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Enforcement Of Noncompete Agreements: Protecting The Public Interest Through An Entrepreneurial Approach

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ENFORCEMENT OF NONCOMPETE AGREEMENTS:

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I. INTRODUCTION

The enforcement of noncompete agreements is variable, differing between courts, between states, and between contexts. Courts determine the enforceability of noncompete agreements with little regard to the normal requirements for an enforceable contract. Analysis of a noncompete agreement tends not only to be fact-dependent, but location-dependent as well. Some states enforce virtually all noncompete agreements; other states refuse to enforce any noncompete agreements. Most other states inhabit a middle ground-enforcing noncompete agreements, but only up to the limit that a court believes to be reasonable. Courts determine reasonableness without regard to the terms of the agreement. A noncompete agreement is a unique type of contract, as the normal contract standard of mutual agreement supported by consideration falls to the wayside. Instead, reasonableness becomes the key to enforceability.

To determine reasonableness, courts will generally measure the relative degrees of harm to be suffered by the employer and the employee, and then make enforcement decisions accordingly. In measuring the potential harm and to examine the interests of the parties, courts consider numerous items outside the terms of the agreement. Analysis of the enforceability of a noncompete agreement centers on the concept of reasonableness. Courts will only enforce reasonable noncompete agreements. Reasonable noncompete agreements are those that are constrained by geography, by time, and by scope. Courts will not enforce unreasonable noncompete agreements.

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Focusing only on the interests of the parties, however, neglects an important aspect of noncompete agreements. The impact of a noncompete agreement falls not only on the parties to the agreement, but on the general public as well. An enforced noncompete agreement will inevitably result in at least some negative consequences to society as a whole. For instance, an enforced covenant that restricts employee mobility can rob society of the employee’s endeavors and contributions. Society loses the all the benefits of the individual who wants to work but, because of contractual obligations, cannot work. The restrained employee may continue to work in a lower-paying job with few benefits. Even worse, the employee may become a drain on the public’s resources.

Therefore, the public’s interest should also be weighed. Taking the public’s interest into account is not a hardship. Some states already encourage courts to evaluate the impact of a noncompete agreement on the public. But even in those states, an additional problem arises. Without suitable guidance as to the proper definition of the public interest, how can a court measure the benefit or harm to the public that might arise from enforcement of the noncompete agreement? Case law provides little guidance in determining how the public’s interest is served.

In this article, I propose a new approach to enforcement of noncompete agreements. Under this new approach, additional considerations will play a role in determining enforceability. I ask that courts give greater consideration of the public good. In making the decision to enforce or not enforce a noncompete agreement, courts should weigh more heavily the potential harm to society.

To measure the benefit to the public that may accrue from the employee’s endeavors, I look to entrepreneurship to serve as a proxy for the public good. Research indicates that society benefits from entrepreneurship: the development of new ideas, new processes, and new businesses. Under the proposed analysis set forth in this Article, to assist in determining the public’s interest, a court should examine whether the departing employee is leaving the organization to engage in entrepreneurial activity, or instead to perform the same tasks for a different employer. In light of this purpose-based approach, an employee may escape the reach of an otherwise enforceable noncompete agreement if the indicia of entrepreneurship are present in her new position.

In part II of this article, I review the role that the noncompete agreement plays in business. In part III, I describe the uneven rules of enforcement that courts across the country utilize. In part IV, I explore the meaning of entrepreneurship. And finally, in part V, I provide guidelines for courts to use in determining the presence of entrepreneurship. Part VI concludes the article.
II. THE ROLE OF THE NONCOMPETE AGREEMENT IN BUSINESS

A. The Noncompete Agreement Explained

A noncompete agreement is “an agreement, generally part of a contract of employment or a contract to sell a business, in which the covenanter agrees for a specific period of time and within a particular area to refrain from competition with the covenantor.”\(^2\) The noncompete agreement has other names, most notably as a “covenant not-to-compete,” a “restrictive covenant,” or a “non-compete clause.”\(^3\) For the most part, these terms are interchangeable and all refer to an employment contract or provision purporting to limit an employee’s power upon leaving his or her employment, to compete in the market in which the former employer does business.\(^4\)

In the employment context, noncompete agreements are generally directed at four discrete areas: (1) general noncompetition; (2) customer (or client) non-solicitation; (3) employee non-solicitation; and (4) non-disclosure.\(^5\)

Though the nomenclature differs, non-solicitation provisions, whether aimed at customer or employee solicitation are forms of non-compete agreements. The same legal standard of enforceability applies to each.\(^6\) Similarly, nondisclosure agreements also resemble noncompete agreements, with the same restrictions on enforceability. Courts subject nondisclosure agreements to the same sort of balancing tests as noncompete agreements.\(^7\) Sometimes however, these four different areas are


\(^3\) But, since no substantive difference exists among the names, this Article will collectively refer to such covenants as “noncompete agreements.”


\(^6\) See Lasership, Inc. v. Watson, 79 Va.Cir.205, 210 (Fairfax 2009)(citing Foti v. Cook, 220 Va. 800, 263 S.E.2d 430 (1980)) (invalidating a non-solicitation agreement that prohibited a former employee from contacting any of the employer’s customers for two years because it was burdensome to expect the former employee to know every customer that had an account with the employer).

\(^7\) Lasership, 79 Va.Cir. at 210 (“The protection afforded to confidential information should reflect a balance between an employer who has invested time, money and effort into developing such information and an employee’s general right to make use of knowledge and skills acquired through experience in a field or industry for which he is best suited.”)
intermingled within the same document. Noncompete agreements may, and often do, contain some or all of these protective clauses.

Noncompete agreements, in theory at least, are not meant to punish the former employee. Instead, they are meant to protect the employer from unfair competition. Noncompete agreements arguably protect an employer’s customer base, trade secrets, and other information vital to its success. From this perspective, noncompete agreements encourage employers to invest in their employees. An employer does not wish to invest in an employee only to see the employee take the skills acquired, or the company’s customers, to another employer. Logically, the employer will invest more in the employee if measures are in place to guard against the employee’s movement to a competitor.

B. A Noncompete Agreement Restricts Employee Mobility

The noncompete agreement discourages employee movement between employers. An enforceable noncompete agreement will prevent an employee from working for a competitor for a specified length of time. Once, noncompete agreements were reserved for upper level employees. In recent years, however, use of the agreements has expanded to other areas of the organization. Noncompete agreements do not eliminate employee turnover, however, they act as a strong deterrent to employees seeking to change jobs. Understandably, few employees can readily absorb a long term of inactivity—a term that could last up to three years based on a typical noncompete agreement. A noncompete agreement, even if never enforced, provides a strong disincentive to leave a job.

Moreover, an employee restrained by a noncompete agreement will have a more difficult time finding a new place to work. Employers understand that it is difficult to poach employees who have agreed to a noncompete agreement. An organization seeking to hire away key employees from a competitor will be aware that those employees may not be able to start work in the near term. An employee forced to the sidelines for a year or more is considerably less desirable to another employer.

The noncompete agreement inhibits competitors in another way. A company that hires an employee away from a competitor, knowing that the employee has a contractual obligation to not work for a competitor, runs the risk of being sued for tortious

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interference with a contract.\textsuperscript{10} A company that encourages a new hire to breach her noncompete agreement may be liable under this tort. The original employer then may have a suit not only against its former employee for breach of the noncompete agreement, but also against the hiring competitor for encouraging the former employee to breach her contractual obligations.\textsuperscript{11} Without overwhelming factors in favor of the proposed hire, risk averse organizations may refuse to run the risk of a lawsuit.

Multiple policy reasons support both the enforcement of noncompete agreements as well as the refusal to enforce those agreements. This dual nature of noncompete agreements is the core problem. On the one hand, employee mobility has numerous associated benefits for employees: higher wages, increased opportunities, better retirement and medical plans, and increased satisfaction. Likewise, employee mobility can provide positives to the public through greater contributions made possible by the higher paid employee, as well as the reduced need to depend on public assistance. Finally, increased employee mobility is a benefit for employers as well. When employees are freed from their restrictive covenants, they are easily able to relocate to new positions. This mobility increases the available pool of trained and experienced candidates.

At the same time, however, arguments exist in support of an employer’s use of an agreement limiting mobility. Most people would agree that an employer should be able to protect itself against unfair competition, though the degree of protection may be debatable. Furthermore, allowing an employer to limit its employees’ mobility can encourage the employer to provide training opportunities, secure in the knowledge that newly acquired skills will not be used to compete with it. Finally, there is something to be said for respecting the freedom of parties to contract to the terms and conditions of employment, without a constant threat of judicial intervention.

\textsuperscript{10} In Lumley v. Wagner, 42 Eng. Rep. 687 (1852), a singer under contract to sing at the plaintiff’s theater was induced by the defendant, who operated a rival theater, to break her contract. The court held that the plaintiff was entitled to recover money damages from the rival theater owner for his interference with the singer’s contract, which was essentially a form of unlawful competition. This case is the basis for the tort of inducement to breach a contract. \textit{Id.}

\textsuperscript{11} \textit{Id.}
III. THE UNEVEN ENFORCEMENT OF NONCOMPETE AGREEMENTS

A. The Noncompete Agreement Is Troublesome

Agreements that restrict employee mobility “are not favored, will be strictly construed, and, in the event of an ambiguity, will be construed in favor of the employee.”\textsuperscript{12} This general rule of noncompete agreements presents difficulties to employers, employees, and the courts charged with enforcement. It is little wonder then that the law of noncompete agreements is, in the words of one commentator, “a mess.”\textsuperscript{13} Moreover, the confusion and complexity of noncompete agreement law has worsened over time.\textsuperscript{14}

Little uniformity exists in the enforcement of noncompete agreements. Each state analyzes noncompete agreements from a different perspective.\textsuperscript{15} In a few states, the agreement is void and unenforceable.\textsuperscript{16} At the other end of the spectrum, some states enforce virtually all noncompete agreements.\textsuperscript{17} Even worse, among those states that enforce agreements, the degree of enforcement varies. The same noncompete agreement may be enforced in one state, while not being enforced in another state.\textsuperscript{18}

Because of the uncertainty surrounding the agreement, a noncompete agreement seems to scarcely rise to the level of a legally enforceable contract. Often, the traditional elements of contract formation are not found in a noncompete agreement: one often finds neither a bargained-for exchange nor a meeting of the minds in these agreements. Too


\textsuperscript{13} Viva R. Moffatt, Making Non-Competes Unenforceable, 54 Ariz. L. Rev. 939, 943 (2013).


\textsuperscript{15} For an overview of enforcement considerations, see Kyle B. Sill, Drafting Effective Noncompete Clauses and Other Restrictive Covenants: Considerations Across The United States, 14 Fl. Coastal L. Rev. 365 (2013).

\textsuperscript{16} California and North Dakota have laws making virtually all noncompete agreements enforceable. see CAL.BUS.&PROF.CODE § 16600 and N.D.CENT.CODE § 9-08-06 (containing language identical to California’s statute). The North Dakota statute reflects North Dakota’s “long-standing public policy against restraints upon free trade.” Warner & Co. v. Solberg, 634 N.W.2d 65, 69-70 (N.D. 2001).

\textsuperscript{17} Sill, supra at 368-9.

\textsuperscript{18} Sill, supra at 368-9.
often, the parties to a noncompete agreement will be uncertain as to whether the agreement will be enforced according to its terms.\textsuperscript{19} In fact, often employers create clauses that they know will not be enforced according to their terms.\textsuperscript{20}

Courts may give little credence to the agreement as it is actually written.\textsuperscript{21} Often, in those states that permit enforcement of noncompete agreements, the language of the agreement represents a mere starting point. In contrast to most contracts, enforcement of a noncompete agreement depends heavily on the circumstance of its execution: the context in which the agreement was executed, the nature of the industry or profession at stake, and the status of the restricted employee.\textsuperscript{22} In many jurisdictions, courts routinely “blue pencil” or reform covenants that are not reasonable, as determined by a multipart test.\textsuperscript{23} The blue pencil doctrine gives courts the authority to either (1) strike unreasonable clauses from a noncompete agreement, leaving the rest to be enforced, or (2) actually modify the agreement to reflect the terms that the parties could have - and probably should have - agreed to.\textsuperscript{24}

Courts have traditionally viewed noncompete agreements with disfavor, believing that the agreements contravene public policy.\textsuperscript{25} The agreements were seen as unfair restraints on trade\textsuperscript{26} and in response, the common law prohibited the use of such agreements. In time, the restrictions on such agreements lessened.\textsuperscript{27} Nevertheless, the


\textsuperscript{20} Charles A. Sullivan, The Puzzling Persistence of Unenforceable Contract Terms, 70 Ohio St. L.J. 1127, 1147 (2009).

\textsuperscript{21} Virginia is an important exception. Virginia courts must interpret contracts as written. See *Lanmark Tech.*, 454 F.Supp.2d at 529 (“[C]ourts applying [the Virginia Supreme Court’s] three-part test must take the non-compete provision as written; there is no authority for courts to blue pencil or otherwise rewrite the contract to eliminate any illegal overbreadth.”)

\textsuperscript{22} Sill, supra at 373.

\textsuperscript{23} See, Sill supra at 373-4.

\textsuperscript{24} Jon P. McClanahan and Kimberly M. Burke, Sharpening The Blunt Blue Pencil: Renewing The Reasons For Covenants Not To Compete In North Carolina, 90 N.C.L. Rev. 1931, 1935 (2012).

\textsuperscript{25} Garrison & Wendt, supra, 45 at 112-13 (2008).

\textsuperscript{26} “Covenants of this nature are in restraint of trade; the test is whether the particular restraint is reasonable on the specific facts.” Ruhl v. Bartlett Tree Co., 245 Md. 118, 225 A.2d 288, 291 (Md. 1967).

\textsuperscript{27} Id. at 114.
common law has generally restricted their use for any purpose other than for legitimate business purposes.\textsuperscript{28} To ensure the purpose is legitimate, the law requires that a valid noncompete agreement meet a reasonableness requirement.\textsuperscript{29}

To satisfy the reasonableness requirement, the law requires that the employer establish a reason for the noncompete agreement other than simply preventing the employee from competing with his former employer.\textsuperscript{30} There must be some element to the competition that would make such competition unfair. The employer’s justification cannot simply consist of the training or experience gained while on the job because an employee has a right to those things. Instead, the employer must demonstrate the existence of “special circumstances” that are present to justify the use of the noncompete agreement.\textsuperscript{31}

The burden rests with the employer to show that the provision is no greater than necessary to protect the employer’s legitimate business interests, is not unduly burdensome on the employee’s ability to earn a living, and does not offend sound public policy.\textsuperscript{32} As an initial matter, the validity of a restrictive covenant is a question of law

\textsuperscript{28} See, e.g., Allen, Gibbs, & Houlik v. Ristow, 94 P.3d 724 (Kan. Ct. App. 2004); see also M. Scott McDonald, \textit{Noncompete Contracts: Understanding the Cost of Unpredictability}, 10 TEX. WESLEYAN L. REV. 137 (2003). McDonald notes that among the recognized protectable interests for employers are:

(1) to protect trade secrets and confidential information of the company;
(2) to protect customer goodwill developed for the company (customer relationships);
(3) to protect overall business goodwill and assets that have been sold (noncompetes used in the sale of a business);
(4) to protect unique and specialized training;
(5) for situations in which the employer has contracted for the services of an individual of unique value because of who they are (e.g., performers, professional athletes); and
(6) for pinnacle employees in charge of an organization.

\textit{Id.} at 143 (footnotes omitted)

\textsuperscript{29} McDonald, \textit{supra} note 101, at 143.

\textsuperscript{30} Garrison, \textit{supra} note 99, at 115.

\textsuperscript{31} \textit{Id.} at 115-16.

\textsuperscript{32} See, e.g., Lanmark Tech., Inc, 454 F.Supp.2d at 528–29; Modern Env’ts., 263 Va. at 493, 561 S.E.2d 694; Roanoke Eng’g Sales Co. v. Rosenbaum, 223 Va. 548, 552, 290 S.E.2d 882 (1982).
resolved in light of the language and circumstances surrounding the specific covenant at issue.\textsuperscript{33}

Courts have acknowledged two areas that serve as sufficient justification for the execution of a noncompete agreement.\textsuperscript{34} An employer is entitled to (1) protect the goodwill of its business, and (2) protect its confidential information.\textsuperscript{35}

The first area includes the protection of goodwill. An organization has the right to protect its goodwill. An employee often generates goodwill in his conduct with clients, fostering personal relationships with customers. That goodwill does not, however, belong to the employee, who has conducted business as an agent of the employer. Instead, the goodwill is an asset of the employer. The law protects these corporate customer relations as part of the “customer contact” theory.\textsuperscript{36}

The employer also has a right to protect its confidential information. An employer has a protectable interest in “information pertaining especially to the employer’s business.”\textsuperscript{37} A covenant that is reasonable in time and geographic scope shall be enforced to the extent necessary “(1) to prevent an employee’s solicitation or disclosure of trade secrets, (2) to prevent an employee’s release of confidential information regarding the employer’s customers, or (3) in those cases where the employee’s services to the employer are deemed special or unique.”\textsuperscript{38}

Furthermore, it is not necessary that the employee make actual use of the information before he is restrained. An employee’s mere ability to take advantage of the employer’s confidential information and thereby gain an unfair advantage may be sufficient for equity to restrain the employee from engaging in a competing business.\textsuperscript{39}

\textsuperscript{33} See, e.g., Omniplex World Servs., 270 Va. at 249, 618 S.E.2d 340 (“Each noncompetition agreement must be evaluated on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved.”).

\textsuperscript{34} Id. at 116.

\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} Employee Agreements Not to Compete, 73 Harv. L.Rev. 625, 652 (1960).

\textsuperscript{38} Estee Lauder at 177.

\textsuperscript{39} See North Pac. Lumber Co. v. Moore, 275 Or. 359, 551 P.2d 431, 434 (1976) (“It is clear that if the nature of the employment is such as will bring the employee in personal contact with the patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him ... to take
An employee’s knowledge of confidential information is sufficient to justify enforcement of the noncompete if there is a substantial risk that the employee will be able to divert all or part of the employer's business given his knowledge.  

An employer can utilize a number of other legal documents to secure these secrets. In fact, a contract may not even be required. "[A]n employee's use of an employer's trade secrets or confidential customer information can be enjoined even in the absence of a restrictive covenant when such conduct violates a fiduciary duty owed by the former employee to his former employer."  

Nevertheless, a noncompete agreement remains useful as a form of protection against the loss of confidential information. The noncompete agreement protects trade secrets in the best manner possible—by preventing the former employee from working for a competitor. Thus, the employer is able to prevent the sharing of trade secrets before the disclosure ever takes place. A noncompete agreement serves as a prophylactic remedy that aims to prevent unwanted disclosures rather than having to sue for misappropriation of trade secrets after the fact.  

The reasonableness requirement should balance the interests of all entities affected by the noncompete agreement: the employer, the employee, and society as a whole. Each entity has an interest to be protected. The employee wishes to preserve his mobility; the employer wishes to protect itself from unfair competition; and society wishes to balance with a system that provides incentives for the development and training of employees. With such varied interests at hand, the noncompete agreement should be sculpted so as to satisfy all three elements.

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advantage of such knowledge of or acquaintance with the patrons or customers of his former employer, and thereby gain an unfair advantage, equity will interfere in behalf of the employer and restrain the breach of a negative covenant not to engage in such competing business . . . "

40 Id.
43 Id. at 117.
44 Id.
B. The Reasonableness Test Does Not Sufficiently Measure the Interests of the Public

Establishing the existence of a legitimate business interest to be protected is merely the threshold step that an employer must meet to create an enforceable agreement.\textsuperscript{45} The scope of the noncompete agreement must not be greater than is necessary to protect that business interest.\textsuperscript{46} To measure the ability to protect a business interest, almost all courts apply a standard of reasonableness in deciding whether to enforce a noncompete agreement.\textsuperscript{47} The reasonableness test measures the interests of the parties to the agreement. The test does not, however, adequately measure the interests of the public. Even in those states that purport to weigh the public’s interest, there is no discrete list of factors whereby the public’s interest may be taken into account. As will be seen below, however, “reasonableness” as a standard holds minimal value in the construction of noncompete agreements.\textsuperscript{48}

Many states provide a statutory framework for the regulation of noncompete agreements. For example, in Michigan, the Michigan Antitrust Reform Act prohibits any “contract, combination, or conspiracy between 2 or more persons in restraint of, or to

\begin{itemize}
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. at 118.
\item \textsuperscript{47} Garrison, supra note 99, at 117-18; Reddy, 298 S.E.2d at 910-11.
\item \textsuperscript{48} See Reddy, 298 S.E.2d at 910. The court in Reddy put it best:
\end{itemize}

Reasonableness, in the context of restrictive covenants, is a term of art, although it is not a term lending itself to crisp, exact definition. Reasonableness, as a juridical term, is generally used to define the limits of acceptability and thus concerns the perimeter and not the structure of the area it is used to describe. This general observation is nowhere more particularly true than with respect to a restrictive covenant. Once a contract falls within the rule of reason, the rule operates only as a conclusive observation and provides no further guidance. A court’s manipulation of the terms of an anticompetitive covenant, where none of its provisions standing alone is an inherently unreasonable one, cannot be accomplished with reasonableness as the standard. It is like being in the jungle – you’re either in or you’re out, and once you’re in the distinction is worthless for establishing your exact location.

Reddy, 298 S.E.2d 906 at 910-11.
monopolize, trade or commerce.” However, the statute explicitly authorizes agreements not to compete as long as they are reasonable. Section 4(a)(1) of the Act provides:

An employer may obtain from an employee an agreement or covenant which protects an employer’s reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of the employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

The remaining states rely on the court system. In common law jurisdictions, a noncompete agreement will be upheld only “if the restraint imposed is not unreasonable, is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public.” Many states follow the test set forth in the Restatement (Second) of Contracts, which takes into consideration the following factors: (1) whether the restriction is greater than necessary to protect the business and goodwill of the employer; (2) whether the employer’s need for protection outweighs the economic hardship which the covenant imposes on the departing party; and (3) whether the restriction adversely affects the interests of the public.

A reasonable restrictive covenant does not “extend beyond what is apparently necessary for the protection of those in whose favor it runs.” Section 188 of the

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52 Vanko, supra note 98, at 2. Further, even in states with a statutory framework, the common law remains important. For example, Michigan courts have clarified that “§4(a)(1) represents a codification of the common-law rule that ‘the enforceability of noncompetition agreements depends on their reasonableness.’ ” St. Clair Med., 715 N.W.2d at 918 (quoting Bristol Window & Door, 650 N.W.2d at 679).
53 W.R. Grace & Co. v. Mouyal, 422 S.E.2d 529, 531 (Ga. 1992) (quoting Rakestraw v. Lanier, 30 S.E. 735, 738 (Ga. 1898)).
54 Restatement (Second) of Contracts § 188 cmt. a (1979).
Restatement instructs: “[a] promise to refrain from competition that imposes a restraint ... is unreasonably in restraint of trade if (a) the restraint is greater than is 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.”\(^{56}\) A post-employment restraint may impose a hardship on the employee if it “inhibits his personal freedom by preventing him from earning his livelihood if he quits."\(^{57}\)

The question of reasonableness is open to interpretation. For instance, in New York, courts require an employee’s noncompete agreement to meet analysis based on “an overriding limitation of reasonableness.”\(^{58}\) In Virginia, courts must consider “the function, geographic scope, and duration of any restriction.”\(^{59}\)

The reasonableness requirement is designed to take the interests of the employee into account. As one New York court noted:

> [O]ur economy is premised on the competition engendered by the uninhibited flow of services, talent and ideas. Therefore, no restrictions should fetter an employee’s right to apply to his own best advantage the skills and knowledge acquired by the overall experience of his previous employment.\(^{60}\)

Courts are required to examine any number of factors to determine whether to enforce a noncompete agreement. For instance, in Virginia, courts must consider a number of specific facts: “the legitimate, protectable interests of the employer, the nature of the former and subsequent employment of the employee, whether the actions of the employee actually violated the terms of the non-compete agreements, and the nature of the restraint in light of all the circumstances of the case.”\(^{61}\)

Once a court determines that the noncompete agreement protects a legitimate business interest, it will then examine the agreement to ensure that it does not exceed the

\(^{56}\) Restatement (Second) of Contracts § 188(1)(a), (b) (1981).

\(^{57}\) Id. at § 188, cmt. c.


\(^{61}\) Modern Env’ts., 263 Va. at 494–95, 561 S.E.2d 694.
minimum restraint necessary to protect that interest.\textsuperscript{62} Courts will enforce agreements only where they are “strictly limited in time and territorial effect and . . . [are] otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee.”\textsuperscript{63} In common law jurisdictions, noncompete agreements are enforced as reasonable if they are found to satisfy the following three elements:

First [the agreement] must be ancillary to an otherwise valid contract, transaction or relationship. Second, the restraint created must not be greater than necessary to protect the promisee’s legitimate interests such as business goodwill, trade secrets, or other confidential or proprietary information. Third, the promisee’s need for the protection given by the agreement must not be outweighed by either the hardship to the promissor or any injury likely to the public.\textsuperscript{64}

Thus, to be enforceable, agreements must be reasonable in three ways: scope (referring to the subject matter of the agreement), duration, and geography.\textsuperscript{65}

1. **Limitations on Scope of Activity**

There are two general types of “scope of activity” limitations: those that prohibit the employee from soliciting the employer’s customers and those that prohibit the employee from engaging in any competitive business. With respect to customer solicitation, “reasonable” limitations are valid and enforceable.\textsuperscript{66} A legitimate purpose of a noncompete agreement is to prevent “employees or departing partners from using the

\textsuperscript{62} Garrison & Wendt, supra note 102, at 117.

\textsuperscript{63} Palmer & Cay, Inc., v. Marsh & McLennan Co., 404 F.3d 1297, 1303 (11th Cir. 2005).

\textsuperscript{64} Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 386 (Tex. 1991) (citations omitted). In Texas, the common law test was later codified in the Texas Business and Commerce Code. Id.


\textsuperscript{66} See Ruscitto v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 777 F. Supp. 1349, 1354 (N.D. Tex. 1991) (limiting the solicitation for one year of any of the clients of Merrill Lynch “whom [the employee] served or whose names became known to [the employee] while [working at] Merrill Lynch” was reasonable), aff’d, 948 F.2d 1286 (5th Cir. 1991), cert. denied, 504 U.S. 930 (1992); Picker Int’l v. Blanton, 756 F. Supp. 971, 982 (N.D. Tex. 1990) (holding that the limitation against servicing MRI systems that employee serviced while with employer was reasonable); Investors Diversified Servs., Inc. v. McElroy, 645 S.W.2d 338, 339 (Tex. App. 1982) (holding that the limitation against soliciting customers with whom the employee dealt or had contact during employment was reasonable).
business contacts and rapport established during the relationship of representing [a] . . .
firm to take the firm’s customers with him.” Thus, noncompete agreements that are
limited to those customers with whom the employee had daily contact on a personal level
would likely be deemed reasonable. 68

2. Limitations on Time

The duration of the restriction also determines the reasonableness of the
restraint. 69 Restraints that are unlimited in time are almost always unreasonable. 70
However, it is necessary to consider the particular industry at issue to determine whether
the particular restraint is reasonable as to time. At least some courts weigh the specific
value of the information that is being protected. For instance, in New York the
“durational reasonableness of a non-compete agreement is judged by the length of time
for which the employer’s confidential information will be competitively valuable.” 71

67 Peat Marwick, 818 S.W.2d at 387. Some customer solicitation limitations may be considered overbroad,
unreasonable, and, therefore, unenforceable, at least without reformation. In Peat Marwick, the Texas
Supreme Court held that a covenant not to compete was overbroad and unenforceable. Id. at 388. The
covenant prohibited a former partner of an accounting firm from soliciting or doing business for clients
acquired by the firm during the 24 month period immediately after the partner left, or with whom the
partner had no contact while at the firm. Id. at 383. For a scope of activity limitation of this type to be
reasonable, there must be “a connection between the personal involvement of the former firm member
[and] the client.” Id. at 387. Therefore, a covenant against soliciting customers should be limited to
customers with whom the employee had contact during the period of employment; absent such a limitation,
the covenant is overbroad. Id. at 388. The second, and broader scope of activity limitation is one that
prohibits any competitive activity. Texas courts generally uphold such limitations when the employer is
engaged in only a single type of business. See Property Tax Assocs. v. Staffeldt, 800 S.W.2d 349, 351
(Tex. App. 1990). On the other hand, when an employer engages in a number of different types of
business, such a limitation may be unreasonable unless it is limited to the specific type of business in which
the employee worked while employed by the employer. See Diversified Hurron Res. Group v. Levinson-
Polakoff, 752 S.W.2d 8, 11 (Tex. App. 1988).

68 Peat Marwick, 818 S.W.2d at 387.

69 McElroy, 645 S.W.2d 338 at 339.

70 See, e.g., Taylor v. Saurman, 1 A. 40, 41 (Pa. 1885) (declaring covenant not to re-engage in photography
void as against public policy).

71 Estee Lauder, at 181; see also Business Intelligence Servs. Inc. v. Hudson, 580 F.Supp. 1068, 1073
The courts’ inconsistent analysis under this fact-specific inquiry is frustrating. As one commentator states:

A look at the cases finds courts upholding restrictive covenants that last as long as five or ten years, while invalidating others that last only one or two years. Moreover, courts in the same jurisdiction will uphold a three-year limitation in one case but invalidate it in another. Unfortunately, in so doing the courts seldom attempt to reconcile their decisions, except perhaps by saying that each case must be decided on its own facts. In reviewing the cases, one could decide that the decisions are totally serendipitous and would not be far wrong. However, luck and good fortune are not particularly helpful when drafting clauses.72

A review of case law indicates that most courts usually uphold time limitations of one or two years.73 While limitations of three to five years may be upheld in the sale of a business, the decisions conflict as to whether a three to five year limitation is reasonable in an employment situation.74

3. Limitations on Geography

The geographical limitation in a noncompete agreement must be definite.75 An indefinite description of the geographical area should render the agreement unenforceable as written.76 Nevertheless, even a worldwide restriction may reach the standard of


74 Texas cases provide a representative array of decisions. Compare Prop. Tax Assocs., Inc. v. Staffeldt, 800 S.W.2d 349, 350 (Tex. App. 1990) (“The courts of this state have upheld restrictions ranging from two to five years as reasonable.”), and McElroy, 645 S.W.2d 338 at 339 (“Two to five years have repeatedly been held to be reasonable.”), with Bob Pagan Ford, Inc. v. Smith, 638 S.W.2d 176, 178-79 (Tex. App. 1982 ) (upholding trial court’s decision to reform the restricted period under an employment agreement from three years to six months).


76 See Butts Retail, Inc. v. Diversifoods, Inc., 840 S.W.2d 770, 774 (Tex. App. 1992) (holding the language “metropolitan area’ of the Parkdale Mall store in Beaumont, Texas” indefinite and unenforceable); Gomez, 814 S.W.2d at 117-18 (holding the language “existing marketing area” and “future marketing area of the employer begun during employment” indefinite and unenforceable).
reasonableness. The particular nature of the employer's business may warrant what otherwise appears to be hopelessly overbroad.77

Numerous courts have found that a reasonable area consists of the territory in which the employee worked while employed.78 Beyond this general rule, however, what constitutes a reasonable geographical area invariably depends upon the facts of the specific case.

Traditionally, the reasonableness of a geographic limitation was directly related to the location of the territory in which the employee worked for his former employer.79 Courts have found that geographic restraints were reasonable “if the area of the restraint is no broader than the territory throughout which the employee was able to establish contact with his employer’s customers during the term of his employment.”80

4. The Effect of the Blue-Pencil Doctrine

Traditionally, under the common law, courts rarely enforced unreasonable agreements in part.81 An agreement made unreasonable by attempting to overextend its prohibitions would be either invalidated, or the offending passage could be deleted pursuant to the blue-pencil doctrine.82 The blue-pencil test is a “judicial standard for deciding whether to invalidate the whole contract or only the offending words.”83 If the blue-pencil doctrine is strictly applied, “only the offending words are invalidated if it

77 Estee Lauder, at 181. See, e.g., Business Intelligence Services, 580 F.Supp. at 1072–73 (worldwide restriction reasonable “given the international nature of [the employer’s] business”).


79 See Levinson-Polakoff, 752 S.W.2d at 12; see also Butler v. Arrow Mirror & Glass, Inc., 51 S.W.3d 787, 793 (Tex. App. 2001).


81 Garrison & Wendt, supra note 102, at 117.

82 Id. at 118-19 (footnote omitted).

83 BLACK’S LAW DICTIONARY 183 (8th ed. 2004).
would be possible to delete them simply by running a blue-pencil through them, as opposed to changing, adding, or rearranging words." The blue-pencil doctrine is based in large part on the "understanding that there is not necessarily a sinister purpose behind an overbroad restrictive covenant." Courts can and do look to the good faith of the employer in determining whether to utilize the blue-pencil doctrine.

Use of the blue-pencil doctrine differs from state to state. Among those states that enforce noncompete agreements, three schools of thought exist. As the First Circuit summarized:

"Courts presented with restrictive covenants containing unenforceable provisions have taken three approaches: (1) the "all or nothing" approach, which would void the restrictive covenant entirely if any part is unenforceable, (2) the "blue-pencil" approach, which enables the court to enforce the reasonable terms provided the covenant remains grammatically coherent once its unreasonable provisions are excised, and (3) the "partial enforcement" approach, which reforms and enforces the restrictive covenant to the extent it is reasonable, unless the "circumstances indicate bad faith or deliberate overreaching" on the part of the employer."

As noted above, some states follow a "no modification" approach to noncompete agreements. Also known as the "all-or-nothing" rule, this approach precludes the use of the blue-pencil doctrine. Courts adhering to this approach refrain from either rewriting

\[ \text{84 Id.} \]
\[ \text{85 Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 914 (W. Va. 1982) ("In most cases, the promise is not required by the employer because he is a hardhearted oppressor of the poor. He too is engaged in the struggle for prosperity and must bend every effort to gain and to retain the good will of his customers. It is the function of the law to maintain a reasonable balance.") (quoting A.L. CORBIN, CONTRACTS § 1394 (1962)).} \]
\[ \text{86 See Reddy, 298 S.E.2d at 916 ("If the reviewing court is satisfied that the covenant is reasonable on its face, hence within the perimeter of the rule of reason, it may then proceed with analysis leading to a ‘rule of best result.’ Pursuant to that analysis, the court may narrow the covenant so that it conforms to the actual requirements of the parties.").} \]
\[ \text{88 Id.} \]
\[ \text{89 Id.} \]
\[ \text{90 Id.} \]
or striking overbroad provisions in noncompete agreements.91 Courts in no-modification states first determine whether the restrictive covenant is reasonable as written.92 If not, the court will not modify or eliminate provisions, but will instead refuse to enforce the agreement at all.93

The second approach is known as the strict blue-pencil rule. The strict blue-pencil rule does not allow courts to rewrite overbroad noncompete agreements.94 Instead, the strict approach allows courts only to strike overbroad provisions and enforce what is left of the agreement. Enforcement is permitted only if the agreement is reasonably limited after the overbroad provisions have been removed.95

Finally, other states have adopted a liberal form of the blue-pencil doctrine: the “reasonable modification” approach. These states permit a court to rewrite an overbroad non-competition agreement to reasonably limit the restrictions found in the agreement.96

C. The Public’s Interest in Enforcement Should Play a Larger Role in the Reasonableness Test

In this paper, I argue that the public good should receive enhanced focus in the enforcement of noncompete agreements. This stand comports with the language of the Restatement of Contracts that courts should examine “whether the restriction adversely affects the interests of the public.”97 Although in language less strong (as well as more convoluted), the draft of the Restatement of Employment Law includes, among the exceptions to enforcement of noncompete agreements found in, where “in the geographic region covered by the restriction a great public need for the special skills and services of

91 Id.

92 Levinson-Polakoff, 752 S.W.2d at 12.

93 Id.

94 See Deustche Post Global Mail, Ltd. v. Conrad, 292 F. Supp 2d 748, 754 (D. Md. 2003) (explaining that the strict approach is “limited to removing the offending language without supplementing or rearranging the remaining language.”).


97 See note 35, supra.
the former employee outweighs any legitimate interest of the employer in enforcing the covenant."98 Therefore, a basis already exists for examining the interest of the public in examining the possible enforcement of a noncompete agreement.

In fact, many states have acknowledged that the public has an interest in the enforceability of a noncompete agreement. Although stated in different ways, some state reasonableness tests already reflect the position that the noncompete agreement should not harm the public as a whole. There are numerous instances in which courts have recognized that the public's interest in enforcement. This willingness to consider the interests of the public takes different forms and has been stated in different ways.

For instance, Arkansas courts have noted that a reasonable noncompete agreement "should not injure the public's interest."99 In Kentucky, courts have noted the potential conflict between the employer's interest and those of the public: "[O]n consideration of the subject, nature of the business, situation of the parties and circumstances of the particular case," a restrictive covenant is reasonable if it "is such only as to afford a fair protection to the legitimate interests of the covenantee and not so large as to interfere with the public interests or impose undue hardship on the party restricted."100

In Maryland, a noncompete agreement may only be enforced if "the restraint is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the business of the employer and do not impose undue hardship on the employee or disregard the interests of the public."101 In New Jersey, courts state that a reasonable noncompete agreement is one that "does not impair public interest."102

Similarly, the New York Court of Appeals notes that its version of the reasonableness test includes weighing the potential harm to the public:

98 Restatement (Third) of Employment Law, § 8.06(d).
99 Dawson v. Temps Plus, Inc., 337 Ark. 247, 987 S.W.2d 722, 727 (Ark. 1999); see also Sensabaugh v. Farmers Ins. Exch., 420 F. Supp. 2d 980, 985 (E.D. Ark. 2006) (citing Evans Laboratories, Inc. v. Melder, 262 Ark. 868, 870, 562 S.W.2d 62 (1978)) ("The test is whether the restraint imposed is no greater than is reasonably necessary for the protection of the [employer] and not so great as to injure a public interest."
A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.\textsuperscript{103}

Under Connecticut law, restrictive covenants made in an employment agreement "may be against public policy, and, thus, are enforceable only if their imposed restraint is reasonable, an assessment that depends upon the competing needs of the parties as well as the needs of the public."\textsuperscript{104} Courts have identified those needs as "(1) the employer's need to protect legitimate business interests, such as trade secrets and customer lists; (2) the employee’s need to earn a living; and (3) the public’s need to secure the employee’s presence in the labor pool."\textsuperscript{105}

The public's interest may derive from the supposed benefit of competition. Free competition, presumably to benefit society as a whole, underlies the notion of a strict reasonableness test.\textsuperscript{106} "[O]nce the term of an employment agreement has expired, the general public policy favoring robust and uninhibited competition should not give way merely because a particular employer wishes to insulate himself from competition."\textsuperscript{107}

Similarly, Illinois courts refuse to permit expansive readings of restrictive covenants, because more competition often serves the public interest in low prices.\textsuperscript{108} Wisconsin considers, among other issues, whether a noncompete agreement "is reasonable with reference to the public's interest in unrestrained competition.\textsuperscript{109} The states that refuse to enforce noncompete agreements have done so, in large part, in an effort to protect the public's interest. The California statute's prohibition against the enforcement of noncompetes is rooted in public policy arguments.\textsuperscript{110} Courts have traditionally disfavored noncompete agreements as restraints on trade, but permitted


\textsuperscript{105} Deming, 905 A.2d at 634.

\textsuperscript{106} EarthWeb at 313.

\textsuperscript{107} Id.; American Broadcasting, 52 N.Y.2d at 404, 438 N.Y.S.2d at 487, 420 N.E.2d 363.


\textsuperscript{109} Chuck Wagon Catering v. Raduege, 88 Wis.2d 740, 277 N.W.2d 787 (1979).

\textsuperscript{110} Moffat, at 945.
them if the restraints were reasonable. The California statute, however, goes beyond "disfavor" to instead eliminate the use of virtually all noncompetes.\textsuperscript{111} In Edwards v. Arthur Andersen LLP, the California Supreme Court explained the statute as "settled legislative policy in favor of open competition and employee mobility."\textsuperscript{112} The Edwards court noted that the "law protects Californians and ensures that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice. It protects the important legal right of persons to engage in businesses and occupations of their choosing."\textsuperscript{113}

North Dakota shares a common position on the enforceability of noncompete agreements. Other than in the context of a sale of a business or dissolution of a partnership, North Dakota refuses to recognize the enforceability of noncompete agreements: "Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void ... ."\textsuperscript{114} As with California, North Dakota's statute reflects the public interest in limiting the ability to restrict employee mobility. It reflects the "long-standing public policy against restraints upon free trade."\textsuperscript{115} There is no question that public policy, i.e., the interests of the public lie at the heart of the North Dakota statute. "Although the statute may appear to protect the party against whom a contract not to compete is sought to be enforced, statutes making void contracts in restraint of trade are based upon consideration of public policy and not necessarily upon consideration for the party against whom relief is sought."\textsuperscript{116}

The public has an interest in open access to the goods and services that the employee may produce. The North Dakota Supreme Court stated that the purpose of the statute is "to promote commercial activity by restricting the ability of individuals to form agreements which limit commercial exchange or more specifically limit agreements not to compete."\textsuperscript{117} The Eighth Circuit, applying North Dakota law, stated that "North Dakota

\textsuperscript{111} Moffat, at 945.

\textsuperscript{112} Edwards v. Arthur Andersen LLP, 189 P.3d 285, 291 (Cal. 2008).

\textsuperscript{113} Id.

\textsuperscript{114} N.D. Cent. Code § 9-08-06 (2012).

\textsuperscript{115} Warner & Co. v. Solberg, 634 N.W.2d 65, 70 (N.D. 2001).

\textsuperscript{116} Warner, at 70.

deems the public’s access to services to be a more pressing policy concern than the details of the relationship between a particular employee and employer.”).\textsuperscript{118}

The problems with noncompete agreements are well-documented. These agreements are subject to a bewildering maze of state laws, courts that may enforce the agreement only in part or not at all, and general confusion on the part of both employer and employee. Given these problems, it seems clear that the process of enforcing a noncompete agreement should be clarified.

IV. PROTECTING THE PUBLIC’S INTEREST BY ADOPTING AN ENTREPRENEURIAL APPROACH

A. Entrepreneurship Is In The Public Interest

For this paper, I equate the public interest with entrepreneurship. Although some may consider this a reach, logical reasons support this notion. Entrepreneurship is important. The development of new business, new goods, and new services bring value to society. Entrepreneurship “satisfies the twin conditions for a public good: (1) Entrepreneurial activities create benefits that spillover in the entire economy; (2) It is difficult, impractical, and cost ineffective to collect money from all those who benefit from initial entrepreneurial activities.”\textsuperscript{119} Some scholars have estimated that “the direct and indirect effects of small business formation accounts for more than half of gross domestic product and approximately sixty to eighty percent of the new jobs created in this country.”\textsuperscript{120}

Entrepreneurship is a vital component to the economic health of companies, sectors, and nations.\textsuperscript{121} Entrepreneurship plays a critical role in “new economic activity—boosting innovation, wealth, growth, and employment.”\textsuperscript{122} Entrepreneurship is “an engine

\textsuperscript{118} CDI Energy Servs. v. W. River Pumps, Inc., 567 F.3d 398, 404 (8th Cir. 2009).

\textsuperscript{119} Inder P Nijhawan and Khalid Dubas, Entrepreneurship: Public or Private Good, Proceedings of the Academy of Entrepreneurship, at 49.

\textsuperscript{120} Id. (citing John McDowell, New Look at look at Entrepreneurship in The 21st Century,” Small Business Administration, Office of Advocacy. 2004)

\textsuperscript{121} See Soriano, supra note 179, at 297.

\textsuperscript{122} Id. at 297.
Entrepreneurship strengthens competition between developed economies and supports social welfare within developing countries. It is “vital for the competitiveness of enterprises in existing or emerging markets.” Numerous studies have established a link between increased business formation and economic growth.

Similarly, entrepreneurs create employment opportunities that resonate through the economy. Entrepreneurship creates employment opportunities. In a 2001 study, scholars, studying data from 23 countries, demonstrated that lower levels of unemployment could result from increasing the number of business owners per unit of labor.

Moreover, some researchers argue that entrepreneurs may broaden the scope of their hires to include “individuals who might otherwise remain unemployed because they are too young or too old or lack experience, education or skills to be employed by the large or medium size firms.” In short, entrepreneurial activity creates spillover effects that benefit all of society.

B. The Difficulty of Defining Entrepreneurship

Entrepreneurship provides a benefit to society and serves as a public good. To use the concept in making the decision to enforce a noncompete agreement, it is necessary to create an analytical framework to assist in determining the presence of entrepreneurial activity. To analyze the presence of entrepreneurial opportunity, I look to the academic

124 See Soriano, supra note 179, at 297.
127 Nijhawan at 50
129 Nijhawan at 50.
130 Id. at 51.
field of entrepreneurship, examine the various definitions of entrepreneurship, and create a workable legal test.

Finding a definition of entrepreneurship that satisfies everyone is difficult. Despite the concept’s seeming ubiquity, entrepreneurship remains difficult to define. Entrepreneurship is a “broad and complex concept.” It is difficult to find a “precise, inherently consistent, and agreed-upon definition.” Some may associate entrepreneurship with small businesses and sole proprietors, while others may associate the word with industry leaders such as Richard Branson and Steve Jobs. Still others may not view the concept with the same affection.

The “who” and “what” of entrepreneurship remains difficult to capture. Who is an entrepreneur? How can someone recognize an entrepreneur or an entrepreneurial opportunity? Despite a tradition of study dating back hundreds of years, creating a single description of the elements of entrepreneurship remains controversial. Nevertheless, while entrepreneurship remains difficult to define in precise terms, the phenomenon seems to be “broadly understood.”

133 See generally, June Thomas, Why Do TV Writers Hate Entrepreneurs?, SLATE (Dec. 7, 2012, 5:00 PM), http://www.slate.com/blogs/browbeat/2012/12/07/entrepreneurs_on_television_why_are_they_such_dolts.html.
135 Hampering our ability to understand entrepreneurship is the media’s bipolar portrayal of entrepreneurship, from lionization of such entrepreneurs to the denigration of small businesses. See e.g., Thomas, supra note 181.
136 The first author to give entrepreneurship an economic meaning was Richard Cantillon in Essai sur la nature du commerce en général (1755/1999). Cantillon “outlined the principles of the early market economy based on individual property rights and economic interdependency.” Hans Landström et al., Entrepreneurship: Exploring the Knowledge Base, 41 RES. POL’Y 1154, 1155 (2012).
138 Nadim Ahmad and Richard G. Seymour, Defining Entrepreneurial Activity: Definitions Supporting Frameworks for Data Collection, Organization for Economic Co-Operation and Development (Jan.
B. Discovering Common Aspects of Entrepreneurship

Study of entrepreneurship has yielded numerous varied definitions.\(^\text{139}\) The difficulty of definition has even caused some to question the legitimacy of the academic study of entrepreneurship.\(^\text{140}\) Entrepreneurship can involve the creation of new firms.\(^\text{141}\) Entrepreneurship can focus on activities, generally new and innovative, taken in response to perceived business opportunities.\(^\text{142}\) Entrepreneurship “is the process whereby an individual or a group of individuals use organized efforts and means to pursue opportunities to create value and grow by fulfilling wants and needs through innovation and uniqueness, no matter what resources are currently controlled.”\(^\text{143}\) It is the set of practices involving the creation or discovery of opportunities and their enactment.\(^\text{144}\)

The many different definitions share some common elements. Certain elements often arise in discussions attempting to define entrepreneurship:

1. The environment within which entrepreneurship occurs.
2. The people engaged in entrepreneurship.
3. Entrepreneurial behaviors displayed by entrepreneurs.
4. The creation of organizations by entrepreneurs.
5. Opportunities identified and exploited.
6. Innovation, whether incremental, radical or transformative.
7. Assuming risk, at personal, organizational, and even societal levels.

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24, 2008),

\(^\text{139}\) For an overview of the academic study of entrepreneurship, including a list of 135 core entrepreneurship works, see Landström, supra note 184, at 1154-1181.

\(^\text{140}\) See Margaret Kobia & Damary Sikalieh, Towards a Search for the Meaning of Entrepreneurship, 34 J. EUR. INDUS. TRAINING 110 (2010) (“In the past decade or so, researchers and educators in this field have had and still have to confront the question ‘what are we talking about when we talk about entrepreneurship?’ The answer to this question however, has been and still is unclear, delayed and overlaps with other sub fields.”).


\(^\text{143}\) Mary Coulter, Entrepreneurship in Action (2001).

\(^\text{144}\) See El Harbi, supra note 189, at 43.
8. Adding value for the entrepreneur and society.\textsuperscript{145}

\textbf{C. The Three Dimensions of Entrepreneurship}

Attempts to define entrepreneurship have focused on three areas: the skills and traits that characterize the entrepreneur, the processes and events that are part of entrepreneurship, and the results that entrepreneurship generate.\textsuperscript{146} The many definitions of entrepreneurship can be categorized according to three main dimensions of entrepreneurship.\textsuperscript{147} These three dimensions of entrepreneurship are processes, behaviors, and outcomes.\textsuperscript{148}

The process dimension of entrepreneurship focuses on the development of a new business or innovative strategy. Entrepreneurship is “a process by which individuals—either on their own or inside organizations—pursue opportunities without regard to the resources they control.”\textsuperscript{149} Entrepreneurship can also be defined as “the process of creating something new of value by devoting the necessary time and effort, assuming the accompanying financial, psychic and social risks, and receiving the resulting rewards of monetary and personal satisfaction and independence.”\textsuperscript{150}

Defining entrepreneurship as a behavior involves examination of the actions of the individual. Entrepreneurship is the manifest ability and willingness of individuals, on their own or in teams, within and outside existing organizations to: perceive and create new economic opportunities (new products, new production methods, new organizational schemes, and new product-market combinations) and to introduce their ideas in the market, in the face of uncertainty and other obstacles, by making decisions on location, form and the use of resources and institutions.\textsuperscript{151}


\textsuperscript{146} See generally Margaret Kobia & Damary Sikalieh, Towards a Search for the Meaning of Entrepreneurship, 34 J. OF EUR. INDUS. TRAINING 110 (2010).

\textsuperscript{147} See David Stokes et al., Entrepreneurship 4 (2010).

\textsuperscript{148} See id.


\textsuperscript{150} Robert D. Hisrich & Michael P. Peters, Entrepreneurship (5th ed. 2002).

We may also define entrepreneurship by its outcome. Genuine entrepreneurship “results in the creation, enhancement, realization and renewal of value not just for the owners but all participants and stakeholders.”152 There must be a concrete result of either the entrepreneurial process or the set of behaviors that characterize entrepreneurship. In other words, without actual creation of value, entrepreneurship does not exist.

D. Creating a Legal Definition

Entrepreneurship consists of three dimensions: process, behavior, and outcome. All three dimensions of entrepreneurship are important to the creation of a legal definition. The proposed legal test should incorporate elements of each of the three dimensions to create a workable test. Our proposed definition of entrepreneurship should incorporate a synthesis of all three dimensions:

2. Behavior: the management of a new or transformed organization so as to facilitate the production and consumption of new goods and services.
3. Outcome: the creation of value through the successful exploitation of a new idea.153

If we are to create a new definition, we should start with these three dimensions. What word or phrase takes into account entrepreneurship processes? Innovation. What word or phrase encompasses entrepreneurial behavior? Risk. Finally, what word or phrase incorporates the notion of entrepreneurial outcomes? Results. Thus, we have innovation, risk, and results. These elements will provide touchstones in developing a new legal test to determine the presence of genuine entrepreneurial opportunity.

V. Developing an Entrepreneurial Analysis

A. The Innovation Component

Innovation has long been an important element in the definition of entrepreneurship. In 1934, Joseph Schumpeter defined entrepreneurs as innovators who implement entrepreneurial change within markets. Schumpeter’s definition integrated


153 See Stokes, supra note 200, at 8.
innovation into the mainstream definition of entrepreneurship.\textsuperscript{154} Entrepreneurial innovation reflects five aspects:

1. the introduction of a new (or improved) good,
2. the introduction of a new method of production,
3. the opening of a new market,
4. the exploitation of a new source of supply, and
5. the re-engineering/organization of business management processes.\textsuperscript{155}

Schumpeter’s definition equates entrepreneurship with business innovation—identifying market opportunities and using innovative approaches to exploit them.\textsuperscript{156} Simply put, innovation leads to new demand, and thereby creates wealth.

The entrepreneur as innovator establishes change within markets by executing new combinations. These new combinations may appear as:

1. The introduction of a new good or quality thereof
2. The introduction of a new method of production
3. The opening of a new market
4. The conquest of a new source of supply of new materials or parts
5. The carrying out of the new organization of any industry.\textsuperscript{157}

Entrepreneurship represents “an attitude of helping innovative ideas become reality by establishing new business models and at the same time replacing conventional business systems by making them obsolete.”\textsuperscript{158} Thus, genuine entrepreneurship requires the presence of an opportunity for innovation. The first component in the remade worker classification test must be the opportunity for innovation.

How much innovation should be required to establish entrepreneur status for the purposes of the proposed noncompete agreement test? I propose that this element be viewed broadly. The entrepreneurial analysis will examine factors that indicate that the job requires or rewards innovation and creativity. How might the innovation analysis take place in real life? In evaluating this factor, courts might well look to many of the factors


\textsuperscript{155} See \textit{id}.

\textsuperscript{156} \textit{Id}.

\textsuperscript{157} \textit{Id} at 7.

commonly designated as “control” factors. The innovation analysis will focus on factors similar to the control question. The emphasis will, however, change to the employee’s perspective. How much freedom does an employer give to its workers in the performance of their work? If an employee is given the freedom to create newer and better productivity solutions, then the employer’s ability to control the manner of the work is lessened. In essence, the innovation component is the control analysis, turned on its head.

Employers wishing to restructure their independent contractor relationships must permit their workers to create or modify their own work processes. This could include permitting work to take place at a different time or place than normal. Workers may set their own hours and work from home or from another location.

D. The Risk Component

The notion of risk is important to the concept of entrepreneurship. The presence of risk forms the second part of my proposed analysis. Risk-taking and profit have long been part of the key features defining entrepreneurship. 159

The concept of risk impliedly encompasses an element of uncertainty. 160 Genuine entrepreneurship requires that an element of uncertainty exist in the venture. The entrepreneur will be uncertain of duration, uncertain as to success or failure, and uncertain as to profit or loss. Therefore, for an employer to classify a position as that of an independent contractor, there must be both the potential for loss as well as the potential for reward. Ideally, the two aspects should be proportional. The presence of actual entrepreneurial opportunity will be signaled by potentially large rewards accompanying a potentially large loss.

Under this new test, the employer may be required to allow the worker to work for other companies. The employer must also assume the risk that the worker may use its innovations for the benefit of a competitor.

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E. The Results Component

Entrepreneurship requires not just the trying, but the doing.\textsuperscript{161} This third proposed element of the entrepreneurial test requires genuine market opportunity. In other words, to be an entrepreneur there must be an opportunity to succeed and make a profit. Effective entrepreneurship requires market outcome. This third factor may prove more difficult to analyze.

It is impossible to understand entrepreneurship without understanding the market process. Entrepreneurship consists of “the competitive behaviors that drive the market process.”\textsuperscript{162} Entrepreneurship is more than simply creating new ideas or reintroducing discarded ideas. Instead, entrepreneurship, if it is to be considered entrepreneurship, must “make a difference.”\textsuperscript{163} The activity must have a level of success to constitute entrepreneurship.

It may be difficult to establish the ability to make a profit, especially if the new opportunity is so new as to defy analysis. The best evidence of actual opportunity would be to present evidence of other entrepreneurs, either at the firm or in similarly situated firms, who have achieved market success. If there is actually an entrepreneurial opportunity, someone should have been able to take advantage of it. Nevertheless, even in the absence of evidence of other entrepreneurs engaged in the same or similar activity, a court should be able to make a determination of whether opportunity exists or not.

VI. Conclusion

In construing noncompete agreements, courts tend to examine only those parties to the agreement, measuring the degree of harm to be suffered by the employer and the employee and making enforcement decisions accordingly. But focusing only on the parties to the agreement neglects the unique character of noncompete agreements. The impact of noncompete agreements falls not only on the parties to the agreement, but on the general public as well. A covenant that restricts employee mobility could possibly rob the public of the employee’s future endeavors and contributions. In this article I have advocated a new approach to enforcement of noncompete agreements.

\textsuperscript{161} As Star Wars character Yoda put it, “Do or do not. There is no try.” Thinkexist.com, http://thinkexist.com/quotation/do_or_do_not-there_is_no_try/250565.html (last visited Feb. 27, 2013).

\textsuperscript{162} PER DAVIDSSON, RESEARCHING ENTREPRENEURSHIP \textit{6} (2005) (emphasis in original removed).

\textsuperscript{163} \textit{Id.}
I propose that courts give greater consideration of the public good. To measure public good, I look to the ideals of entrepreneurship. Society benefits from entrepreneurs, those who develop new ideas and new businesses. To guide courts in determining the presence of entrepreneurship, I provide guidelines as to what entrepreneurship is and is not.

Given the widespread recognition of the difficulty with enforcement of noncompete agreements, it is past time for reform. Perhaps it is time to modify the enforcement test by giving increased focus to the potential harms to society as a whole. Although there may be other measures for benefit to society, entrepreneurship should serve as an effective proxy.