LIST OF NON-COMPETE CASES THROUGH JUNE 10, 2010[1]

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Non-Competes in Employment Contracts

1. Sanitary Farm Dairies, Inc. v. Wolf: Employee not subject to non-compete. A few days before he terminated employment, he sent out a notice to customers announcing he was going into his own business and asking for the opportunity to continue serving those customers. He discussed with a few of the customers the possibility of changing his employment. The court distinguished between route cases and other types of employment involving solicitation and sales. Employee has no right to pirate customers if he was given a list of customers on a given route, or the names of customers who have no geographical continuity, and the employee has made no contribution by acquiring additional customers or adding to the good will of the business. On the other hand, if the employee has built up the route, or generated geographically unrelated prospects, he has a right to solicit those customers after termination of employment. The court held that the identity and location of customers generated by a route employee are not a trade secret, confidential information, or a property right and that, in the absence of a restrictive covenant, the employee could go after the customers. [The implication appears to be that, in a non-route case, the customer list is a trade secret. However, I doubt that under normal circumstances a court today would restrict a former employee from soliciting customers under a trade secret analysis, at least not those customers with whom the employee had direct contact. Certainly, if the former employer could show that the former employee had taken a customer list which contained names that the former employee would not otherwise know, that should be a trade secret.] The court found that the employee's discussion of the proposed change with some of the customers and the fact that he advised 50% of the customers that he would later in the week solicit their business and the fact that he circulated six printed announcements constituted a solicitation of business inconsistent with the loyalty which employee owed his employer. An employee may take steps to ensure continuity in his livelihood in anticipation of

[1] An index of all case cites is at the end of this list.

resigning his position but he cannot feather his own nest at the expense of his employer while he is still on the payroll. An employee is not advancing the interests of his employer when he suggests that customers can do as well or better by discontinuing their present patronage and transferring their business elsewhere. Restatement, Agency, § 393, comment (e) references the permissible purchase of a rival business before termination of employment but solicitation of customers is impermissible. Employee was obliged to give employer sufficient notice of his intention to quit so that his employer could train a new man to continue the route.

2. Thermorama, Inc. v. Buckwold: "The evidence of irreparable harm is not strong but there is inherent in a situation of this kind damage which is not susceptible of precise proof. Employer may well lose a number of customers for whom it has not had a fair opportunity to compete and may forfeit as well future benefits which are difficult to evaluate. Under these circumstances, we think some irreparable harm may be inferred."

3. Bennett v. Storz Broadcasting Co.: Former employee cannot sue former employer for interference with former employee's contract with new employer where the interference was made in good faith in an attempt to assert a legally protected interest which might be endangered or destroyed and under circumstances where the contract gives the employer a right which is equal or superior to the right of the employee to better his condition. Former employer had a covenant not to compete with former employee.

Good quotes:

> It is true that this court has uniformly upheld covenants in a contract of employment designed to protect the employer against the deflection of trade or customers by the employee by means of the opportunity which the employment has given him; or to protect the legitimate interest of the business or professional man about to employ another under circumstances where the employee is given access to the employer's patronage, customers, clients, or trade secrets. Where the restraint is for a just and honest purpose, for the protection of a legitimate interest of the party in whose favor it is imposed, reasonable as between the parties, and not injurious to the public, the restraint has been held valid.
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> It is important to note that courts recognize a distinction between restrictive covenants as they relate to the ordinary commercial transaction involving business or property transfers and those which relate to employment contracts entered into by wage earners. A different measure of reasonableness is used. The test applied is whether or not the restraint is necessary for the protection of the business or good will of the employer, and if so, whether the stipulation has imposed upon the employee any greater restraint than is reasonably necessary to protect the employer's business, regard being had to the nature and character of the employment, the time for which the restriction is imposed, and the territorial extent of the locality to which the prohibition extends.

> Restrictions which are broader than necessary to protect the employer's legitimate interest are generally held to be invalid, and the determination of the necessity for the restriction is dependent upon the nature and extent of the business, the nature and extent of the employee, and other pertinent conditions.
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> Our approach has been influenced by a concern for the average individual employee who as a result of his unequal bargaining power may be found in oppressive circumstances.
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> "***It may well be surmised that such a covenant finds its way into an employment contract not so much to protect the business as to needlessly fetter the employee, and prevent him from seeking to better his condition by secured employment with competing concerns. One who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any of the terms in the contract of employment offered him, so long as the wages are acceptable."
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> "***A man's right to labor in any occupation in which he is fit to engage is a valuable right, which should not be taken from him, or limited, by injunction, except in a clear case showing the justice and necessity therefor."
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> It is sufficient to say that the lawfulness of employment contracts containing such covenants depends upon numerous circumstances. It may be fairly said that the merits of a dispute arising from the provisions of a restrictive clause in an employment contract cannot always be determined by an examination of the contract itself. The validity of the contract in each case must be determined on its own facts and a reasonable balance must be maintained between the interests of the employer and the employee.
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> …the court must consider not only the nature of the business and character of the employment but all the circumstances of the case, including the situation of the parties, the necessity of the restriction for the protection of the employer's business, and the right of the employee to work and to ear a livelihood and better his status within the limits of his skill, talent, and continued productivity.

4. Equipment Advertiser, Inc. v. Harris: No covenant not to compete but employee copied employer's circulation list while still in employer's employ. Court pointed out holding from Sanitary Farm Dairies that, even in the absence of a restrictive covenant, an employer is entitled to equitable protection against unfair competition.

5. Eutectic Welding Alloys Corp. v. West: Employer waited approximately four months before seeking a permanent injunction. The absence of a provable injury may itself tend to show that the restrictive covenant is broader than the legitimate interests of the employer may reasonably require. The court upheld trial court's finding that employee received no significant trade secrets or confidential information; employee was basically a salesman with minimal training; and he sold to distributors, not consumers, in his new position. The court also found that employee's small salary and that he could be terminated on two week's notice suggested he was an ordinary employee to whom neither technical nor sales information of a uniquely sensitive nature was disclosed. "Restrictive covenants that serve primarily to prevent an employee from working for others or for himself in the same competitive field so as to discourage him from terminating his employment constitute a form of industrial peonage without redeeming virtue in the American Enterprise System." Covenants against competition as part of commercial transactions involving business or property transfers are completely distinguishable. Same with business executives and professional employees. Minnesota cites are provided. [This case predates the blue-pencil doctrine. Also, the courts general view of non-competes has changed unless the employee is truly no threat whatsoever. It is significant in this case that the employee sold to distributors, not consumers, in his new job. There are no customer relationships to protect.]

6. Alside, Inc. v. Larson: Former employee took a mailing list of 1300 names, selected 250 names that were former employer's customers and added 24 names to the list. Former employee made personal calls to former employer's customers and admitted he attempted to transfer the good will which he had built up for himself while working for the former employer. Former employee was trained in the business operations, had a unique and intimate relationship with customers through a number of years, and had access to confidential information. Former employer voluntarily limited the geographic scope. Two year period upheld.

7. Walker Employment Service, Inc. v. Parkhurst: "If this particular covenant which was not unreasonable either in terms of area or time, and which was utilized for the obvious reason of protecting the employer's confidential relationships with its customers, is not valid, it is difficult to see what type of covenant could ever be upheld by this court." Involved an employment agency where the employer had lists of both employers and prospective employees to match up. Employee adopted forms and methods of operation into his own business. "He was in a unique position to exploit the knowledge he took with him in leaving Walker's employment."

8. Modern Controls, Inc. v. Andreadakis: The potential or actual disclosure of confidential information is relevant in determining the reasonableness of a covenant not to compete. Employer agreed to pay employee during the period of the non-compete if he could not find suitable work in another field. Minnesota Supreme Court has held that confidential business information which does not rise to the level of a trade secret can be protected by a properly drawn covenant not to compete. Several Minnesota cases are cited. To require an employer to prove the existence of trade secrets prior to enforcement of a covenant not to compete may defeat the only purpose for which the covenant exists. An

employer need only show that an employee had access to confidential information and a court will then determine the overall reasonableness of the covenant in light of the interest sought to be protected. Two types of legitimate interests an employer may protect through restrictive covenant are trade secrets or confidential information and the employer's good will. Court found that, as CEO, employee had access to all areas of company information and policy including long and short range planning, sales data, pricing, and the opening and closing of retail outlets. The court certainly took into consideration that employee was CEO and probably that he was being paid a substantial amount following termination of his employment. In fact, the court notes that employee was "at the highest levels of the company and had equal bargaining power when entering into the employment agreement." Employer was not seeking an injunction, only to terminate its obligation to make payments. A court may accept a voluntary limitation on the restrictive covenant when evaluating the reasonableness of the covenant. [If employee is being paid during period of non-compete, covenant should be enforced, and broadly.]

9. Cherne Indus., Inc. v. Grounds & Assoc., Inc.: Employer had only about 2% of the market leaving the former employees 98% of the rest of the market. Even assuming an alternate means of obtaining customer names, this is not sufficient without more to establish that the information is generally ascertainable. The former employer's list had more information than just the names. Also, even though former employees had access to a list of 10,000 names, some work would have to be undertaken absent knowledge gained from the former employer to make this list meaningful. Appears to be significant that the former employer was the first to enter the particular field so that documents taken by former employees would have value. Also significant that the former employer lost money the first few years because of the cost of soliciting customers, compiling a list and hiring company representatives. Court cites a case in which it was found that, although former employee could have gained customer names from independent sources, he did not do so but instead used knowledge that he had gained from the former employer. Damages in this case were based on profits gained from the taking and use of customer and prospect lists. Not only can irreparable harm be inferred from an alleged breach of a non-compete, it can be inferred from a court's actual finding of a breach. The specific finding was that the former employer had suffered and would continue to suffer loss and damage. [Note that there was no requirement of a finding that former employer would lose most of its clients or go out of business]. Even if the confidential information, subsequent to the wrongful taking and use, becomes generally available, the initial conduct is still wrongful and the employer is still entitled to relief for any injuries suffered as a result of the wrongful use. A trial court has authority to draft an injunction so that it provides an adequate remedy without imposing unnecessary hardship on the enjoined party. There may be situations where injunctive relief extending beyond the expiration of the non-compete period is appropriate. The court did not get to this issue because it had already affirmed the issuance of a two year injunction based on the use of confidential information which had lasted for two years up to the point of trial and also the court found that that is the amount of time that it would take the former employees to develop the confidential information on their own. Employee who violates non-compete may have to pay illegal profits as a proper measure of damages.

10. Davies & Davies Agency, Inc. v. Davies: Davies continued his employment for ten years, advanced to a position that would not have been open to him if he had not signed the contract. Received training and had sole responsibility for many customers. Court looked at length of time necessary to obliterate the identification between employer and employee in the minds of the customers and length of time necessary for an employee's replacement to obtain licenses and learn the fundamentals of the business. Prohibition only against actively soliciting business from employer's customers, not a blanket prohibition from working in the area at all. Blue penciled to a one year non-compete.

11. Jim W. Miller Const., Inc. v. Schaefer: Covenant not enforced because it allowed employee to work as a real estate sales person but not a real estate broker and the court found that this was not a reasonable distinction to make so that if he could do one he should be able to do both. One interesting quote: 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. This includes those techniques which are but skillful variations of general processes known to the particular trade.

12. Minn. Min. & Mfg. Co. v. Kirkevold. Non-compete provided that 3M would pay employee if he terminated employment. Quotes: To require an employer to prove the existence of trade secrets prior to enforcement of a covenant not to compete may defeat the only purpose for which the covenant exists. An employer need only show that an employee had access to confidential information and a court will then determine the overall reasonableness of the covenant in light of the interests sought to be protected. Even in the best of good faith, a former technical or creative employee working for a competitor, or in business for himself in the same or a related field, can hardly prevent his knowledge of his former employer's confidential methods or data from showing up in his work. And utmost good faith cannot always be expected.

13. Medtronic v. Gibbons. Irreparable harm shown through former employee's access to confidential information, his employment by a competitor in the same territory, the relationship between the sales rep and manufacturer, the relationship between the sales rep and the customers, substantial investment made in training of sales rep, and substantial assistance given to sales rep in developing information about customers and good will.

14. National Recruiters, Inc. v. Cashman: Covenant not ancillary to initial employment contract can be sustained only if supported by independent consideration. Not telling prospective employees all conditions of employment until after acceptance of job takes undue advantage of the inequality between the parties. No tortious interference claim against new employer because no showing that there was intentional procurement of a breach.

15. Roth v. Gamble-Skogmo, Inc.: Former CEO was receiving deferred compensation payments monthly over a 5-year period. Non-compete contained no specific space or time restrictions, but terminated former CEO's right to further deferred compensation

payments if he accepted employment with a competitor as long as he was receiving such payments. Former CEO had access to employer's confidential info. Non-compete was held reasonable because employer intended to enforce it only if former CEO engaged in direct competition. The provision was tailored to fit the employer's legitimate interests.

16. Freeman v. Duluth Clinic, Inc.: Non-compete signed subsequent to employee's original employment contract held unenforceable for lack of consideration. Significant that other similarly situated employees did not sign non-compete. Indirect benefit to an employee by a benefit to the corporation of which he is a shareholder cannot be sufficient consideration where other shareholders who have not signed received the same benefit.

17. Edin v. Josten's, Inc.: Court refused to enforce covenant because employer had induced employee into allowing his current contract to expire without signing a new contract then terminated him for failing to timely sign the new contract. This left employee who had worked his whole life for the company without employment at age 50 and suffering from a diabetic condition. Court found employee could be forced to file bankruptcy within a year and had exhausted 39% of his assets since termination.

18. Hruska v. Chandler Assoc., Inc.: Non-compete tied to severance payments and sale of stock. Since employee was seeking enforcement of severance provision, he could not get out of non-compete.

19. Kari Family Clinic of Chiropractic, P.A. v. Bohnen: Non-compete signed 2 months after starting work was unenforceable for lack of consideration.

20. Klick v. Crosstown State Bank of Ham Lake, Inc.: Goofy case in which court declined to blue-pencil the covenant. Court does point out that employee only worked for under one year and that he had no special training and gained no special reputation or connections with customers. Still, not to enforce a narrowed covenant is the wrong decision. Court could have protected certain customers and narrowed the trade area.

21. Dean Van Horn Consulting Assoc., Inc. v. Wold: Reasonableness of the duration of a restrictive covenant is tested under two alternative standards: (1) the length necessary to obliterate the identification between employer and employee in the minds of the employer's customers and (2) the length of time necessary for an employee's replacement to obtain licenses and learn the fundamentals of business. Court upheld reduction of period from three years to one year. Court found that employer's notice by letter to customers alerted the customers of the obliteration of the relationship between former employee and employer. [This finding is wrong since the purpose of the law is to allow the former employer to create the same relationship in the customer's mind between the employer and the replacement employee as the employer had with the former employee. Simply alerting the customer that the former employee no longer works for the former employer only tells the customer that he will have to switch his business away from the former employer if he wants the same person working on his business. The point is the customer has developed a relationship with the former employee (a human being) rather

than the former employer (an entity). The former employer needs time to create an association in the customer's mind between the former employer and its new hire.]

22. Rosewood Mortg. Corp. v. Hefty: Court only looked at balancing of harm. Case completely misstates the law on inferring irreparable harm: "Irreparable harm to an employer from a former employee's competing business is generally not inferred, as it is where competition follows the sale of the business." The court does cite *Thermorama* as holding that irreparable harm will be inferred where a former employee was a salesman who began selling competing goods in the same trade area. Also when a professional employee acquires personal influence over patients or clients. Covenant not to compete not upheld because pricing rather than personal contacts predominated in this market and prices were set by large institutions. There was a finding of no exclusive customers in the market.

23. Satellite Indus., Inc. v. Keeling. Continuation of employment alone can be used to uphold coercive agreements, but the agreement must be bargained for and provide the employee with real advantages. Court of appeals found consideration provided by 11-year career with Satellite which included steady advancement to the position of vice president of sales, industry and product training, gain substantial knowledge about the design and marketing of portable restrooms. If any consideration is found to support a contract, inquiry into its adequacy is forbidden. Test applied is whether or not the restraint is necessary for the protection of the business or good will of the employer, and if so, whether the situation has imposed upon the employee any greater restraint than is reasonably necessary to protect the employer's business, regard being had to the nature and character of employment, the time for which the restriction is opposed, and the territorial extent of the locality to which the prohibition extends. Unreasonably broad non-competition agreements can be limited to include only the area where the employee performed duties. When a court blue-pencils a contract between the parties, it must provide an explanation of why the revision is warranted including what protectable interests were considered, what hardships need to be avoided and how or why the particular remedy fashioned by the court accomplishes its ends. Court of appeals ignored case law inferring irreparable harm from the breach of a non-compete and found that, because the competing business was not up and running at the time of the motion the claim of irreparable injury was speculative and that lost profits could be calculated with a reasonable degree of certainty. [The reason irreparable harm should be inferred is that the nature of customer relationships is such that, once a customer is gone, the employer cannot get the customer back. There is generally always a lag between when the employee leaves and when the customers start leaving the employer. To deny a temporary restraining order until there is a large exodus of customers ignores the fact that the former employee is working to take those customers from the day he leaves. Also, the fact that lost profits can be calculated with certainty misses the point. The equitable relief recognizes the uniqueness of customer relationships and the unfairness of allowing a former employee who has developed customer relationships while in the employ of the former employer to take those customers.]

24. Bellboy Seafood Corp. v. Nathanson: Employee talked to several customers and suppliers about his intended departure and, "the implication was there" that they should buy from him in the future. Two former employees compiled a customer list from memory and telephone calls a week after resignation. Employer lost 25% to 33% of its business when one customer left. In light of the size and nature of the employer's business, customer information did not require extensive confidentiality measures. Only the former employee and his secretary had access to the customer cards. The confidentiality of the information was apparent to the employee as he testified at trial. Breach of fiduciary duty to imply that customers should switch their business.

25. Creative Communications Consultants, Inc. v. Gaylord: Court found irreparable harm from loss of clients and threat of disclosure of confidential information. Also, employee signed document acknowledging non-compete and agreeing to be bound by it.

26. Ensco Int'l, Inc. v. Blegen: Procedural discussion. Court vacated temporary injunction to enforce a non-compete because the trial court failed to include findings of fact or conclusions of law in its decision.

27. Rehabilitation Specialists, Inc. v. Koering: Possible cause of action if there is no non-compete is breach of a duty of loyalty to employer. Includes good discussion of what communication employee may have with customers in preparation for leaving employer for competitor.

28. Orkin Exterminating Co., Inc. v. Devine. Where the record clearly supports the denial of the temporary injunction, the trial court can be upheld even in the absence of findings of fact and conclusions of law. The former employees had represented they had not knowingly solicited or accepted business from the former employer's customers with a current service contract and that they had actually used their knowledge of customers to turn down business.

29. R.L.Youngdahl & Assoc., Inc. v. Peterson. Irreparable harm established through solicitation of former employer's customers and signing one former customer. Breach of a non-compete agreement is sufficient to establish irreparable harm when the breach involves use of confidential client lists or trade secrets. The trial court must make findings of fact and conclusions of law under Rule 52.01.

30. Webb v. Fosshage: Employee was the primary contact for almost half of the employer's business which represented four customers. Employee was terminated, formed his own competing business and took two of those four customers. Court focused on the balance of harm and likelihood of success. Court was only looking at the custom publishing arm of the employer's business. Even though that arm produced only a small percentage of the employer's total revenue, the employee produced only a conclusory allegation that he would have to file bankruptcy. Employee failed to show why he would be unable to transfer his experience into soliciting customers who are not the employer's or that there is an absence of potential clients for custom publishing. Termination of an employment contract does not preclude enforcement of a restrictive covenant where the employer has

not taken undue advantage of his right to terminate. Wrongful termination may preclude enforcement of restrictive covenants. Citing, *Edin v. Jostens*. Court found employee to be at will. Interestingly, the court ignored the fact that there were other account executives who did not sign non-competition agreements but were also paid increased commissions. Customer's decision to remain with employee indicates the strength of the relationship. Court contrasted those cases where there was no ongoing relationship with purchasers of floor cleaners where each sale is a distinct transaction not necessarily implying that another will follow. Employee's reliance on *Sanitary Farm Dairies* was misplaced because there was no restrictive covenant in that case. Significantly, the court remanded on the scope of the restraint since the evidence showed that employee had no access to information on customers other than his own which would aid him in soliciting their business. Instead, the record showed that customers were the responsibility of individual account executives without overlap. [This is an argument for enjoining the employee only from contact with his own customers in the absence of other information about other customers that would give an unfair advantage to the employee in soliciting those customers]. Court found it significant that there was only a brief window of opportunity during which the employer's relationships with customers solicited by the employee could be salvaged. Eighteen month duration was upheld.

31. BFI-Portable Services, Inc. v. Kemple. Only looks at balance of harm and likelihood of success on the merits. Inference of irreparable harm is refutable if former employee can adequately establish that he did not come into contact with former employer's customers in a way which obtains a personal hold on the good will of the business. This refers to contact the former employee had while in the former employer's employ. Where no distinction is made between signors and non-signors, the covenant is unenforceable for lack of consideration. Non-compete agreements are assignable upon the sale of a business to protect the good will of the business. Although the non-compete prohibited solicitation of any customers, the temporary injunction prohibited solicitation of customers with whom former employee dealt directly or indirectly during his employment. Two year period upheld.

32. Overholt Crop. Ins. Service. Co., Inc. v. Bredeson. Prohibited solicitation from customers the former employee personally serviced for a period of two years and from competing in any territory in which he had worked. Former employee resigned and signed on 50 of former customers. Cites *Dahlberg* factors. Case looks at balance of the harm and likelihood of success. Significant that former employee could contact anyone other than former employer's customers which amounted to less than 10% of the market in the areas where former employee worked. Apparently the territorial prohibition was ignored. Court found adequate consideration in the receipt of additional income, territory and experience. Economic and professional benefits are sufficient consideration to support subsequent non-competition agreements. Geographical scope not overbroad because limited to area in which former employee actually worked. Test employed to determine reasonableness of a temporal restriction examines the nature of the employee's work, the time necessary for the employer to train a new employee, and the time necessary for the customers to become familiar with the new employee. Two year restriction reasonable because former employee established a good relationship with

customers during five years of employment and his work required close contact with customers. [As a general rule, unless confidential information or specialized training is involved, restriction should revolve around analysis of extent of contact between employee and customer.]

33. Arnold Corp. v. Anderson. Two-fold covenant which had one restriction for all of employer's customers and another restriction for those customers served by the employee. Only looked at balance of hardships and likelihood of success. Former employee gained knowledge of the fact that he would have to sign a non-compete at a point in time when he had bargaining position equal to that of the former employer. This suggests that he was advised of the non-compete prior to, e.g., quitting his old job or otherwise irreversibly changing his position. The court excluded from the injunction those customers former employee had brought to former employer. The court seems to suggest that irreparable harm must be supported by a finding of solicitation of customers. [This is very difficult at the TRO and temporary injunction stage. Irreparable harm should be inferred and then a careful balancing of the harms should be conducted which should include the hold that former employee appears to have on customers and percentage of business employee represents, on the one hand, and what else the former employee can do to earn a living if he is prohibited from violating non-compete, on the other.]

34. Kempf Paper Corp. v. Boldon: Non-compete was solely between former employee and employer and did not restrict former employee from competition with the employer's closely related company. Non-competes must be strictly construed, and to interpret the restriction to include products sold or distributed by the employer's affiliate would unreasonably expand the scope of the non-compete.

35. RING Computer Systems, Inc. v. Paradata Computer Networks, Inc.: Court found that because covenant did not have any geographical limitation it was unenforceable. The court says that there is no case law which requires a court to blue-pencil an overly broad covenant and ruled that the trial court did not abuse its discretion in declining to modify the party's agreement. [Although it may be reasonable under the specific facts of a case not to apply the blue-pencil doctrine, there should be a very good reason articulated by the trial court in its findings and conclusions.] The covenant also did not contain a temporal restriction. Also a discussion of why there was no trade secret protection.

36. Millard v. Electronic Cable Specialists: Courts infer irreparable harm from breach of a non-compete where confidential information is involved. Irreparable harm can result from loss of good will and misuse of confidential information which cannot be calculated in monetary amounts. Former employee's financial difficulties which may affect his ability to pay a damage award considered. Clause found reasonable because former employee closely associated with the area in which he went into competition. Consideration found even though agreement entered into after employment started because former employee received economic and professional benefits through training and experience (higher salary and increased responsibilities). Irreparable injury can be inferred from the breach of a restrictive covenant if the former employee came into

contact with the employer's customers in a way which obtains a personal hold on the goodwill of the business. (citing *Webb*). Former employee went over the agreement paragraph by paragraph with employer and placed "OK" next to each paragraph. $20,000 bond. The preliminary injunction prevents former employee from competing at all in the United States without regard to whether he had a relationship with the employer's clients or not. The injunction is clarified such that former employee was restrained from engaging in any business with or performing any service which would compete with the business of employer with respect to any entity which was an actual customer of employer during the time of former employee's employment there or which was solicited for business by employer during that time.

37. Dynamic Air, Inc. v. Bloch: Employer offered to continue to pay employee's salary during the two year period of the non-compete. Court rejects a *per se* rule barring enforceability of all restrictive covenants lacking a territorial limit. The agreement in this case prevented employee from soliciting customers with whom he worked and working for a competitor selling conflicting products. The limitation as to specific customers is a *de facto* territorial limitation (my note). The other prohibition, however, may be too broad if the company does not sell on a national level. The court recognized this point. The court also said that a restriction to former clients is sufficiently narrow. The court also said that disclosure of confidential information to a competitor could be harmful to the employer regardless of where the competitor is located. "We therefore conclude that the reasonableness of both the non-solicitation and confidentiality covenants in this matter should be examined without regard to the territorial limitation."

38. Sanborn Mfg. Co. v. Currie: Only balance of the harm and likelihood of success considered. Court rejected employer's argument that non-compete was valid as long as executed before employee begins work. The court said employer and employee had an oral agreement before they executed the non-compete. [Definitely makes a difference when the employee leaves another job. In this case, employee quit his job and sold his home]. No independent consideration unless employer provides real benefits beyond those already obtained by the employee in a previous contract. Promotion and increase in salary were attributable to nothing other than performance that was expected under initial employment agreement.

39. Alternative Pioneering Systems, Inc. v. Janu: Court upheld temporary injunction after discussion of *Dahlberg* factors. Irreparable harm is inferred from the former employee's knowing breach of a non-compete by working for a competitor in a position that involves the creation of competing products.

40. Ecolab v. Ford: Court looked at time necessary to obliterate identification between employee and employer in the minds of customers and for employer's customers to become familiar with replacement. Notwithstanding $200,000 loan made in connection with extending non-compete from one year to two years, the court only enforced non-compete for one year based on findings that (1) employee's break with the company was well publicized and known to customers; (2) employee's replacement was not new; (3) employee had had a one year non-compete for 23 years which had only recently been

increased to two years. Employer's motivation was not to protect legitimate interest but to protect its investment in the employee by forcing him to remain with the company. Court found adequate independent consideration through 20 plus years of service, pay increases, stock options.

41. New Sunrise Beginnings, Inc. v. Dwyer: Covenant not enforced because employee signed written non-compete under protest and threat that his paycheck and bonus check would be withheld. Employee frequently has no bargaining power once employed and can be easily coerced.

42. 1st Street Northwest, Inc. v. Yeager: Fact dispute about whether former employee was told of the non-compete before he quit his former job and showed up for work the first day.

43. College Craft Companies, Ltd. v. Perry: Former employee was hired as a Regional Manager Trainee and asked to sign an employment contract containing a non-compete 6 days after beginning work. Later signed a different non-solicitation agreement. Neither non-compete was supported by independent consideration. Significant that both contracts were drafted by the employer and the enforceability language of the second contract is limited to its non-compete provision, which is contrary to the employer's assertion that the second contract supplements the first. Preliminary injunction denied.

44. Ecolab v. Gartland: Court considered primarily likelihood of success. Court found that there was no evidence presented as to the intent of the parties when they entered into the non-compete 15 years earlier. [I think the focus should be on the legitimate interests of the employer and, particularly since the court can blue-pencil the covenant, the covenant should be reviewed in the context of the current situation. Otherwise, employers are put in the position of having to update their non-competes which seems an unnecessary requirement given the court's wide latitude in fashioning relief which balances the harm and need on both sides.]

45. General Cleaning Corp. v. Lindmeyer: Employee's classification as an account representative, rather than an ordinary janitor, was in name only. Non-compete is unreasonable where it requires commitment much broader than the employee's actual job functions and status. Also, where employer admits that one of the purposes of the non-compete is to prevent quitting, the non-compete is an unreasonable restraint upon an employee's opportunity to work and earn a living.

46. Inspecta Homes of America, Inc. v. Lilley: Employer trained employee to conduct home inspections. Employee had benefit of forms, procedures, name recognition and expertise for four years. Employee could still perform inspection services in counties other than those in which he worked for employer. He could still work in carpentry and home construction which he did before. Covenant upheld.

47. Free Spirit, Inc. v. Matejka-Rupp: Where enforceability of a covenant not to compete is dispositive, and the court concludes that the agreement is not legally enforceable, it is not

a clear abuse of discretion to deny injunctive relief without findings on the other *Dahlberg* factors. A non-compete agreement signed after an oral employment agreement and after the employee has begun work can be sustained only if supported by independent consideration. Continuation of employment alone can be used to uphold coercive agreements, but the agreement must be bargained for and it must provide the employee with real benefits. The record revealed that the employee did not receive any additional compensation, employment related benefits, or training in exchange for her agreement to sign the non-compete agreement. Because it was not supported by consideration, the trial court did not abuse its discretion in denying a motion for a TRO.

48. Midwest Sports Marketing, Inc. v. Hillerich & Bradsby of Canada, Ltd.: Courts evaluate facts of each case to determine adequacy of consideration. Although employee was told he would have to sign a non-compete before he started working, he was not aware of the terms of the agreement until two weeks after he started. [This underscores importance of employer documenting that employee received non-compete before offer of employment accepted.] Also, employer made no distinction between those who signed and those who didn't sign.

49. Sutley v. Selchow: Court found oral employment agreement which included a non-compete. Former employee had sold his home and stopped looking for other employment. An addendum was found not to have consideration in part because former employee had already sold home and ended search for employment before addendum was presented which diminished his bargaining power.

50. Western Water Management: No consideration for non-compete agreement. Signed nearly four months after began employment; no additional benefits; duties and sales territory remained unchanged; paid dependent solely on his own efforts; change in title was meaningless; training was insignificant because already experienced in the business; most training occurred before non-compete signed; later training was in a normal course of duties and not a bargained for term of employment. Confidentiality clause unenforceable because does not define what is confidential and plaintiff did not offer what would be confidential, e.g., customer list.

51. Medtronic, Inc. v. Sun: Employee prohibited from going to work for another company that manufactures pacemakers. Court blue-penciled the non-compete from two years to one year plus a small additional time period to account for the previous inequitable behavior of the employee and the new employer. Issue was mostly whether the two products at issue were the same. Court found highly confidential information and unusually skilled professional workers. Court cites cases where a two or more year injunction was granted. Court found pacemaker industry intensely competitive; confidential information critically important; a design engineer and research scientist would receive such confidential information; number of years required to go from research to getting a product to market. Court said that it would not apply an inevitable disclosure test and cited *Modern Controls* in finding that it would be virtually impossible for Medtronic to know what information the employee might even inadvertently pass along. The court found unworkable a "boxing in" injunction which would allow

employees to keep working for competitor but not in a job that would require disclosure because it would require the court to continuously monitor the employees. No precedent in Minnesota for fashioning a boxing in injunction. The court refused to find that new employer had tortiously interfered with the employment agreement.

52. D. L. Ricci Corp. v. Forsman: A non-compete agreement which is not ancillary to an employment contract must be supported by independent consideration. Continued employment insufficient unless the employer provides real benefits beyond those already obtained. Adequacy of consideration depends on the facts of each case. Former employee signed non-compete on the day she started, could have refused, adequate consideration. Consideration also provided when former employee switched from temporary employee to permanent employee. Legitimate interests that may be protected by an employer through a non-compete include the company's goodwill, trade secrets, or confidential information. Court lists confidential information: customer lists, sales projections, sales figures, margin figures, pricing calculations, bids, estimates. If information is generally known, it cannot be a trade secret. Irreparable harm may be inferred based on employee's access to confidential information and the threat of disclosure. Former employee's knowledge would allow a competitor to underbid former employer and interfere with ability to obtain new work. Former employer must show irreparable harm but former employee need only show substantial harm to bar injunction. Former employee only spent one morning looking for other employment. [Typically, signing non-compete on first day of employment should not be enough; employee should be shown non-compete before she accepts offer. Knowledge of sales, pricing, margin and the like is not enough to enforce non-compete if this information is generally well known].

53. Kallok v. Medtronic, Inc.: Employee and new employer brought declaratory judgment action. Supreme Court found new employer tortiously interfered with employee's employment and that new employer was liable for damages as measured by the attorneys' fees and other expenses former employer incurred in its litigation with employee. Employee had a PhD. in biomedical engineering and was a senior staff engineer in research. Employment agreement allowed employee to work for a competitor as long as not working on a competitive product. Employee would be compensated if he couldn't find a job after leaving. Employee was one of the top 25 scientists employed by Medtronic. He generated 15 patents. The new employer knew before it hired employee that he was subject to a non-compete. Medtronic informed employee before final day of work that going to work for new employer would be a breach. A third party's interference with a non-compete agreement is a tort for which damages are recoverable. In determining whether to enforce a particular non-compete agreement, the court balances the employer's interest in protection from unfair competition against the employee's right to earn a livelihood. Tortious interference claim can protect an employer's investment in its business by decreasing the risk that confidential proprietary information it developed will be plundered through tortious employee raids. Tortious interference is not justified when a plaintiff demonstrates that the defendant had knowledge of facts which, if followed by reasonable inquiry, would have led to a complete disclosure of the contractual relations and rights of the parties. [A court should

find tortious interference only if new employer knew or had very good reason to know that hiring the employee would be violative of the non-compete agreement. Because of the blue-pencil doctrine, courts frequently modify a non-competes such that an employee will oftentimes be able to work for a competitor but, e.g., not to be able to contact the former employer's customers or work on a competitive product. Since non-compete covenants are reviewed on a case-by-case basis, every situation is different and a new employer and the former employee should generally have the opportunity to test the covenant not to compete.] In this case, the new employer did not utilize a reasonable inquiry in ascertaining whether the employee's non-compete agreement prevented him from being employed by the new employer. [This effectively requires new employers to (a) ask whether the employee is subject to a non-compete and (b) make a thorough inquiry as to the types of information the employee had access to and the type of products on which the employee was working. This type of inquiry seems particularly well suited to an employment context in which there is technology, scientific research, etc. involved. Even so, in light of this case new employers would be well advised to keep away from former employer's customers until the case is resolved. In many cases, this will undercut the very reason for which the employee is considered in the first place. I still think courts should lean toward not finding tortious interference.] The damages were awarded under the third party litigation exception which permits a court to award attorneys' fees as damages if the defendant's tortious act thrusts or projects the plaintiff into a litigation with a third party. The court said that but for the new employer's tortious actions, Medtronic would not have had to enforce its valid non-compete agreement with the employee. [This seems to ignore the employee's at least equal responsibility in accepting employment in breach of the covenant not to compete. After all, the new employer is a competitor and should be expected to push the limits of the covenant. The employee, on the other hand, who willingly entered into the covenant as a condition of employment is apportioned no responsibility. It seems that damages should at least be reduced in this context.] [All that I said above is especially true if restrictive covenants are still looked upon with disfavor and scrutinized carefully. Another reason this case should not have a wide application is that it will be difficult for basic employees who don't have highly specialized knowledge or who are not highly placed in the company to get a new employer to take a chance on them since they are looking at not only their own attorneys' fees but potentially the former employer's attorneys' fees as well. Of course, this is an appropriate deterrent sometimes but courts should be quite reluctant to apply this decision.] [I could not find a single case where the court awarded Rule 11 attorneys' fees to the employer. So no employee has been held responsible in that respect but the new employer does get held responsible for all of the fees.]

54. Midwest Systems, Inc. v. Faulkner: Temporary injunction denied. Employee only worked for a short time and had little success, was not able to develop intimate relationships with customers. Employee gained no specific information during his employment. Employer's affidavit had only conclusory allegations about confidential information. Employer must demonstrate irreparable harm while employee need only show substantial damages to bar an injunction. Employee went to work in a different sales region and was required to work from the new employer's own client database. For some reason the court declined to blue-pencil the scope of the non-compete. Employer

cited *Dynamic Air, Inc. v. Bloch*, which held that in situations where disclosure of confidential information to a competitor would be harmful to an employer regardless of where the competitor is located, a restrictive covenant unlimited as to territory may be necessary to protect an employer's interests.

55. Como Gas Sales, Inc. v. Jeffrey Downs: Employer failed to show causal connection between former employee's new employment and any perceived loss of business when employee's job for both was to install and service propane tanks.

56. Federated Mutual Ins. Co. v. Pehrson: Fact issues as to whether non-compete provision that was not specific as to territory covered both California, the first territory to which the employee was assigned, and Minnesota, the employee's later territory. Also a fact issue as to whether the employment contract was modified or rescinded when the employee changed territories.

57. World Data Products: Non-compete prohibited employee for one year from being part of any business owned by former employee of the employer. Employee had access to confidential information that had been purchased or developed by employer including lead sheets and notebooks containing customer lists, names and telephone numbers of contacts, purchasing information and sales agreements. Employees sign confidentiality agreements and there were non-disclosure provisions in the employee handbook. Employee did not give back notebook after termination. Employee formed his own business and began to contact employer's customers. Employer provided extensive training and experience in the computer business to employee who had been hired right out of college. Because employee resigned for a period of three days and then came back to work again, the court found that the non-compete had expired when the employment was terminated. Lengthy discussion of trade secrets. [I think there is a good argument that with the dramatic increase in his salary and his hold on a quarter of the company's goodwill that this is the kind of consideration that was found in the *Davies* case; particularly since the employee did sign a non-compete before he first started working for the company.]

58. Burke v. Fine: Employment agreement had a two year term. Court found that non-compete contained in employment agreement was not enforceable after the end of the two years.

59. Advance PCS v. Moen: Preliminary injunction denied. Non-compete signed 3 years after employee began work with employer. There was a lack of evidence that employee could lure customers away because employee's job was to negotiate contracts, not to solicit or retain customers; employee had almost no interaction with and no personal influence over the employer's customers. Factual issues as to what the employee was told about the enforcement of the non-compete if he left without severance pay.

60. Guidant Sales Corp. v. George: An employee signed a one year non-compete agreement. The employee argued that when a wholly-owned subsidiary was created the one-year period was triggered. The court rejected this argument, ruling that the employee's non-

compete agreement was transferred and assigned, which in no way changed the employee's employment, because he continued to sell the same products in the same territory under the same name. In addition, the non-compete agreement contained language "…and all of its parent, subsidiary or affiliated corporations and the operating divisions thereof." A simple corporate name change is no basis for not allowing a non-compete agreement to be assigned. Territorial restrictions in non-compete agreements have been upheld, and a restriction limited to prior customers is reasonable, especially when two colleagues have left the employer and both joined a new employer, because they could "flip" their clients, each taking advantage of the client relationship developed by the other. Also, if goodwill that was generated prior to becoming an employee is interdependent on a parent company's product, the parent company is entitled to the benefit of the goodwill established for that product.

61. Guidant Sales Corp. v. Niebur: By signing their non-compete agreements, both defendants clearly agreed to a MN choice of law provision. In addition, one defendant was working for a MN corporation, and made visits to MN for business. Also, the products for which the employee was responsible were manufactured in MN. A non-compete agreement entered into at the beginning of an employment agreement does not require independent consideration and, thus, is enforceable if the agreement is found to be reasonable. The Court found that the employers have a protectable business interest in the long-term customer relationships that were cultivated by the employees. Given the unique sales representative/customer relationship in the CRM industry and the highly competitive market, businesses in the CRM industry are entitled to protect their customer relationships and goodwill by reasonable provisions that do not unnecessarily burden their former employees from continuing to work within the industry. Employment restrictions limited to one year are sufficiently reasonable. A breach of a non-compete agreement may be found when there is evidence that employees indirectly promoted their new employer's devices by facilitating the presence of the new employer's representatives at locations that had previously been exclusively serviced by the former employer. Also, even if the employees are only responsible for selling different devices, their continued contact with their former customers inevitably facilitates the promotion and sale of the new employer's devices. Also, there was evidence that the employees encouraged and succeeded in taking employees from the former employer to work for the new employer. Irreparable harm may be inferred from the breach of a valid restrictive covenant. Because customer relationships were developed over significant time periods with substantial investment of the employer's training sessions and clinical support, its interest is substantial.

62. Hagen v. Burmeister & Assoc., Inc.: the Minnesota Supreme Court considered the former employer's claim that the new employer was liable under the doctrine of respondeat superior for the former employee's violation of the trade secrets act. Because of the procedural posture of the case, the Supreme Court assumed, for this case only, that an employer could, as a matter of law, be liable. However, the court found the former employer had introduced no evidence as to whether violations of the trade secrets act are a common hazard in the insurance industry. In other words, the former employer did not establish foreseeability.

63. Howard Schultz & Assoc. Int'l, Inc. v. Evert Software, Inc.: Preliminary injunction denied. No evidence of irreparable harm. No evidence that marketing and selling audit software is a violation of a non-compete prohibiting independent contractor from participating in an audit. Restrictive covenant must be limited to its plain language.

64. J.K. Harris & Co. v. Dye: JHK terminated Dye, an accountant, and moved to enforce a covenant against solicitation after Dye sent a letter to JHK's clients stating that she had been terminated, another JHK representative would be getting in touch with them, and JHK was being investigated by the IRS. The court held that JHK failed to demonstrate irreparable harm because the IRS investigation had been in the newspapers and the evidence did not "compel the inference that Dye was trying to steal away clients" with the letter. The court also concluded that the non-compete was not supported by adequate consideration because at the time the agreement was executed, no independent benefit was conferred.

65. Manhattan Group, LLC v. Rizer: Manhattan sued former president, Rizer, for breach of non-compete and confidentiality provisions of employment agreement. After terminating Rizer, Manhattan discussed the possibility of Rizer remaining as a consultant over a period of three months. During the same time, Rizer considered serving in a similar position with Manhattan's distributor, MTC UK. The appellate court upheld the trial court's decision that Manhattan's claims were "too speculative" and granting Rizer motion for summary judgment. Manhattan presented evidence that 1) Rizer phoned MTC representatives the day after termination, 2) MTC incorporated a competing business eight days after the phone call, 3) Rizer traveled to MTC's London headquarters for an all-day meeting, and 4) even discussed Manhattan's Easter product line with MTC. The court held that the evidence supported the inference that Rizer might have provided confidential information to MTC, but that that is speculative and no causal connection could be inferred.

66. Medtronic, Inc. v. Advanced Bionics Corp.: Two year prohibition on involvement with competitive products. Case stresses customer relationships. "Advanced Bionics haste to preempt enforcement of the non-compete agreement immediately after [employee] resigned from Medtronic demonstrates the value placed on his relationships within the industry. The market for the device is finite, and the formation of relationships within this limited market is critical. Here, [employee] has acquired personal influence over customers, and influence that [employee] may take with him in his work with Advanced Bionics." Despite the enormous size of Medtronic, the court found "there is a significant risk that Medtronic may lose the good will of a limited customer base, [therefore] the total size of the corporation is irrelevant." Good language on confidential information.

67. Midwest Urologic Stone United Ltg. Partnership. v. Domina: Defendants executed non-compete agreements as a condition of their investment in Midwest's business. Defendants began providing services similar to Midwest's and Midwest moved for a preliminary injunction to enforce the non-compete restriction. The court denied Midwest's motion, finding that Midwest did not present evidence that the quality or

quantity of information defendants acquired as limited investors was sufficient to cause irreparable harm to Midwest. Evidence was presented that Midwest did not advise investors of the confidential nature of information.

68. Neve, Inc. v. Jerkovich: Employer's appeal for failure to fully enforce the terms of a non-compete prohibiting former employee from working for a competitor in a 7-county area for a 6-month period following termination was held moot because the injunction that was issued had expired.

69. Tom Schmidt Associates, Inc. v. Williams: When non-compete with 5-mile radius geographic restriction failed to specify how the 5-mile distance should be measured, it was not unreasonable to deny an injunction based on the conclusion that the driving distance between the two businesses was at least 5 miles. It was also appropriate to limit the geographic restriction with the blue-pencil doctrine because the non-compete covered a substantial portion of Minneapolis and the two neighborhoods in which the businesses were located served different markets.

70. Twin City Catering, Inc. v. LaFond: Court upheld temporary injunction preventing LaFond from 1) contacting or soliciting customers, and 2) working in catering sales for two years within 30 miles of Twin City's offices. LaFond executed the non-compete a year after employment, but the agreement was supported by adequate consideration because LaFond received more sales support, an increase in salary and continued employment (LaFond was the only employee asked to sign the non-compete). The Court held that irreparable injury can be inferred from the breach of the restrictive covenant if the former employee came into contact with the employer's customers in a way which obtains a personal hold on the good will of the business (citing *Webb Publishing*). Knowledge gained while employed gives the employee insight into customer preferences and pricing.

71. Alpine Glass, Inc. v. Adams: Non-compete for a period of 12 months prohibited telemarketers from competing in similar business, disclosing confidential info, and soliciting business/customers or employees. Geographic scope including Minnesota, Iowa, Kentucky and/or New York was too broad. Employer failed to demonstrate a protectible business interest. Employees who worked as cold-call telemarketers did not develop "special relationships" with customers and the position requires no education or experience.

72. Commodities Specialists Co. v. Brummet: Court found irreparable harm because former employee had significant responsibilities, access to confidential and proprietary info, and was the primary contact for many customers. Employer proved that at least one customer had switched business to former employee's new employer. Non-competes were supported by the promise of additional benefits or new employment. The lack of a geographic location was reasonable in light of the international nature of the commodities markets.

73. FSI Int'l v. Shumway: Shumway, a sales representative for FSI for 19 years, signed a non-compete and non-disclosure agreement 6 years before resigning to work for a competitor. FSI's request for a preliminary injunction denied for lack of consideration for the non-compete. The court found that continued employment and compensation increases did not constitute sufficient consideration because these were benefits to which Shumway was already entitled.

74. Medtronic, Inc. v. Camp: Where a former employee violates a valid covenant not to compete, the Court may infer irreparable harm to the employer. Irreparable harm is often inferred from the threatened misappropriation of trade secrets or other confidential information. If employees have not alleged that the non-compete agreement is invalid in any way, and they appear to concede that they are violating the terms of the agreement, then the former employer has established that it is suffering irreparable harm.

75. Sulzer Spine-Tech v. Brietenbach: Fact issues with respect to employee's prior voluntary dismissal of an action seeking a declaration that the non-compete provisions were unenforceable.

76. TestQuest, Inc. v. LaFrance: The Court upheld a temporary injunction against a former sales executive for a company that sells testing products for technology systems. The court held that there was sufficient consideration for the non-compete clause which was contained in the second agreement signed by the employee after he had already commenced working, because it allowed him to continue working and also obtained additional vested stock options. The court reasoned that the employer would have been harmed if the ex-salesman could sell competitive products through a newly formed company. Although the ex-employee had not sold any products yet, he had solicited the largest customers of his former employer, which warranted injunctive relief. The non-compete agreement was not too broad because it permitted the ex-salesman to sell competitive products outside of the United States, which did not make the agreement "unreasonably restrictive in geographic scope."

77. Tonna Heating Cooling, Inc. v. Waraxa: Preliminary injunction affirmed. Case is distinguished from *National Recruiters, Davies,* and *Midwest Sports* because the non-compete, although not examined prior to employment and signed after work began, was fully discussed and negotiated prior to employment. Also evidence that employee had offered to draft the non-compete, actually filled in its terms, held a key management position and the scope and duration was limited.

78. Ultra Lube, Inc. v. Dave Peterson Monticello Ford-Mercury, Inc.: Ultra Lube sued its former service manager, alleging breach of non-compete and misappropriated trade secrets. Court granted summary judgment on breach of non-compete claim, holding that former employee did not have specialized skills, his duties were not managerial or professional and he was paid meager wages.

79. Universal Hospital Services, Inc. v. Henderson: Motion for TRO denied. Former employee was responsible for preparing written proposals for current and prospective

clients and had access to confidential info including customer lists, contact persons and pricing info. Non-compete prohibited employee from competitive work within 100 miles of any city having an office for which he had any oversight or through which he operated during the last 12 months of employment. UHS didn't refute the assertion that former employee accepted offer and began working prior to being asked to sign the non-compete. No additional consideration was given for non-compete.

80. Universal Hospital Services, Inc. v. Hennessey: Motion for TRO granted. Former district manager responsible for soliciting customers and serving existing customers prevented from working within 100 miles of district office upon employment by direct competitor. Addressing the balance of harms, the court found that the competitor could assign the employee to another territory during the pendency of the restraining order. UHS established its harm by demonstrating that its former employee was breaching his non-compete.

81. Inter-tel, Inc. v. CA Communications, Inc.: Former employees were terminated prior to the sale of the company. As part of their severance agreements, former employees signed "letters of confirmation" that released them from the non-competes contained in their employment agreements and imposed new non-competes preventing them from soliciting customers or employees for one year. The letters of confirmation were silent as to their assignability. When a contract does not provide for assignability, Minnesota courts construe the language against the employer and find the assignment void. Therefore, the court held that the letters of confirmation could not be assigned to the purchaser of the business and the purchaser could not enforce the non-competes.

82. Metro Networks Communications, LP v. Zavodnick: Non-compete contained a Texas choice of law provision, but the court applied Minnesota law because the former employee's brief failed to cite Texas law and the outcome would not be different. Court found that the non-compete was tailored to protect the employer's legitimate business interests because it included only the Minneapolis-St. Paul radio traffic market, the duration was one year, and it did not prohibit the employee from soliciting sponsors for ads not involving traffic reports. Court also held that, while the employee's new employer is off the market for traffic reports, there is still likely to be competition between the two employers for advertising sponsors in general. Preliminary injunction issued.

83. Retek, Inc. v. Cox: Former employee breached non-compete by working for a competitor within 1 year of his employment. Irreparable harm is inferred because of the breach and because former employee certified that he was entering a relationship of confidence and that he may receive proprietary and confidential information. Court entered a preliminary injunction tailored to prevent employee from disclosing information and from working for the competitor in active competition with the former employer.

84. Benfield, Inc. v. Moline et al.: Several of employer's former customers transferred their business to former employees' new employer. Both former employees had worked for employer over 10 years. One-year period held reasonable in light of former employees'

close relationships with and knowledge of customers and because it only limits them with respect to 12 former clients and doesn't affect their ability to remain employed.

85. Bromen Office 1, Inc. v. Coens et al.: The nature of employer's business – a middleman between office supply manufacturers and business customers – does not suggest the need to protect confidential systems or designs. Employer failed to show that it would suffer irreparable injury absent an injunction. In addition, the employment contracts contain liquidated damages provisions which may compensate employer for its claim. [I understand the reasoning that if there is a contractual remedy there can be no equitable remedy. However, there is nothing inconsistent with issuing of injunction to prevent loss of customers while setting a damage formula for customers already lost].

86. Cannon Services, Inc. v. Culhane: At the time former employee signed the non-compete, he had already quit his job and moved to a new locale. The terms of the job proposal and description do not contain the non-compete, and there is contradictory testimony and a lack of further evidence regarding whether or not former employee was aware of the terms of the non-compete prior to accepting the position. Based upon the controverted material facts and the disfavor with which the law looks upon non-competes, the court denied the preliminary injunction request.

87. Duluth/Superior Comm'ns, Inc. v. Shouts: After 9 months of employment, employer paid former employee $50 to sign a non-compete. Court did not address the adequacy of the consideration because it was not argued before the trial court. Court held that former employee's new employer was not a direct competitor because it did not deal in the same products, nor did it offer the same services. In addition, former employee's job duties with new employer were entirely different. Court held the inference of irreparable harm was rebutted by former employee's testimony that he didn't have a confidential relationship with employer's clients and the employer's confidential information was of no use to him in his new job duties.

88. West Publishing Corp. v. Stanley: Upon termination, former employee signed separation agreement with non-compete in return for 1 year of salary. Former employee argued that the separation agreement granted him the right to either compete or receive the salary benefits. Court held that the availability of damages for past harm does not preclude equitable relief as well. Court held that the $200,000 salary received in exchange for the non-compete was adequate consideration. Preliminary injunction granted.

89. Head, DVM v. Morris Veterinary Center: Veterinarians signed a non-compete prohibiting the provision of veterinary services within a 25 mile radius for 3 years from the date of termination. After discussions to purchase a portion of the vet business failed, two employees started their own vet clinic in a location they believed was outside the 25-mile radius. Reasonableness of the duration of a restrictive covenant may be tested by either (1) the length of time necessary to obliterate the identification between employer & employee in the minds of the customers; or (2) the length of time necessary for an employee's replacement to obtain licenses and learn the fundamentals of the business. If a non-compete is overbroad, a court can only enforce it to the extent that it is reasonable.

The former employees' testimony was credible and showed that new vets are fully incorporated into the business within 6 months. The employer admitted that the "first year" after a vet leaves is particularly devastating to the clients. The record supports the conclusion that the non-compete protection was only needed for 1 year, and the trial court did not error in modifying the restriction from three years to one.

90. Lisec America, Inc. v. Wiedmayer and Bystronic, Inc.: Factual disputes concerning whether former employee actually ever worked for employer due to the inability to secure a work visa. Therefore, the court found the employer's likelihood of success on the merits of its breach of non-compete claim was weak. In addition, even if the former employee was legally employed, it was only for 3 years in a glass manufacturing industry with long lead times, so the court found it unlikely that he had developed the customer relationships necessary to demonstrate irreparable harm. Preliminary injunction denied.

91. Prime Vest Financial Services, Inc. v. Ruxer: Dispute as to whether employee signed the non-compete before or after his employment began. Non-compete agreement signed after employment begins are generally unenforceable unless they are ancillary to employment or otherwise supported by independent consideration. The mere knowledge of the existence of a non-compete, without the opportunity to examine the agreement or to otherwise know its terms before employment begins, does not make the non-compete enforceable.

92. Schwan's Consumer Brands North America, Inc. v. Home Run Inn, Inc.: Court denied motion for TRO because there were fact issues as to whether former employees received consideration for signing non-competes in conjunction with a change in their employment positions.

93. Storage Tech. Corp. v. Cisco Systems, Inc.: Former employer sued company whose predecessor had hired away its employees. Case analyzes and ultimately dismisses a claim for tortious interference with contract, but states that Minnesota courts would allow a restitutionary remedy where the contractual interference alleged was inducing an employee to breach a non-compete.

94. Guy Carpenter & Co., Inc. v. John B. Collins & Associates, Inc.: Employment agreements contained a non-solicitation provision and were not assignable without the parties' consent. Employer merged with another company and employees were never asked to consent to the assignment of the employment agreements. Court held that the employees' consent was required to any sort of transfer, including successor *and* assigns. Because the consent was not obtained, the non-solicitation provisions no longer applied to the employees' relationships with the successor employer.

95. Hutchinson Technology Corp. v. Magnecomp Corp.: Preliminary injunction granted to enforce non-compete. Court was not swayed by former employee's argument that he was working on "internal processes" and was not violating the non-compete. Former employee did not dispute that his new employer was a competitor or that their businesses and knowledge overlap. Because the non-compete prohibited the sale or manufacture of

similar products, former employee breached it. Court also rejected the argument that an employer has to prove the existence of trade secrets prior to the enforcement of a non-compete.

96. Naterra Land, Inc. v. Dingmann: Parties entered into a non-compete about 10 years after employee began his employment. Because it was made independent of the employee's initial employment contract, the non-compete requires independent consideration, or evidence it was bargained for and provided the employee with real advantages. Court held that the non-compete was supported by adequate consideration. The evidence showed that in exchange for signing the non-compete, the employee received an enhanced compensation structure, a raise, continued employment, and access to all of the confidential and proprietary information necessary to successful job performance. [The non-compete should explicitly state that a specific dollar amount or other benefit is consideration for signing non-compete.] The non-compete also reflects negotiation and modifications as a result of bargaining. The Court found the non-compete to be reasonable with a scope of only one year and within the employee's market. Partial summary judgment that the non-compete is valid and enforceable and supported by adequate consideration was granted.

97. Unisource Worldwide, Inc. v. Schroeder: Former employee signed a non-compete in exchange for 3 years of back pay due and other changes in employment. Later, the employer's VP sent a letter terminating the "employment agreement" and stating that the former employee was now "at-will." Court held that "employment agreement" included the non-compete agreement because the termination was implemented in order to create uniformity among the sales reps and because the letter stated that employment would not be subject to change without notice, while the non-compete had previously not allowed changes without agreement of both parties. In addition, there was no independent consideration for the non-compete as a stand-alone agreement.

98. United Products Corp. of America, Inc. v. Cederstrom: Non-compete prohibited former employee from working for a competitor for 18 months following his resignation. In determining the reasonableness of a temporal restriction, courts must consider the nature of the employee's work, the time necessary for the employer to train a new employee, and the time necessary for the employer's customers to adjust to the new employee. Here, the former employee was a salesperson, but the employer presented no evidence indicating how many salespersons it employs, what training it provides, or whether the work requires close contact with customers. With respect to the reasonableness of geographic restrictions, courts generally uphold them when they are limited to areas necessary to protect the employer's interest. The non-compete here prohibited the former employee from working for any competitor selling siding in the former employee's former territory, even if the former employee is not active in that territory. Court held that, given these facts, the district court did not abuse its discretion in refusing to enjoin the former employee form violating the non-compete. With regard to the former employee's non-solicitation agreement, the court held that, absent a breach, irreparable harm cannot be inferred solely because a non-technical employee with access to confidential information took a position with a competitor.

99. H.B. Fuller & Co. v. Mooney: Non-compete executed in conjunction with a promotion prevented former employee from selling or soliciting orders for any competing product to or from customers with whom he had contact. Court issued preliminary injunction after considering the *Dataphase* factors. Former employee breached non-compete by engaging in prohibited sales contacts and advising his new employer on competing products. Based on evidence of the breach, irreparable harm can be inferred.

100. Salon 2000, Inc. v. Dauwalter: Hair stylists are in a position to develop close relationships with salon customers, so a non-compete serves a legitimate interest for the salon employer. A 10 mile geographic scope and one year duration is reasonable. The court held that in order to establish a breach of the non-compete, it is not necessary to show that the new employer competes with the former employer, but that the employee does. The employee's admission that 19 of her customers from her former employer now use her services at the new employer is at least a genuine issue of material fact regarding whether she competes with her former employer.

101. St. Jude Medical S.C., Inc. v. Hasty: Irreparable harm was inferred from the former employees' actual breach of their non-competes by contact with the employer's customers. One year duration and scope preventing the sale of competing products to customers with whom the former employees' had contact while working for employer was reasonable.

102. St. Jude Medical S.C., Inc. v. Hasty: Irreparable harm was inferred from the former employees' actual breach of their non-competes by contact with the employer's customers. One year duration and scope preventing the sale of competing products to customers with whom the former employees' had contact while working for employer was reasonable.

103. Vital Images, Inc. v. Martel: Under Minnesota law, the blue pencil doctrine allows a court the discretion to modify an unreasonable non-compete and enforce it only to the extent reasonable. The non-compete does not contain a geographic restriction, but that does not make it per se unreasonable. It restricts the former employee from providing services for any entity that is developing or marketing competing products. Court concluded that it was reasonable to limit the geographic scope to those states in which the former employee operated while working for the employer.

104. Cook Sign Co. v. Combs: Although the one year term under the non-compete was up, court still would look at the enforceability of the non-compete because the employer was also seeking damages for its breach, which would need to be determined at trial. Court held non-compete valid when it was not signed until several days after work began but was supported by independent consideration listed in the employment agreement, including a signing bonus and additional income. Court found irreparable harm because former employee had an insider's knowledge of employer's business

105. Merrill Corp. v. R.R. Donnelley & Sons Co. et al.: one-year non-compete prevented solicitation of employer's clients. The restrictions only applied "where the client is solicited to purchase a service or product that competes with a service or product" of the employer. The court found that the employer's practice was to provide clients with gifts and free services as part of ongoing efforts to enhance client relationships and business development and, while each contact may not have been a direct solicitation, each was done with that intent in mind and can be characterized as an effort to solicit. Once the former employees began working for employer and once their pre-existing clients became employer's clients, those clients were "existing" under the terms of the non-compete and could not be solicited. The term "client" in the non-compete was ambiguous because it could refer to company clients or to both company and individual (within the company) clients. Because the employer drafted the agreement, the court interpreted the term "client" according to the former employee's interpretation, which included only the company client and not the individuals who work for the company. Court held that there was evidence that two former employees breached the non-compete by (1) referring a client who called to another person working for their new employer and (2) contacting a client to offer Cubs tickets that had been purchased by the former employer. Court issued a temporary injunction as to these two former employees.

106. Tenant Construction, Inc. v. Mason et al.: Former employee signed non-compete after 6 months of employment for added consideration of $500. Employer gave former employee permission to serve on the board in a limited capacity for a similar construction and development business. Former employee later resigned to accept employment with that similar business. Court held the additional consideration for the non-compete was sufficient because $500 was not an insignificant sum, the former employee had the opportunity to ask for more, and his continued employment, while not sufficient alone, also indicated adequate consideration.

107. Witzke v. Mesabi Rehabilitation Services, Inc.: Former employee signed non-compete months after beginning work. Because the former employee was already employed at the time he entered the agreement with the non-compete, the agreement requires independent consideration. In some situations, continued employment can serve as consideration if the employee is employed for many years, advances within the company, and is given increased responsibilities. Court held that the non-compete in this case demonstrated that there was bargaining because the employee handwrote an exception in the agreement. Former employee advanced within the company and continued in employment for 17 years. Court therefore held that the non-compete was supported by adequate consideration.

108. Arizant Holdings, Inc. v. Gust, 668 F.Supp. 2nd 1194 (D. Minn. 2009). Former employee did not dispute that he violated the noncompete agreement. On cross-motions for summary judgment, the court granted summary judgment in favor of the former employee because the former employer failed to submit any evidence that it had suffered any harm as a result of the violation of the noncompete; former employer did not identify a single customer or sale that was lost. **[I disagree with any requirement that *actual* lost customers or sales be proved at the TRO stage for the reasons I identified at the**

end of the *Satellite Industries* summary in my original list of cases. See also, *Thermorama Inc. v. Buckwold*. However, there has to be some showing at least that harm is likely unless the TRO is issued – it appears no such showing was made in this case.] Former employer contended that it could have been harmed by its customers making a trial use of the competing product but no evidence was offered that any customers in fact made a trial use. Notably, the former employee signed a separation agreement which failed to tie a severance payment to the former employee's continued compliance with the noncompete agreement. Since the severance payment was only in exchange for the former employee's promise to release the former employer from any claims, the court determined that the former employer was not entitled to return of the severance payment. Even worse, the separation agreement abrogated a previously signed confidentiality agreement through a merger clause. This did not preclude a claim under the Minnesota Trade Secrets Act, although the court in this case found no violation of the Act. Finally, the former employer sought an injunction under a tolling provision in the noncompete agreement. Perhaps the most important comment in the decision, although made somewhat offhandedly by the court, is that "it is not clear whether the tolling provision on which [former employer] relies is enforceable" citing to a 2007 Wisconsin court of appeals case. The court ruled that, in any event, the former employer had not shown irreparable harm. **[Since one of the chief purposes of a noncompete is to sever the relationship between the former employee and customers for a period long enough to allow the former employee's replacement to establish relationships with those customers, tolling could be very important to achieve that goal.]** Judge Schiltz ends his opinion with a quote that undoubtedly every former employee's attorney will cite: "This lawsuit no longer has a reason for being, except as a means for Arizant to reek vengeance on Gust and the Augustine companies (which are paying for Gust's defense). That is not a proper use of the federal courts."

109. Softchoice, Inc. v. Schmidt, 763 N.W.2d 660 (Minn. Ct. App. 2009). Softchoice informed former employee that he was being promoted and that a formal offer would be forthcoming. A week later, the HR department sent a formal offer letter of promotion detailing the benefits and responsibilities. The offer letter also contained a one year non-solicitation agreement prohibiting the solicitation of customers. Former employee was directed to review the formal letter and return a signed copy signifying his acceptance of the terms of employment. The issue in this case, which the court of appeals said was an issue of first impression, was whether the non-solicitation agreement was supported by adequate consideration. The court observed that if the promotion had occurred prior to the offer letter being presented and signed, the promotion could not serve as consideration for the non-solicitation agreement. However, the court ruled that the promotion did serve as consideration because it was not made until the terms of the promotion had been defined and a formal offer had been made and accepted in writing. Of significance to the court was that the offer letter stated that the promotion would be null and void if not signed and returned. **[*Sanborn Manufacturing Co. v. Currie*, 500 N.W.2d 161 (Minn. Ct. App. 1993) held that a promotion and increase in salary attributable to nothing other than performance that was expected under initial employment agreement were not independent consideration supporting a noncompete agreement. Obviously, the important distinguishing factor in**

Softchoice **was that the promotion would have been null and void had the former employee not signed and returned the offer letter.]**

In a footnote, the court cited with approval a Connecticut case which analyzed whether an employee retention plan could serve as valid consideration for a non-competition or non-solicitation agreement. *Aetna Retirement Serv., Inc. v. Hug*, 1997 WL 396212 (Conn. Super. Ct. June 18, 1997). In that case the court found adequate consideration provided by the former employer legally obligating itself to pay a retention bonus and severance benefits if the former employee remained at the company for two years and did not compete for one year thereafter. Good quote:

> It is useful at the start to make clear what this case concerns. It involves the enforceability of a non-competition agreement voluntarily entered into by a very high ranking executive of ARS, who together with approximately twenty-five other senior level managers of ARS, were offered considerable financial inducements to enter into the agreement and were advised that no sanctions would be imposed if they declined to agree to the noncompetition provision.
>
> This case does not involve consideration of non-competition agreements that, as a result of a blanket corporate policy, are presented to middle level managers under the threat of job termination.

[A good practice pointer is found in the court's reference to a portion of the record reflecting that it takes over a year for an employee in a former employee's position to fully develop customer relationships. Such information should always be provided in at least affidavit form in connection with a TRO or temporary injunction motion.]

110. Guidant Sales Corporation v. Baer, 2009 W.L. 490052 (D. Minn. 2009). Baer worked for Guidant from 2002 until December 19, 2008 as a sales representative selling pace makers and defibrillators (CRM devices). Noncompete applied to customers with whom Baer had sales related contacts in the year preceding the termination of his employment. Noncompete was signed in conjunction with a promotion to a management position. Applying *Davies*, the court found independent consideration in the fact that the managerial position would not have been open to Baer if he had refused to sign a noncompete agreement. The court found that, regardless of whether Baer's income decreased or not, he was eligible to receive more as a manager than as a sales representative and he received "something" that, while intangible, made the managerial position more satisfying than continuing as a sales representative. **[Court distinguished *Sanborn* on the basis that the managerial position would not have been open to Baer if he had refused to sign the noncompete. Unlike *Softchoice*, this fact does not appear in the "background" section of the opinion which states only that Baer signed a noncompete "in conjunction with his promotion."]** Interestingly, the court found that Baer's compensation was guaranteed regardless of the outcome of Guidant's motion even though the court acknowledged that this finding was based on hearsay. [**The guaranteed compensation along with the fact that Baer basically admitted he**

blatantly violated the noncompete and Guidant's proof that it lost sales following Baer's departure appears likely to have (justifiably) influenced the court's finding of independent consideration.)] Good quote: "In a competitive industry in which the clientele is particularly sophisticated and the products are technically complex, the trust and personal knowledge of the customer engendered by a long term relationship is helpful to making the sales." **[Note that, by its terms, the court's order remained in place until the one year anniversary of Baer's resignation even though the motion was one for a temporary restraining order. There is nothing in the order to indicate that the temporary restraining order was followed by a temporary injunction hearing which means Guidant effectively won the case at the temporary restraining order stage.]**

111. St. Jude Medical S.C., Inc. v. Ord. 2009 WL 973275 (D. Minn. 2009). Another CRM case in which Ord left St. Jude and went to work for Boston Scientific. Noncompete restriction applied to customers upon whom employee called during the last year of employee's employment. Ord claimed that industry practice dictated that the noncompete should be enforced only with respect to hospitals and doctors he called on more than three times during his last year with St. Jude. The court rejected the imposition of this industry understanding on the basis that it was contrary to the plain language of the noncompete. As in the *Guidant* case above, the court found that Ord was entitled to guaranteed compensation, a factor which certainly impacts the balance of the harm analysis. Unlike the *Guidant* case, the TRO was for a short duration. A number of other CRM cases are cited in this case.

112. Medtronic, Inc. v. Hedemark, 2009 WL 511760 (Minn. Ct. App. 2009) (Unpublished). Hedemark signed a stock option agreement which gave him the opportunity to purchase company stock but required forfeiture of any exercised stock options if he left Medtronic's employ less than six months after exercise and engaged in competition. The court found that this was an enforceable noncompete agreement that served the legitimate business interest of promoting and rewarding employee loyalty as well as maintaining stable, consistent relationships between the sales force and customers. Unlike many noncompete agreements, the stock option agreement afforded Hedemark almost complete control over how it impacted him, i.e., he controlled the timing of his resignation. Hedemark went to work for St. Jude in almost exactly the same geographic area, with same customers, as he did for Medtronic.

113. Schmit Towing, Inc. v. Frovik, A-10 0362, (Minn. Ct. App. 2010) (unpublished). Schmit Towing entered into a subcontract agreement with Frovik to provide towing services to Schmit. The parties mutually terminated the first agreement and entered into a second subcontract agreement. The first contract did not contain a noncompete clause, the second did. Schmit sued Frovik claiming Frovik had provided towing services for Schmit's competitor in breach of the noncompete agreement. The district court analogized the facts of this case to terminating an at-will employee and then conditioning rehiring on signing a noncompete. The court of appeals stated the requirement of independent consideration to validate a noncompete agreement entered into subsequent to an initial contract has only been applied in the context of employer-employee

relationships and that imposing such a requirement in the independent contractor context would require an extension of existing law. The court of appeals ruled that the district court improperly applied the post-employment independent consideration requirement. On remand, the court of appeals invited the district court to consider anti-trust law. **[Presumably Frovik did towing other than what he did as a subcontractor for Schmit which would be a basis for not requiring independent consideration as in the employment context. However, for independent contractors who work for only one entity there would appear to be no basis for distinguishing that situation from the employment context.]**

Non-Competes Ancillary to the Sale of a Business

1. Faust v. Parrott: Involves sale of business. Damages awarded for breach of covenant not to compete are measured by the business loss suffered as a consequence of the breach, i.e., profits lost as a direct result of competitive activities. The portion of the initial purchase price allocated to good will does not normally serve as a measure of damages. Court said lost profits may be determined only by reference to the financial records of the salvage yard, both before and after its sale to the Fausts. Court said decline in profitability could be a result of poor management or market changes, change of name of business after purchase. [I see no reason why the measure of damages should not be the profit made by the defendant in making the sales that breached the non-compete. Otherwise, the buyer could make the business more profitable but still have lost sales that went to the breaching party].

2. B & Y Metal Painting, Inc. v. Ball: Court applies a different standard in scrutinizing a covenant not to compete in connection with the sale of the business. Court applied the same measure of damages as in *Faust*. Court said buyer could have shown that the metal painting business as a whole had continued to grow but failed to do so. Thus buyer could not establish a causal relationship between seller's breach and buyer's decline in growth. Buyer argued that it should be able to calculate its damages by applying its profit margin to seller's gross sales in violation of the covenant. Court cited *Cherne* as a case in which damages were based on the defendant's gain from the violation of the covenant. However, in *Cherne*, the plaintiff's profit margin was only applied to that portion of the defendant's gross income that derived from the plaintiff's former or prospective customers. In this case, buyer did not prove what percentage of seller's gross sales were made to buyer's customers. Since there were ten other competitors in the market, the court concluded some of the sales went to those competitors. [Overall, I think it is appropriate to limit the application of the plaintiff's profit margin to sales by the defendant to plaintiff's customers and prospects]. Because the loss of profits in a complex market can rarely be ascertained with certainty, the plaintiff must often rely on reasonable inferences to establish his loss. Once a plaintiff raises a reasonable inference as to the amount of lost profits caused by a defendant's breach of a covenant not to compete, defendant is liable unless he rebuts the inference.

3. Saliterman v. Finney: Court held that a covenant not to compete in an employment agreement is assignable ancillary to the sale of a business to protect the goodwill of that business.

4. Bruner v. Klemp: Non-compete was in connection with the sale of a business. Court applied it very broadly so that, even though former owner claimed that he was only selling parts that the buyer couldn't supply, court found that it was still the same business. Court said measure of damages in a non-compete case are the business losses actually suffered as a consequence of the breach.

5. Energy Solutions Intern. v. Tastad: Non-compete signed in connection with sale of a business. Nonetheless, non-compete was not enforced. It appears that the reason why is because a lot of time passed between when the buyer learned that seller was going into business and when the lawsuit was filed. It appears that it may have been over a year. Also the seller told the buyer up front what he was intending to do. It appears that the court found that the balance of the hardships weighed in favor of the seller, probably given the length of time that had passed.

6. Kunin v. Kunin: Sets forth a three step test for determining the reasonableness of a non-compete agreement arising out of the sale of a business. (1) Whether the restriction exceeds the protection necessary to secure the good will purchased; (2) whether the restriction places an undue hardship on the covenantor; and (3) whether the restriction has a deleterious effect on the interests of the general public. There was no hardship on the employee because he could either collect under the consulting agreement or go back into the hair salon business and forfeit the payments.

7. Ikon Office Solutions, Inc. v. Dale: Ikon sold that portion of its business related to the sales and servicing of computer related business equipment to Dale. Five year non-compete was reduced to three years without any explanation by the court other than five years created an undue hardship and failed to serve any legitimate needs of plaintiff's business. [This case is not the same as when an owner sells his business and agrees not to compete in connection with the sale. In this case, the buyers bought a portion of an existing business and agreed not to compete with respect to the portions of the business that were not purchased. Presumably, the buyers had no experience in the other portions of the business and certainly had no hold on Ikon's good will through customer relationships. It is difficult to analyze this case without more facts.]

8. Lemon v. Gressman: Sale of restaurant business with one mile geographic restriction for ten years. Court did not buy former owner's claim that his daughter, and not himself, was operating the business. Court indicates that ownership, without operating the business, would be acceptable. [I disagree because it is only a one mile radius, it is a non-compete in connection with the sale of the business, and it is too difficult to monitor whether the former owner is really involved behind the scenes or not.]

9. Fung v. Riemenschneider: Non-compete signed in conjunction with the sale of a dental practice prohibited seller from engaging in a competing dental practice within a 5 mile radius for a 6 year period. Parties initially entered consulting agreement, but the relationship broke down. Seller sent letters and billing statements to past patients, encouraging them to continue treatment with him at a new location. Court held that, although the new practice was not within 5 miles, the purchase agreement expressly provided for the sale of the dental practice and its accompanying goodwill. Therefore, the seller had an implied duty not to solicit former patients privately, even though the non-compete didn't expressly prohibit solicitation. Without such an implied duty, the intent and purpose of non-compete would be frustrated.

10. Hypred S.A. v. Pochard: Seller of business signed non-compete in conjunction with his employment as president. After purchaser terminated seller's employment as president, seller accepted a job with a competitor. Although the non-compete was signed in conjunction with an employment agreement, it was also entered into in connection with the sale of a business, so the court employed the reasonableness test used for non-competes ancillary to the sale of business. Non-compete provisions in connection with the sale of a business can only be enforced to the extent necessary to protect the goodwill purchased. Court found that the non-compete exceeded the protection necessary by preventing seller from working for companies outside of the restricted area if the companies (but not the seller) engaged in any activities within the restricted areas. The court also found that the seller was not hired by the competitor to work in any capacity in the restricted areas, so the balance of harms was in his favor. Court granted a limited preliminary injunction to prevent seller from engaging in restricted activities in restricted areas, as defined in the parties' stock purchase agreement.

11. Berg v. Miller: Purchase agreement for a business contained a covenant not to compete prohibiting the seller from owning, managing, being a partner or employee of, or consulting within the lawn care industry for a period of 5 years within the western and northwestern suburbs of Minneapolis. Following the sale, the seller continued to be involved with his other two businesses, landscaping and irrigation system installation and service. Court held that, to the extent "lawn care industry" was ambiguous, the evidence was insufficient to conclude that the term included landscaping and irrigation services when the buyer hadn't purchased any of the landscaping contracts, knew that the seller intended to continue operating his landscaping and irrigation businesses, and admitted that the non-compete did not preclude the seller from doing landscaping work. The trial court did not abuse its discretion in refusing to modify the non-compete to change the geographic scope to the area in which the 3 businesses were doing business because it was similarly vague to the original provision and might even include the same area.

12. Duy v. Lake Weed-A-Way, Inc.: Asset purchase agreement for a weed-removal business contained a non-compete preventing sellers from engaging in the selling of substantially similar services to those services which are being purchased by buyer. Buyers renamed the business and engaged in retail sales of aquatic herbicides. Court held that the non-compete was unambiguous, the term "services" was to be given its plain and ordinary meaning, and "services" did not include the retail sale (only the application) of aquatic herbicides.

13. Sealock v. Peterson: Seller of optometry practice began a new practice outside of the 5-mile radius in the non-compete, but advertised in papers covering areas within the 5-mile radius. Court held that the plain and ordinary meaning of "compete" includes newspaper advertisements, which are attempts to secure the business of third parties. Seller's advertisements were striving for the same customers/market designated as restricted in the non-compete. Although the seller's business was located outside the restricted area, his activities were still violating the non-compete. The court stated, in dicta, that it would not restrain publications with large circulation areas that happen to enter the 5-mile area,

but that advertising with its primary focus in the restricted area is a violation of the non-compete.

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