

Covenants Not To Compete In Missouri and Other States

A UMKC Student Project

I. Introduction

This proposal addresses the practical and jurisprudential ramifications of Missouri's general enforcement of noncompete agreements between physicians. Missouri courts use an unacceptably old fashioned method of determining the reasonableness of noncompete agreements which tends to recognize and weigh more heavily the "interest of the public in protecting the freedom of persons to contract in enforcing contractual rights and obligations,"¹ rather than the patient's right and interest in maintaining a stable relationship with their doctor of choice. Noncompete agreements between physicians deserve closer scrutiny. The reasonableness of an agreement must be balanced with the strong public policy concerns which may be irrelevant when analyzing most commercial restrictive covenants.

II. Missouri - An Overview of Judicial Analysis of Restrictive Covenants

In Missouri, covenants not to compete are generally considered a restraint of trade and presumptively void, and are enforceable only to the extent that they are demonstrably reasonable.² A noncompete agreement is valid and enforceable if it satisfies the common law test of reason: the covenant must be reasonable as to the employer, employee, and public when viewed in light of facts and circumstances of the particular case under consideration. To be reasonable, the restraint must be qualified as to both time and space, and must be no greater than fairly required for protection for whose benefit it is imposed.³ Legitimate interests protected by covenants not to compete in Missouri include: customer contacts, trade secrets and customer lists, a stock of customers, and good will.⁴

Within the last five years, Missouri courts generally upheld covenants with a time limit of two years. The longest geographical restriction enforced within the last five years was an area with a

¹ Willman v. Beheler, 499 S.W.2d 770, 777 (Mo. 1973).

² See Continental Research Corp. v. Scholz, 595 S.W.2d 396 (Mo. App. 1980).

³ See Prentice v. Rowe, 324 S.W.2d 457, 461 (Mo. App. 1959).

⁴ See Herrington v. Hall, 624 S.W.2d 148, 151 (Mo. App. W.D. 1981); Grebing v. First Nat'l Bank of Cape Girardeau, Mo., 613 S.W.2d 872, 874 (Mo. App. E.D. 1981); National Starch and Chem. Corp. v. Newman, 577 S.W.2d 99, 104 (1978).

radius of 200 miles.⁵ To support a larger area restriction, it is likely that an employer would be required to make a strong showing of necessity, such as specifically defined sales territory. Where an area restriction has been tailored to a particular employment position or a category of employees, enforcement is more likely.⁶

As a general rule, Missouri courts do not treat physicians differently than other business professionals regarding the enforceability of covenants not to compete. This method of analysis is fundamentally unsound because as one Ohio court stated, "when an ailing person selects a physician to treat him, he does so with the full expectation that such physician will do his best to restore him to health, and the contract into which they enter is deserving of more attention from the law than a businessman's expectation of profit from a purely commercial transaction."⁷

III. An Alternative Approach: Introduction of a Public Policy Analysis

To date, eight states have invalidated noncompetition agreements between physicians either through direct legislation or judicial interpretation of state antitrust statutes.⁸ Missouri must follow this trend and adopt similar legislation which would statutorily require considering the impact of the involuntary termination of existing relationships between doctors and patients and the restriction of a patient's choice of physicians. As one court noted, "the doctor/patient relationship is an important and special relationship, vital to the provision of health care. It develops over time, by a doctor learning a patient's history and exercising professional judgment in not only evaluating a patient's complaints, but in developing a specific strategy for treating a patient's ailments. Consequently, an individual's choice of doctor is of great importance."⁹

⁵ See Douglas M. Weems, Covenants Not to Compete: Recent Missouri Decisions, 50 J. Mo. B. 169 (May/June, 1994).

⁶ Id.

⁷ See Hammonds v. Aetna Casualty & Surety Co., 237 F. Supp. 96, 101 (N.D. Ohio), motion for reconsideration overruled, 243 F. Supp. 793 (N.D. Ohio 1965). See also § 458.301, Fla.Stat. (1991) (where Legislature recognized importance of making informed choice when selecting a physician).

⁸ See Paula Berg, Judicial Enforcement of Covenants Not To Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense, 45 Rutgers L. Rev. 1 (Fall, 1992).

⁹ Humana Medical Plan, Inc. v. Jacobson, 614 So. 2d 520, 522 (Fla. Dist. Ct. App. 1992).

Colorado and Delaware are the only states that have enacted statutes specifically invalidating covenants not to compete between physicians.¹⁰ Legislative history suggests these statutes were supported by the public policy argument that restrictive covenants between physicians are not in the public interest.¹¹ The remaining six states pursued a different legal route but achieved the same goal. These states attacked noncompete agreements through their antitrust statutes.¹² However, all of the state antitrust statutes that prohibit contractual restraints upon the practice of a profession expressly permit such a restraint if it is ancillary to an agreement dissolving a partnership.¹³

IV. Liquidation Clauses

Courts are split as to the application of liquidation clauses contained in employment agreements ancillary to a covenant not to compete. In states which do not have a statutory provision governing covenants not to compete, courts recognize that compensation for competition (as well

¹⁰ See COLO. REV. STAT. ANN. § 8-2-113(3) (West 1982) (The statute was adopted because the state legislature believed that restrictive covenants between physicians adversely affected patient care and the delivery of health care services. This amendment to the original statute barring noncompetition covenants permits the recovery of monetary damages from a covenantor/doctor who causes the employment agreement to terminate by breaching the provision.); DEL. CODE ANN. tit. 6 § 2707 (1983) (the statute is similar to Colorado's in that it permits action to recover damages related to termination of the underlying agreement, including damages associated with competition.)

¹¹ See COLO. REP. HUME & COLO SEN. SOASH, MEMORANDUM RE HOUSE BILL 1174, COLO. HOUSE OF REP. (1982) (this memorandum stated that restrictive covenants between physicians are not in the public interest because they, inter alia, (1) are anti-competitive and inhibit free enterprise; (2) restrain trade and enable some medical organizations to engage in monopolistic practices, which increase the cost of medical care; (3) protect the business interests of the medical organization, while not protecting the health care needs of patients; (4) have a negative impact on patient care; and (5) sever the doctor-patient relationship.)

¹² See ALA. CODE § 8-1-1(a)(1975); CAL. BUS. & PROF. CODE § 16600 (West 1987); FLA. STAT. ANN. § 542.33(1) (West 1988); LA. REV. STAT. ANN. § 23:921(A) (West 1985); MONT. CODE ANN. § 28-2-703 (1992); N.D. CENT. CODE § 9-08-06 (1987) (the state antitrust statutes expressly prohibit contractual restraints upon the practice of a "profession," and they have been held to render invalid all noncompetition agreements ancillary to employment contracts between physicians.)

¹³ See ALA. CODE § 8-1-1(c) (1984); CAL. BUS. & PROF. CODE § 16602 (West 1987); FLA. STAT. ANN. § 542.33(3) (West 1988); LA. REV. STAT. ANN. § 23:921(D) (Supp. 1992); MONT. CODE ANN. § 28-2-705 (1992); N.D. CENT. CODE § 9-08-06(2) (1987).

as forfeiture for competition) clauses constitute restrictions on an individual's right to work, but enforce them if reasonable.¹⁴ Some courts recognize that liquidated damages clauses can seriously impair a patient's choice of a physician, by discouraging doctors from continuing existing doctor/patient relationships. However, these courts also recognize that an HMO, like any business, may contract with others in such a way as to protect its financial interests.¹⁵ However, "patients are not the property or chattel of an HMO."¹⁶ Public policy is violated when the business relationship an HMO has with its affiliated doctors interferes with something as fundamental as the doctor/patient relationship, especially when the doctor is no longer affiliated with the HMO. A majority of cases from other jurisdictions support the conclusion that a compensation for competition (or a forfeiture for competition) clause is, in effect, a restriction on a physician's ability to practice in a particular geographic area.¹⁷ A statute should favor "[t]he strong public interest in allowing [patients] to [consult the physician] of their choice,"¹⁸ over any benefit to the medical profession or individuals of permitting noncompetition covenants.

V. Shortage of Health Care Providers & Impact of Training and Subspecialties on a Court's Decision

Many courts recognize that restrictive covenants between physicians may harm the public if enforcement will lead to a shortage of health care providers within the covenant areas.¹⁹

¹⁴ See Owens v. Penn Mut. Life Ins. Co., 851 F.2d 1053, 1054-1055 (8th Cir. 1988) (applying Arkansas law); Dental East, P.C. v. Westercamp, 423 N.W.2d 553, 555 (Iowa Ct. App. 1988); Food Fair Stores, Inc. v. Greeley, 264 Md. 105, 114-117, 285 A.2d 632 (1972). See also Club Properties, Inc. v. Atlanta Offices-Perimeter, Inc., 180 Ga.App. 352, 353-355, 348 S.E.2d 919 (1986) (liquidated damages clause restricting lessee's ability to hire lessor's employees amounted to covenant not to compete, enforceable only if reasonable).

¹⁵ See Humana, 614 So. 2d 520 (1992).

¹⁶ Id. at 522.

¹⁷ See, e.g., McCray v. Cole, 259 La. 646, 654-656, 251 So. 2d 161 (1971) (the Supreme Court of Louisiana concluded that a liquidated damages clause, enforceable if the defendant practiced as a psychologist within two years of leaving the plaintiffs' employment in the parish where his former employers were located, violated Louisiana's statutory prohibition against noncompetition agreements.)

¹⁸ Meehan v. Shaughnessy, 404 Mass. 419, 431, 535 N.E.2d 1255 (1989).

¹⁹ See, e.g., Odess v. Taylor, 211 So. 2d 805 (Ala. 1968); Fumo v. Medical Group of Michigan City, Inc., 590 N.E.2d 1103 (Ind. Ct. App. 1992); Karlin v. Weinberg, 390 A.2d 1161 (N.J. 1978); Gelder Medical Group v. Webber, 394 N.Y.S.2d 867 (1977); Nalle Clinic Co. v.

Furthermore, most courts will uphold a noncompete covenant if the employer has provided training in certain specialties/subspecialties. However, a number of courts have denied enforcement of a restrictive covenant if the employer/physician did not pay for additional employee training but instead merely provided the new physician/employee with the opportunity to gain experience.²⁰

VI. Inconsistency With Treatment of Restrictive Covenants Between Attorneys

Courts are generally unwilling to hold noncompete agreements between physicians contrary to public policy and hence unenforceable. Yet, courts consistently invalidate noncompetition agreements between attorneys "on the grounds that they inappropriately intrude upon the lawyer-client relationship and restrict the public's right to choose an attorney."²¹ The judicial inconsistencies may be the result of the actions taken by the American Bar Association to prevent the application of noncompete agreements to the legal profession.

In 1969, the American Bar Association adopted a code of professional conduct, which included a specific disciplinary rule addressing restrictive covenants between attorneys.²² The first case to address the issue between attorneys stated:

Commercial standards may not be used to evaluate the reasonableness of lawyer restrictive covenants. Strong public policy considerations preclude their applicability. In that sense lawyer restrictions are injurious to the public interest. A client is always entitled to be represented by counsel of his choosing...The attorney-client relationship is consensual, highly fiduciary on the

Parker, 399 S.E.2d 363 (N.C. Ct. App. 1991); Statesville Medical Group v. Dickey, 418 S.E.2d 256 (N.C. Ct. App. 1992); New Castle Orthopedic Assoc. v. Burns, 392 A.2d 1383 (Pa. 1978).

²⁰ See Berg, *supra* note 8 at 20-21.

²¹ *Id.* at 36. See also, Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 410-11 (N.Y. 1989) (holding that law firm's partnership agreement, which conditioned payment of withdrawing partner's uncollected revenues on his refraining from competing with former firm, was void as against public policy); In re Silverberg, 427 N.Y.S. 2d 480, 480-81 (App. Div. 1980) (provision of partnership agreement, which amounted to covenant restricting practice of law, was void as against public policy); Gray v. Martin, 663 P.2d 1285, 1290-91 (Or. Ct. App. 1983) (provision of attorneys' partnership agreement, which penalized attorney for entering into competitive practice, was contrary to public policy and void). *But cf.*, Haight, Brown & Bonesteel v. Superior Court of Los Angeles County, 285 Cal. Rptr. 845 (Ct. App. 1991) (holding that California rule of professional conduct did not prohibit withdrawing partner from compensating former partner if he represented clients previously represented by the firm).

²² MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108 (1989).

part of counsel, and he may do nothing which restricts the right of the client to repose confidence in any counsel of his choice...The lawyer's function is to serve, but serve he must with fidelity, devotion and erudition in the highest tradition of his noble profession.²³

Missouri followed suit in adopting a similar provision regarding restrictions on the right of practice.²⁴

In contrast, the American Medical Association did not act swiftly, and as a result the Judicial Council lacks power to release anything other than nonbinding declarations regarding the effects of noncompete agreements on the medical profession.²⁵ However, the lack of judicial initiative in eradicating the discrepancies between the treatment of the two professions is perplexing. Many commentators suggest similar public policy concerns as those expressed by the ABA. As one journal noted:

[T]he foundation of the patient-physician relationship is the trust that physicians are dedicated first and foremost to serving the needs of their patients...physicians care for patients directly, are in the best position to now patients' interests, and can advocate within the health care system for patients' needs. Without the commitment that physicians place patients' interests first and act as agents for their patients alone, there is no assurance that the patient's health and well-being will be protected.²⁶

Furthermore, the same commentary noted that "legislation reasonably protecting patients' rights to be informed and to choose and protecting physicians' rights to remain professionals is also

²³ Dwyer v. Jung, 336 A.2d 498 (N.J. Super. Ct. Ch. Div.), aff'd, 348 A.2d 208 (N.J. Super Ct. App. Div. 1975) (the court relied on the Model Code in reaching its decision that sound public policy requires application of a per se rule to restrictive covenants between attorneys to uphold their duty to public service and clients' rights to freely choose an attorney.)

²⁴ See MISSOURI SUPREME COURT RULES OF PROFESSIONAL CONDUCT, RULE 5.6 (West 1995) (the comment supporting the rule states that an agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer).

²⁵ See AMA JUDICIAL COUNCIL, Op. 9.01 (1982) ("the AMA Judicial Council discourages any agreement between physicians that restricts the right of a physician to practice medicine for a specified period of time or in a specified area on termination of employment. In the absence of some unconscionable provision in an agreement of this nature, however, such agreements are not necessarily unethical even though they may be 'discouraged.'")

²⁶ Ethical Issues In Managed Care, JAMA, The Journal of the American Medical Association (January 25, 1995).

essential."²⁷ In practice, the public policy arguments supporting the two professions are relatively the same. Each is primarily concerned with protecting either a patient or client's right to choose the doctor or attorney of their choice. This notion is fundamental in a society of free trade. Therefore, legislation must be enacted to secure patients' rights in controlling the nature of their medical care.

²⁷ Id.

APPENDIX

I. Missouri Cases

Ballesteros v. Johnson, 812 S.W.2d 217 (Mo. App. E.D. 1991): Plaintiff-Appellant Ballesteros, a physician who had worked for a corporate cardiology practice, brought suit against the corporate practice and its shareholder (Johnson) seeking equitable accounting and injunctive relief barring enforcement of covenant not to compete. The trial court granted a permanent injunction in favor of Johnson and Ballesteros appealed.

Plaintiff argued that "the permanent injunction serves no legitimate business interest of defendant and violates public policy." Ballesteros, 812 S.W.2d at 222. However, the Court found that the covenant not to compete included in the physician's employment agreement was necessary to protect the defendant's legitimate business interest in his practice and did not violate public policy, so it was enforceable with a time limit of one year. The court reasoned that "prior to his association with Johnson, plaintiff had no patient or referral base. The covenant clearly was necessary to protect Johnson's legitimate business interest in his practice." Id. at 222-23.

Furthermore, plaintiff argued that enforcement of the covenant would violate public policy as contained in § 334.100 RSMo (Supp. 1989). The statute provides that any of the following may constitute unethical conduct:

(4)(b) Attempting, directly or indirectly, by way of intimidation, coercion or deception, to obtain or retain a patient or discourage the use of a second opinion or consultation;

(5) Any conduct or practice which is or might be harmful or dangerous to the mental or physical health of a patient or the public;...

The Court found that "the plaintiff cite[d] no legal authority for his proposition that this statute prohibits covenants not to compete between physicians but argues only that it is a statutory expression of public policy...a physician's voluntary agreement to not practice at specific hospitals or to refrain from soliciting particular classes of patients does not constitute the unethical medical conduct set forth in the statute for which a medical license may be denied or revoked." Id. at 223.

Long v. Huffman, 557 S.W.2d 911 (Mo. App. 1977): The appeal came from an injunction which restrained physician Huffman from "the practice of medicine within a radius of sixty miles of the City of Butler for five years...in accordance with the restrictive covenant provision of the contract." Id. at 913. Plaintiff did not dispute violating the covenant, but asserted "equity should not give aid to remedy the breach because the terms of the restriction contradict the public policy of this state." Id.

Huffman argued that the restrictive covenant "contradicts the public policy of [Missouri] against restraint of trade and, because of the need for medical practitioners, causes serious public inconvenience." Id. at 914. The court declared that "as a matter of evidence, the covenant was

proven to impose a restriction no greater than reasonably necessary to protect Long, and as a matter of law was otherwise reasonable." *Id.* at 915.

Furthermore, the court argued based on precedent that the "established public policy of the state [does not] inhibit enforcement of an otherwise valid noncompetition employment contract between medical practitioners. That contention was expressly rejected in *Willman v. Beheler*, 499 S.W.2d 770 (Mo. 1973)." 557 S.W.2d at 915. As a result, the court ruled that the "rationale of *Willman* controls." *Id.*

Willman v. Beheler, 499 S.W.2d 770 (Mo. 1973): The Supreme Court held that a restrictive covenant proscribing the practice of medicine by a partner for five years from the date of his leaving the partnership, within a radius of twenty miles from the corporate limits of city, did not impose an unreasonable restraint.

Generally, covenants not to compete are enforceable against physicians and are not against public policy even though they may deprive a particular community of a particular physician's services. *Beheler* argued that there is "a social need...for the services of a skilled surgeon and that in determining whether to enforce this restrictive covenant the Court should weigh the benefit to the people of this section of the State which will result from a refusal to enforce the covenant, compared with the benefit to *Willman* by enforcing it." *Id.* at 777. However, the Court reasoned that the interests of a community elsewhere are as important as they are in the restricted area. The Court declared that the "public policy argument is weak for the reason that at this point in time most communities are short of professional medical practitioners, whose services ordinarily are as valuable and needed in one community of the State as in another." *Id.*

The Court found that "[t]here is a counterbalancing public policy which recognizes the interest of the public in protecting the freedom of persons to contract and in enforcing contractual rights and obligations." See *Lovelace Clinic v. Murphy*, 76 N.M. 645, 417 P.2d 450 (1966). The court pronounced that "courts are concerned with requiring those, who solemnly assume contractual obligations, to observe and fulfill them." *Willman*, 499 S.W.2d at 777 (citing *Prentice v. Rowe*, 324 S.W.2d 457, 466 (Mo. App. 1959)).

Thompson v. Allain, 377 S.W.2d 465 (Mo. 1964): Suit by physicians and surgeons to enjoin a violation by a former partner of a restrictive covenant contained in a partnership agreement for the operation of a clinic. There was significant conflict regarding the area to be enforced under the covenant. Since the date the covenant was signed, the corporate limits of St. Joseph were extended. As a result, the court held that the term "radius of fifty miles" as used in the restrictive covenant meant air miles and not road miles.

Furthermore, the court ruled that "contracts of this character, between physicians and surgeons, will ordinarily be enforced in equity on the grounds that, for breach of such covenant, there is no remedy at law, and that the object of the contract can be attained only by parties conforming expressly and exactly to its terms." *Id.* at 467; see also 28 Am.Jur. Injunctions, page 626, par. 127.

Baxter International, Inc. v. Morris, 976 F.2d 1189 (8th Cir. 1992): Baxter sued to enjoin Morris, a former managerial employee, from disclosing trade secrets and from working for a competitor in alleged violation of a noncompete agreement. The District Court entered an order enjoining Morris from disclosing trade secrets, but ruled that the noncompete agreement was overbroad, unreasonably burdensome, and unnecessary for Baxter's protection. Baxter appealed.

As a general rule, "Missouri courts will grant equitable protection for an employer's interest in trade secrets." *A.B. Chance Co. v. Schmidt*, 719 S.W.2d 854, 857 (Mo. Ct. App. 1986). Furthermore, under Missouri law, the restraint imposed on a former employee to protect trade secrets must not be greater than required for the protection of the former employer. See *Mo-Kan Cent. Recovery Co. v. Hedenkamp*, 671 S.W.2d 396, 399 (Mo. Ct. App. 1984).

The Court of Appeals held that "Missouri courts generally give effect to the parties' choice of law." *Baxter*, 976 F.2d at 1195. Therefore, application of Illinois law to govern validity of the noncompete agreement was valid. In Illinois, restrictive covenants in employment agreements are enforceable only if reasonably necessary to protect a legitimate business interest of the employer. See *Arpac Corp. v. Murrery*, 589 N.E.2d 640, 649 (Ill. App. 1992). A restrictive covenant's reasonableness is "measured by its impact on the parties, including its hardship on the employee." *Id.*

The Court stated the "employment agreement indicates that protection of trade secrets is the goal of the noncompete agreement...[and] that even if [Microscan] paid Morris's salary for the years he would be forbidden to work by the covenant, Morris would suffer undue hardship." *Baxter*, 976 F.2d at 1197. Accordingly, the Court held that the "one-year noncompete covenant contained in Morris's employment agreement with Baxter is overbroad, unreasonably burdensome, and unnecessary for Baxter's protection." *Id.* The Court held the "noncompete covenant unenforceable as a matter of Illinois law." *Id.*

White v. Medical Review Consultants, 831 S.W.2d 662 (Mo. App. W.D. 1992): White, a lawyer, and his subsequent employer brought action against Medical Review Consultants for declaratory judgment that a covenant not to compete contained in an employment contract was invalid. The Circuit Court granted a partial summary judgment in favor of White and MRC appealed. The validity of the covenant not to compete in the employment contract with MRC "is called into question by virtue of the Missouri Supreme Court Rules in relation to Professional Conduct of Lawyers...[s]pecifically, Rule 5.6, which prohibits lawyers from making employment agreements that restrict the rights of a lawyer to practice after termination of employment." *Id.* at 664.

MRC argued that Rule 5.6 does not "apply to federal administrative appeals because such appeals are a federal activity regulated and controlled by federal law which preempts state law and does not prohibit the covenant not to compete." *Id.* However, the Court of Appeals found that "MRC cite[d] nothing to show the preemption of state law regarding the validity of a covenant not to compete in the practice of law upon termination of employment by a lawyer." *Id.* Moreover, the Court upheld the circuit courts decision in finding that "Missouri has the right to determine that it is in the public's best interest to allow individuals to choose the lawyer they desire without

interference from a covenant not to compete, limiting the lawyer's practice and also limiting the public's right to choose a given lawyer." *Id.* at 665.

Osage Glass, Inc., v. Donovan, 693 S.W.2d 71, (Mo. banc 1985): enforced a covenant with a time limit of **three years** - reasoned based on the general standard that covenants not to compete are enforceable if they serve a legitimate business interest and are reasonably limited in time and space.

Orchard Container Corp., v. Orchard, 601 S.W.2d 299 (Mo. App. E.D. 1980): Orchard Container Co. brought this action against Orchard, a former corporate president, for breach of a non-compete covenant. The non-compete agreement included a 200-mile restriction on competition for a three year period. The Circuit Court awarded a permanent injunction against defendant enforcing the non-compete agreement, as well as damages to the corporation. The president appealed.

According to the language of the agreement which was signed in 1971, the employment contract was to expire at the end of 1973. Furthermore, the non-compete agreement was created to protect the company during its "formative years." *Id.* at 301. In 1977, defendant was discharged and immediately thereafter defendant's wife formed a company which "operated in direct competition with plaintiff Corporation." *Id.* at 302. Defendant was initially affiliated with the new company as a "consultant." However, shortly after the creation of the new company, defendant's wife ceased daily activity and defendant assumed active control over the operations and held himself out to be president.

On appeal defendant argued that "the 200 mile restriction on competition [was] unreasonable and, hence, invalid, and that that use of the time restriction language 'formative years' in the covenant was fatally vague." *Id.* at 303. As a general rule, "non-compete agreements are considered to be in restraint of trade...are presumptively void and enforceable only to the extent that they are demonstrably reasonable." *Orchard*, 601 S.W.2d at 303; see also *Continental Research Corp. v. Scholz*, 595 S.W.2d 396 (Mo. App. 1980). Further, "an employer may only seek to protect 'certain narrowly defined and well recognized interests' against appropriation by former employees by means of such restriction, viz.: trade secrets and stock of customers." *Id.*

The Court of Appeals noted that "neither party has raised the issue of trade secrets, and consideration is limited to the issue of customer contacts." *Orchard*, 601 S.W.2d at 303. Furthermore, the "question of reasonableness of the geographical limits sought to be imposed depends upon whether the employer possessed a stock of customers located co-extensively with those geographical limits." *Id.* In reviewing the record, the Court determined that plaintiff had conducted business in the St. Louis Metropolitan area as well as solicited customers located up to 125 miles from St. Louis. As a result, the Court of Appeals modified the restriction to a 125-mile radius from St. Louis in the states of Missouri and Illinois.

The Court dismissed defendant's complaint with the words "formative years" as "without merit," because "by its express terms, the non-compete agreement [was] limited to three years duration

fromn the date of termination. The subsequent use of the words 'formative years,' while less luculent, is admonitory only." Id. at 304. As a result, the Court imposed the three year time limit.

National Starch and Chem. Corp. v. Newman, 577 S.W.2d 99 (Mo. App. E.D. 1978): action was brought for injunction and damages for breach of employment contract restriction against post-employment competition. The Circuit Court entered summary judgment for the former employee and former employer appealed. The Court of Appeals reversed and remanded.

The covenant not to compete required a two year restriction after employment termination barring the employee from soliciting customers of former employer either "for himself, or as a partner, agent or employee of any person, firm or corporation." Id. at 101. Following his termination of employment with plaintiff, defendant formed a limited partnership which "[sold] products in competition with National, and intend[ed] to continue to solicit and accept business and orders for competitive products from National's customers." Id. at 102. The trial court sustained defendant's motion for summary judgment on the grounds that "the agreement was so suppressive of postemployment competition and harsh as to be invalid under Missouri law." Id.

However, the Court of Appeals stated that "an employer such as National has a proprietary right in its stock of customers and their good will and such asset is protected against appropriation by an employee by enforcement of a reasonable covenant not to solicit or compete." Id. at 104; see also *Reed, Roberts Assoc., Inc. v. Bailenson*, 537 S.W.2d 238 (Mo. App. 1976). Further, the Court found that "the covenant in dispute [was] reasonable for the reason: 'The retrain of the restrictive covenant, limited as it is only as to time, is less stringent than many others imposing limitations of space as well...'" *National*, 577 S.W.2d at 105; 472 S.W.2d l.c. 9. Moreover, "[o]ne method of limiting 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." See Comment, 41 Mo. L. Rev. 37, 43 (1976). The Court used these rationales to determine that the covenant was reasonable and therefore reversed and remanded the action.

Reed, Roberts Associates, Inc., v. Bailenson, 537 S.W.2d 238 (Mo. App. 1976): action was brought by a nationwide business of rendering unemployment insurance advice and service to enforce a non-compete agreement executed by a former employee who became vice-president of the service department of plaintiff's competitor. The Circuit Court ordered an injunction against the defendant to enforce the non-competition agreement for three years. Defendant was enjoined from soliciting any of plaintiff's customers, making statements to divert business from plaintiff or engaging in consultation service in unemployment compensation matters within three states. Defendant appealed.

Defendant sought a reversal of the trial court's judgment arguing that the non-competition covenant was unreasonable "and therefore should not be enforced in a court of equity." Id. at 239. In order to be enforceable "a covenant restraining an employee must not only be legally valid but also reasonable as to the employer, the employee, and the public." Id. at 241; see also *Prentice v. Williams*, 324 S.W.2d 466, 469(3) (Mo. App. 1959). Further, the test applied is "whether the area in which the restriction is to be enforced is larger than reasonably necessary for the

protection of the covenantee." See *Renwood Food Products v. Schaefer*, 240 Mo. App. 939, 223 S.W.2d 144, 152(6) (1949). Application of the test requires a "thorough consideration of all surrounding circumstances, including the subject matter of the contract, the purpose to be served, the situation of the parties, the extent of restraint, and the specialization of the business." See *R.E. Harrington, Inc. v. Frick*, 428 S.W.2d 945, 950(3) (Mo.App. 1968).

In affirming the trial court's decision, the Court of Appeals reasoned that "defendant became acquainted with plaintiff's clients and had access to extensive information concerning their accounts. This client contact was valuable to plaintiff and potentially valuable to defendant's new employer." *Reed, Roberts*, 537 S.W.2d at 242. It is clear that the courts will enforce a covenant not to compete where "an employer has a proprietary right in his stock of customers and their goodwill" as long as the covenant is reasonable. See *Mills v. Murray*, 472 S.W.2d 6, 11(1,2) (Mo. App. 1971).

Prentice v. Williams, 324 S.W.2d 466 (Mo. App. 1959): set the standard regarding enforceability...."in order to be enforceable a covenant restraining an employee must not only be legally valid but also reasonable as to the employer, the employee, and the public." at 469(3).