DRAKE
LAW REVIEW

Volume 35 1985-1986 Number 2

COMPETITION BETWEEN EMPLOYER AND EMPLOYEE: DRAFTING AND ENFORCING RESTRICTIVE COVENANTS IN EMPLOYMENT AGREEMENTS

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I. Introduction

The use of the employment agreement is commonplace in today's increasingly complex commercial world. Firms in highly competitive industries have long made a practice of requiring key employees such as senior management or those with access to highly confidential information to execute employment agreements containing covenants restricting the employee's right to compete with the employer.[1] An employee's agreement to refrain from competition is of obvious benefit to an employer. Increasingly, however, the impetus for a written employment agreement has come from the opposite side of the bargaining table. Perhaps partially due to an increase in the number of business mergers and acquisitions, many executive and professional employees now seek to formalize the terms of an employment relationship with a written agreement.

The primary motivation for an employer to enter into a contract of employment is a legitimate business interest in the protection of trade secrets, customer contacts, and other competitive advantages.[2] Today's employer must be wary of the threat posed from within by the unscrupulous employee as well as competitors. Competition between the employer and its former employee has given rise to a plethora of litigation involving primarily the enforcement of restrictive covenants,[3] the enforcement of confidentiality agreements,[4] and business tort claims.[5] The restrictive covenant is undoubt-

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1. Such covenants are known in the practice variously as "restrictive covenants," "anticompetition agreements," and "non-compete provisions," and will be referred to in this article in any of these manners.

2. *See infra* text accompanying notes 112-40.

3. *See* Lamp v. American Prosthetics, Inc., 379 N.W.2d 909 (Iowa 1986); Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984); Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500 (Iowa 1984); Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376 (Iowa 1983); Tasco, Inc. v. Winkel, 281 N.W.2d 280 (Iowa 1979); Farm Bureau Serv. v. Kohls, 203 N.W.2d 209 (Iowa 1972); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971); Kunz v. Bock, 163 N.W.2d 442 (Iowa 1968); Orkin Exterminating Co. v. Burnett, 259 Iowa 1218, 146 N.W.2d 320 (1966); Baker v. Starkey, 259 Iowa 480, 144 N.W.2d 889 (1966); Cogley Clinic v. Martini, 253 Iowa 541, 112 N.W.2d 678 (1962); Federated Mut. Implement & Hardware Ins. Co. v. Erickson, 252 Iowa 1208, 110 N.W.2d 264 (1961); Mutual Loan Co. v. Pierce, 245 Iowa 1051, 65 N.W.2d 405 (1954); Larsen v. Burroughs, 224 Iowa 740, 277 N.W. 463 (1938); McMurray v. Faust, 225 Iowa 50, 276 N.W. 95 (1937); Dain Bosworth, Inc. v. Brandhorst, 356 N.W.2d 590 (Iowa Ct. App. 1984); Insurance Agents, Inc. v. Abel, 338 N.W.2d 531 (Iowa Ct. App. 1983).

4. *See* Hutter, *Trade Secret Misappropriation: A Lawyer's Practical Approach to the Case Law*, 1 W. New Eng. L. Rev. 1, 10-12 (1978).

5. The tort claims may include interference with a business relation. *See, e.g.*, Thompson v. Allstate Ins. Co., 476 F.2d 746 (5th Cir. 1973); Hare v. Family Publications Service, Inc., 334

edly the most litigated portion of the average employment agreement.[6] Covenants not to compete have provided the impetus for a wealth of judicial authority[7] as well as annotation[8] and commentary.[9]

When counselling an employer or employee, the practicing attorney should have a firm grasp upon the principles of this area of the law as well as some insight into the practical aspects of litigating claims arising from competition between employer and employee. The drafter of an employment agreement should be aware of the methods which the courts will employ in scrutinizing a restrictive covenant. A variation in the wording of an anti-competition covenant can be determinative when the enforceability of the provision is later called into question.[10] This article will discuss the law of restrictive covenants as used in employment contracts[11] and tactics for litigating conflicts arising from restrictive covenants.[12] Finally, the author will offer suggestions for drafting anti-competitive provisions in employment agreements.[13]

II. The Employment Relationship

A. *The Employee's Right to Compete*

The law of restrictive covenants is integrally related to the common law defining the rights and duties of employers and employees. Often, a dispute over a restrictive covenant will also encompass claims that an employee breached his common law fiduciary duties owed to his employer. Thus, a general discussion of these duties will be beneficial.

F. Supp. 953 (D. Md. 1971); American Oil Co. v. Towler, 56 Ga. App. 866, 194 S.E. 223 (1937); Beane v. McMullen, 265 Md. 585, 291 A.2d 37 (Ct. App. 1972); Irby v. Citizens National Bank, 239 Miss. 64, 121 So. 2d 118 (1960). *See also infra* text accompanying notes 231-56. Other claims involve tortious interference with an employment agreement. *See, e.g.*, Wear-Ever Aluminum, Inc. v. Towncraft Industries, 74 N.J. Super. 135, 182 A.2d 387 (1962); Cranford v. Shelton, 378 So. 2d 652 (Miss. 1980); Fitzgerald v. Wolf, 40 N.C. App. 197, 252 S.E.2d 523 (1979); Juhasz v. Quik Shops, Inc., 55 Ohio App. 2d 51, 379 N.E.2d 235 (1977); Chitwood v. McMillan, 189 S.C. 262, 1 S.E.2d 162 (1939); Knoxville Milk Producer's Ass'n v. Blake, 171 Tenn. 283, 102 S.W.2d 64 (1937).

6. *See infra* text accompanying notes 48-59.

7. *See* Arthur Murray Dance Studios v. Witter, 62 Ohio L. Abs. 17, 105 N.E.2d 685 (Ct. of Common Pleas 1952).

8. *See* Annot., 43 A.L.R.2d 94 (1955); Annot., 152 A.L.R. 415 (1944); Annot., 119 A.L.R. 1452 (1939).

9. *See generally* Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625 (1960)[hereinafter cited as Blake]; 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).

10. *See infra* text accompanying notes 100-10.

11. *See infra* text accompanying notes 548-99.

12. *See infra* text accompanying notes 199-259.

13. *See infra* text accompanying notes 282-91.

In Iowa, in the absence of an enforceable restrictive covenant, trade secret misappropriation, or breach of confidence, an employee-at-will is entitled to resign his position and engage in direct competition with his former employer.[14] This is consistent with the general rule of most jurisdictions.[15] The reasoning behind this general rule was well-stated by the Iowa Supreme Court in *Baker v. Starkey*:[16]

> [A]n employer has no right to unnecessarily interfere with the employee following any trade or calling for which he is fitted and from which he may earn his livelihood and he cannot be precluded from exercising the skill and general knowledge he has acquired or increased through experience or even instructions while in the employment.[17]

Similarly, in *E.W. Bliss v. Struthers-Dunn, Inc.*,[18] the Eighth Circuit Court of Appeals, applying Iowa law, stated that at-will employees are "entitled to resign from [the plaintiffs'] employ for a good reason, a bad reason, or no reason at all, and are entitled to pursue their chosen field of endeavor in direct competition with [the plaintiff] so long as there is no breach of a confidential relationship with the [the plaintiff]."[19]

Iowa courts have never been benevolent to former employers seeking to restrain ex-employees from using information acquired while employed, or from setting up competing businesses using skills acquired while working for the former employer.[20] An employer cannot claim that the general skills of an employee are the property of the employer merely because a salary was paid. An employee's right to move on to other employment is a valuable personal right which the Iowa courts recognize and weigh against the asserted rights of the employer: "The employee may achieve superiority in his particular department by every lawful means at hand, and then, upon the rightful termination of his contract for service, use that superiority for the benefit of rivals in trade of his former employer."[21]

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14. *See* E.W. Bliss Co. v. Struthers-Dunn, Inc., 408 F.2d 1108, 1113 (8th Cir. 1969); Universal Loan Corp. v. Jacobson, 212 Iowa 1088, 237 N.W. 436 (1931).

15. *See, e.g.*, Avocado Sales Co. v. Wyse, 122 Cal. App. 627, 10 P.2d 485 (1932); Renpak, Inc. v. Oppenheimer, 104 So. 2d 642 (Fla. Dist. Ct. App. 1958); Tinseltex Importing Co. v. Greenwald, 16 N.Y.S.2d 422 (Sup. Ct. 1939); Albert B. Cord Co. v. S. & P. Management Services, Inc., 2 Ohio App. 2d 148, 207 N.E.2d 247 (1965); Soeder v. Soeder, 82 Ohio App. 71, 77 N.E.2d 474 (1947); Carl A. Colteryahn Dairy, Inc. v. Schneider Dairy, 415 Pa. 276, 203 A.2d 469 (1964); RESTATEMENT (SECOND) OF AGENCY § 393 comment e, § 396(a) (1958).

16. 259 Iowa 480, 144 N.W.2d 889 (1966).

17. *Id.* at 493-94, 144 N.W.2d at 897.

18. 408 F.2d 1108 (8th Cir. 1969).

19. *Id.* at 1113 (citing Baker v. Starkey, 144 N.W.2d at 897; Mutual Loan Co. v. Pierce, 65 N.W.2d at 408; Universal Loan Corp. v. Jacobson, 212 Iowa 1088, 237 N.W. 436 (1931)).

20. *See, e.g.*, E.W. Bliss Co. v. Struthers-Dunn, Inc., 408 F.2d 1108, 1113 (8th Cir. 1969). *See also* Baker v. Starkey, 259 Iowa 480, 144 N.W.2d 889 (1966); Mutual Loan Co. v. Pierce, 245 Iowa 1051, 65 N.W.2d 405 (1954); Universal Loan Corp. v. Jacobson, 212 Iowa 1088, 237 N.W. 436 (1931).

21. Universal Loan Corp. v. Jacobson, 212 Iowa at 1093, 237 N.W.at 438. The Iowa Su-

Thus, a former employee, in competing with his former employer, may freely use general knowledge, skills and experience gained in the employment relationship.[22]

However, there are limitations on an employee's right to compete with his former employer. Employees are subject to pre-resignation fiduciary and common law duties.[23] Additionally, ex-employees are restricted in their activities under certain circumstances.[24] Employees are subject to these duties in addition to any contractually imposed obligations. Thus, an action for breach of a covenant not to compete may also involve claims couched in tort terms arising from a breach of these common law and fiduciary duties.[25]

B. *Fiduciary and Common Law Duties of Employees*

Anyone acting as an agent, employee, director or in any other fiduciary capacity, is legally bound not to act contrary to the interests of the business.[26] An employee is bound to exercise good faith and loyalty towards his employer.[27] This fiduciary obligation prohibits an employee from competing with his employer while still employed.[28] Even in the absence of a restrictive

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preme Court continued by quoting Herbert Morris, Ltd. v. Sazelby (1916) 1 A.C. [House of Lords] 688, at 714:

> A man's aptitudes, his skill, his dexterity, his manual or mental ability . . . ought not to be relinquished by the servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and expand his powers is advantageous to every citizen, and may be highly so for the country at large.

Id. at 1093-94, 237 N.W. at 438.

22. *See* New England Overall Co. v. Woltmann, 343 Mass. 69, 176 N.E.2d 193 (1961) (wearing apparel sales); Gulf Oil Corp. v. Rapp, 33 Misc. 2d 1011, 226 N.Y.S.2d 562 (Sup. Ct. 1962) (oil and gas sales); Albert B. Cord Co. v. S. & P. Management Serv., Inc., 2 Ohio App. 2d 148, 207 N.E.2d 247 (1965) (management consulting services). Accordingly, an Illinois court stated:

> Our free economy is based upon competition. One who works for another cannot be compelled to erase from his mind all of the general skills, knowledge, acquaintances and the over-all experience which he acquired during the course of his employment. The success of a person who is engaged in sales depends largely upon his personal friendships and the confidences inherent herein. Absent special circumstances, such persons cannot be prevented from seeking out customers of his former employer when he has entered into a competing business or gone to work for a competitor.

Revcor, Inc. v. Fame, Inc., 85 Ill. App. 2d 350, 228 N.E.2d 742 (1967).

23. *See infra* text accompanying notes 28-44.

24. *See infra* text accompanying notes 40-44.

25. *See infra* text accompanying notes 45-60.

26. *See* Las Luminarias of the New Mexico Counsel of the Blind v. Isengard, 92 N.M. 297, 587 P.2d 444 (N.M. Ct. App. 1978) (employees owe "an undivided and unselfish loyalty to the corporation").

27. *See generally* CALLMAN, UNFAIR COMPETITION AND MONOPOLIES § 54 at 411.

28. AGA Aktiebolag v. ABA Optical Corp., 441 F. Supp. 747 (E.D.N.Y. 1977). *Accord* ABC Trans Nat'l Transp. v. Aeronautics Forwarders, Inc., 62 Ill. App. 3d 671, 379 N.E.2d 1228

covenant, an employee may be enjoined from competing with his employer if the employee violated his pre-resignation fiduciary and common law duties.[29]

Thus, an employee, while still employed, cannot make preparations for a competing business while on "company time."[30] Although an employee may, on his own time, take steps to insure his future,[31] he cannot make preparations to compete with his employer at the expense of his employer while still on the payroll.[32] In addition, an employee who openly competes with his employer during the course of employment commits an actionable breach of fiduciary duty.[33]

Numerous courts have held that an employee breaches the fiduciary duty of loyalty owed his employer when he acts for his own account in competition with his employer while still employed.[34] A salesman, for example, who sells in competition with his employer during the course of such employment commits an actionable breach of his fiduciary duty. This duty of loyalty not only forbids actual sales for a competitor while employed, it also forbids the beginning of negotiations to be later consummated by the competitor.[35] For example, *Group Association Plans, Inc. v. Colguhoun*,[36] a sales representative for the plaintiff insurance brokerage firm resigned without notice and immediately began employment with a competitor.[37] Prior to his resignation, the employee had begun negotiations for the sale of group insurance plans to at least three potential customers. Subsequent to his resignation, the employee consummated these negotiations on behalf of his new employer. The court issued an injunction against this conduct and directed

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(1978); Fremont Oil Co. v. Marathon Oil Co., 26 Ohio Op. 2d 109, 192 N.E.2d 123 (Ct. of Common Pleas 1963).

29. Insurance Field Services, Inc. v. White & White Inspection & Audit Serv., 384 So. 2d 303 (Fla. Dist. Ct. App. 1980).

30. *See* Buskuhl v. Family Life Ins. Co., 271 Cal. App. 2d 514, 76 Cal. Rptr. 602 (Ct. App. 1969); Maryland Metals, Inc. v. Metzner, 282 Md. 31, 382 A.2d 564 (1978).

31. Midland Ross Corp. v. Yokana, 185 F. Supp. 594 (D. N.J. 1960), *aff'd*, 293 F.2d 411 (3d Cir. 1961) (employee may, before leaving, make plans for a new venture on his own time).

32. Sanitary Farm Dairies, Inc. v. Wolf, 261 Minn. 166, 112 N.W.2d 42 (1961); Fremont Oil Co. v. Marathon Oil Co., 26 Ohio Op. 2d 109, 192 N.E.2d 123 (Ct. of Common Pleas 1963).

33. *See infra* text accompanying notes 262-80 for a discussion of competition by an employee and its effect on the likelihood of injunctive relief in an action to enforce a restrictive covenant.

34. Community Counselling Serv., Inc. v. Reilly, 317 F.2d 239 (4th Cir. 1963); Midland Ross Corp. v. Yokana, 185 F. Supp. 594 (D.N.J. 1960), *aff'd*, 293 F.2d 411 (3d Cir. 1961); National Chemsearch Corp. v. Hanker, 309 F. Supp. 1278 (D.D.C. 1970); Group Ass'n Plans, Inc. v. Colguhoun, 292 F. Supp. 564 (D.D.C. 1968), *vacated on other grounds*, 466 F.2d 469 (D.C. Cir. 1972).

35. *See* Group Ass'n. Plans, Inc. v. Colguhoun, 292 F. Supp. 564 (D.D.C. 1968), *vacated on other grounds*, 466 F.2d 469 (D.C. Cir. 1972).

36. 292 F. Supp. 564 (D.D.C. 1968), *vacated on other grounds*, 466 F.2d 469 (D.C. Cir. 1972).

37. *Id.*

an accounting of proceeds, stating:

> An employee who is in the process of securing business for his employer and works on the matter as part of his employment on his employer's time for which his employer pays him, may not, upon terminating his employment, continue negotiations in behalf of himself or in behalf of a new employer. In a sense he is delivering the proceeds or the fruits of his work for one employer to his new employer if he continues solicitations for the latter. This is such an activity that is clearly a breach of an agent's duty at common law irrespective of contract.[38]

Thus, employees cannot rid themselves of their fiduciary obligations to an employer by merely submitting a resignation. The Second Restatement of Agency imposes upon ex-employees the duty not to use trade secrets and confidential information intimated during the agency relationship.[39] The law of Iowa is in accord with the view set forth in the Second Restatement of Agency. Even in the absence of an employment contract containing a covenant not to compete, it is well established that the law implies an obligation on the employee not to use for his own advantage, and to the detriment of his former employer, confidential information or trade secrets acquired by or imparted to him in the course of his employment.[40]

In addition to the post-resignation duties discussed thus far, an employee may be prevented from undertaking other acts which injure a former employer. For example, courts have held that an ex-employee cannot misrepresent to customers the circumstances under which he left his former employer in order to play on the sympathies of customers and thus influence them to switch their business.[41] Similarly, an ex-employee cannot attempt to deceive customers as to the source of the goods or services he supplies after

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38. *Id.* at 567.

39. Section 396 of the Second Restatement of Agency provides as follows:

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

> (b) has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists or 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 the 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).

40. Hulsenbusch v. Davidson Rubber Co., 344 F.2d 730 (8th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966); Sandlin v. Johnson, 141 F.2d 660 (8th Cir. 1944); Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220 (Iowa 1977).

41. Carl A. Colteryahn Dairy, Inc. v. Schneider Dairy, 415 Pa. 276, 203 A.2d 469 (1964).

he enters new employment in competition with his former employer.[42]

C. *Causes of Action Against Ex-Employee*

In the absence of an employment contract containing an enforceable restrictive covenant, an employer seeking injunctive or monetary relief from a former employee would have to show: the employee misappropriated a trade secret or confidential information;[43] the employee engaged in some manner of unfair competition;[44] or the employee acted in bad faith in breach of a confidential relationship.[45] As discussed below, many of these causes of action and claims will accompany a claim for breach of a restrictive covenant.[46] Thus, this area of the law will be discussed in conjunction with actions to enforce restrictive covenants.[47]

III. The Law of Restrictive Covenants in Employment Agreements

Though restrictive covenants ancillary to contracts of employment were once considered void as repugnant to public policy,[48] American courts have been enforcing noncompetition provisions for well over a century.[49] Judicial aversion for noncompetition provisions is, however, still evidenced by procedural[50] and substantive rules[51] operating against the party seeking enforce-

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42. Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220 (Iowa 1977) (similar order books). *See also* Wallich v. Koren, 80 Cal. App. 2d 223, 181 P.2d 682 (1947) (use of labels confusingly similar to those of prior employer); Excelsior Laundry Co. v. Diehl, 32 N.M. 169, 252 P. 991 (1927) (misrepresentation of salesman's status with former employer); People's Coat, Apron & Towel Supply Co. v. Light, 171 App. Div. 671, 157 N.Y.S. 15, *aff'd*, 224 N.Y. 727, 121 N.E. 886 (1916) (misrepresentation of salesman's status with former employer).

43. Hulsenbusch v. Davidson Rubber Co., 344 F.2d 730 (8th Cir.), *cert. denied*, 382 U.S. 977 (1965); Sandlin v. Johnson, 141 F.2d 660 (8th Cir. 1944); Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220 (Iowa 1977).

44. *See* Universal Loan Corp. v. Jacobson, 212 Iowa 1088, 237 N.W. 436 (1931).

45. *See* E.W. Bliss Co. v. Struthers-Dunn, Inc., 408 F.2d 1108 (8th Cir. 1969). *See also* Orkin Exterminating Co. v. Burnett, 259 Iowa 1218, 146 N.W.2d 320 (1966); Baker v. Starkey, 259 Iowa 480, 144 N.W.2d 889 (1966); Mutual Loan Co. v. Pierce, 245 Iowa 1051, 65 N.W.2d 405 (1954); Universal Loan Corp. v. Jacobson, 212 Iowa 1088, 237 N.W. 436 (1931).

46. *See infra* text accompanying notes 220-59.

47. *Id.*

48. At common law, restrictive covenants were held to be void as restraints of trade. *See* Blake, *supra* note 11. *See also* Lumbermen's Trust Co. v. Title Ins. & Inv. Co., 248 F. 212 (9th Cir. 1918); Straight Side Basket Corp. v. Webster Basket Co., 4 F. Supp. 644 (1933); Lee v. Clearwater Growers' Ass'n., 93 Fla. 214, 111 So. 722 (1927); Parish v. Schwartz, 344 Ill. 563, 176 N.E. 757 (1931), *aff'g*, 252 Ill. App. 591 (1929); Chaplin v. Brown, 83 Iowa 156, 48 N.W. 1074 (1891); State v. Langley, 53 Wyo. 332, 84 P.2d 767 (1938).

49. *See* Cropper v. Davis, 243 F. 310 (8th Cir. 1917); Merriman v. Cover, 104 Va. 428, 51 S.E. 104 (1923). *See also* Blake, *supra* note 9 at 629-46; Note, 31 Iowa L. Rev. 249 (1946).

50. *See* Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983). *See also infra* text accompanying notes 100-49.

51. The party seeking to enforce a restrictive covenant bears the burden of proving the covenant reasonable in scope. Lamp v. American Prosthetics, Inc., 379 N.W.2d 909 (Iowa 1986);

ment of restrictive covenants.[52] In Iowa, as in numerous other jurisdictions,[53] a party seeking to enforce a restrictive covenant must prove that the covenant is reasonably necessary for the protection of the business of the plaintiff.[54]

Iowa courts have dealt with restrictive covenants on numerous occasions.[55] The law of Iowa has developed in the same general manner as that of the majority of jurisdictions.[56] Although at early common law restrictive covenants were deemed void as restraints of trade,[57] Iowa courts have never held them void per se.[58] Iowa courts do, however, evidence an aversion to restrictive covenants contained in employment agreements.[59]

A. *The Enforceability of Restrictive Covenants in Iowa*

It is important to note that, although the general principles of the law of restrictive covenants are readily distilled, cases are determined on an ad hoc basis and, while trends and propensities can be discussed, it is very difficult to predict the outcome of a given situation. Iowa adheres to the "rule of reason" doctrine in enforcing restrictive covenants. In Iowa the general rule is that a restrictive covenant that is supported by consideration will be enforced if the covenant is reasonably necessary for the protection of the employer's business and is not unreasonably restrictive of the employee's rights nor prejudicial to the interest of the public.[60] Because of their separate importance, each element of the covenant's enforceability will be discussed below.

Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500 (Iowa 1983); Dain Bosworth, Inc. v. Brandhorst, 356 N.W.2d 590 (Iowa Ct. App. 1984); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 373 (Iowa 1971); Orkin Exterminating Co. v. Burnett, 259 Iowa 1218, 146 N.W.2d 320 (1967); Cogley Clinic v. Martini, 253 Iowa 541, 112 N.W.2d 678 (1962).

52. *See infra* text accompanying notes 100-49.

53. *See generally* 2 CALLMANN ON LAW OF UNFAIR COMPETITION AND TRADE-MARKS § 51.4 at 793.

54. *See supra* note 1.

55. *See, e.g.*, Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500, 501 (Iowa 1984).

56. *See* Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971).

57. *See* Swigert & Howard v. Tilden, 121 Iowa 650, 97 N.W. 82 (1903) (court set forth with some detail the reasons for the early common law doctrine banning contracts in restraint of trade in general and for its gradual modification to meet changing conditions).

58. *See* Baker v. Starkey, 259 Iowa 480, 144 N.W.2d 889 (1966); Brecher v. Brown, 235 Iowa 627, 628, 17 N.W.2d 377, 378-79 (1945); Swigert & Howard v. Tilden, 121 Iowa at 658, 97 N.W. at 84.

59. *See* Swigert & Howard v. Tilden, 121 Iowa at 652, 97 N.W. at 84.

60. *See* Lamp v. American Prosthetics, Inc., 379 N.W.2d 909 (Iowa 1986). *See also* Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983); Farm Bureau Serv. Co. v. Kohls, 203 N.W.2d 209 (Iowa 1972); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971).

B. *Consideration Requirements*

Generally, a covenant not to compete is unenforceable unless supported by consideration.[61] To be enforceable under Iowa law, a restrictive covenant must be ancillary or incidental to a lawful contract.[62] This requirement is often couched in terms of consideration. Additionally, it is generally held that consideration alone is insufficient to make a restrictive covenant enforceable.[63] Naked restrictive covenants, those not ancillary to a valid employment agreement, are unenforceable because they are subject to the full force of common law and federal prohibitions on contracts in restraint of trade.[64] Restrictive covenants will be scrutinized under the "rule of reason" standard only when they are incidental to an employment contract.[65]

Courts differ as to what constitutes sufficient consideration for a covenant-not-to-compete. Generally, courts in most jurisdictions will hold that a restrictive covenant is supported by adequate consideration when the employee executes the covenant not to compete at the inception of employment.[66] Where, however, an employee executes a noncompetition covenant some time after he begins employment, there is a split of authority on whether the covenant is ancillary to the employee's employment agreement.[67] Some courts have held that a covenant executed by an employee after he has already worked for a period of time is not ancillary to the taking of employment and hence invalid as a "naked" restraint of trade.[68] In contrast, other courts have held directly to the contrary, that sufficient consideration exists for a restrictive covenant executed after the inception of

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61. Insurance Agents, Inc. v. Abel, 338 N.W.2d 531, 533 (Iowa Ct. App. 1983); 54 AM. JUR. 2d *Monopolies* § 513 (1971); Annot., 51 A.L.R.3d 825 (1973).

62. Chapin v. Brown, 83 Iowa 156, 48 N.W. 1074 (1891); Carruthers v. McMurray, 75 Iowa 173, 177, 39 N.W. 255, 257 (1888).

63. *See* Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 629, 136 A.2d 838, 845 (1957), where the court stated: "It has long been the rule at common law, that contracts in restraint of trade made independently of a sale of a business or contract of employment are void as against public policy regardless of the valuableness of the consideration exchanged therein."

64. *See id.*; Water Services, Inc. v. Tesco Chemicals, Inc., 410 F.2d 163 (5th Cir. 1969) (federal antitrust law prohibits nonancillary restrictive covenant); Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (1944) (common law prohibits nonancillary restrictive covenants).

65. *See, e.g.*, Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376 (Iowa 1983); Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (1944).

66. Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264 (8th Cir. 1978); 54 AM. JUR. 2d *Monopolies* § 513 (1971).

67. Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264 (8th Cir. 1978) (noting split of authority on this issue, the court found under Minnesota law that non-competition covenant was supported by a new promise by employer to pay for two years of employee who could not find suitable work after leaving). *See also* Annot., 51 A.L.R.3d 825 (1973).

68. Morgan Lumber Sales Co. v. Toth, 41 Ohio Misc. 17, 321 N.E.2d 907, (Ct. of Common Pleas 1974); McCombs v. McClelland, 223 Or. 475, 354 P.2d 311 (1960); Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (1944).

employment.[69]

Some courts hold that it is sufficient that an employer refrain from terminating an at-will employee.[70] This liberal view should be distinguished from those decisions in which a court either finds adequate consideration from factors other than continued employment[71] or holds that the execution of a restrictive covenant relates back to the inception of employment and is therefore ancillary to the original contract of employment.[72]

Numerous decisions hold that agreements not to compete executed after the inception of employment are ancillary to the original employment contract.[73] For example, where a restrictive covenant is discussed between the parties at the beginning of employment but executed sometime later, courts have found the covenant to be supported by adequate consideration.[74] Similarly, other courts will overlook the fact that a written agreement containing a restrictive covenant is not formally executed until sometime after the employee starts work where there are other indicia that the covenant was ancillary to the taking of employment.[75] For instance, where the execution of a written agreement was delayed to enable the employee to participate in a more favorable stock option plan, the court in *Seaboard Industries, Inc v. Blair*,[76] held the covenant to be part of the original contract of employment.[77] The rationale for this rule was well-stated by the Pennsylvania Supreme Court: "As long as the restrictive covenants are an

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69. Credit Bureau Management Co. v. Huie, 254 F. Supp. 547 (E.D. Ark. 1966); Daughtry v. Capital Gas Co., 285 Ala. 89, 229 So. 2d 480 (1969); Tasty Box Lunch Co. v. Kennedy, 121 So. 2d 52 (Fla. Dist. Ct. App. 1960); Baker v. National Credit Ass'n., 211 Ga. 635, 88 S.E.2d 19 (1955).

70. *See* Daughtry v. Capital Gas Co., 285 Ala. 89, 229 So. 2d 480 (1969); Tasty Box Lunch Co. v. Kennedy, 121 So. 2d 52 (Fla. Dist. Ct. App. 1960).

71. *See* Mouldings, Inc. v. Patter, 315 F. Supp. 704 (M.D. Ga. 1970); Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961) (covenant held ancillary to employment even if signed upon promotion, not employment); Thomas v. Coastal Indus. Serv., Inc., 214 Ga. 832, 108 S.E.2d 328 (1959); Credit Rating Serv., Inc. v. Charlesworth, 126 N.J. Eq. 360, 8 A.2d 847 (1939) (covenant signed two months after employment, held ancillary); Roessler v. Burwell, 119 Conn. 289, 176 A. 126 (1934) (covenant entered into three years after employment, held ancillary).

72. Novelty Bias Binding Co. v. Shevrin, 342 Mass. 714, 175 N.E.2d 374 (1961). *Accord* Marine Contractors Co. v. Hurley, 365 Mass. 280, 310 N.E.2d 915 (1974) (a non-competition covenant executed at the end of an employee's term of employment was upheld as ancillary to employment and supported by sufficient consideration in that the employer made immediate payment of retirement benefits in return for the covenant). *See also* Technicolor, Inc. v. Traeger, 57 Hawaii 113, 551 P.2d 163 (1976) (covenant entered into upon promotion and salary raise supported by sufficient consideration).

73. *See infra* text accompanying notes 74-76.

74. *See, e.g.*, Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971). *See also* Farm Bureau Serv. Co. v. Kohls, 203 N.W.2d 209, 212 (Iowa 1972).

75. *See* Seaboard Indus., Inc. v. Blair, 10 N.C. App. 323, 178 S.E.2d 781 (1971).

76. 10 N.C. App. 323, 178 S.E.2d 781 (1971).

77. *Id.*

auxillary part of the taking of regular employment [citation omitted] and not an after-thought to impose additional restrictions on the unsuspecting employee, a contract of employment containing such covenants is supported by valid consideration, and is therefore enforceable."[78]

Courts in some jurisdictions will require a showing of additional consideration where a restrictive covenant is executed after the inception of employment. In jurisdictions which hold that mere continued employment is insufficient consideration, courts will look to numerous items as possible consideration.[79] Restrictive covenants have been found to be supported by consideration where the employee receives a promotion[80] or increased compensation.[81] Other substantial changes in employment will support a restrictive covenant. For instance, where the employee's employment status changes substantially due to a change in position from office worker to outside salesman, thereby gaining a commission on sales, a restrictive covenant will likely be held as supported by consideration.[82]

In Iowa, the settled rule is that continued employment for an indefinite period is sufficient consideration to support a covenant not to compete executed subsequent to employment.[83] In *Ehlers v. Iowa Warehouse Co.*,[84] the Iowa Supreme Court enjoined an ex-employee from competing with his former employer for two years following the termination of employment.[85] The employment contract at issue was not signed until sometime after the employee began work.[86] However, the covenant not to compete had been discussed at the time the employee took his position.[87] The court, *sub silentio*, found the covenant to be supported by sufficient consideration and enforced it under the rule of reason doctrine.[88]

The Iowa rule was more explicitly stated in *Farm Bureau Service Co. v. Kohls*,[89] where the court held that a restrictive covenant is supported by consideration if signed after the creation of the employment relationship.[90] The court quoted American Jurisprudence (Second):

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78. Beneficial Finance Co. v. Becker, 422 Pa. 531, 536, 222 A.2d 873, 876 (1966).

79. *See infra* text accompanying notes 80-82.

80. Jacobson & Co. v. International Env. Corp., 427 Pa. 439, 235 A.2d 612 (1967).

81. Mail-Well Envelope Co. v. Saley, 262 Or. 143, 497 P.2d 364 (1972).

82. *See* M.S. Jacobs & Assocs., Inc., v. Duffley, 452 Pa. 143, 303 A.2d 921 (1973).

83. Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983); Farm Bureau Serv. Co. v. Kohls, 203 N.W.2d 209, 212 (Iowa 1972). *Accord* Insurance Agents, Inc. v. Abel, 338 N.W.2d 531, 533 (Iowa Ct. App. 1983).

84. 188 N.W.2d 368 (Iowa 1971).

85. *Id.* at 374.

86. *Id.* at 372.

87. *Id.*

88. *Id.* The court noted that the voluntariness of the execution of the agreement was called into question by the employee, but made no mention of the adequacy of consideration supporting the agreement. *Id.*

89. 203 N.W.2d 209.

90. *Id.* at 212.

> An employee's anticompetitive covenant executed after the commencement of employment has been held unenforceable by some courts as without consideration. Other courts, however, have held that there is sufficient consideration in the continuance of employment — at least where the employee would have been discharged had he not agreed to the covenant.[91]

The court then adopted the rule that continued employment of an employee-at-will would support a restrictive covenant.[92] This rule was reaffirmed in *Iowa Glass Depot, Inc. v. Jindrich*.[93]

Presumably, a different holding would result where an employee had a contract with a specific term and executed a covenant not to compete after the commencement of the term. The Iowa Supreme Court has not dealt with this specific issue. The Iowa Court of Appeals did, however, deal with a very similar question in *Insurance Agents, Inc. v. Abel*.[94] In that case, the defendant-employee, Abel, sold his business to the plaintiff in 1977, with the sale-of-business agreement providing that Abel would sell his business in exchange for shares of the plaintiff's stock. The sale agreement further provided that Abel would not compete with the plaintiff for three years and that the plaintiff would employ Abel for three years.[95] Shortly after his employment began, Abel signed a second agreement in 1978 whereby he was asked by the plaintiffs' president to enter into a "Corporate Stock Purchase Plan With Agreement Not to Compete" in connection with receiving shares of stock of the plaintiff.[96] The stock was transferred to Abel under the first agreement. The second agreement was not incorporated into the sale-of-business agreement executed in 1977. Abel was terminated after the employment term of the sale-of-business agreement expired.[97] He then proceeded to compete with Insurance Agents, Inc.

The Iowa Court of Appeals held that the noncompetition agreement contained in the 1978 contract failed for lack of consideration.[98] The court correctly reasoned that, although the covenant was signed while the defendant was in the employ of the plaintiff, it was a "naked" agreement in that no additional consideration passed between the parties. The defendant, as a term-employee, did not execute the second covenant in exchange for continued employment.[99] Thus, a restrictive covenant executed by a term employee after the commencement of employment would, by analogy, be unenforceable for lack of consideration.

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91. 54 Am. Jur. 2d *Monopolies* § 550 (1971).
92. *Id.*
93. 338 N.W.2d 376 (Iowa 1983).
94. 338 N.W.2d 531 (Iowa Ct. App. 1983).
95. *Id.* at 532.
96. *Id.*
97. *Id.* at 533.
98. *Id.* at 534.
99. *Id.* at 535.

C. *Enforceability of Restrictive Covenants Under Judicial Standards of Reasonableness*

As previously stated, the general rule in Iowa is that a non-competition provision embodied in an employment contract will be enforced if the covenant is reasonably necessary for the protection of the employer's business and is not unreasonably restrictive of the employee's rights nor prejudicial to the public interest.[100] The Iowa rule is analogous to that set forth in section 188(1) of the Second Restatement of Contracts.[101] That provision reads:

> (1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if:
> (a) the restraint is greater than needed to protect the promisee's legitimate interest, or
> (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.
> (2) Promises imposing restraints that are ancillary to a valid transaction or relationship include the following:
> (a) a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of the business sold;
> (b) a promise by an employee or other agent not to compete with his employer or other principal;
> (c) a promise by a partner not to compete with the partnership.

In *Iowa Glass Depot, Inc. v. Jindrich*,[102] the court amplified this standard, stating:

> Although we must afford fair protection to the business interests of the employer, the restriction on the employee must be no greater than necessary to protect the employer. Moreover, the covenant must not be oppressive or create hardships on the employee out of proportion to the benefits the employer may be expected to gain. The burden of proving reasonableness is upon the employer who seeks to enforce such a covenant.[103]

All but thirteen states follow basically the same common law "rule of reason" doctrine as is used in Iowa.[104] The remaining thirteen states have stat-

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100. Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500, 502 (Iowa 1984); *see* Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983).

101. 342 N.W.2d at 502; 338 N.W.2d at 381.

102. 338 N.W.2d 376 (Iowa 1983).

103. *Id.* at 381.

104. *See* Mixing Equip. Co. v. Philadelphia Gear, Inc., 436 F.2d 1308 (3d Cir. 1971) (New York law); Water Services, Inc. v. Tesco Chemicals, Inc., 410 F.2d 163 (5th Cir. 1969); Budget Rent-A-Car Corp. v. Fein, 342 F.2d 509 (5th Cir. 1965) (Georgia and North Carolina law); Hydraulic Press Mfg. Co. v. Lake Erie Eng'g Corp., 132 F.2d 403 (2d Cir. 1942); E. L. Conwell & Co. v. Gutberlet, 298 F. Supp. 623 (D. Md. 1969), *aff'd*, 429 F.2d 527 (4th Cir. 1970); McLeod v. Meyer, 237 Ark. 173, 372 S.W.2d 220 (1963); American Credit Bureau, Inc. v. Carter, 11 Ariz. App. 145, 462 P.2d 838 (1969); House of Vision, Inc. v. Hiyane, 37 Ill. 2d 32, 225 N.E.2d 21

utes which control restrictive covenants.[105] Courts in various jurisdictions which apply the rule of reason doctrine differ somewhat in the manner in which they apply the rule.[106]

The Iowa courts engage in a four-part analysis in assessing the reasonableness of non-competitive covenants contained in employment agreements.[107] Generally, the courts will: (1) examine the time and (2) area restrictions contained in the covenant; (3) determine whether the restrictive covenant was reasonably necessary to protect the plaintiff-employer's business; and (4) weigh the countervailing interests of the employer, employee and public and assess whether the detriment suffered by the employee is

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(1967); Barrington Trucking Co. v. Casey, 117 Ill. App. 2d 151, 253 N.E.2d 36 (1969); Silver v. Goldberger, 231 Md. 1, 188 A.2d 155 (1963); Richmond Bros., Inc. v. Westinghouse Broadcasting Co., 357 Mass. 106, 256 N.E.2d 304 (1970); Novelty Bias Binding Co. v. Shevrin, 342 Mass 714, 175 N.E.2d 374 (1961); Solari Indus., Inc. v. Malady, 55 N.J. 571, 264 A.2d 53 (1970); Purchasing Assoc., Inc. v. Weitz, 13 N.Y.2d 267, 196 N.E.2d 245, 246 N.Y.S.2d 600 (1963); Harwell Enter., Inc. v. Heim, 276 N.C. 475, 173 S.E.2d 316 (1970); Kelite Prod., Inc. v. Brandt, 206 Or. 636, 294 P.2d 320 (1956); Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 136 A.2d 838 (1957); Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961); Ramey v. Combined Am. Ins. Co., 359 S.W.2d 523 (Tex. Civ. App. 1962).

105. Section 8-1-1(a) of the Alabama Code (1975) has been interpreted as prohibiting restrictive covenants in contracts with independent contractors. C & C Prod., Inc. v. Fidelity & Deposit Co., 512 F.2d 1375, 1377 (5th Cir. 1975). As to agents or employees, reasonable restrictive covenants are permitted. *See also* COLO. REV. STAT. § 8-2-113 (1973) (prohibits restrictive covenants in employment contracts, except for executive and management personnel and officers and employees who constitute professional staff to executive and management personnel); FLA. STAT. ANN. § 542.33 (West 1986) (allows restrictive covenants in which an employee agrees to refrain from engaging in a similar business and from soliciting old customers within a reasonable limited time and area); HAWAII REV. STAT. § 480-4 (1976) (allows only reasonable restrictive covenants which prohibit the use of trade secrets); LA. REV. STAT. ANN. § 23:921 (West 1985) (prohibits restrictive covenants in employment contracts unless the employer incurs a special expense in training the employee, or an expense in advertising the employee in which case the employee can be restricted over the same route or in the same territory for two years); MONT. CODE ANN. § 28-2-703 (1986) (prohibits restrictive covenants in employment agreements); NEV. REV. STAT. § 598A.030 (1985) (prohibits restrictive covenants in employment agreements); N.D. CENT. CODE § 9-08-06 (1975) (prohibits restrictive covenants in employment agreements); OKLA. STAT. ANN. TIT. 15, § 217 (West 1966) (prohibits restricitve covenants in employment agreements); OR. REV. STAT. § 653.295 (1985) (prohibits restrictive covenants in employment agreements which are not entered into upon the initial employment of the employee); S.D. CODIFIED LAWS ANN. § 53-9-8 (1980) (prohibits restrictive covenants, except those between licensed professionals which prohibit the employee directly or indirectly from engaging in the same business or profession as that of the employer for any period not exceeding ten years from the date of such agreement and within any specified territory not exceeding a radius of twenty-five miles from the principal place of business of the employer); WIS. STAT. ANN. § 103.465 (West 1985) (allows reasonable restrictive covenants in employment agreements, but prohibits partial enforcement of overly broad restrictive covenants).

106. *See supra* note 104.

107. *See* Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376 (Iowa 1983); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, *supp. opinion*, 190 N.W.2d 413 (Iowa 1971); Orkin Exterminating Co. v. Burnett, 259 Iowa 1218, 146 N.W.2d 320 (1967); Baker v. Starkey, 259 Iowa 480, 144 N.W.2d 889 (1966); Mutual Loan Co. v. Pierce, 245 Iowa 1051, 65 N.W.2d 405 (1954).

outweighed by the potential benefits the employer would derive from the enforcement of the covenant.[108] In *Lamp v. American Prosthetics, Inc.*[109] the Iowa Supreme Court phrased this analysis in the form of a three-pronged test: (1) Is the restriction reasonably necessary for the protection of the employer's business; (2) is it unreasonably restrictive of the employee's rights; and (3) is it prejudicial to the public interest?[110]

Obviously, what is reasonable in any given instance will depend upon the facts. However, the practitioner need not approach this subject blindfolded. The Iowa courts have continually supplied parameters by which to gauge the reasonableness of a restrictive covenant.[111] The decisions are best analyzed by looking to the elements of a restrictive covenant.

1. *Protectable Employer Interests*

Most every restrictive covenant should embody the necessary elements of employer need, area, and time restraints. Necessity, duration of the covenant, territory encompassed, and reasonableness as to the employee and the general public are obviously dependent upon each other. Employers who use restrictive covenants not to compete, are either attempting to retain customers in a specified area or trying to protect their market and investment by keeping confidential information, such as trade or business secrets, away from competitors. The necessity of protecting these assets is also the justification for the duration of the covenant and the area encompassed by it. As the court stated in *Mutual Loan Co. v. Pierce,*[112] the employer's burden is "to show the reasonable necessity for the enforcement of the covenant at all in order to protect its business."[113]

An employer must be able to show one of the following: (1) close proximity between the employee and customers facilitating a potential piracy of business by the employee;[114] (2) the employee received special training or

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108. *See generally* Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500 (Iowa 1984). *Accord* Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376 (Iowa 1983).

109. 379 N.W.2d 909 (Iowa 1986).

110. *Id.* at 910. *Accord* Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 369 (Iowa 1971); Baker v. Starkey, 259 Iowa 480, 493, 144 N.W.2d 889, 897 (1966).

111. *See infra* text accompanying notes 114 - 205.

112. 245 Iowa 1051, 1056-57, 65 N.W.2d 405, 408 (1945). *See also* Ehlers. v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971). The Iowa Supreme Court in Mutual Loan Co. stated further that there must be:

> some showing that defendant, when he left plaintiff's employment, pirated or had the chance to pirate part of plaintiff's business; took or had the opportunity of taking some part of the good will of plaintiff's business, or it can be reasonably expected some of the patrons or customers he served while in plaintiff's employment will follow him to the new employment.

Mutual Loan Co. v. Pierce, 245 Iowa 1051, 1057, 65 N.W.2d 405, 408 (1954).

113. Mutual Loan Co. v. Pierce, 245 Iowa at 1056-57, 65 N.W.2d at 408.

114. Ehlers v. Iowa Warehouse Co., 188 N.W.2d at 373; Mutual Loan Co. v. Pierce, 245

knowledge giving him an unfair competitive advantage over the employer;[115] or (3) the employee misappropriated trade secrets or confidential information.[116]

One way to show the "business necessity" required to justify a restrictive covenant is to prove that the employee has a unique opportunity to pirate the business goodwill and customers of the employer.[117] This aspect of the business necessity requirement usually involves sales employees. Employers most often attempt to meet this burden by showing that an employee had close proximity to customers.[118] Proximity to customers is examined in light of the nature of the employer's business and other factors, including the employee's accessibility to information peculiar to his employer's business.[119] Where, however, the employer fails to show substantial customer contact, the court will refuse to enforce a restrictive covenant on the basis that the restriction was unreasonable.[120]

A special type of restrictive covenant case involving an employee's proximity to customers is termed the "route case" by the Iowa Supreme Court.[121] These cases typically involve an employee who is given an area or route in which he regularly services his employer's customers.[122] In *Mutual Loan Co. v. Pierce*,[123] the Iowa Supreme Court stated that in route cases "the employee has had a close contact with the employer's customers and it is only fair, on termination of his employment, there be an interval when a new employee will be able to get acquainted with the customers."[124] The business necessity element is well-illustrated by the route cases because in the eyes of the customer, the employee personifies his employer and is, for all intents and purposes, "the company."

As noted above, however, even very close proximity to customers may

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Iowa at 1057, 65 N.W.2d at 408. *See infra* text accompanying notes 117-129.

115. Dain Bosworth, Inc. v. Brandhorst, 356 N.W.2d 590, 593 (Iowa Ct. App. 1984). *Accord* Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983). *See infra* text accompanying notes 130-132.

116. *See infra* text accompanying notes 133-149.

117. Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500, 502 (Iowa 1984); Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983); Lamp v. American Prosthetics, Inc., No. 84-1428, slip op. at 2 (Iowa Ct. App. Aug. 29, 1985), *aff'd*. 379 N.W.2d 909 (1986).

118. Farm Bureau Co. v. Kohls, 203 N.W.2d at 211; Ehlers v. Iowa Warehouse Co., 188 N.W.2d at 373; Orkin Exterminating Co., Inc. v. Burnett, 259 Iowa 1218, 1222-23, 146 N.W.2d 320, 324 (1967); Cogley Clinic v. Martini, 253 Iowa 541, 112 N.W.2d 678 (1962); Federated Mut. Implement & Hardware Ins. Co. v. Erickson, 252 Iowa 1208, 1215-16, 110 N.W.2d 264, 267 (1961); Sioux City Night Patrol v. Mathwig, 224 Iowa 748, 752-53, 277 N.W. 457, 460 (1938).

119. Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d at 382.

120. Mutual Loan Co. v. Pierce, 245 Iowa at 1057, 65 N.W.2d at 408.

121. *See* Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376 (Iowa 1983).

122. *See* Farm Bureau Serv. Co. v. Kohls, 203 N.W.2d at 210; Orkin Exterminating Co. v. Burnett, 259 Iowa at 1221-22, 146 N.W.2d at 323.

123. 245 Iowa at 1051, 65 N.W.2d at 405.

124. 245 Iowa at 1058, 65 N.W.2d at 409.

be outweighed by factors militating against enforcement of a restrictive covenant.[125] For instance, in *Ma & Pa, Inc. v. Kelly*,[126] the court refused to enforce a restrictive covenant where the employee sold bulk petroleum products in a designated area and had extensive personal contact with customers.[127] In refusing to uphold the covenants the court emphasized the hardship that its enforcement would work on the employee.[128] The numerous factors that affect a court's decision in restrictive covenant cases will be discussed in detail in Section IV below.[129]

An employer can also show that a restrictive covenant is necessary because the employee received "special training or peculiar knowledge that would allow him to unjustly enrich himself at the expense of his former employer."[130] Thus, the Iowa courts have held that employers have met the burden of showing business necessity by establishing that they had invested substantial time and money in training the employee.[131] However, the mere training of an employee should not be sufficient reason to justify a restrictive covenant based upon business necessity. The experience and knowledge gained by the employee during a period of employment do not become the property of the employer.[132]

An employer can also meet the business necessity requirement by showing that an employee had access to trade secrets and confidential information.[133] The essence of this justification is that if the information reposed in confidence, were used in competition with the employer it would result in irreperable harm.[134]

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125. *See* Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500 (Iowa 1984).

126. 342 N.W.2d 500 (Iowa 1984).

127. *Id.* at 501.

128. *Id.*

129. *See infra* text accompanying notes 201-58.

130. Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d at 382.

131. Lamp v. American Prosthetics, Inc., No. 84-1428 slip. op. at 3 (Iowa Ct. App. August 29, 1985), *aff'd*, 379 N.W.2d 909 (1986) (twelve years training as prosthetic fitter); Dain Bosworth, Inc. v. Brandhorst, 356 N.W.2d at 592 (employee received $20,000 training to be a broker); Orkin Exterminating Co. v. Burnett, 259 Iowa at 1222, 146 N.W.2d at 323 (employee given eight weeks' training in exterminating insects and methods of operation); Federated Mut. Implement & Hardware Ins. Co. v. Erickson, 252 Iowa at 1215, 110 N.W.2d at 268 (insurance company's agent had intimate knowledge of customer list, policyholders' insurance needs and, undoubtedly, policy expiration dates); Cogley Clinic v. Martini, 253 Iowa at 544, 112 N.W.2d at 679-80 (cost clinic $10,000 to train a new doctor and doctor's acquaintance with patients, referral doctors, hospital personnel and local procedures was through his association with the clinic); Sioux City Night Patrol v. Mathwig, 224 Iowa at 753, 277 N.W. at 460 (employee's position made him privy to confidential information about his employer's business and the property of its customers).

132. Universal Loan Corp. v. Jacobson, 212 Iowa at 1093, 237 N.W. 438; McLeod v. Meyer, 237 Ark. 173, 372 S.W.2d 220 (1963).

133. Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 373 (Iowa 1971).

134. *See* Hutter, *Drafting Enforceable Employee Non-Competition Agreements to Protect Confidential Business Information: A Lawyer's Practical Approach to the Case Law*, 45

Before enforcing an employee noncompetition covenant designed to protect trade secrets, the courts will first determine whether in fact the employer has given this employee access to valid trade secrets.[135] The burden is on the employer to justify the employee's noncompetition restraint by demonstrating the potential danger of irreparable harm to his business potentially resulting from the employee's divulgence of trade secrets.[136] If there are no trade secrets, or they were not disclosed to the employee, many jurisdictions will refuse to enforce a covenant.[137] Mere training of an employee in the employer's methods may not prove the existence of any trade secrets.[138] The fact that an employee gained general knowledge at the employer's expense is not enough.[139]

Determining whether any employee has had access to trade secrets may be extremely difficult. The Iowa Supreme Court, in *Basic Chemicals, Inc. v. Benson*,[140] adopted the first Restatement of Torts definition of a trade secret.[141] In essence, a trade secret is: (1) information or a device; (2) used in a

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ALBANY L. REV. 311 (1981).

135. Mixing Equipment Co. v. Philadelphia Gear, Inc. 436 F.2d 1308 (3d Cir. 1970) (trade secret found); Thomas v. Best Mfg. Corp., 234 Ga. 787, 218 S.E.2d 68 (1975) (while an agreement enforced insofar as employee gained knowledge of protectable trade secrets, broad terms in which employee agreed never to disclose any information "pertaining to the business or affairs" of employer or its customers held void as restricting general knowledge); Gary Van Zeeland Talent, Inc. v. Sandas, 84 Wis. 2d 202, 267 N.W.2d 242 (1978) (list of customers taken from agency which contains no other information held not protectable as a trade secret and not protectable under agreement not to disclose the information).

136. Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d at 381.

137. Orkin Exterminating Co., Inc. v. Wesver, 257 Ark. 926, 521 S.W.2d 69 (1975); Gaynor & Co. v. Stevens, 61 A.D.2d 775, 402 N.Y.S.2d 398 (1978).

138. Club Aluminum Co. v. Young, 263 Mass. 223, 160 N.E. 804 (1928); Gates-McDonald Co. v. McQuilkin, 33 Ohio Rep. 481, 34 N.E.2d 443 (Ct. App. 1941); Menter Co. v. Brock, 147 Minn. 407, 180 N.W. 553 (1920).

139. Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 382-83; Baker v. Starkey, 259 Iowa at 493-94. *Accord* Capital Bakers, Inc. v. Townsend, 426 Pa. 188, 231 A.2d 292 (1967); Dunfey Realty Co. v. Enwright, 101 N.H. 195, 138 A.2d 80 (1957); McDonald's System, Inc. v. Sandy's, Inc., 45 Ill. App. 2d 57, 195 N.E.2d 22 (1963); Reed, Roberts Associates, Inc. v. Strauman, 40 N.Y.2d 303, 353 N.E.2d 590, 386 N.Y.S.2d 677 (1976).

140. 251 N.W.2d 220 (Iowa 1977).

141. *Id.* at 226. The RESTATEMENT OF TORTS provides:

> A trade secret may consist of 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 for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information as a business in that it is not simply information as to single or ephermeral events in the conduct of the business, as, for example, the amount or other term of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of

trade or business; (3) lending an economic advantage over competitors; and (4) not generally known in the industry.[142]

The inability to show that an employee had access to information that rises to the level of a trade secret should not prohibit the enforcement of a restrictive covenant.[143] An employer need only show that the employee had access to confidential information.[144] A covenant not to compete is, in fact, a pragmatic solution to the problem of protecting confidential information.[145] As the Eight Circuit Court of Appeals stated in *Modern Controls, Inc. v. Andreadakis*,[146] "to require an employer to prove the existence of trade secrets prior to enforcement of a covenant not to compete may defeat the only purpose for which the covenant exists."[147] Thus, an employer may be able to meet the business necessity requirement by showing that an employee had access to secret processes or methods, confidential customer lists, supply sources, income and expense data, and the like.[148] This should be true regardless of whether the information rises to the level of trade secret, so long as the information is of a confidential nature.[149]

2. *Time and Area Restraints*

The courts will examine both the time and area restraints contained in a restrictive covenant as a necessary step in evaluating the reasonableness of the covenant in connection with the rights of the employer and the interests of the public.[150] It is impossible to predict with certainty the results of judicial scrutiny of any given covenant because the cases are addressed on an ad hoc basis.[151]

Geographic limitations in restrictive covenants have been expressed as restraints on competition within a particular municipality, state, region and

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> an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS, § 757, comment (b) (1939).

142. *Id.*

143. *See* Water Services, Inc. v. Tesco Chemicals, Inc., 410 F.2d 163 (5th Cir. 1969).

144. *See* Ehlers v. Iowa Warehouse Co., 188 N.W.2d at 373.

145. *See* Water Services, Inc. v. Tesco Chemicals, Inc., 410 F.2d 163 (5th Cir. 1969); Continental Group, Inc. v. Kinsley, 422 F. Supp. 838 (D.C. Conn. 1976).

146. 578 F.2d 1264 (8th Cir. 1978).

147. *Id.* at 1268.

148. *See* Blake, *supra* note 9, at 673.

149. *See* Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264 (8th Cir. 1978). It would be necessary to show that the information was imparted to the employee in the context of a confidential nature. *Id.* at 1270. *See* Gates-McDonald Co. v. McQuilkin, 33 Ohio App. 481, 34 N.E.2d 443 (1941).

150. *See* Dain Bosworth, Inc. v. Brandhorst, 356 N.W. 2d 590, 593 (Iowa Ct. App. 1984).

151. Baker v. Starkey, 259 Iowa 480, 495, 144 N.W.2d 889, 897-98 (1966).

radius surrounding the employer's business.[152] The reasonableness of any given covenant will necessarily depend upon the nature of the employer's business and the type of business interest that the employer is seeking to protect.[153] For example, where it is claimed that the employee could take advantage of proximity to customers, courts will require that the geographic limitation embodied in the covenant bear some relationship to the area in which the employee had client contact.[154] Similarly, if the employer is attempting to safeguard trade secrets and confidential information, a reasonable geographic location would be one in which the employer would be harmed by disclosure by the employee.[155] In some instances, this could be nationwide.[156]

Iowa courts have upheld geographic limitations in restrictive covenants encompassing cities,[157] counties,[158] and any geographic area described in terms of a radius from the employer's officers.[159] The Iowa Supreme Court has stated that a restriction might reasonably cover the entire nation if it embodies the employer's trade area.[160]

Restrictive covenants must also contain a time limitation.[161] This temporal limitation must also be reasonable.[162] Theoretically, the time limitation contained in a restrictive covenant should bear some relationship to the harm the covenant is designed to prevent.[163] Some courts express this requirement in the terms of how much time is needed by an employer to reasonably mitigate the potential injury caused by an employee's departure.[164]

Thus, if a restraint is aimed at protecting customer relationships, the time restriction is reasonable only if it is no longer than necessary for the employer to put a new employee on the job and for this employee to demonstrate his ability to the customers.[165] If a relationship is complex or customer contacts numerous, a longer period may be warranted. Similarly, if a covenant is justified by an employee's access to confidential information, the duration of the time restraint should bear a relationship to the useful life of

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152. Handler & Lazaroff, *Restraint of Trade & The Restatement (Second) of Contracts*, 57 N.Y.U.L. Rev. 669, 764 (1982); *See* Annot., 43 A.L.R.2d 94 (1955).

153. *See, e.g.*, Cogley Clinic v. Martini, 253 Iowa 541, 112 N.W.2d 678 (1962).

154. *See* Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 593 (1961).

155. Orkin Exterminating Co. v. Mills, 218 Ga. 340, 127 S.E.2d 796 (1962).

156. *See* Tasco, Inc. v. Winkel, 281 N.W.2d 280 (Iowa 1979).

157. Larsen v. Burroughs, 224 Iowa 740, 277 N.W. 463 (1938) (city of LeMars).

158. McMurray v. Faust, 224 Iowa 50, 276 N.W. 95 (1937) (Jasper County).

159. Orkin Exterminating Co. v. Burnett, 259 Iowa 1218, 146 N.W.2d 320 (1967).

160. *See* Tasco, Inc. v. Winkel, 281 N.W.2d 280 (Iowa 1979).

161. *See* Orkin Exterminating Co. v. Burnett, 259 Iowa 1218, 146 N.W.2d 320 (1967).

162. *See* Annot., 41 A.L.R.2d 15 (1955).

163. *See* Blake, *supra* note 9, at 677.

164. *Id.*

165. *See* Iowa Glass Depot Inc. v. Jindrich, 338 N.W.2d at 384; *See also* Lamp v. American Prosthetics, Inc., No. 84-1428 (Iowa Ct. App. Aug. 29, 1985), *aff'd*, 379 N.W.2d 909 (1986).

the confidential information.[166]

Iowa lawyers often state two years as the "rule of thumb" for the duration of time limitations contained in restrictive covenants. Due to many factors which determine when a restrictive covenant is reasonable, reliance on such a general rule is dangerous. Iowa courts have enforced restrictive covenants with temporal limitations ranging from ninety days[167] to ten years.[168] The Iowa courts have, on numerous occasions, upheld covenants not to compete with time limitations of three years or less.[169]

3. *Judicial Enforcement of Restrictive Covenants: Weighing the Interests of Employer and Employee*

Once the court has determined that the time and area restraints contained in a covenant are reasonable, it will examine the relative interests of the employer, employee and public.[170] It will weigh in the employee's favor if the employer is attempting to prevent the employee from engaging in the only business he knows.[171] Courts will also consider the former employee's mobility and financial situation together with the terms of the employment relationship when determining whether the covenant not to compete is reasonable.[172] Additionally, courts have stated that termination of the employee by the employer is a factor militating against the grant of an injunction.[173] The employee's conduct as it affects the likelihood of injunctive relief will be discussed in Section IV below.[174]

Iowa courts have broad powers to order partial enforcement of restrictive covenants.[175] The courts, however, will not reform or partially enforce a restrictive covenant *sua sponte*.[176] Thus, it is necessary to request partial enforcement of the covenant as an alternative to complete injunctive relief.[177]

There are several schools of thought with regard to the method of en-

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166. *See* Rector-Phillips-Morse, Inc. v. Vroman, 253 Ark. 750, 489 S.W.2d 1 (1973).

167. Dain Bosworth, Inc. v. Brandhorst, 356 N.W.2d at 593.

168. Larsen v. Burroughs, 224 Iowa 740, 277 N.W. 463 (1938) (upheld ten year bar on practice of medical surgery in Le Mars, Iowa).

169. Dain Bosworth, Inc. v. Brandhorst, 356 N.W.2d at 593 (upheld 90 day restriction on stock brokerage); Orkin Exterminating Co. v. Burnett, 259 Iowa 1218, 146 N.W.2d 320 (1967) (three years); Cogley Clinic v. Martini, 253 Iowa 541, 112 N.W.2d 678 (1962) (three years); Federated Mut. Implement & Hardware Ins. Co. v. Erickson, 252 Iowa 1208, 110 N.W.2d 264 (1961) (two years).

170. *See* Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d at 381.

171. *See* Ma & Pa, Inc. v. Kelly, 342 N.W.2d at 502-03.

172. *See* Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d at 384.

173. *See* Lamp v. American Prosthetics, Inc., No. 84-1428 (Iowa Ct. App. Aug. 29, 1985), *aff'd*, 379 N.W.2d 909 (1986).

174. *See infra* text accompanying notes 199-280.

175. *See* Ehlers v. Iowa Warehouse Co., 188 N.W.2d at 370-73.

176. *See* Lamp v. American Prosthetics, 379 N.W.2d 909, 910-11 (Iowa 1986).

177. *See infra* text accompanying note 123.

forcement of restrictive covenants.[178] One school is the "blue pencil" rule of partial enforcement, now abandoned in most states, which holds that a restrictive covenant will only be reformed if it is easily divisible.[179] Thus, if the restrictive covenant were phrased in terms such that the offending restraint could be eliminated by crossing out a few words, while the remaining terms constituted an entire contract, the restrictive covenant would be partially enforced.

An example would be an employer seeking to enforce an otherwise valid restrictive covenant encompassing the states of Iowa and Missouri. If the employee's sales territory includes only Iowa, the blue pencil doctrine would allow the court to enforce the covenant to prevent competition in Iowa but not in Missouri. However, the blue pencil doctrine applies only if the covenant contains distinct and severable geographic areas.[180] If the restriction is a fifty-mile radius around the city of Des Moines, the doctrine would not apply.[181]

Iowa courts have never utilized the blue pencil rule.[182] Although Iowa at one time adhered to the harsh "all or nothing" rule,[183] the courts now take the most liberal approach in modifying overly broad temporal or geographic limitations. The Iowa Supreme Court, in *Ehlers v. Iowa Warehouse Co.*,[184] engaged in an in-depth discussion of the advisability of partial enforcement of restrictive covenants.[185] Noting that the "all or nothing" rule of enforcement led to "results of questionable equity," the court adopted the reasoning of the New Jersey Supreme Court in *Solari Industries, Inc. v. Malady*,[186] the seminal case applying the reasonableness test.[187]

In *Solari Industries, Inc.*, the court abandoned the void per se and blue-pencil tests in favor of the reasonableness test permitting partial enforcement of non-competition agreements. The court construed the covenant in light of the reasonableness test and held that "plaintiffs are entitled . . . to that limited measure of relief within the terms of the non-competitive agreement which is reasonably necessary to protect their legitimate interest, will cause no undue hardship on the [employee], and will not impair

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178. *See infra* text accompanying notes 79-197.

179. *See* Raimonde v. Van Vlerah, 42 Ohio St. 21, _, 325 N.E.2d 544, 546-47 (1975) (discussion of the blue pencil doctrine and the reasons for its rejection by a majority of jurisdictions).

180. *See* Schultz v. Ingram, 38 N.C. App. 422, _, 248 S.E.2d 345, 350-51 (1978).

181. *See* Timenterial, Inc. v. Dagata, 29 Conn. Supp. 180, _, 277 A.2d 512, 514-15 (1971); Max Garelick, Inc. v. Leonardo, 105 R.I. 142, 250 A.2d 354 (1969).

182. *See* Ehlers v. Iowa Warehouse Co., 188 N.W.2d at 370-71.

183. *See* Brecher v. Brown, 235 Iowa 627, 17 N.W.2d 377 (1945).

184. 188 N.W.2d 368 (Iowa 1971).

185. *Id.* at 370-72.

186. 55 N.J. 571, 264 A.2d 53 (1970).

187. Ehlers v. Iowa Warehouse Co., 188 N.W.2d at 371.

the public interest."[188] Consequently, the court remanded the case, reasoning that the extent of relief allowable depended on the determination of a reasonable territorial limit by the trial court below.[189]

Iowa courts do not hesitate to modify both the temporal and geographic elements of restrictive covenants.[190] This reasonableness approach is laudable in that it may provide for more uniformity of outcome and isn't dependent upon mechanical rules concerning the divisibility of a contract.[191] The reasonableness test is not, however, without its shortcomings.[192] The primary criticism leveled against it is that partial enforcement allegedly destroys an employer's incentive to draft narrow covenants.[193] Nonetheless, it appears that the Iowa courts will continue to use the liberal modification rule. Regardless, the risk that the Iowa courts will retreat from their liberal approach, or that a court in another jurisdiction will not apply Iowa law can be contractually insured against.[194]

The *Ehlers* decision provides an excellent example of partial enforcement of restrictive covenants.[195] The Iowa Supreme Court examined the facts and determined that, with modification, the covenant at issue was reasonable and would be enforce.[196] An exception to the court's decision would be a geographic limitation embodied in the covenant which is too broad. Instead of prohibiting the employee from competing in an area consisting of a one hundred and fifty mile radius around Waterloo, Iowa, as provided for in the covenant, the court enjoined the employee from soliciting customers that were actually solicited by the ex-employee while working for the employer.[197]

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188. Solari Industries, Inc. v. Malady, 55 N.J. at _, 264 A.2d at 61.

189. *Id.*

190. *See* Ehlers v. Iowa Warehouse Co., 188 N.W.2d at 374.

191. *Id.*

192. *See* Boldt Machinery & 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's illegal, we'll act as your counsel and rewrite it.' "); Blake, *supra* note 11, at 682.

193. *See* Rector-Phillips-Morse, Inc. v. Vroman, 489 S.W.2d 1 (Ark. 1973) (court applied void per se test). Courts respond to this criticism by asserting that "in no event are restraints enforceable where their purposes [contravene] public policy . . . ." Solari Industries, Inc. v. Malady, 55 N.J. 571, _, 264 A.2d 53, 57 (1970). *See also* Fullerton Lumber Co. v. Torborg, 270 Wisc. 133, _, 70 N.W.2d 585, 592 (1955). *Fullerton* is one of the first cases employing the reasonableness test of partial enforcement. *See generally* 6 A. CORBIN ON CONTRACTS, §§ 1390, 1394 (1962).

194. *See infra* text accompanying notes 181-82.

195. *See* Ehlers v. Iowa Warehouse Co., 188 N.W.2d at 373.

196. *Id.* at 374.

197. *Id.* at 373. Ehlers consisted of an action by the former employee to have the noncompetition covenants declared void and unenforceable. *Id.* at 369. The plaintiff introduced at trial a list of all persons he contacted while working for the defendant. This list was used by the court in modifying the restrictive covenant. *Id.* at 373.

IV. Litigating Restrictive Covenants

A. *Representing the Employer*

Injunctive relief is the remedy most frequently sought by employers for the breach of a restrictive covenant.[198] Enjoining the ex-employee from competing with the ex-employer is usually the only effective remedy available to the employer.[199] This is a function of the nature of the wrong and the difficulty in calculating and proving monetary damages resulting from the violation of a restrictive covenant.[200] Other forms of relief are available.[201] In the appropriate situation, an employer may be awarded an accounting for profits[202] and damages.[203]

The rules applying to a request for injunctive relief in the context of a restrictive covenant are in conformity with the general principles governing injunctive relief.[204] Generally, the plaintiff must show an invasion or imminent invasion of its contractual rights which would result in a substantial injury.[205] A temporary injunction may be issued if the employer proves with a reasonable certainty that it would prevail in a disposition of the underlying case and irreparable harm would result in the absence of and injunctive relief.[206]

A federal court in Iowa would grant preliminary injunctive relief if there are sufficiently serious questions going to the merits of a case, so as to make them fair ground for litigation and a balancing of the hardships tips the scale decidedly toward the employer.[207] Ultimately, the court will con-

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198. *See* Blake, *supra* note 11 at 683. *See also* Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376 (Iowa 1983); Insurance Agents, Inc. v. Abel, 338 N.W.2d 531 (Iowa Ct. App. 1983); Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500 (Iowa 1984); Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984); Dain Bosworth, Inc. v. Brandhorst, 356 N.W.2d 590 (Iowa Ct. App. 1984); Tasco, Inc. v. Winkel, 281 N.W.2d 280 (Iowa 1979); Farm Bureau Serv. Co. v. Kohls, 203 N.W.2d 209 (Iowa 1972); Orkin Exterminating Co. v. Burnett, 259 Iowa 1218, 146 N.W.2d 320 (1967); Cogley Clinic v. Martini, 253 Iowa 541, 112 N.W.2d 678 (1962); Federated Mut. Implement & Hardware Ins. Co. v. Erickson, 252 Iowa 1208, 110 N.W.2d 264 (1961).

199. *See* 14 S. Williston, A Treatise on the Law of Contracts § 1636 (3d ed. 1972).

200. *See* Lakeside Oil Co. v. Slutsky, 8 Wis. 2d 157, 98 N.W.2d 415 (1959).

201. *See infra* text accompanying notes 230-59.

202. *See, e.g.*, McMurray v. Faust, 224 Iowa 50, 276 N.W. 95 (1937); Cherne Indus., Inc. v. Grounds & Assoc., 278 N.W.2d 81, 94-95 (Minn. 1979). Damages may be liquidated on compensation in nature. McMurray v. Faust, 224 Iowa at 58-61, 276 N.W. at 99-100.

203. Other remedies are less commonly sought, including replevin. *See* Hedberg v. State Farm Mut. Auto Ins. Co., 350 F.2d 924 (8th Cir. 1965), and forfeiture of contributions to a profit sharing plan. *See* Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984); Courington v. Birmingham Trust Nat'l Bank, 347 So. 2d 377 (Ala. 1977).

204. *See* R. Milgrim, Milgrim on Trade Secrets § 7.05 (1969).

205. Cogley Clinic v. Martini, 253 Iowa 541, 548-49, 112 N.W.2d 678, 682 (1962).

206. *See* Medtronics, Inc. v. Gibbons, 1982 CCH Trade Co. § 64,855 (8th Cir. 1982).

207. *See* Fennell v. Butler, 570 F.2d 263, 264 (8th Cir. 1978)(adopting second circuit injunctive relief test propounded in *Gresham v. Chambers*, 501 F.2d 687, 691 (2d Cir. 1974) and *Sonesta Int'l Hotels Corp. v. Wellington Assoc.*, 483 F.2d 247, 250 (2d Cir. 1973)).

sider the threat of irreparable harm to the employer, the balance of harm to the employer and employee and the relative interests of the parties and public.[208]

Iowa Rule of Civil Procedure 321 governs the issuance of injunctive relief in the Iowa courts. Rule 321 provides that a temporary injunction is proper: "when the petition, supported by affidavit, shows the plaintiff is entitled to relief which includes restraining the commission or continuance of some act which would greatly or irreparably harm him . . . . "[209] In Iowa, the burden is on the plaintiff-employer to prove an invasion or threatened invasion of right, and that substantial injury will result by invasion of the right, or that such injury is reasonably to be apprehended.[210]

Although it is apparently unnecessary to make a concrete showing of harm from competition by the employee as a prerequisite to obtaining enforcement of a noncompetition agreement,[211] the courts will require a greater showing of harm from the employer in some circumstances.[212] It appears that an employer should be prepared to point to concrete evidence of such harm in order to prevail in otherwise marginal cases.[213]

Counsel can evaluate numerous factors in assessing the likelihood of an award of injunctive relief.[214] The court will, of course, take into account those factors weighed in determining the reasonableness of the restrictive covenant.[215] There are, however, other considerations that will influence a court's decision concerning injunctive relief. The factors most frequently stressed by courts denying injunctive relief include: a lack of evidence of malice or bad faith on the part of the former employee;[216] evidence of employer intent to stifle competition;[217] nonexistence of extensive customer contact or access to highly confidential information.[218] Other factors that weigh in the determination to grant injunctive relief include bad faith on the part of the employee manifested in preparations to compete while still employed, notification of customers of the intent to set up a competing enterprise, solicitation of the co-employees, and misleading the former em-

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208. *See* Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264 (8th Cir. 1978).

209. IOWA R. CIV. P. 321(a).

210. *See* Orkin Exterminating Co. v. Burnett, 259 Iowa 1218, 146 N.W.2d 320 (1966).

211. *See* Cogley Clinic v. Martini, 253 Iowa at 548, 112 N.W.2d at 682.

212. *See* Iowa Glass Depot v. Jindrich, 338 N.W.2d 376 (Iowa 1983).

213. *Id.*

214. *See* Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500, 502 (Iowa 1984).

215. *See supra* text accompanying notes 170-74.

216. *See* Lamp v. American Prosthetics, Inc., 379 N.W.2d 909 (Iowa 1986); Motorola, Inc. v. Fairchild Camera Instrument Corp., 366 F. Supp. 1173 (D. Ariz. 1973) (it will weigh in the employee's favor that he was acting merely to further his own economic interest as opposed to attempting to harm the plaintiff).

217. It will help the employee if it appears from the facts that an employer is using a restrictive covenant as a sword rather than a shield. *See generally* Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500 (Iowa 1984).

218. *See* Iowa Glass Depot v. Jindrich, 338 N.W.2d 376 (Iowa 1983).

ployer as to the employee's intent to embark upon a competing enterprise.[219]

B. *Suggested Strategy for the Former Employer*

An employer should waste little time when faced with the departure of a key employee. Assuming that an enforceable restrictive covenant is in place, the former employer's first task is to determine whether a former employee is actively engaged in competition in violation of a restrictive covenant. A former employee might attempt to disguise his offending acts of competition by various methods. Effective drafting, however, can ensure that a former employee competing in any form would be in breach of a non-competition clause.[220] Proof of the offending competition will usually exist in the form of circumstantial evidence including customer solicitations, finance agreements, purchases of supplies and the like. Occasionally, the employer will be provided direct evidence tantamount to a "smoking gun." An example is a copy of a letter from the former employee to customers advertising the former employee's competing enterprise. This would indicate a clear violation of a covenant not to compete.[221]

Counsel for the employer should act immediately upon receiving reasonably reliable evidence of the breach of a restrictive covenant. The former employer should attempt to place the former employee and his new employer on the run. A "blitz" of legal action by the former employer may have the effect of placing the former employee and his new employer at an unrectifiable disadvantage. This may be best accomplished by filing a complaint, a motion for temporary restraining order and a preliminary injunction together with a motion for accelerated discovery.[222] Many employees don't believe that an employer will actually sue to enforce a covenant and will be surprised by a swift flurry of action. Care should be taken to draft the complaint with a specific request for modification and partial enforcement of the restrictive covenant as an alternative remedy.[223]

If the dispute is one involving information of questionable confidentiality, the plaintiff-employer should file a request for a protective order. The application should request a protective order aimed at guaranteeing the continued confidentiality of trade secrets and other confidential information. In cases involving the alleged misappropriation of customer lists and other in-

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219. *See* E. W. Bliss Co. v. Struthers-Dunn, Inc., 408 F.2d 1108 (8th Cir. 1969); Universal Loan Corp. v. Jacobson, 212 Iowa 1088, 237 N.W. 436 (1931).

220. *See infra* text Section V.

221. *See* Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220 (Iowa 1977). This author has, on more than one occasion, been presented with a case where an employee, out of ignorance of the existence or effect of a restrictive covenant, has communicated in writing his intent to leave his employer and either establish or join a competing concern.

222. Federal Rule of Civil Procedure 30 provides for accelerated discovery with leave of court. FED. R. CIV. P. 30.

223. *See* Lamp v. American Prosthetics, Inc., 379 N.W.2d at 911.

formation which are arguably trade secrets or of a confidential nature, a protective order may have a bootstrap effect and create an inference or presumption that the information is indeed confidential.[224] The protective order request also functions as a barometer by which the employer can determine whether the confidential nature of the information is at issue.

Naturally, all necessary discovery should immediately be initiated including requests for production of documents, interrogatories and depositions. The employee should be deposed as soon as possible after commencement of the action. With the leave of court,[225] the employee may be deposed within thirty days after service of the summons.[226] Otherwise, the employer may serve notice of the deposition immediately after commencement of the action but must set the date for the deposition more than thirty days after service of the summons.[227] The former employer should obtain all of the defendant's business records in an attempt to substantiate the ex-employee's contact with the plaintiff's customers. Telephone records will frequently provide the only evidence of solicitation of customers or contacts with suppliers.[228] Discovery should be aimed at establishing the breach of the restrictive covenant, the violation of employee fiduciary obligations and other wrongful acts of the employee.[229]

An action to enforce a restrictive covenant may consist of much more than an action to enjoin the former employee from breaching the restrictive covenant. The former employer will probably want to join any new employer of the ex-employee as a party defendant.[230] Several theories exist upon which a former employer might base an action against the former employee's new employer. The possible causes of action include intentional interference with existing contractual relations,[231] intentional interference with prospective business relations,[232] trade secret theft,[233] and civil conspir-

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224. Information such as customer lists and buying habits may or may not be accorded trade secret protection. *See* Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220 (Iowa 1977); American Specialty Co. v. Collis Co., 235 F. 929 (D.C. Iowa 1916). The protective order request may predispose the court to find the information to be trade secrets.

225. *See* FED. R. CIV. P. 30.

226. Most courts will require a showing of undue hardship or unusual circumstances before granting leave. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2104 at 384.

227. *Id.* at 383-84.

228. The plaintiff should be prepared to subpoena phone information from the utility if necessary.

229. *See infra* text accompanying notes 230-59.

230. The Plaintiff may, for tactical reasons, choose to exclude the new employer in the hope that the employee, faced with a costly defense, will capitulate. Often, however, the new employer will finance the former employee's defense whether or not it has been joined as a party defendant.

231. *See infra* text accompanying notes 236-49.

232. *See infra* text accompanying notes 249-50.

233. *See supra* text accompanying notes 16-19.

acy.[234] It stands to reason that to a greater extent, each of these causes of action would turn upon whether the noncompetition agreement is enforceable.[235]

If improper methods are not utilized, a party can interfere with prospective or at-will business relations in furtherance of its own economic interest.[236] A new employer would, therefore, be privileged to hire an employee away from his present employer if it did not, by doing so, violate a covenant not to compete, or act with the intent to purloin trade secrets or confidential information. Section 768 of the Second Restatement of Torts provides:

> (1) one who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if
> (a) the relation concern a matter involved in the competition between the actor and the other;
> (b) the actor does not employ wrongful means;
> (c) his action does not create or continue an unlawful restraint of trade and
> (d) his purpose is at least in part to advance his interest in competing with the other.
> (2) the fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.[237]

Honest competition is, therefore, a valid defense to any cause of action filed by a former employer. A cause of action for intentional interference with existing contractual relations may be based upon a defendant's causing a third party to breach a contract or preventing the plaintiff from performing, or increasing plaintiff's expense or burden of performing its contract.[238]

Most authorities hold that breach of a contract by a party to the contract does not constitute tortious interference with the business of another.[239] A party to a contract cannot be guilty of inducing itself to breach

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234. *Id.*

235. *See infra* text accompanying notes 234-59.

236. *See* Farmers Coop. Elevator, Inc. v. State Bank, 236 N.W.2d 674 (Iowa 1975); M & M Rental Tools, Inc. v. Milchem, Inc., 94 N.M. 449, _, 612 P.2d 241, 244-45 (Ct. App. 1980); Candalaus Chicago, Inc. v. Evans Mill Supply Co., 51 Ill. App. 3d 38, 366 N.E.2d 319 (1977).

237. RESTATEMENT (SECOND) OF TORTS, § 768 (1979).

238. *See id.* at §§ 766, 766A (1979)(cited with approval in Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398, 403 (Iowa 1982)).

239. *See* W. PROSSER, TORTS, § 129 at 934 & n.9 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 766 (1979)(by implication); *See also* George A. Davis, Inc. v. Camp Trails Co., 447 F. Supp. 1304, 1309 (E.D. Pa. 1978); Allison v. American Airlines, Inc., 112 F. Supp. 37, 39 (N.D. Okla. 1953); Dryden v. Tri-Valley Growers, 65 Cal. App. 3d 990, 998, 135 Cal. Rptr. 720, 725-26 (1977); Cuker Industries, Inc. v. William L. Crow Constr. Co., 6 A.D.2d 415, 178 N.Y.S.2d 777 (1958); Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982); Houser v. City of

its own contract. The former employee would, therefore, not be liable for tortious interference with the employment relationship.[240] However, acts which can constitute a breach of contract can also independently constitute the tort of intentional interference with another's existing or prospective business relationships.[241] Thus, the former employer may sue the former employee's current employer for inducing a breach of the restrictive covenant.

The elements of the tort of intentional interference with prospective business relationships are: (1) an existing, valid contractual relationship; (2) knowledge of the relationship on part of the interfering party; (3) intentional interference with performance of the contract; (4) causation; and (5) damage.[242] The employer must show that it had a valid and existing contract.[243] Thus, the former employer would have to prove that the non-competition provision of the employment contract was enforceable in order to recover from the new employer.[244] Liability will not arise for inducing breach of a void contract.[245] However, the fact that liability under the contract may be avoided by a party to the contract does not permit a third party to interfere with performance of the contract before it is avoided.[246] Thus, it appears that a court could refuse to enforce a restrictive covenant, but still find a third party liable for inducing a breach of the employment agreement by the former employee.

The ex-employer must show that the new employer had knowledge of the employment contract containing the restrictive covenant.[247] The new employer must have intended to interfere with an existing contract and have acted at least in part with the purpose of that interference.[248]

Redmond, 91 Wash. 2d 36, 39, 586 P.2d 482, 484 (1978); Kvenild v. Taylor, 594 P.2d 972, 977 (Wyo. 1979).

240. *See supra* note 239.

241. Pogge v. Fullerton Lumber Co., 277 N.W.2d 916, 920 (Iowa 1979).

242. *See* Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398, 402-03 (Iowa 1982); RESTATEMENT (SECOND) OF TORTS §§ 766, 766A (1979).

243. *See* Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d at 402.

244. *Id.*

245. *See* RESTATEMENT (SECOND) OF TORTS § 766 comment (f) (1979); Colorado Accounting Mach. v. Mergenthaler, 44 Colo. App. 155, _, 609 P.2d 1125, 1127 (1980) (plaintiff-employer denied relief where a defendant-competitor induced the breach of an employment contract containing a void anti-competition covenant). Liability can, however, arise for inducing breach of a contract which is voidable. *See* RESTATEMENT (SECOND) OF TORTS § 766 comment (f) (1979); Carman v. Heber, 43 Colo. App. 5, _, 601 P.2d 646, 648 (1979).

246. *See* Royal Realty Co. v. Levin, 244 Minn. 288, 69 N.W.2d 667 (1955); Speer v. Continental Oil Co., 586 S.W.2d 193 (Tex. Ct. App. 1979) (liability for interference with contract unenforceable under the statute of frauds); Balter v. Frank, 386 So. 2d 1227 (Fla. Dist. Ct. App. 1980), *petition for review denied*, 392 So. 2d 1371 (1981) (liability for interference with contract unenforceable for want of consideration, lack of mutuality or uncertainty).

247. Gruen Industries, Inc. v. Biller, 608 F.2d 274, 282 (7th Cir. 1979).

248. *See* Farmers Coop. Elevator, Inc. v. State Bank, 236 N.W.2d at 679. *See also* Engine Specialties, Inc. v. Bombardier, Ltd., 605 F.2d 1, 19 (1st Cir.) *on reh'g*, 615 F.2d 575 (1st Cir.

In addition, the ex-employer might also allege that the new employer, by enticing the employee into leaving employment and causing him to breach his non-competition agreement, interfered with prospective sales that he may have procured for the ex-employer. Generally, two types of actions may lead to liability for interference with a prospective business relation: 1) causing a third person not to enter into or continue a prospective relation; or 2) preventing the plaintiff from acquiring or continuing the prospective relation.[249] The fundamental premise of the tort of interference with a prospective business relation is that a party has the right to pursue its valid business expectancies unmolested by the wrongful intermeddling of a third party.[250] The tort is aimed at protecting the expectancies of future contractual relations such as the opportunity of obtaining customers.[251] Examples of interferences which can give rise to this tort include interference with the prospect of obtaining employment or employees, the opportunity of selling or buying real or personal property or services, and other relations leading to potentially profitable contracts.

The elements of the tort of interference with a prospective business relation are: (1) an existing business expectancy; (2) knowledge of the expectancy on the part of the defendant; (3) intentional interference with the expectancy; (4) causation; and (5) damage.[252] Although the elements of this tort appear similar to the elements for tortious interference with existing contracts, there are significant differences. The plaintiff must show a reasonably likely business relationship or contract from which pecuniary benefit could be derived.[253] Most jurisdictions require a showing of specific intent to interfere as an element of the tort.[254] The Second Restatement of Torts suggests a less stringent requirement of intent which focuses on the elements of the actor's motive, the interest sought to be advanced by the actor, and whether the actor's means or conduct of interference was itself wrongful, criminal, or fraudulent.[255]

Iowa courts require a specific purpose to injure or destroy on the part of defendants.[256] Thus, the tort of intentional interference with prospective contracts will be difficult to prove and will be available to former employers only in exceptional circumstances.

1979), *cert. denied*, 446 U.S. 983, *reh'g denied*, 449 U.S. 893 (1980).

249. *See* Farmers Coop. Elevator, Inc. v. State Bank, 236 N.W.2d at 679.

250. Stoller Fisheries, Inc. v. American Title Ins., 258 N.W.2d 336, 340 (Iowa 1977).

251. Page County Appliance Center, Inc. v. Honeywell, Inc., 347 N.W.2d 171, 178 (Iowa 1984)(quoting W. PROSSER, LAW OF TORTS § 130 at 950 (4th ed. 1971)).

252. *See* Stoller Fisheries, Inc. v. American Title Ins., 258 N.W.2d at 340; RESTATEMENT (SECOND) OF TORTS § 766B (1979).

253. *See* Farmers Coop. Elevator, Inc. v. State Bank, 236 N.W.2d at 681. *See also* RESTATEMENT (SECOND) OF TORTS § 766B comment (c) (1979).

254. *See* Stoller Fisheries, Inc. v. American Title Ins., 258 N.W.2d 336 (Iowa 1977).

255. *See* RESTATEMENT (SECOND) OF TORTS §§ 766A, 766B, and 767 (1979).

256. *See* Farmers Coop. Elevator, Inc. v. State Bank, 236 N.W.2d 674 (Iowa 1975).

An additional cause of action that may be joined with a complaint for a breach of a noncompetition provision is civil conspiracy on the part of the former employee and new employer.[257] This claim would be premised upon the mutual action taken by the former employee and his new employer with the intent to harm the former employer.[258] A conspiracy claim would probably be a companion cause of action for other tort claims accompanying the action to enforce the restrictive covenant.[259]

C. *Advising and Representing the Employee*

The conduct of the employee before and after termination of the employment relationship will substantially affect the court's inclination to enjoin subsequent competition. Thus, acts of an employee in planning a new business while still employed may tip the scales in favor of an injunction.[260] If the employee is insightful enough to consult counsel before acting, the attorney should surmise that a few precautionary steps may be determinative of any subsequent litigation involving a restrictive covenant. The importance of the manner in which an employee departs is illustrated by two Iowa Supreme Court decisions.[261] Although neither *Universal Loan Co. v. Jacobsen*[262] nor *Basic Chemicals, Inc. v. Benson*[263] involve restrictive covenants, when viewed together the decisions provide useful insight into how a court will react to certain employee conduct.

Both cases involved a key employee leaving his former employer to work for a competitor. In both situations the former employee used his sub-

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257. *See, e.g.*, Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220 (Iowa 1977).

258. *See* Neff v. World Publishing Co., 349 F.2d 235 (8th Cir. 1965). The elements of a civil conspiracy are (1) an agreement or understanding between two or more persons to effect a wrong against another and (2) acts taken in furtherance of the understanding. *See also* Basic Chemicals, Inc. v. Benson, 251 N.W.2d at 233.

259. *See* Westway Trading Corp. v. River Terminial Corp., 314 N.W.2d 398 (Iowa 1982). *See also* Team Central, Inc. v. Teamco, Inc., 271 N.W.2d 914 (Iowa 1978).

260. *See* Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220 (Iowa 1977). *See also* American Loan Corp. v. California Commercial Corp., 211 Cal. App. 2d 515, 27 Cal. Rptr. 243 (1963) (corporate officer began soliciting customers on confidential list even before end of his employment; solicitation enjoined and damages awarded); Inland Rubber Corp. v. Triple A Tire Serv., Inc., 210 F. Supp. 880 (S.D.N.Y. 1962) (prior to termination, employee negotiated with competing company, and removed records from office); State Export Co. v. Mol Shipping & Trading, 155 N.Y.S.2d 188 (Sup. Ct.), *appeal dismissed*, 2 A.D.2d 837, 158 N.Y.S.2d 765 (1956) (acts of preparation and disloyalty during employment may affect result of case); McLean v. Hubbard, 24 Misc. 2d 92, 194 N.Y.S.2d 644 (Sup. Ct.), *appeal dismissed*, 11 A.D.2d 625, 202 N.Y.S.2d 1015, *conditionally vacated*, 11 A.D.2d 911, 205 N.Y.S.2d 1013 (1960) (planning competitive business during working hours); Bancroft-Whitney Co. v. Glen, 64 Cal. 2d 327, 411 P.2d 921, 49 Cal. Rptr. 825 (1966) (leader of defecting employees deferred their raise so as to more easily lure them away); Annot., 24 A.L.R.3d 795 (1969).

261. *Compare* Universal Loan Corp. v. Jacobson, 212 Iowa 1088, 237 N.W. 436 (1931), *with* Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220 (Iowa 1977).

262. 212 Iowa 1088, 237 N.W. 436 (1931).

263. 251 N.W.2d 220 (Iowa 1977).

stantial knowledge of his former employer's customers to the advantage of his new employer. In addition, in both cases the former employee advertised his job change with a letter of announcement. The *Basic* court held that the employee was guilty of unfair competition and trade secret misappropriation.[264] The *Universal Loan* court held that the former employee was free of any wrongdoing.[265]

The important difference in the two cases seems to be the manner in which the former employee went about competing with his former employer. In *Basic* the former employee was obvious in his attempts to duplicate sales techniques and advertising used by his former employer.[266] In contrast, although the former employee in *Universal Loan*, used his rapport with customers to the advantage of his new employer, the employee did not engage in an all out attempt to purloin the customers of his former employer.[267] The letters sent to each employee announcing the change in their employment exemplifies the difference in conduct. In *Universal Loan* a circular advertising the business of the new employer and announcing the affiliation of the new employee with the new employer was mailed to numerous individuals, most of whom were not customers of the plaintiff-former employer.[268] In *Basic*, the letters were sent primarily to customers of the former employer.[269] Additionally, the letters stated that the products of the new employer were identical to those of the former employer and that customers of the former employer could make purchase orders using the catalogue of the former employer.[270] The *Basic* court also found, *inter alia*, that the defendants distributed a catalogue strikingly similar to the plaintiff's, which contained product numbers nearly identical to those of the former employer.[271]

With a good understanding of the principles of restrictive covenant law, an attorney for the employee should be able to provide the employee with guidance aimed at avoiding or minimizing the impact of litigation. The employee should be advised to avoid taking any steps toward the establishment of a competing business while still working for the established employer. This would constitute a breach of every employee's fiduciary duty to give his employer his undivided loyalty.[272]

The employee should not confiscate and make use of any written or computerized list of customers. This may constitute the appropriation of a

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264. Basic Chemicals, Inc. v. Benson, 251 N.W.2d at 232.
265. Universal Loan Corp. v. Jacobson, 212 Iowa at 1094; 237 N.W. at 438.
266. Basic Chemicals, Inc. v. Benson, 251 N.W.2d at 222.
267. Universal Loan Corp. v. Jacobson, 212 Iowa at 1094; 237 N.W. at 438.
268. *Id.* at 1090; 237 N.W. at 438.
269. Basic Chemicals, Inc. v. Benson, 251 N.W.2d at 223.
270. *Id.* at 224.
271. *Id.*
272. Fremont Oil Co. v. Marathon Oil Co., 26 Ohio Op. 2d 109, 192 N.E.2d 123 (1963). *See also* Equipment Advertiser, Inc. v. Harris, 271 Minn. 451, 136 N.W.2d 302 (1965).

trade secret. The taking of any records concerning the purchasing habits of clients and any other documentation of customer habits and needs may also constitute an appropriation of trade secrets.[273]

The employee must avoid the "enticement and bailout" situation.[274] Where an officer of the company uses his knowledge of key employee compensation and productivity to entice such employees away from an established company to form a competing venture, a possibility exists that a court might hold that there is a conspiracy with the intent to restrain trade for purposes of Section 1 of the Sherman Act.[275] Such a scenario may also give rise to common law tort liability.[276]

The employee should strive to avoid the appearance of impropriety. The decisions involving restrictive covenants indicate that a court is more willing to award a former employer injunctive and compensatory relief where the departing employee has not conducted himself in an above-board and straightforward manner.[277] A departing employee, should, if possible, avoid using identical or similar advertising brochures, order forms, trademarks, names, or other items used by his former employer.[278] By the same token, it appears that acting in a gentlemanly fashion may cause a court to view an employee's actions in a favorable light. Courts are more inclined to grant injunctive relief and damages to the former employer where it appears that the former employee has acted with the intent to injure or destroy his former employer's business.[279]

Any marketing plan involving direct customer contact should not be aimed exclusively or primarily at preferred customers of the employee's former employer A marketing strategy which calls for an aggressive business solicitation and campaign should include non-customers of the former employer and should be well-documented.[280]

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273. *See supra* note 233.

274. *See* Nalley's Inc. v. Corona Processed Foods, Inc., 240 Cal. App. 2d 948, 50 Cal. Rptr. 173 (1966).

275. *Id.*

276. *See* Metal Lubricants Co. v. Engineered Lubricants Co., 411 F.2d 426 (8th Cir. 1969); Nalley's, Inc. v. Corona Processed Foods, Inc., 240 Cal. App. 2d 948, 50 Cal. Rptr. 173 (1966); Southern California Disinfecting Co. v. Lomkin, 183 Cal. App. 2d 431, 7 Cal. Rptr. 43 (1960).

277. *See* American Loan Corp. v. California Commercial Corp., 211 Cal. App. 2d 515, 27 Cal. Rptr. 243 (1963).

278. *See* Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220 (Iowa 1977).

279. *See* Gloria Ice Cream & Milk Co. v. Cowan, 2 Cal. 2d 460, 41 P.2d 340 (1935). *See also* Reid v. Mass Co., 155 Cal. App. 2d 293, 318 P.2d 54 (1957).

280. *See* Universal Loan Corp. v. Jacobson, 212 Iowa 1088, 237 N.W. 436 (1931); Reid v. Mass Co., 155 Cal. App. 2d 293, 318 P.2d 54 (1957) (employee is not expected to surrender his acquaintance and knowledge of a former employer's customers and such knowledge may be used in a fair and legal manner.)

V. Drafting Suggestions

The drafter of an employment agreement containing a restrictive covenant should take into account the facts and holdings of the numerous Iowa decisions concerning the enforceability of such provisions.[281] The attorney should initially ascertain and document, as extensively as possible, the business necessity providing the impetus of the covenant. If it appears that there is very little business necessity, an employer should be advised that the covenant may be of marginal benefit. Restrictive covenants will be accorded greater weight and effect if used sparingly.[282] A standard employment contract containing a restrictive covenant which is used with numerous and varied employees may be viewed more as an *in terrorem* device than one aimed at protecting an employer's business interests.[283] The drafter should premise a restrictive covenant with recitals of the reasons for it.[284] These recitals should be specific and explicit.[285]

The drafter must remember that reasonableness should be stressed. Although Iowa is liberal in allowing the modification of overly broad provisions, especially onerous terms may cause the agreement to be construed as aimed at stifling competition as opposed to protecting an interest of the employer.[286] In this regard, it may be useful to insert a clause expressly providing for partial enforcement of the restrictive covenant.[287] The compositional, geographic and temporal limitations should be narrowly tailored to serve the legitimate function of protecting the employer's interests. For instance, a clause prohibiting competition with specifically enumerated customers for a period of time adequate to allow the reestablishment of the employer's rela-

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281. *See supra* note 3.

282. A tailored agreement will probably be given greater import.

283. *See* 12B R. Milgrin, Trade Secrets, Appendix C, Forms A and B (1986).

284. Mere recitations, however, will not ordinarily be given much weight

285. *See* 12B R. Milgrin, Trade Secrets, Appendix C, Forms A and B (1986).

286. The Illinois Supreme Court has stated:

> To stake out unrealistic boundaries in time and space, as the employer did in this case, is to impose on the employee the risk of proceeding at his peril or the burden of expensive litigation to ascertain the scope of his obligation. While we do not hold that a court of equity may never modify the restraints embodied in a contract of this type and enforce them as modified, the fairness of the restraint initially imposed is a relevant consideration to a court of equity.

House of Vision, Inc. v. Hiyane, 37 Ill. 2d 32, _, 225 N.E.2d 21, 25 (1967).

287. In C & D Forms, Inc. v. Cerniglia, 189 So. 2d 384 (Fla. Dist. Ct. App. 1966), a Florida District Court of Appeals gave effect to the following clause:

> It is agreed and understood that as to the geographic area set forth above for the purpose of covenants not to compete herein contained, each area is divisible and separate so that in the event the covenants not to compete shall be invalid or unenforceable in any geographic area described, they shall be valid and enforceable by law, the intention of the parties being that [the employer] be given the broadest protection allowed by the law as respects the covenants not to compete herein contained.

C & D Forms, Inc. v. Cerniglia, 189 So. 2d 384, 385-86 (Fla. Dist. Ct. App. 1966).

tionship would probably be enforced.[288]

If a restrictive covenant is drafted with the intent that it have effect beyond Iowa, the drafter should be aware of conflicts of law issues. The law of the forum state is especially important. As a general rule, even if the restraint is valid under the law of the state where the contract was entered into, performed or stipulated to be applicable, the restraint will be held unenforceable if contrary to the public policy of the forum state.[289]

Thus, a stipulation that the employment agreement will be governed by laws of Iowa would be ineffective where the restrictive covenant would be unenforceable in the forum state.[290] However, absent a public policy of the forum state invalidating the provision, the enforcement of the restrictive covenant should be governed by the law of Iowa if the covenant was made and performed here.[291]

VI. Conclusion

Parties have been doing battle over restrictive covenants for over five hundred years.[292] The Iowa courts have and will continue to examine such provisions on a regular basis. The foregoing discussion, though inexhaustive, is aimed at providing the practitioner with a general knowledge of the state of the law as well as supplying litigation and drafting advice. It will undoubtably be beneficial to have a grasp upon this area of the law for as long as our capitalist system exists.

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288. *See supra* text accompanying notes 234-59.

289. *See generally* Annot. 70 A.L.R.2d 1292, 1297 (1960). The same result would obtain in actions brought in federal court, since under the *Erie* rule, the federal rules must apply state law in diversity cases. *See* May v. Mulligan 36 F. Supp. 596 (W.D. Mich. 1939), *aff'd per curiam*, 117 F.2d 259 (6th Cir. 1940), *cert. denied*, 312 U.S. 691 (1941).

290. *See* Solari Indus., Inc. v. Malady, 55 N.J. 571, 264 A.2d 53 (1970) (adopted in Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971)). *Accord* Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324 (9th Cir. 1980); Forney Indus. Inc. v. Andre, 246 F. Supp. 333 (D.N.D. 1965). *But compare* Temporarily-Yours Temporary Help Services, Inc. v. Manpower, Inc., 377 So. 2d 825 (Fla. Dist. Ct. App. 1979) *with* Minnesota Mining & Mfg. Co. v. Kirkevold, 87 F.R.D. 324 (D. Minn. 1980) (Non-competition covenant was entered into in Minnesota between Minnesota engineer and Minnesota employer and specified that Minnesota law should govern the contract. Engineer left to work for competing firm in California. California law would not uphold such a covenant. Held that where employee is sued in Minnesota, Minnesota law applies and enjoins engineer from working for the California firm in California).

291. *See, e.g.*, Award Incentives, Inc. v. Van Rooyen, 263 F.2d 173 (3rd Cir. 1959).

292. Arthur Murray Dance Studios v. Witter, 62 Ohio L. Abs. 17, 105 N.E.2d 685 Ohio Ct. of Common Pleas (1952).