buyer of a grocery store on the south end of Kansas City would have trouble showing the danger of the seller opening a store in North Kansas City.

38. *Gill v. Ferris*, 82 Mo. 156 (1884) (Mexico, Missouri); *Peltz v. Eichele*, 62 Mo. 171 (1876) (St. Louis, Missouri); *Mitchel v. Branham*, 104 Mo. App. 480, 79 S.W. 739 (St. L. Ct. App. 1904) (Portageville, Missouri).

39. *Thompson v. Allain*, 377 S.W.2d 465 (K.C. Mo. App. 1964); *Hessel v. Hill*, 38 S.W.2d 490 (K.C. Mo. App. 1931).

40. In *Thompson v. Allain*, 377 S.W.2d 465 (K.C. Mo. App. 1964), the restrictive covenant excluded an ophthalmologist from practicing his profession within 50 miles of St. Joseph, Missouri. The defendant opened an office in North Kansas City, a distance of about forty miles. The court said that miles meant air miles and found the restraint reasonable after finding that defendant had treated 99 of his former patients from plaintiff's clinic in the thirty days before the injunction was granted.

boundaries as spatial restraints.⁴¹ The convenient alternative is to restrict competition in a given county or counties.⁴² Missouri courts have allowed the use of county boundaries if the draftsman can show that his business extends into any portion of the county.⁴³ It appears likely that in some cases the goodwill of a business may extend to a minor portion of a neighboring county. To restrict competition in the total area of that county would be of no benefit to that business and thus seems unreasonable. However, because the Missouri courts have upheld such restrictions in the past,⁴⁴ this alternative may offer the greatest amount of territorial protection for the smaller business.

Because the reasonableness of a spatial restraint is a function of the interests of the business sought to be protected,⁴⁵ a relatively large business is entitled to a relatively large territorial restraint. In addition to the size of a business, specialization may be considered in determining the extent to which a business requires protection.⁴⁶ In *Harrington, Inc. v. Frick*⁴⁷ an unemployment compensation consulting firm required its employees to sign a covenant restricting post-employment competition within any state in which it was engaged in business at the time of the termination of employment. The trial court enjoined two former employees from engaging in any similar business in Ohio, Missouri, and Texas. The employees appealed, claiming that the restrictive covenant was geographically broader than was necessary to protect the employer's legitimate interests. The appellate court held the restrictive covenant "fair to all concerned," considering that the plaintiff, a specialized corporation with a limited clientele, had over 1,900 customers in the three-state area.⁴⁸

Harrington is consistent with the general rule that a large territorial restraint will be upheld if it can be shown that the draftsman's vulnerable interests are coextensive with the forbidden area. Applying this rule, courts have found a worldwide restraint to be reasonable,⁴⁹ and have upheld restrictive covenants covering the entire United States.⁵⁰ However,

41. For example, the metropolitan area of St. Louis contains over 100 municipalities in Missouri alone.

42. See *Haysler v. Butterfield*, 240 Mo. App. 733, 218 S.W.2d 129 (K.C. Ct. App. 1944) (county boundaries used to prohibit competition within a metropolitan area); *Gordon v. Mansfield*, 84 Mo. App. 367 (K.C. Mo. App. 1900) (use of a county restriction in a rural setting).

43. *Athletic Tea Co. v. Cole*, 16 S.W.2d 735 (St. L. Mo. App. 1929).

44. See cases cited note 42 *supra*.

45. See text accompanying note 35 *supra*.

46. *House of Tools & Engineering v. Price*, 504 S.W.2d 157 (Mo. App., D. St. L. 1973).

47. 428 S.W.2d 945 (St. L. Mo. App. 1968).

48. *Id.* at 950.

49. See *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535, *aff'g* [1893] 1 Ch. 630 (C.A. 1892), in which the court held that a covenant ancillary to the sale of a world-wide munitions firm which precluded the seller from competing in a similar business anywhere in the world was reasonable under the circumstances.

50. See, e.g., *Goodrich v. Wohlgemuth*, 117 Ohio App. 493, 192 N.E.2d 99 (1963).

at least one Missouri case⁵¹ indicates that by seeking to overprotect his interests the greedy draftsman may lose his protection entirely.

One method of limiting a post-employment restraint so as to be reasonable without having to establish a territorial restraint is to draft a covenant restricting former employees from soliciting clients of their former employer.⁵² Such a restraint appears to be treated as reasonable *per se*, because the goodwill of an employer clearly extends to his current stock of customers,⁵³ and the employee is not forbidden from opening a competing business, even "at plaintiff's doorstep."⁵⁴

Notwithstanding the well-settled case law requiring a spatial limitation to make a covenant reasonable, covenants are often still drafted without such a limit.⁵⁵ Such an omission will result in the invalidation of the covenant.⁵⁶ It is also important to define clearly the extent of the territorial restraint. If an ambiguity exists, the court will construe it against the draftsman and invalidate what may be the most important part of the restraint.⁵⁷ The careful draftsman will make sure that his covenant contains a clear and unequivocal spatial limit. He must also be sure that he is able to show the necessity of the restraint.

B. Time Limitations

The general rules that apply to spatial limitations also apply to time limitations in covenants not to compete. The time restraint may not exceed that period during which the covenantee's goodwill is subject to appropriation by the covenantor.⁵⁸ The reasonableness of a time limitation depends upon the length of this "vulnerable period." The distinction between time and space limits lies in the difficulty of ascertaining objectively the period during which a former employee or owner retains substantial influence over his former customers. As a result, courts seem to be more lenient when considering a time restraint.

51. *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 6 (St. L. Ct. App. 1899), *aff'd*, 169 Mo. 388 (1902).

52. *See Mills v. Murray*, 472 S.W.2d 6 (K.C. Mo. App. 1971):

It is universally recognized that an employer has a proprietary right in his stock of customers and their good will and, if otherwise reasonable, the courts will protect this asset against appropriation by an employee by the enforcement of such a restrictive covenant not to compete.

Id. at 12.

53. *See Mills v. Murray*, 472 S.W.2d 6 (K.C. Mo. App. 1971).

54. *Id.* at 12.

55. *Prentice v. Rowe*, 324 S.W.2d 457 (Spr. Mo. App. 1959).

56. [W]e cannot find that the restraint imposed by the first restrictive covenant, wholly unlimited as to area, was reasonable and no greater than fairly required for the protection of [the covenantees] who here seek its shelter.

Id. at 461.

57. *See Athletic Tea Co. v. Cole*, 16 S.W.2d 735 (St. L. Mo. App. 1929), in which the court refused to enforce a covenant restricting competition from "Imperial, Mo. and surrounding territory" and limited it to the city of Imperial only.

58. *See* note 35 and accompanying text *supra*.

Missouri courts, although allegedly following a general rule,⁵⁹ distinguish between covenants not to compete ancillary to the sale of a business and those ancillary to an employment contract. When dealing with the former, courts are likely to enforce vague, open-ended covenants,⁶⁰ and may even imply a time limit where none exists.⁶¹ On the other hand, the latter must have a definite and reasonable duration.⁶²

The same result would usually be reached by following the general rule that the scope of a covenant may not exceed the covenantee's business interest.⁶³ Several cases indicate that it is not unlikely that an individual who had sold an existing business or professional practice could return many years later and establish a competing business, based heavily on residual goodwill.⁶⁴ The restraint needed in post-employment situations is usually more limited, because the goodwill retained by an ex-employee is usually more intangible.⁶⁵

Several recent cases involving employee covenants have found a three year time limitation reasonable.⁶⁶ Because the three year period is evidently "safe," there is no apparent need to resort to a shorter period.⁶⁷ However, a wise employer-covenantee should be prepared to substantiate his need for any post-employment covenant with a term exceeding three years.

V. REASONABLENESS AS TO THE COVENANTOR

The *Restatement of Contracts* states that a covenant in restraint of trade is unreasonable if it "imposes undue hardship upon the person re-

59. The general doctrine is that agreements in restriction of trade will be upheld when the restriction does not go beyond some particular locality, is founded on a sufficient consideration, and is limited as to time, place and person.

Mallinckrodt Chemical Works v. Nemnich, 83 Mo. App. 6, 14 (St. L. Ct. App. 1899).

60. *Gill v. Ferris*, 82 Mo. 156 (1884).

61. *Gordon v. Mansfield*, 84 Mo. App. 367 (K.C. Ct. App. 1900).

62. *Reddi-Wip, Inc. v. Lemay Value Co.*, 354 S.W.2d 913 (St. L. Mo. App. 1962); *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 6 (St. L. Ct. App. 1899).

63. *Long v. Towl*, 42 Mo. 545 (1868). See text accompanying note 23 *supra*.

64. *Gill v. Ferris*, 82 Mo. 156 (1884); *Gordon v. Mansfield*, 84 Mo. App. 367 (K.C. Ct. App. 1900) (doctor returned seven years after selling his practice only to be enjoined by an indignant court).

65. *Thau-Nolde, Inc. v. Krause Dental Supply and Gold Co., Inc.*, 518 S.W.2d 5 (Mo. 1974), is a sad example where even a one-year covenant might have protected a plaintiff who lost most of its employees and customers to a business established by a former employee.

66. *House of Tools & Engineering v. Price*, 504 S.W.2d 157 (Mo. App., D. St. L. 1973); *Mills v. Murray*, 472 S.W.2d 6 (K.C. Mo. App. 1971); *Harrington, Inc. v. Frick*, 428 S.W.2d 945 (St. L. Mo. App. 1968); *Thompson v. Allain*, 377 S.W.2d 465 (K.C. Mo. App. 1964).

67. This is especially true because Missouri courts have held, in both sale and employment situations, that a court of equity has the power to limit an injunction "to such duration as is necessary to give an employer fair protection of his interest." *State ex rel. Schoenbacher v. Kelly*, 408 S.W.2d 383, 393 (St. L. Mo. App. 1966).

stricted."⁶⁸ Missouri courts have recognized the existence of such a factor,⁶⁹ but have rarely used it to invalidate restrictive covenants. This reluctance may result from a judicial recognition of the mobility of the American people and the assumed availability of comparable employment in another field.⁷⁰ In *Haysler v. Butterfield*⁷¹ the court applied this reasoning to the facts before it and stated:

In enforcing the contract no particular hardship will be worked as to the defendants, for they can be employed in any business except that of employment agency and, in that business, anywhere except within the area generally known as "Greater Kansas City."⁷²

Applying such a rationale, it would be hard to envision a situation in which "undue hardship" existed. However, in *Willman v. Beheler*⁷³ the Missouri Supreme Court, although finding a restrictive covenant reasonable and awarding monetary damages for its breach, denied an injunction, arguably because of "undue hardship." *Willman* involved a medical partnership agreement whereby the junior partner agreed not to practice medicine in St. Joseph for five years after leaving the partnership. Upon being dismissed, the junior partner continued to practice in St. Joseph for almost five years. The court stated that it would be inequitable to enforce the contract because during the existence of the partnership defendant had become an "established and recognized medical practitioner and surgeon."⁷⁴ It appears that the court believed that the hardship imposed outweighed the covenantee's need for protection. The same reasoning seems applicable to many potential covenantors who have become expert in a specialized field and would have difficulty finding other employment.

VI. REASONABLENESS AS TO THE PUBLIC

The interests of the public weigh both in favor of and against the validity of covenants not to compete. Freedom to contract in this area is essential in our economy, because without its assurance a prospective buyer might be driven from the "going-business" market and a prospective employer from the labor market. On the other hand, the public policy against attempts to restrain competition has been clearly shown by the great amount of legislation in this area.⁷⁵

68. RESTATEMENT OF CONTRACTS § 515 (b) (1932).

69. *Prentice v. Rowe*, 324 S.W.2d 457 (Spr. Mo. App. 1959).

70. *Renwood Food Products, Inc. v. Schaefer*, 240 Mo. App. 939, 223 S.W.2d 144, 151 (St. L. Ct. App. 1949).

71. 240 Mo. App. 733, 218 S.W.2d 129 (K.C. Ct. App. 1949).

72. *Id.* at 739, 218 S.W.2d at 131.

73. 499 S.W.2d 770 (Mo. 1973).

74. *Id.* at 778.

75. *E.g.*, Sherman Anti-trust Act, 15 U.S.C. § 1 (1970); § 416.040, RSMo 1969. See also AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-108 (1974), which states:

A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a

The result of the balancing of these conflicting policies is that a restraint on competition will be tolerated only if it is necessary to protect a legitimate business interest. Further public interests can enter into this process, however, resulting in an otherwise reasonable covenant becoming unreasonable and unenforceable. For instance, it has been stated that if a contract tends to create a monopoly or deprive the public of an unusual talent or productive ability, it will not be upheld.⁷⁶ Nevertheless, Missouri courts have been reluctant to use such policy arguments to strike down covenants not to compete. *Presbury v. Fisher*⁷⁷ indicates the weakness of such an argument in Missouri:

[T]here is no practical man who would not smile at the concept that the public welfare would sustain an injury by enforcing an obligation like that involved in the present case.⁷⁸

It is worthy of note that *Presbury* involved a covenant executed by the seller of a counterfeit detector. Such an enterprise, due to its specialization, seems particularly susceptible to monopolization. Later cases citing *Presbury* also involved areas where the possibility of monopolization, or at least public injury, was present.⁷⁹

In a relatively recent case⁸⁰ the breaching party to a covenant not to compete argued that such covenants violate section 416.040, RSMo 1969, which declares that all contracts that tend to restrain trade are against public policy and void. Although several states have statutes declaring void certain types of covenants not to compete, the Missouri statute has been interpreted only to prevent such things as price-fixing and unlawful combinations, many of which also are forbidden by the Sherman Act.⁸¹ Thus, in the absence of expanded legislation, the task of protecting the

lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

Although not expressly stated, the *Code of Professional Responsibility* also appears to prohibit the use of covenants not to compete ancillary to the sale of a law business. Cf. Ethical Consideration 4-6, which states that a lawyer should not attempt to sell a law practice as a going business, and Disciplinary Rule 3-102, which prohibits dividing legal fees with a non-lawyer (which, in effect, is what the seller/ covenantor would become). Cf. also American Bar Association Comm. on Professional Ethics, *Formal Opinion No. 266* (1945) ("The goodwill of the practice of a lawyer is not . . . an asset, which either he or his estate can sell.").

76. *Haysler v. Butterfield*, 218 S.W.2d 129 (K.C. Mo. App. 1944).

77. 18 Mo. 50 (1853).

78. *Id.* at 51.

79. See, e.g., *Gordon v. Mansfield*, 84 Mo. App. 367 (K.C. Ct. App. 1900), in which the court enjoined a physician who sold his practice from reentering practice in the county as long as the purchaser remained there. The judge made a comment that many rural residents would challenge today: "It is a social condition, of which we may take notice, that physicians are quite a numerous class of the population of the state. . . ." *Id.* at 377.

80. *State ex rel. Schoenbacher v. Kelly*, 408 S.W.2d 383 (St. L. Mo. App. 1966). But see *Reddi-Wip, Inc., v. Lemay*, 354 S.W.2d 913 (St. L. Mo. App. 1963), where the court indicated that the statute in question might apply to covenants not to compete.

81. *Gerecht v. American Insurance Co.*, 344 F. Supp. 1056 (W.D. Mo. 1971).

public from unreasonable covenants remains one for the Missouri courts, a task that in the past has perhaps been taken too lightly.

VII. REMEDIES FOR BREACH OF A COVENANT

If the draftsman of a covenant not to compete can convince the court that the covenant is reasonable based on the criteria described above, the court should grant a remedy if it is breached.⁸² However, the remedy the court chooses will often have as much bearing on the effectiveness of a given covenant as the language of the covenant itself. When a covenant is breached, the covenantee has two possible remedies. He can, as in any action on a contract, sue for the monetary damages arising from the breach. Although a court will often award money damages even though they only approximate the actual damages,⁸³ in many cases the intangible nature of goodwill prevents the ascertainment of present and future damages. As a result, the preferred remedy, and at times the only effective remedy, is to enjoin the covenantor from further breaches.

Missouri courts faced with the demand for injunctive relief have given varying amounts of consideration to the appropriateness of this type of equitable remedy. In *Mills v. Murray*⁸⁴ a Missouri appellate court held:

The injunctive remedy is peculiarly appropriate to prevent the violation of reasonable non-competition covenants, particularly where, as here, the full damage to be suffered by the breach could be estimated only uncertainly.⁸⁵

This liberal attitude toward injunctive relief was followed in *House of Tools v. Price*,⁸⁶ where the court reversed the lower court's denial of relief and issued a permanent injunction after finding only that the covenant was reasonable and that it had been breached. In *State ex rel. Schoenbacher v. Kelly*⁸⁷ the court discussed the affect of recent legislation on the equity jurisdiction of Missouri courts and concluded that a circuit judge had the power to issue and enforce an *ex parte* restraining order prohibiting violation of a covenant not to compete. In that case the court noted that equity has granted injunctions forbidding competitive em-

82. See *Willman v. Beheler*, 499 S.W.2d 770 (Mo. 1973): "Equity will not suffer a wrong to be without a remedy, and seeks to do justice and avoid injustice." *Id.* at 778.

83. In *Mills v. Murray*, 472 S.W.2d 6 (K.C. Mo. App. 1971), the court stated:

In such a case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.

Id. at 17.

84. 472 S.W.2d 6 (K.C. Mo. App. 1971).

85. *Id.* at 18.

86. 504 S.W.2d 157 (Mo. App., D. St. L. 1974).

87. 408 S.W.2d 383 (St. L. Mo. App. 1966).

ployment following the breach of an exclusive services contract even in the absence of a post-termination covenant.⁸⁸

The recent case of *Willman v. Beheler*⁸⁹ indicates that the remedy of injunction will not always be available to enforce a covenant not to compete. In that case, the covenant prohibited competition by an ex-partner for five years after the termination of the partnership. However, litigation to determine the validity of the covenant consumed four years, during which the ex-partner continued to practice medicine within the proscribed territory. The Missouri Supreme Court reversed the trial court's grant of a five-year injunction. The court stated that a court of equity is reluctant to grant a mere money judgment, but went on to hold:

The only feasible way in which Article XXII [the covenant not to compete] may be enforced in favor of the covenantee and at the same time protect the covenantor against an unjust penalty is to remand the cause for a hearing on the question of Willman's financial loss arising out of competition with Beheler.⁹⁰

Thus *Willman* stands as a warning to the injured covenantee to seek injunctive relief immediately by means of a restraining order or a temporary injunction, to avoid risking the loss of any equitable remedy. In order to claim the alternative relief, money damages, the court in *Willman* stated that the injured party must be prepared to show that his losses were sustained as a natural, direct, and immediate result of the covenantor's breach. In order to meet this difficult and conceivably impossible burden the prudent draftsman would do well to consider the inclusion of a liquidated damages clause. Such a clause was apparently approved in dictum in *State ex rel. Schoenbacher v. Kelly*.⁹¹ The result would be a covenant which provides the court with two viable alternatives on which to compensate adequately an injured covenantee.⁹²

88. The leading case on injunctive relief under these circumstances is *Lumley v. Wagner*, 1 De G., M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852). Many jurisdictions grant injunctions to restrain violation by an employee of expressed or implied negative covenants in personal service contracts if the employee is a person of "exceptional and unique knowledge, skill and ability in performing the service called for in the contract." *Dallas Cowboys Football Club, Inc. v. Harris*, 348 S.W.2d 37, 42 (Tex. Civ. App. 1961). On the other hand, under Roscoe Pound's "separate significance of the negative" theory, injunctive relief should be denied unless "breach of the negative involves a damage by itself apart from or over and above the breach of the affirmative." Pound, *Progress of the Law-Equity*, 33 HARV. L. REV. 420, 440 (1920).

89. 499 S.W.2d 770 (Mo. 1973).

90. *Id.* at 778-79.

91. 408 S.W.2d 383 (St. L. Mo. App. 1966). Possible damages may be substantial, as in *Thau-Nolde, Inc. v. Krause Dental Supply and Gold Co., Inc.*, 518 S.W.2d 5 (Mo. 1974), where plaintiff claimed damages of over \$117,000 as a result of competition by former employees.

92. Including a liquidated damages clause in a covenant not to compete has one potential danger. The breaching party could allege that the liquidated damages clause provides an adequate legal remedy and thus injunctive relief should be precluded. However, the general rule is that the mere existence of a liquidated damages clause does not preclude injunctive relief. *Rubenstein v. Rubenstein*, 23 <https://scholarship.law.missouri.edu/mlr/vol41/iss1/8>