The Ties That Bind: Enforcing Non-Compete Covenants Ancillary To Employment Under Pennsylvania Law

By JOSEPH G. FERGUSON*

Lackawanna County
Member of the Pennsylvania Bar

INTRODUCTION

What steps can an employer take to protect the resources and trust it has invested in the training of an employee, as well as its customer/client base, when that employee resigns or is terminated? This is a question as old as time itself.

Indeed, most people are familiar with the story of Satan's fall from Heaven.[1] Once a highly placed angel in the service of God,[2] Satan was "[h]urld headlong" out of Heaven for taking "ambitious aim" against the "Throne and Monarchy of God".[3]

Although I am hardly in a position to second guess the all-knowing and all-seeing God, it is hard not to wonder how different the world might have been had He required Satan to execute a non-compete covenant while he was employed as an angel in Heaven. In the absence of a non-compete covenant, of

---

*Mr. Ferguson is a partner in the Scranton Office of Rosenn, Jenkins & Greenwald, L.L.P. He received his undergraduate degree from Marywood College and his law degree from the Dickinson School of Law. He practices in the areas of commercial, employment and civil rights litigation.

[1]*See*, e.g., Milton, J., Paradise Lost: Book I, lines 33-48 (1667).

[2]Satan was once among the "Sons of God." Job 1:6-7.

[3]Paradise Lost: Book I, ln. 33-48.

course, Satan was free, on the very day upon which he was "[h]urld headlong" out of Heaven, to open up shop down the street (well, "down" anyway) and go into direct competition with his former employer. In doing so, moreover, Satan took other angels formerly employed by God, his "Host of Rebel Angels", with him.[4]

The employer/employee ramifications of this ancient story apparently have not been lost on employers in Pennsylvania. Indeed, many Pennsylvania employers require their employees to execute covenants, ancillary to their employment, by which those employees agree to restrict their ability to compete against the employer for a period of time after leaving employment.

The purpose of this article is to review the current state of the law in Pennsylvania concerning the interpretation and enforcement of such non-compete covenants. This will be accomplished by reviewing the elements which must be present to make such covenants enforceable, the rules by which courts of this Commonwealth interpret these covenants and the matters which should be considered in drafting such covenants, as well as litigating to enforce them.

ELEMENTS OF AN ENFORCEABLE NON-COMPETE COVENANT ANCILLARY TO EMPLOYMENT

Pennsylvania law has long recognized the validity and enforceability of covenants not to compete which are ancillary to employment so long as they are reasonably necessary to further protection of legitimate business interests of the employer and reasonably limited in duration and geographic scope.[5] Such covenants, when properly drafted and executed, provide the employer with an effective way to

---

[4]*Id.*

[5]*Morgan's Home Equipment Corp. v. Martucci*, 390 Pa. 618, 629, 136 A.2d 838, 844 (1957); *All-Pak v. Johnston*, 694 A.2d 347, 350 (Pa. Super. 1997).

protect customer goodwill, proprietary business information, and the time and resources it has invested in the training of employees.

Generally, such covenants will be enforced by courts in Pennsylvania where they are: (1) ancillary to employment[6] (2) supported by adequate consideration; (3) reasonably limited in time and geographic scope; and (4) designed to protect the legitimate interests of the employer.[7] Each of these elements will be reviewed separately.

The Covenant Must be Ancillary to Employment

Non-compete covenants, of course, are contracts in restraint of trade and, therefore, are not favored by the courts.[8] As the Supreme Court of Pennsylvania has explained:

> 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.[9]

---

[6]In addition to non-compete covenants ancillary to employment, Pennsylvania law also recognizes non-compete covenants ancillary to the sale of a business. *See*, e.g., *Scobell, Inc. v. Shade*, 455 Pa. Super. 415, 688 A.2d 715, 718 (1998). This article, however, will focus on covenants which are ancillary to employment.

[7]*Insulation Corp. of America v. Brobston*, 446 Pa. Super. 520, 667 A.2d 729, 733 (1995); *Davis & Wade, Inc. v. Tripodi*, 420 Pa. Super. 450, 454, 616 A.2d 1384, 1387 (1992), *app. den.*, 536 Pa. 624, 637 A.2d 284 (1993); *Bilec v. Auburn & Associates, Inc. Pension Trust*, 403 Pa. Super. 176, 183, 588 A.2d 538, 542 (1991), *app. den.*, 528 Pa. 620, 597 A.2d 1150 (1991).

[8]*Martucci*, 390 Pa. at 629, 136 A.2d at 844.

[9]*Id.*

So long, however, as there is a lawful main purpose to the contract (such as employment), an ancillary restraint of trade will be enforced.[10] The Supreme Court has further explained the reasoning which underlies the "ancillary to employment" rule as follows:

> [The] very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure or protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. . . . But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. . . . There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.[11]

The Covenant Must be Supported by Adequate Consideration

Like all contracts, covenants not to compete ancillary to employment must be supported by adequate consideration.[12] Generally, so long as the covenant is made part of the bargain at the inception

---

[10]*Id.*

[11]*Jacobson & Co. v. International Environment Corporation*, 427 Pa. 439, 448, 235 A.2d 612 (1967) (*quoting, United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 281-82 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)).

[12]*Thermo-Guard, Inc. v. Cochran*, 408 Pa. Super. 54, 64-66, 596 A.2d 188, 193-94 (1991).

of employment, then the covenant will be found to be supported by adequate consideration.[13] Indeed, even if the employee actually begins working for the employer before executing a covenant not to compete, the covenant nevertheless will be enforced if it was part of the original bargain and was executed fairly contemporaneously with the employee's commencement of work.[14]

When the covenant is not executed until *after* the employee has agreed to the terms of employment and begun work, however, then the covenant cannot be enforced absent new consideration in the form of a corresponding benefit to the employee or a beneficial change in employment status.[15] Merely offering continued employment – i.e., "sign or be fired" – does not constitute adequate consideration to support a non-compete covenant.[16]

---

[13]*Modern Laundry & Dry Cleaning v. Farmer*, 370 Pa. Super. 288, 293, 536 A.2d 409, 411 (1988).

[14]*Beneficial Finance Corp. v. Becker*, 422 Pa. 531, 535-36, 222 A.2d 873 (1966) (contract signed two (2) days after employment began); *see also, National Business Services, Inc. v. Wright*, 2. F.Supp. 2d 701, 707 (E.D. Pa. 1998). (contract signed ten (10) days after employment began).

[15]*Maintenance Specialities, Inc. v. Gottus*, 455 Pa. 327, 314 A.2d 279, 281 (1974); *Tripodi*, 616 A.2d at 1387; *see also, National Risk Management v. Branell*, 819 F.Supp. 417, 429 (E.D. Pa. 1993).

[16]*George W. Kister, Inc. v. O'Brien*, 464 Pa. 475, 347 A.2d 311, 316 (1975); *see also*, Jordan, G.B. and Hackett, M.F., *Non-Compete Agreements and Consideration – What's An Employer To Do?*, LXVII Pa. Law. Q. 76 (April, 1996).

Provided that there is new consideration, however, Pennsylvania law recognizes the appropriateness of mid-employment non-compete covenants.[17] As the Supreme Court of Pennsylvania has stated:

> [I]n many instances, the insertion of a restrictive covenant in the original contract would serve no valid purpose. An employer who hires a novice has no desire to restrict his present competitive force. Only when the novice has developed a certain expertise, which could possibly injure the employer if unleashed competitively, will the employer begin to think in terms of the protection of a restrict covenant. This is an economic realty and the law should be influenced by it.[18]

The adequacy of the new consideration offered during the course of employment to support a restrictive covenant is a question of law.[19] The Court must ensure that the covenant does not constitute a "later attempt to impose additional restrictions on an unsuspecting employee."[20]

The following offers of "new consideration" have been found to be insufficient to support a non-compete covenant executed during employment:

- A raise or other benefit that is the same annual raise or benefit that the employee would otherwise receive.[21]

---

[17] *Jacobson*, 427 Pa. at 450, 235 A.2d at 618.

[18] *Id.*

[19] *Tripodi*, 616 A.2d at 1387.

[20] *Id.*

[21] *Bilec*, 588 A.2d at 542 (must be "additional consideration").

- One dollar ($1.00) nominal consideration.[22]
- A promise to give the employee fifteen (15) days notice before termination.[23]
- A change in the employee's status from at-will employment to week-to-week employment.[24]

Conversely, the following offers of "new consideration" have been found to be sufficient to support a non-compete covenant executed doing employment:

- A change from part-time employment to full-time employment.[25]
- A change from at-will employment to term employment.[26]
- A promotion that the employee would not otherwise be offered.[27]
- A change in a combination of benefits (e.g., bonus, insurance benefits, severance and/or promotions).[28]

The Covenant Must Be Reasonably Limited
In Time and Geographic Scope And Must Be
Designed to Safeguard the Legitimate Interests of the Employer

---

[22]*Kistler*, 464 Pa. at 485 n. 5, 347 A.2d at 316 n. 5.

[23]*Maintenance Specialties, Inc.*, 455 Pa. at 330 n. 1, 314 A.2d at 281 n. 1.

[24]*Markson Bros. v. Redick*, 164 Pa. Super. 499, 66 A.2d 218, 220 (1949).

[25]*Modern Laundry*, 536 A.2d at 411.

[26]*Kramer v. Robeck*, 824 F.Supp. 508, 511 (E.D. Pa. 1992).

[27]*MS Jacobs and Associates v. Duffley*, 452 Pa. 153, 303 A.2d 921, 923 (1979).

[28]*Tripodi*, 616 A.2d at 1387.

Post-employment restrictive covenants are subject to a more stringent test of reasonableness than covenants ancillary to the sale of a business.[29] The Court must make a "searching inquiry" of all the circumstances surrounding enforcement of the covenant to determine its reasonableness.[30] Thus, reasonableness must be determined on a case-by-case basis.[31]

Accordingly, for a salesman in the heating business, a two year prohibition from competing in five mid-Atlantic states may be reasonable.[32] While, for an advertising specialist, a one-year nationwide prohibition may be found to be reasonable.[33] It all depends upon the reasonable interests of the employer which the covenant is meant to protect as balanced against the hardship imposed upon the former employee by the restrictions contained in the covenant.[34] As the Supreme Court of Pennsylvania has explained:

> An employee may receive specialized training and skills, and learn the carefully guarded methods of doing business which are the trade secrets of a particular enterprise. To prevent an employee from utilizing such training and information in competition with his former employer, for the patronage of the public at large, restrictive covenants are entered into.

---

[29] *Brobston*, 667 A.2d at 733. The less rigorous test for covenants not to compete ancillary to the sale of a business merely asks whether the covenant is designed to protect the reasonable interests of the purchaser. *Scobell*, 688 A.2d at 718; *Geisinger Clinic v. DiCuccio*, 414 Pa. Super. 85, 103, 606 A.2d 509, 518 (1992), *alloc. denied*, 536 Pa. 625, 637 A.2d 285 (1993), *cert. denied* 513 U.S. 1112 (1995).

[30] *Brobston*, 667 A.2d at 735; *see also, Jacobson*, 235 A.2d at 619.

[31] *Id*. at 735 n. 7.

[32] *Jacobson*, 235 A.2d at 619.

[33] *National Business Services, Inc.*, 2 F.Supp. 2d at 708.

[34] *Brobston*, 667 A.2d at 734.

> They are enforced by the courts as reasonably necessary for the protection of the employer. *See Arthur Murray Dance Studios, Inc. v. Witter*, 62 Ohio L.Abs. 17, 105 N.E. 2d 685, 694-99, 708-811 (1952); 3 Pomeroy, Equity Jurisprudence, §934c (5th ed. 1941). *A general covenant not to compete, however, imposes a greater hardship upon an employee than upon a seller of a business. An employee is prevented from practicing his trade or skill, or from utilizing his experience in the particular type of work with which he is familiar.* He may encounter difficulty in transferring his particular experience and training to another line of work, and hence his ability to earn a livelihood is seriously impaired. Further, the employee will usually have few resources in reserve to fall back upon, and he may find it difficult to uproot himself and his family in order to move to a location beyond the area of potential competition with his former employer.[35]

RULES EMPLOYED BY COURTS IN PENNSYLVANIA IN CONSTRUING NON-COMPETE COVENANTS

In both drafting and attempting to enforce covenants not to compete which are ancillary to employment, it is essential to understand the rules which courts in the Commonwealth of Pennsylvania have employed in construing such covenants. An understanding of these rules will assist employers and their counsel in drafting enforceable covenants so as to properly protect their legitimate business interests.

Non-Compete Covenants are Narrowly Construed by Pennsylvania Courts

As mentioned previously, because non-compete covenants are agreements in restraint of trade, they are not favored by the courts and, therefore, are narrowly construed.[36] Moreover, as also mentioned above, non-compete covenants ancillary to employment agreements are subject to an even more

---

[35] *Morgan's Home Equipment Corp.*, at 631-32, 136 A.2d at 846.

[36] *All-Pak*, 694 A.2d at 351.

heightened level of scrutiny than are non-compete covenants ancillary to the sale of a business.[37] This heightened scrutiny stems, in part, from the historical reluctance of Pennsylvania courts to enforce contracts which restrain an individual from earning a living,[38] as well as, in part, from a recognition of the inherently unequal bargaining power in the employer/employee relationship.[39]

Moreover, consistent with the rules of interpretation for other contracts under Pennsylvania law, ambiguities in the language of a covenant not to compete will be construed against the drafter.[40] The "drafter" of the covenant, however, is not always the employer.[41] When the ambiguous language of the covenant is the product of the joint drafting efforts of the parties to the contract, then the Court will examine parol evidence related to the facts and circumstances surrounding the drafting of the language of the covenant to determine the intent of the parties.[42]

---

[37]*See*, note 29, *supra*.

[38]*Martucci*, at 632, 136 A.2d at 846; *see also*, Decker, Kurt H., *Covenants Not To Compete*, Vol. I, §2.15 (2d Ed. rev. 1993).

[39]*Reading Aviation Service, Inc. v. Bertolet*, 454 Pa. 488, 491-93, 311 A.2d 628, 630 (1973).

[40]*All-Pak*, 694 A.2d at 351.

[41]*See, e.g. Pugliese v. Coar*, 87 Luz. Leg. Reg. 134, 136, *aff'd without opinion* 726 A.2d 1089 (Pa. Super. 1998) (both employer and employee represented by counsel during negotiations and execution of covenant).

[42]*Commonwealth of Pennsylvania, Department of Transportation v. E-Z Parks*, 153 Pa. Cmwlth. 258, 620 A.2d 712, 718 (1993).

Pennsylvania Courts Have Broad Powers to Modify Non-Compete Covenants

The Court does not have to accept the restrictions set forth in the covenant as it finds them. Instead, the Court, sitting as a court of equity, has broad powers to modify the restrictions set forth in the covenant in order to fashion reasonable and appropriate relief.[43]

Thus, a court may reduce a three-year restriction in a covenant to two years or may reduce what it believes to be overly broad geographical limits in a covenant to limits which it considers to be more reasonable.[44] The guide post for the Court in making such reductions is the balance between the hardship which the restrictions impose upon the employee and the legitimate interests of the employer which the restrictions are designed to protect.[45]

THINGS TO CONSIDER WHEN DRAFTING NON-COMPETE COVENANTS

In drafting non-compete covenants ancillary to employment, of course, it is important to consider both the elements which must be present to render such covenants enforceable,[46] as well as the rules which

---

[43]*All-Pak*, 694 A.2d at 352 n. 9; *see also, Sidco Paper Co. v. Aaron*, 465 Pa. 586, 594-95, 351 A.2d 250, 254-55 (1976).

[44]*See, e.g. Kramer*, 824 F.Supp. at 512-13 (reducing a 3-year restriction to 2 years) and *Quatro City Engine Rebuilders, Inc. v. Toscano*, 369 Pa. Super. 573, 584-85, 535 A.2d 1083, 1089 (1987) (remanding case to trial court to determine whether to reduce nationwide restriction).

[45]*Trilog v. Famularo*, 455 Pa. 243, 314 A.2d 287, 293-94 (1974).

[46]*See*, pp 168-69, *supra*.

courts will employ in interpreting such covenants.[47] Considering these factors during the drafting stage will increase the chances that a court will fully enforce the restrictions contained in the covenant when it becomes necessary for the employer to ask the court to do so.

First, as explained above, overly broad restrictions in non-compete covenants simply will not survive scrutiny by the Court, and, therefore, will most likely not be enforced. Accordingly, the drafter should attempt to tie the restrictions set forth in the covenant to the legitimate interests of the employer, both as they exist at the time of the drafting of the covenant and as the employer anticipates that they may exist in the future.

Additionally, the covenant should be drafted so that it applies regardless of the circumstances which result in the cessation of the employee's employment – i.e., the restrictions apply whether the employee voluntarily resigns or is terminated. The mere fact that an employee has been terminated by the employer will not bar the employer from enforcing the restrictive covenant.[48] The question of whether it is reasonable to enforce a covenant not to compete when an employee is terminated is one which will be determined on a case-by-case basis.[49]

---

[47]*See*, p 170, *supra*.

[48]*All-Pak*, 694 A.2d at 352.

[49]*Id*.

In some cases, termination of an employee by an employer has rendered a non-compete covenant unenforceable.[50] As the Superior Court of Pennsylvania has observed:

> The employer who fires an employee for failing to perform in a manner that promotes the employer's business interests deems the employee worthless. Once such a determination is made by the employer, the need to protect itself from the former employee is diminished by the fact that the employee's worth to the corporation is presumably insignificant. Under such circumstances, we conclude that it is unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as worthless to its legitimate business interests.[51]

By the same token, however, the Superior Court has recognized that it is reasonable to enforce the terms of a covenant not to compete where an employee intentionally engages in conduct that caused termination.[52] As the Court observed:

> It is entirely foreseeable that in a given situation an employee might decide to get around a restrictive covenant by deliberate[ly] performing in a poor manner at his job, hoping that his employer will fire him so that he would not be bound by any restriction on his post employment activities. This is why this Court held that every case must be evaluated on its own facts.[53]

In any event, the covenant should be drafted to provide that the restrictions contained therein apply regardless of whether the employee resigns or is terminated. If nothing else, such language will evidence

---

[50]*See, e.g., Brobston*, 667 A.2d at 735-38 (dissolving injunction entered against terminated salesman restricting competition within 300 miles for 2 years).

[51]*Id*. at 532, 667 A.2d at 735.

[52]*All-Pak*, 694 A.2d at 352.

[53]*Id*. at n. 11.

an intent on the part of the parties to apply the covenant even in the event of termination for poor performance.

The employer should also consider allowing the employee and/or his counsel the opportunity to participate in the drafting of the language of the covenant. Allowing such an opportunity to the employee will avoid a court deeming the employer to be the "drafter" of the language of the covenant and construing that language strictly against the employer in the event of an ambiguity.

Furthermore, in addition to the classic non-compete covenant language concerning time and geographic scope (e.g., two years and twenty-five miles), the employer should also consider including language, either in the same covenant or a separate covenant, prohibiting the employee from soliciting customers and employees and disclosing proprietary information. Such language allows the employer to specifically protect its customer base, its investment in training of its other employees and the confidentiality of its proprietary business information.

A further advantage of adding a "nondisclosure" covenant is that an employer may specifically identify certain items which the parties agree constitute confidential, proprietary information of the employer (e.g., customer lists, price lists). Such "non-disclosure" covenants, moreover, are not limited by the "reasonableness" test which applies to "non-competition" covenants.[54]

Additionally, the non-compete covenant should include language by which the employee acknowledges that a breach of the restrictions set forth therein will cause irreparable harm to the employer

---

[54]*Bell Fuel Corp. v. Cattolico*, 375 Pa. Super. 238, 254, 544 A.2d 450, 458 (1988), *app. denied*, 520 Pa. 612, 554 A.2d 505 (1989).

and will warrant immediate injunctive relief. While such language will not be dispositive with respect to these issues, it may help the employer in litigating before a court of equity to enforce the covenant by demonstrating that, at the time that the covenant was executed, all parties understood that the employer would seek to enforce the restrictions in the covenant in a court of equity.

Additionally, the employer should consider including language by which the employee acknowledges that he will be responsible to the employer for the costs and attorney's fees incurred by the employer in enforcing the covenant. Attorney's fees may be recovered under Pennsylvania law when they are the subject of a contractual provision.[55]

In applicable situations, the employer should also consider including forum selection and choice of law provisions in the covenant.[56] Such language can help to ensure that the employer will be able to control the expenses it must incur to enforce the restrictions contained in the covenant.

As explained above, the employer must also make sure that the employee executes the covenant before the commencement of employment or, if executed during employment, that adequate consideration is supplied to the employee and that receipt thereof is acknowledged by the employee in the language of the covenant. These steps should eliminate any arguments concerning the adequacy of consideration.[57]

---

[55]*Jones v. Muir*, 511 Pa. 535, 515 A.2d 855, 858 n. 9 (1986).

[56]*See, Babn Technologies Corp. v. Bruno*, 25 F.Supp. 2d 593, 598 (E.D. Pa. 1998) (upholding forum selection and choice of law provision in non compete covenant); *Behavioral Health Industry News, Inc. v. Lutz*, 24 F.Supp. 401, 402 (M.D. Pa. 1998) (same); *but see, Dentspy International, Inc. v. Benton*, 974 F.Supp. 574, 579 (M.D. Pa. 1977) (refusing to uphold a forum selection clause and choice of law clause imposed upon an employee through a covenant executed after he began employment).

[57]*See*, pp 168-69, *supra*.

Finally, the covenant should contain clear language allowing the employer to assign the covenant to a successor. Consistent with the narrow construction courts have imposed upon non-compete covenants, it has been held that, absent an explicit assignability provision, courts should be hesitate to read one into the covenant.[58] The ability of a successor to bind employees to a restrictive covenant, of course, may have an impact upon the value the employer might receive in the event that the employer sells its business.

THINGS TO CONSIDER WHEN LITIGATING TO ENFORCE NON-COMPETE COVENANTS

Before Running Into Court

Oftentimes, the effective enforcement of a covenant not to compete requires the employer to take action immediately upon becoming aware that the employee is violating the restrictions of the covenant. Indeed, in many cases, the injuries to the employer which these covenants are designed to prevent – unauthorized contact with customers and employees on behalf of a competitor – have already begun to occur.

This need for a quick response, however, must be balanced against the need for the employer to possess sufficient factual information to successfully enforce the restrictions in the covenant. Indeed, an employer may do more damage to its credibility and relationships with customers and remaining employees (some of whom may be subject to similar or identical covenants) by proceeding so quickly that it fails to offer sufficient proof to the Court to achieve enforcement of the covenant.

---

[58] *All-Pak*, 694 A.2d at 351-52.

In fact, many times the employer, at first, does not have sufficient information to succeed on a request for an injunction enforcing the terms of the covenant. For example, an employer may be informed by a valued, long-standing customer that a former salesperson of the employer who is subject to a covenant not to compete has approached the customer on behalf of a competitor of the employer. The customer has informed the employer, however, that he merely wanted to give the employer the "heads up", but does not wish to testify against the former salesperson with whom the customer enjoyed a warm personal relationship. Unfortunately, for the employer, in the absence of the customer's testimony, (which, for customer relations reasons, the employer is loathe to compel by subpoena) there is no evidence to present to the Court to support a request for immediate injunctive relief against the salesperson.

At this point, the employer and/or its counsel might consider sending a letter to the former salesperson and the competitor by whom that salesperson is employed informing both that the employer is aware that the former salesperson is contacting customers or engaging in other activity in violation of the covenant and informing both the salesperson and the competitor that the employer fully intends to enforce the salesperson's obligations under the covenant. Such a letter may result in a response from the salesperson, the competitor and/or their counsel which provides useful information about the salesperson's activities or previews the defenses which the salesperson may raise in an enforcement action. Additionally, such a letter serves to provide the competitor who is now employing the salesperson actual notice of the covenant and, thereby, bolsters the factual foundation for a claim by the employer against the competitor for tortious interference with contractual relations.

The employer may also consider commencing an equity action by writ or complaint, assuming it has sufficient information to do so, and requesting leave of the Court to engage in expedited discovery before filing or proceeding with a request for immediate injunctive relief.[59] Such discovery will allow the employer to uncover facts concerning the actual activities of the former employee and the extent of the harm which the employer is likely to suffer as a result of those activities.

Elements Necessary To Support A Preliminary Injunction

Once the employer has sufficient information to support its claim for immediate injunctive relief, it should request that the Court enter a preliminary injunction enforcing the terms of the covenant not to compete.[60] A preliminary injunction operates to maintain affairs between the parties as they existed prior to the underlying dispute and to "compel the wrongdoer to give up the status he appropriated before an action could have been instituted against him."[61] Thus, prior to imposing a preliminary injunction, the Court must determine whether the activity to be restrained is actionable, and reasonably subject to abatement by issuance of the injunction requested.[62]

If these criteria are met, the Court may enter the preliminary injunction to enforce the restrictive covenant if the following prerequisites are established in the record:

---

[59]*See*, Pa. R.Civ.P. 4007.2 and 4007.3 (allowing a party to request expedited discovery).

[60]*See*, Pa. R.Civ.P. 1531.

[61]*West Penn Specialty MSO, Inc. v. Nolan*, 737 A.2d 295, 298 (Pa. Super. 1999) (quoting, Herman v. Dixon, 393 Pa. 33, 36, 141 A.2d 576, 577 (1958)).

[62]*New Castle Orthopedic Associates v. Burns*, 481 Pa. 460, 464, 392 A.2d 1383, 1385 (1978).

> [f]irst, [the injunction] is necessary to prevent immediate and irreparable harm which could not be compensated by damages; second, that greater injury would result by refusing it than by granting it; and third, that it properly restores the parties to their status as it existed immediately prior to the alleged wrongful conduct.[63]

Additionally, in some cases, the Court must also consider the effect that the granting of the injunction will have on the public. For example, where the covenant in question seeks to limit the professional practice of a physician, the Court must scrutinize the effect of the resulting loss of medical services on the public interest.[64]

An injury will be regarded as irreparable if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard.[65] In the context of non-compete covenants, Pennsylvania Courts have held that "'[i]t is not the initial breach of the covenant which necessarily establishes the existence of irreparable harm, but rather the unbridled thrust of the continuation of the violation' and incumbent disruption of the employer's customer relationships."[66]

Thus, an employer may satisfy the irreparable harm element even where its "proof of injury, although small in monetary terms, foreshadows the disruption of established business relations which would

---

[63]*West Penn Specialty*, 737 A.2d at 298 (*quoting, New Castle Orthopedic*, at 463-64, 392 A.2d at 385.

[64]*Id.*

[65]*Sovereign Bank v. Harper*, 449 Pa. Super. 578, 674 A.2d 1085, 1091 (1996).

[66]*West Penn Specialty*, 737 A.2d at 299 (*quoting, John G. Bryant Co. v. Sling Testing and Repair*, 471 Pa. 1, 8, 369 A.2d 1164, 1167 (1977)).

result in incalculable damages should the competition continue in violation of the covenant.'"[67] The effect of such a disruption "may manifest itself in a loss of new business not subject to documentation, the quantity and quality of which are 'inherently unascertainable'."[68] Thus, "the impending loss of a business opportunity or market advantage may be aptly characterized as an 'irreparable injury'."[69]

In determining whether the enforcement of a covenant not to compete would impose an undue hardship upon the former employee, the Court must not view the question from the singular prospective of the employee, but rather must view it from a prospective that includes both parties to the employment agreement.[70] Any hardship visited upon the former employee as a result of the enforcement of the covenant must be balanced against what is reasonably necessary to protect the interests of the employer.[71]

---

[67] *New Castle Orthopedic*, at 466, 392 A.2d at 1386.

[68] *West Penn Specialty*, 737 A.2d at 299 (*quoting, John G. Bryant*, at 8, 369 A.2d at 1167); *see also, Courier Times v. United Feature Syndicate*, 300 Pa. Super. 40, 445 A.2d 1288, 1296 (1982).

[69] *Sovereign Bank*, 674 A.2d at 1093.

[70] *Wainwright's Travel Services, Inc. v. Schmolk*, 374 Pa. Super 199, 500 A.2d 476, 479 (1985).

[71] *Id*., (*citing, Jacobson and Co*., 427 Pa. 439, 235 A.2d 612).

With respect to the element of preserving the *status quo*, the Court must determine whether the granting of the injunction will restore "the last peaceable, non-contested status which preceded the controversy."[72] Indeed, this is the main purpose of issuing a preliminary injunction.[73]

Finally, in the cases in which it must consider the impact of granting the injunction upon the public interest, the courts should look at the "effect upon the consumer who is in need of the service."[74] The court must also consider, however, whether the granting of such injunction "will discourage unfair competition, the misappropriation and wrongful use of confidential information and trade secrets and the disavowal freely contracted obligations."[75]

The presence of these elements will support an employer's request for the most effective form of relief available to the employer when seeking to enforce a covenant not to compete – the preliminary injunction. Such immediate relief serves to stop the injury to the employer at its earliest stage.

Beyond The Preliminary Injunction

Many employers approach the enforcement of non-compete covenants from the point of view that everything hinges on the grant or denial of the preliminary injunction. Certainly, the seeking and obtaining

---

[72]*Soja v. Fatoryville Sportsmen's Clubs*, 361 Pa. Super. 473, 522 A.2d1129, 1131 (1987) (*citing, Shanahan v. Yellow Cab Co.*, 491 Pa. 516, 421 A.2d 664 (1980)).

[73]*Id.*

[74]*New Castle Orthopedic*, at 468-69, 392 A.2d at 1387-88 (plurality opinion) (Pomeroy, Nix and Marcellmino, J.J.).

[75]National Business Services, 2 F.Supp. At 709 (quoting Graphic Management Associates, Inc. v. Natt, 1998 WC 159035 (E.D. Pa. 1998)).

of a preliminary injunction is an important component of enforcing a covenant not to compete. It is not, however, the only way to obtain relief in these cases.

Situations may arise where a request for an immediate injunction is denied due to lack of proof of immediate and irreparable harm, but where the employer nevertheless has a claim for monetary damages which result from the conduct of the former employee which violates the restrictions of the covenant. For example, in *Pugliese v. Coar*,[76] the Court of Common Pleas of Luzerne County refused to grant a preliminary injunction because it found, at the preliminary injunction stage, that the language of the covenant was ambiguous as to when the restrictions in the covenant began to run and construed that ambiguity against the employer.[77] By the time discovery had been completed and the matter scheduled for trial, the time restriction in the covenant (2 years) had already expired.[78] Discovery had revealed, however, that the employer was not the "drafter" of the covenant, but instead the covenant was the result of a joint drafting effort between the employer and employee.[79] The interpretation of the covenant espoused by the employer as to when the restrictions in the covenant began to run, moreover, was found by the Court to be the

---

[76] 87 Luz. Leg. Reg. 134.

[77] *Id*. at 135.

[78] *Id*. at n. 1.

[79] *Id*. at 136.

interpretation intended by the parties.[80] After trial, the Court awarded damages to the employer for lost profits in excess of $110,000.00.[81]

Similarly, even where a covenant is deemed by the Court to be wholly unenforceable, the employer nevertheless may have a remedy for the common law tort of misappropriation of confidential business information.[82] To obtain relief for misappropriation of such information, the employer must show:

> (1) that there was a trade secret. . .; (2) that it was of value to employer [owner] and important in the conduct of his business; (3) that by reason of discovery of ownership the employer had the right to the use and enjoyment of the secret; and (4) that the secret was communicated to the employee while he was in a position of trust and confidence under such circumstances as to make it inequitable and unjust for him to disclose it to others, or to make use of it himself, to the prejudice of his employer.[83]

Customer lists and other compilations of data gathered by an employer through a material investment of time and money may qualify as protected information.[84] Such misappropriation can justify both injunctive and monetary relief.[85]

---

[80] *Id*. at 139.

[81] *Id*. at 140.

[82] *A. M. Skier Agency, Inc. v. Gold*, 747 A.2d 936, 939-40 (Pa. Super. 2000).

[83] *Gruenwald v. Advanced Computer Applications, Inc.*, 730 A.2d 1004, 1012-13 (Pa. Super. 1999).

[84] *A. M. Skier Agency*, 747 A.2d at 940.

[85] *Id*.

In sum, the remedies available to an employer to enforce the terms of a non-compete covenant are broader than merely obtaining a preliminary injunction. Indeed, in some cases the damages ultimately recovered by the employer may prove in the long run to be just as satisfying as receipt of injunctive relief.

CONCLUSION

The problems faced by an employer who invests time and energy in training an employee only to have that employee leave its employ and compete with the employer for customers and clients are as old as time itself. Non-compete covenants relating to employment, when properly drafted and executed, provide employers with at least some measure of protection against such problems. In order to be enforceable, however, such covenants must be supported by adequate consideration, must be designed to protect the legitimate business interests of the employer and must be reasonably limited in time and geographic scope. If these criteria are met, then the non-compete covenant will serve as an effective tool to protect the employer's business interests.