FORMER EMPLOYMENT AND PRESENT COMPETITIVE RESTRAINT

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INTRODUCTION

Employment carries with it aspects that are purely professional and, at the same time, aspects that make it fairly personal in nature. Obviously, the concept of pay for labor places employment firmly in the business world. A number of factors, however, make it highly personal in nature. Ultimately, much of our waking time is spent at work. Many (if not most) of our personal relationships originally stem from business or work.[1] The law has always acknowledged the personal aspect of the employment relationship. For example, courts will not enforce contracts of employment with an order for specific performance. D. Dobbs, Handbook on the Law of Remedies §12.26 at 993 (1973).

Legal rights within the employment relationship also are changing. Iowa formally adheres to the at will employment doctrine. French v. Foods, Inc., 495 N.W.2d 768, 769 (Iowa 1993); Fogel v. Trustees of Iowa College, 446 N.W.2d 451, 455 (Iowa 1989). Nonetheless, employment litigation mushrooms. Some--mainly employers--are coming to believe that the exceptions now overpower the rule. Starting with the enactment of traditional labor (union) legislation, Congress, state legislatures and municipalities have enacted a large number of statutory exceptions to at will employment. These exceptions constitute clearly articulated public policy limitations upon an employer's ability to terminate the employment relationship.[2]

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[1] Of course, the "personal" aspects of employment are almost wholly dependent upon individuals involved, the size of the work place and the work "atmosphere". Failing to acknowledge the personal side distorts reality. In fact, many of us choose, or remain in, our particular employment setting based upon reasons that are at least as heavily "personal" as "business".

[2] See, e.g., Labor Management Relations Act, 29 U.S.C. §158(a)(1), (3), (4); Fair Labor Standards Act, 29 U.S.C. §§215(a)(3), 216(b); OSHA, 29 U.S.C. §660(c); Title VII, Civil Rights Act of 1964, 42 U.S.C. §§2000e-2, 2000e-3(a); ADEA, 29 U.S.C. §§623, 631, 633(a); ADA, 42 U.S.C. §12112(a); ERISA, 29 U.S.C. §§1140, 1141; Iowa Civil Rights Act of 1965, Iowa Code §216.6; Iowa Code §642.21(2) (garnishment limitation); Iowa Code §730.4(1)-(6) (polygraph protection); Iowa Code §730.5 (drug testing); Iowa Code §88.9(3) (occupational safety). Local ordinances throughout the state, in addition,

The courts, also, have eroded the concept of at will employment, which is, itself, based fundamentally upon the notion of parties' freedom to contract. In a series of decisions, the Iowa Supreme Court has authorized new causes of action for termination of the employment relationship based upon "pseudo" contract principles. See, e.g., French v. Foods, Inc., 495 N.W.2d 768, 770 (Iowa 1993); McBride v. City of Sioux City, 444 N.W.2d 85, 90 (Iowa 1989); Cannon v. National By-Products, Inc., 422 N.W.2d 638, 640 (Iowa 1988) (employment handbook claims). The court has also recognized a cause of action for wrongful termination in violation of public policy. See, e.g., Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988). Concurrent with the rise in government involvement in business has been a general lessening of parties' unfettered right to contract as they choose.

The expansion of employee rights and growing restrictions on employers' ability to terminate the employment relationship have led to increased employment and labor litigation. Because such litigation usually relates to a breakdown of personal relationships also, court battles are frequently fought in highly charged and personal terms. Such cases are often similar to litigation concerning the dissolution of marriage or family relations matters.

The general observations clearly hold true with respect to litigation aimed at restricting a former employee's activities competitive with the previous employer's business. Even before the rapid advancement of employee rights (and the increased technological complexity of the business world), questions concerning an ex-employee's right to compete were litigated. Some time ago, rules were established by the courts. At

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contain specific prohibitions restricting an employer's right to discharge an employee. See e.g., Chapter 69, no. 66-80, Ordinances of City of Cedar Rapids.

least ostensibly, those rules still govern. Changes in society's view of the employment relationship, however, and changes in the legal rules governing employment have affected (usually tacitly) judicial analysis of some of the legal issues. The result has been a large and growing body of case law and legal precedent. See, e.g., Covenants Not to Compete, a State-by-State Survey, ABA Section of Labor and Employment Law (1991 & 1996 Supp.); Empirical Study, a Statistical Analysis of Non-Competition Clauses in Employment Contracts, 15 J. Corp. L. 483, 485 (1990). That authority, however, based upon analysis of individual fact settings--and generally by courts in equity--is exceedingly diverse, divergent and contradictory. Despite (or perhaps because of) the abundance of legal precedent, commentators have decried the "exceptional degree of unpredictability" with respect to the area. Non-Competition Clauses, supra, 15 J. Corp. L. at 486.[3]

Any lawyer participating in litigation seeking to impose competitive restrictions on individuals must understand and appreciate the overriding feature of such litigation--unpredictability. Attempts to analyze given factual settings solely by reference to reported decisions in Iowa or elsewhere can, at best, be only partially successful. Such an approach, likely, will be misleading and, ultimately, expensive. However, since case law is what is available for analysis, this paper will set forth some of the various articulated considerations of Iowa courts with respect to competition questions and practical contexts

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[3] As noted by the Iowa Supreme Court, there "is a fair consensus on the rules governing restraints on competition in employment contracts, but difficulty frequently arises in applying the rules to individual cases." Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983). In Curtis 1000, Inc. v. Youngblade, 878 F.Supp. 1224, 1256 (N.D. Iowa 1995), Judge Bennett quoted a 1952 Ohio decision in which the court referred to case law on non-competition agreements as a " ' sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything . . . .' " (citation omitted). Unpredictability has led to at least one effort to attempt to assess as many as 35 separate variables affecting judicial outcomes in non-competition cases. Non-Competition Clauses, supra, 15 J. Corp. L. at 533, App. B.

in which those traditionally articulated considerations arise. In large part because of the shortcomings of contract-based competitive restrictions litigation, other legal theories are becoming increasingly popular. This paper will also address alternative litigation approaches.

COVENANTS NOT TO COMPETE

A. LEGITIMATE COMPETITION ABSENT CONTRACTUAL RESTRAINT

There is not much case law directly articulating what constitutes non-actionable post-employment competition generally, although the cases in which courts have held covenants not to compete unenforceable, discussed below, demonstrate situations in which courts have found competition to be non-actionable. As a general matter, tort law suggests the limits of appropriate competition.[4] Other factors being equal,[5] conduct that does not constitute tortious interference with existing or professional prospective contractual relations is otherwise legitimate. See, e.g., Nesler v. Fisher & Co., 452 N.W.2d 191, 194-95 (1990); C.F. Sales, Inc. v. Amfert, Inc., 344 N.W.2d 543, 555 (Iowa 1983); Toney v. Casey's General Stores, Inc., 460 N.W.2d 849 (Iowa 1990). In general, Iowa follows the Restatement (Second) of Torts definition of improper conduct. See Hunter v. Board of Trustees, 481 N.W.2d 510, 518 (Iowa 1992); Restatement (Second) of Torts §767. The Restatement also assists in determining the scope of permissible competition.

> One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors. In

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[4] Trade secrets litigation is addressed separately below.

[5] This analysis does not in any way attempt to encompass anti-trust or trade restriction considerations.

> order not to hamper competition unduly, the rule stated in this Section entitles one not only to seek to divert business from his competitors generally but also from a particular competitor. And he may seek to do so directly by express inducement as well as indirectly by attractive offers of his own goods or services.

Restatement (Second) of Torts §768, Comment (b).

Within the context of this statement favoring competition, contractual restrictions on an employee's ability to compete after the employment relationship has terminated have, fairly understandably, been viewed with lack of full approval. Although the view of the courts may be changing, generally contractual covenants not to compete have been looked upon by the Iowa courts with disfavor. "We start with a basic tenet that restraints on competition and trade are disfavored in the law. Exceptions are made under narrowly prescribed limitations." Uptown Food Store, Inc. v. Ginsberg, 255 Iowa 462, 467, 123 N.W.2d 59, 62-63 (1963); see also Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 911 (Iowa 1986) ("agreements in restraint of trade are generally disfavored").[6]

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[6] However, the Iowa Supreme Court has also noted that there is " 'no public policy or rule of law which condemns or holds in disfavor a fair and reasonable agreement [restricting competition], and such a contract is entitled to the same reasonable construction and the same effective enforcement that are accorded to business obligations in general.' " Kunz v. Bock, 163 N.W.2d 442, 445 (1969) (quoting Sickles v. Lauman, 185 Iowa 37, 169 N.W. 670 (1918).

In Dental Prosthetic Services, Inc. v. Hurst, 463 N.W.2d 36, 39 (Iowa 1990), the court attempted to synthesize these two views of no compete agreements, deciding that a covenant not to compete in the employment setting "being in restraint of trade and personal liberty, should not be construed to extend beyond its fair import." The case itself illustrates that the test does not provide much guidance. Expert testimony was presented at trial whether defendant's premises were 50 or 52 miles from plaintiff's. 463 N.W.2d at 38. The court held that plaintiff failed to prove defendant's location was within the 50 miles prohibited under the agreement. Id. Thereafter, the court construed the contractual prohibition against engaging in business "directly or indirectly within a radius of 50 miles" not to include "delivering" to, "calling" upon or "servicing" customers "at their place of business", even where the customer's place of business is within 50 miles. Id. at 39.

B. REASONABLENESS AS THE STANDARD DETERMINING ENFORCEABILITY

Before 1971, Iowa followed the traditional approach, striking down in their entirety contractual restrictions on post-employment competition that the court found in any respect to be overbroad. See, e.g., Smith v. Stowell, 256 Iowa 165, 125 N.W.2d 795 (1964). In Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 369 (Iowa 1971), the Iowa Supreme Court rejected the all-or-nothing approach and, to that extent, overruled earlier case law. Under Ehlers, the court adopted the:

> rule that unless the facts and circumstances indicate bad faith on the part of the employer, we will enforce non-competitive covenants **to the extent that they are reasonably necessary to protect his legitimate interests without imposing undue hardship on the employee when the public interest is not adversely affected.**

188 N.W.2d at 370 (emphasis added). In other words, the court will tailor a covenant not to compete so that it can be enforced.[7]

1. Factors determining reasonableness.

Determining reasonableness is, necessarily, dependent upon the specific facts and circumstances of a given case. Adding to the complexity of analysis is the clearly stated position of the Iowa Supreme Court that the:

> reasonableness of the restraint and the validity of the covenant seldom depend exclusively on a single fact. Rather, all the facts must be considered and weighed carefully, and each case must be determined in its entire circumstances. Only then can a reasonable balance be

[7] Even under the Ehlers rule, however, lawyers involved in no compete litigation must be mindful that the proponent of the contractual restriction must ask the court for partial enforcement and modification of the agreement. Failure to do so may, in effect, result in reversion to the all-or-nothing approach. See Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 911 (Iowa 1986) ("while Ehlers allows for modification of such agreements, it does not require a court to do so sua sponte.").

> struck between the interests of the employer and the employee.

Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 382 (Iowa 1983); Baker v. Starkey, 259 Iowa 480, 495, 144 N.W.2d 889, 897-98 (Iowa 1966).

In applying the reasonableness standard, the court will seek to:

> maintain[] a proper balance between the interests of the employer and the employee. Although we must afford fair protection to the business interests of the employer, the restriction on the employee must be no greater than necessary to protect the employer. Moreover, the covenant must not be oppressive or create hardships on the employee out of proportion to the benefits the employer may be expected to gain.

Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983); see Mutual Loan Co. v. Pierce, 245 Iowa 1051, 1055, 65 N.W.2d 405, 407 (1954). The burden to establish reasonableness, quite appropriately, rests with the employer seeking to enforce the restriction. Iowa Glass, 338 N.W.2d at 381.

In determining the reasonableness of the covenant not to compete, the court "will apply a three-prong test: (1) Is the restriction reasonably necessary for the protection of the employer's business; (2) Is it unreasonably restrictive of the employee's rights; and (3) Is it prejudicial to the public interest?" Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 910 (Iowa 1986).

2. Employer's interest.

Factors considered generally in trying to evaluate the employer's interest include long term customer relationships, good will, and the employee's access to confidential information or trade secrets, customers lists, unique training and skills. A. Valiulis, Covenants Not to Compete, Forms, Tactics and the Law 15-16 (1985); 54 Am.Jur.2d,

Monopolies, Restraints of Trade, and Unfair Trade Practices §512 (1971). As the Iowa Supreme Court has stated in Iowa Glass, however, "proximity to customers is only one aspect. Other aspects, including the nature of the business itself, accessibility to information peculiar to the employer's business and the nature of the occupation which is restrained, must be considered along with matters of basic fairness." 338 N.W.2d at 378.

The courts tend to uphold restrictive covenants when the employee is in a position of close customer relationship and has the opportunity to pirate customers from the employer at the termination of employment. See, e.g., Curtis 1000, Inc. v. Youngblade, 878 F. Supp. 1224, 1270, 1273-74 (N.D. Iowa 1995); Farm Bureau Services Co. v. Kohls, 203 N.W.2d 209 (Iowa 1972); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971); White Pigeon Agency, Inc. v. Madden, 2001 W.L. 855366 (Iowa App. 2001) (trial court reversed, injunction prohibiting customer contact ordered). However, an employer is not "entitled to an injunction without some showing that defendant, when he left plaintiff's employment, pirated or had the chance to pirate part of plaintiff's business; or it can reasonably be expected some of the patrons or customers he served while in plaintiff's employment will follow him to the new employment." Mutual Loan Co. v. Pierce, 65 N.W.2d 405, 408 (Iowa 1954). But see Professional Building Services of the Quad Cities, Inc. v. DeClerck, 2002 W.L. 1058888 (S.D. Iowa 2002) (entering permanent injunction prohibiting solicitation of plaintiff's customers and communication or use of plaintiff's confidential or proprietary business information despite the observation of the court that the "[r]ecord evidence reveals no basis upon which the court can conclude Defendant had confidential information, imparted confidential information, solicited Plaintiff's customers, or was used as an enticement to Plaintiff's customers.").

Many of the cases in which covenants not to compete have been enforced fall into a category the Supreme Court has called "route cases," in which covenants are enforced (if otherwise reasonable in time and geographic area) because "the employee has had a close contact with the employer's customers and it is only fair on termination of his employment, there be an interval when a new employee will be able to get acquainted with the customers." Mutual Loan Co. v. Pierce, 65 N.W.2d 405, 409 (Iowa 1954); see e.g., Farm Bureau Services Co. v. Kohls, 203 N.W.2d 209 (Iowa 1972) (restriction enforced where employee was given a designated area in which he routinely serviced his employer's customers); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971) (restriction enforced where there was close client contact).[8]

Similarly, in Orkin Exterminating Co. v. Burnett, 146 N.W.2d 320, 323 (Iowa 1967), the Supreme Court held the restrictive covenant enforceable involving competition within ten miles of any town the former employee had serviced for three years because the employee was given an established route where he regularly serviced company accounts. See also, Curtis 1000, Inc. v. Youngblade, 878 F.Supp. 1224 (N.D. Iowa 1995) (preliminary injunction granted to enforce two year, "assigned territory" covenant); Presto-X-Co. v. Ewing, 442 N.W.2d 85, 88 (Iowa 1989) (covenant enforced with respect to customers)[9]; Dental East, P.C. v. Westercamp, 423 N.W.2d 553, 555 (Iowa App. 1988)

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[8] Also, Moore Business Forms, Inc. v. Wilson, 953 F.Supp. 1056 (N.D. Iowa 1996). In Moore, Judge Melloy granted preliminary injunction, enforcing customer limitation (but only for key accounts) against a husband & wife team on a balance of harms analysis.

[9] Language in Presto-X is very good for the employer. Specifically, it says that general letter advising of availability is a solicitation. The case also has strong language concerning the irreparable harm that results from pirating of customers: “And the injury to the company would be irreparable in the absence of an injunction because the customers Ewing pirated from the company would be permanently lost. The issuance of an injunction is the only way that Presto-X can be returned to the position it would have been in had Ewing not violated the restrictive covenant.” 442 N.W.2d at 89. Language in the case is also very good regarding potential claim that legal remedy is sufficient. The ability to count lost business is simply not enough to say that an injunction is not merited. See, also, Moore Business Forms, Inc. v. Wilson, 953

(damages recoverable against dentist who violated 2 year, 25 mile, patients only restriction). Further, in Orkin, the court relied on the fact that the employee had received substantial technical training concerning pest control. Id. at 324. See also Cogley Clinic v. Martini, 253 Iowa 541, 544, 112 N.W.2d 678, 679-80 (1962) (medical clinic incurred $10,000 cost to train new doctor; doctor's acquaintance and familiarity with patients, referral doctors, hospital personnel and local procedures all arose through his association with clinic); Dain Bosworth, Inc. v. Brandhorst, 356 N.W. 2d 590, 593 (Iowa App. 1984).

Where there is less contact with existing or established customers or clients, the court is reluctant to uphold restrictions. For example, in Iowa Glass Depot v. Jindrich, 338 N.W.2d 376 (Iowa 1983), the court declined to enforce a restriction, contrasting the customers in "route cases" with Glass Depot's customers and clients. Although Mr. Jindrich had substantial contact with clients and customers, his employer's "business in Iowa City did not lend itself to the type of close personal relationship with the customers that a normal route salesman ordinarily would develop." 338 N.W.2d at 384. The court in Iowa Glass also found it significant that there was no pirating of customers, or specialized training offered to the employee beyond a Dale Carnegie course. 338 N.W.2d at 382-83. See also Mutual Loan Co. v. Pierce, 65 N.W.2d 405 (Iowa 1954). Pierce involved an employee of a small loan company, the services of which consisted mainly of

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F.Supp. 1056, 1062 (N.D. Iowa, 1996)(Melloy)("mere availability of a valid damages claim, however, does not preclude the issuance of a preliminary injunction because money damages may not fully compensate a movant's less tangible injuries.")(Citing Curtis 1000, 878 F.Supp at 1248). Damage to goodwill and business relationships are the "sort of intangible injuries" that will support irreparable harm finding.

Also, Presto-X involves employer breach of contract (failure to provide contractual two-week notice of termination) and injunction is necessary, anyway. However, general law in Iowa seems to be that employer breach will negate enforceability. "In Iowa, a breaching party cannot demand performance from the non-breaching party." Moore Business Forms, Inc. v. Wilson, 953 F.Supp. 1056, 1066 (N.D. Iowa, 1996)(Melloy)(citing Orkin v. Burnett, 146 N.W.2d 320).

collecting delinquent accounts. The court found it significant that there was no meaningful and steady contact with the loan company's customers. 65 N.W.2d at 409-11.

3. Employee's interest that is restricted or impaired.[10]

Injunctive actions to enforce covenants not to compete are tried in equity. Orkin Exterminating Co. v. Burnett, 146 N.W.2d 320, 324 (Iowa 1966). Accordingly, the courts tend to take a careful look at the hardship that will be imposed on an employee if the covenant is enforced. Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376 (Iowa 1983); Baker v. Starkey, 259 Iowa 480, 495, 144 N.W.2d 889, 897 (Iowa 1966). For example, in Iowa Glass, the Supreme Court examined extensively the hardship the employee would endure, considering issues such as his marital break up, the fact that he wished to stay in Iowa City where his children were located and the fact that despite his sales and management skills, he had been unable to find full time employment in Iowa City in another field. 338 N.W.2d at 383-84.

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[10] In Nelson v. Agro Globe Engineering, Inc., 578 N.W.2d 659 (Iowa 1998), the Supreme Court distinguished between contracts that require exclusive services and preclude competition during such period and those contracts that contain requirements for post employment competitive restraint. In Nelson, the employee resigned before the period expired. The Court held such exclusivity agreements are more enforceable than regular, post employment no competes.

The Nelson analysis really addresses the issue of contractual reinforcement of the fiduciary duties that employees generally owe their employers. For that reason, employers in no compete cases should always consider adding a fiduciary duty claim. However, such a claim will not always be viable. In Midwest Janitorial Supply Corp. v. Greenwood, 629 N.W.2d 371 (Iowa 2001), the court held that an officer and director of plaintiff's business—who engaged in limited advance arrangements for competition before he resigned his positions with plaintiff—did not breach the fiduciary duties owed as an officer and director of plaintiff corporation.

> [E]ven before termination [as an officer or director of a corporation, one] is entitled to make arrangements to compete, except he cannot properly make use of confidential information peculiar to the corporation's business and acquired therefrom. Thus, he may purchase or initiate a rival business before the end of his relationship as an officer or director and upon termination of his employment immediately compete"

Id. at 375 (quoting Parsons Mobile Products, Inc. v. Remmert, 216 Kan. 256, 531 P.2d 428, 422-33) (emphasis added by the Iowa court).

The court in Iowa Glass considered whether the employee would be effectively denied gainful employment in the given geographic area. Clearly, this is, in itself, a significant factor. In Lamp v. American Prosthetics, Inc., 379 N.W.2d 909 (Iowa 1986), the court found that enforcement of the restriction would effectively deny employment to the employee because the restriction precluded competition within 100 miles of any of the employer's offices. 379 N.W.2d at 910.[11] Similarly, in Professional Building Services v. DeClerck, 2002 WL 1058888 (S.D. Iowa 2002)(Gritzner), the court refused to enforce that aspect of a no compete agreement prohibiting defendant from engaging in any competitive activity within 50 miles of where plaintiff did business because, to do so, would restrict "Defendant's employment in the Quad Cities area . . . ." But see Uncle B's Bakery, Inc. v. O'Rourke, 920 F.Supp. 1405, 1437-38 (N.D. Iowa 1996) and Uncle B's Bakery, Inc. v. O'Rourke, 938 F.Supp. 1450, 1464-65 (N.D. Iowa 1996) (on modification) (preliminary injunction granted, later clarified and modified because of defendant's extreme difficulty in finding work consistent with restrictions).

Another factor considered is what, beyond employment itself, the employee will have to forego if the covenant is enforced. The court will refuse to enforce restrictive covenants where the employee would forfeit duly earned and vested benefits. E.g., Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984); Van Hosen v. Bankers Trust Co., 200 N.W.2d 504 (Iowa 1972).[12] In Pathology Consultants, the Supreme Court

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[11] Note, however, the court in Lamp refused to enforce the restriction to the extent reasonable since the employer had not previously urged partial enforcement.

[12] See also Anderson v. Aspelmeier Law Firm, 461 N.W.2d 598 (Iowa 1990). The Anderson decision did not turn upon the forfeiture analysis of Pathology Consultants or Van Hosen. However, it could have been so analyzed. In that case, a departing partner's partnership interest was contractually reduced because of the departing partner's competition, deemed under the contract to be "detrimental to the partnership". Id. at 599. An alternative analysis that could have been employed by the court would have held such a clause unenforceable as a forfeiture provision. But see Iowa Code of Professional Responsibility D.R. 2-108(A) (attorney covenants not to compete invalid "except as a condition to payment

refused to enforce a forfeiture provision in a deferred compensation agreement that provided that if a departing physician left and competed in Waterloo, that physician would forego all future benefits. This was held to be unduly burdensome on the physician and the hardship to the physician would outweigh the pathology laboratory's need for restraint. 343 N.W.2d 428 (Iowa 1984).

In considering the rights of the employee, the circumstances of the termination of employment will be considered. However, the fact that the employee has been discharged will not, itself, invalidate the no compete agreement. "[U]nder some circumstances termination of the employment by [the employer] would not invalidate the covenant not to compete. . . . On the other hand, discharge by the employer is a factor opposing the grant of an injunction, to be placed in the scales in reaching the decision as to whether the employee should be enjoined." Ma & Pa, Inc. v. Kelley, 342 N.W.2d 500, 502-03 (Iowa 1984) (employment at will, employer "did not terminate the contract without any cause", injunction nevertheless refused and trial court reversed). But see Presto-X-Co. v. Ewing, 442 N.W.2d 85, 86 (Iowa 1989) (employee terminated for driving violation, court reversed district court refusal to grant injunction)[13]; Curtis 1000, Inc. v. Youngblade, 878 F.Supp. 1224, 1270-71 (N.D. Iowa 1995) (preliminary

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of retirement benefits."). D.R. 2-108(A) followed in Donnelly v. Brown, Winnick, Graves, No. 120/97-1495 (Iowa, 9/9/99).

[13] In Presto-X, the employer also violated the employment agreement by failing to provide the two week termination notice required by the agreement. 442 N.W.2d at 86. Notwithstanding this breach, the court enforced the no compete agreement against the employee and reversed the trial court ruling denying injunctive relief. Justice Harris dissented on the ground that the employer itself breached the contract. 442 N.W.2d at 91.

Preliminary injunction was also entered in Uncle B's Bakery, Inc. v. O'Rourke, 920 F.Supp. 1405, 1431 (N.D. Iowa 1996), despite the claim that the employer breached moving expense and vacation provisions of the employment agreement. The court noted that the claimed breach "bears no necessary connection" to the issues litigated in the case. Id. Also, in Uncle B's—the employee alleged that he was terminated for commencing declaratory judgment action to determine the enforceability of the no compete. The court held that the termination did not appear to raise a public policy wrongful discharge claim (in context of public policy analysis).

injunction entered despite termination of employee following his filing of declaratory judgment action).

4. Public policy.

The courts will not enforce covenants not to compete that are found to be against public policy. For example, in both Van Hosen v. Bankers Trust Co., 200 N.W.2d 504 (Iowa 1972), and Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984), the Iowa Supreme Court declined to enforce the forfeiture provision of pension plan (or deferred compensation plan) benefits in substantial part because of public policy considerations. In Pathology Consultants, referring to Van Hosen, the court stated that it had "found as a matter of public policy that infinite forfeiture and termination of all pension rights acquired by an employee through his prior employment cannot be forfeited by the employee merely accepting employment with a competing institution since this would impose an unjust and uncivic penalty on the employee and disproportionately benefit his employer." 343 N.W.2d at 436. The court in Pathology Consultants also invalidated one of the restrictions involved because the "public interest suffers" when a pathology laboratory can dictate to other practicing pathologists the amount of referral work that should be sent from the hospitals that employed them. Id. The court also cited a third public policy reason in support of its decision--"a monopoly on laboratory services is not in the best interests of the public." Id.[14]

There is one clear example of public policy prohibition against no compete agreements. D.R. 2-108 of the Iowa Code of Professional Responsibility specifically prohibits agreements among lawyers to restrict "the right of an attorney to practice law

[14] In Curtis 1000, Inc. v. Youngblade, 878 F.Supp. 1224, 1270-71 (N.D. Iowa 1995), Judge Bennett analyzed defendant's discharge in the context of public policy.

after the termination of a professional relationship." See Anderson v. Aspelmeier Law Firm, 461 N.W.2d 598, 601 (Iowa 1990). Despite reported decisions involving physicians, see Cogley Clinic v. Martini, 253 Iowa 541, 112 N.W.2d 678 (1962), similar considerations could be argued to apply also to the medical field. The American Medical Association's Council on Ethical and Judicial Affairs has officially stated that it "discourages any agreement between physicians which restricts the right of a physician to practice medicine . . . . Such restrictive agreements are not in the public interest." Current Opinions §9.02 (1989). Obviously, however, that statement does not rise to the level of law. Moreover, in one case, Chandra v. Cardiovascular Associates, (Woodbury Dist. Ct. L.A. No. 98076C, May 4, 1990), the court enforced a covenant not to compete against a partner leaving a physician group, notwithstanding the ethical pronouncement of the professional group.[15]

5. Time and place restrictions.

The courts will not enforce a restriction that is unlimited in time or place. In Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971), the Supreme Court applied the principle that covenants not to compete are unreasonably restrictive unless they are tightly limited as to both time and area. Id. at 373-74; see also Pathology Consultants v. Gratton, 343 N.W.2d 428, 434 (Iowa 1984). In Pathology Consultants, rejecting the argument of the former employer, the court held a contractual provision not to constitute a "limited" covenant not to compete, concluding "that failure to incorporate time and area

[15] Public concern over the Chandra decision resulted in passage of Senate File 210 in the 1991 Iowa General Assembly by wide margins in each house. That legislation specifically provided that such agreements restricting physicians violate public policy. The legislation, however, was vetoed by the governor, also for public policy reasons. In his veto message, the governor specifically acknowledged the physician shortage in Iowa, especially in rural areas, and expressed the opinion that the legislation would discourage physician recruitment efforts as well as interfere with physicians' "ability to freely contract." Letter of June 5, 1991, Governor Branstad to Secretary of State.

restrictions indicates that an anti-competitive covenant was not intended." 343 N.W.2d at 434.

Determining reasonable time and place restrictions is a factual question under the particular circumstances of the case. Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971). With respect to restrictions as to time, it is difficult to discern in the cases what kind of record must be developed to support an argument that the time restriction is reasonable. In Ehlers, for example, the court held that a two year restriction was necessary. The reason given was that a "two year limitation would appear adequate to enable the employer to establish a satisfactory relationship with customers previously dealing with plaintiff." 188 N.W.2d at 373. Generally, two years appears to be a period of limitation that will be enforced. See Dental East, P.C. v. Westercamp, 423 N.W.2d 553, 554 (Iowa App. 1988); Rasmussen Heating and Cooling, Inc. v. Idso, 463 N.W.2d 703, 704 (Iowa App. 1990) (no Iowa Supreme Court case enforcing an agreement of greater than five years, "typically" enforcement of restrictions of two or three years); Phone Connection, Inc. v. Harbst, 494 N.W.2d 445, 447 (Iowa App. 1992) (affirming a trial court decision modifying and enforcing a five year no compete agreement for a period of two years). But see Uncle B's Bakery, Inc. v. O'Rourke, 920 F.Supp. 1405, 1433 (N.D. Iowa 1996) (although five-year time period "is at the very limits of what Iowa courts have found enforceable", for this case it is not "unreasonably restrictive, at least for the purposes of a preliminary injunction."); Rocklin Mfg. Co. v. Tucker, 2001 W.L. 1658676 (Iowa App. 2001) (Trade Secrets Act case, affirming a ten year injunction

limited to prohibition against use of specific trade publications and trade shows that plaintiff used to its "best advantage").[16]

With regard to geographic restrictions, the court looks to determine whether restriction is too broad, i.e., does it protect areas only where the employer is doing business? In Ehlers, for example, the court examined a restriction of 150 miles from Waterloo, Iowa, an area in which the employer claimed it was doing business. 188 N.W.2d 373. The court found that there were many population areas within that radius in which the employer had no local customers. Id. Instead, the court limited the restriction to a customer list that had been introduced into evidence. Id.

In Casey's General Stores, Inc. v. Campbell Oil, 441 N.W.2d 758 (Iowa 1989), the court narrowed a geographic limitation contained in a franchise agreement to three miles from any existing franchise store. The court held this was not unduly restrictive because the franchise would profit from such a rule since it applied to all of the company's franchisees. Id. at 159-60. This case, however, must be contrasted to Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 910 (Iowa 1986), in which the court refused to enforce a provision that restricted competition within 100 miles of any company offices. The differing results can be explained in two ways. First, the geographic restriction was far broader. Second, the Lamp case involved a former employee. Casey's involved a franchisee.[17] See also Farm Bureau Service Co. v. Kohls, 203 N.W.2d 209,

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[16] With respect to the period of limitation, there is Iowa authority that, if the case is tied up in lawsuit and the period of time designated has expired, the injunction issue becomes moot. See Tasco, Inc. v. Winkel, 281 N.W.2d 280, 282 (Iowa 1979); Nitta v. Kuda, 249 Iowa 853, 857, 89 N.W.2d 149, 151 (Iowa 1958). However, in Presto-X-Co. v. Ewing, 442 N.W.2d 85, 90 (Iowa 1989), the court, notwithstanding the approaching expiration of the period of time covered by the covenant, used its "equitable powers", reversed the trial court's refusal to grant injunctive relief and imposed an injunction for a period of "one year from the date of this opinion." Id. at 90.

[17] The Iowa Supreme Court seems to apply less restrictive, though similar, analysis to cases involving the sale of a business or sale of a franchise interest. Baker v. Starkey, 144 N.W.2d 889, 895

211 (Iowa 1972) (two county restriction limited to six townships); Phone Connection, Inc. v. Harbst, 494 N.W.2d 445, 447 (Iowa App. 1992) (affirming trial court enforcement of a no compete agreement after limiting area from the states of Iowa and Minnesota to the particular "trade area"). See also Diversified Fastening Systems, Inc. v. Rogge, 786 F.Supp. 1486, 1492, 1494 (N.D. Iowa 1991).[18]

6. Necessary consideration to support a no compete agreement.

Employees have sought to void or avoid non-compete agreements entered into after the employment relationship has begun. The Iowa Supreme Court has held that a continuing employment relationship is sufficient consideration for such an agreement. Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 381 (Iowa 1983). See also Farm Bureau Services Co. v. Kohls, 203 N.W.2d 209 (Iowa 1972); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971). As with termination from employment, however, under Iowa

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(Iowa 1966); Brecher v. Brown, 17 N.W. 2d 377, 379 (Iowa 1945). As justification, the court in Baker stated that "in case of the sale of good will, the restriction adds to the value of what is sold, and the parties are presumably more nearly on a parity in ability to negotiate than in negotiation of agreements between employer and employee." 144 N.W.2d at 895. But see Rasmussen Heating and Cooling, Inc. v. Idso, 463 N.W.2d 703, 704 (Iowa App. 1990) (referring generally to restrictive covenants, making no distinction that the case was a sale of business situation). In Casey's, the court appears to have given a more liberal, less restrictive look at the covenants because a franchise agreement was involved, rather than an employment agreement. The issue, however, is not addressed explicitly. See also Kunz v. Bock, 163 N.W.2d 442, 446 (Iowa 1969).

[18] The Diversified Fastening case serves as an example of the court's tailoring the parties' agreement to make it reasonable. There the court imposed a nationwide restriction on one defendant, even though time and space blanks were not filled in by the parties. The other defendant was limited to a prohibition regarding customers with which he had established a business relationship. 786 F.Supp. at 1492, 1494.

In other circumstances, the court may even enforce a no compete agreement where it is not at all clear the defendant agreed. See Uncle B's Bakery, Inc. v. O'Rourke, 920 F.Supp. 1405, 1433 (N.D. Iowa 1996) (preliminary injunction entered with no signed agreement in evidence; defendant testified he was aware of no agreement; court noted that a jury or finder of fact "could go either way on the question [of whether the defendant signed the agreement]."); Phone Connection, Inc. v. Harbst, 494 N.W.2d 445, 447-49 (Iowa App. 1992) (injunction affirmed despite fact defendant business partner never signed agreement; defendant did not object to no compete at meeting of partners but repeatedly refused to sign; substantial evidence supported finding that, by his conduct, he assented to the agreement); Barilla America, Inc. v. Wright, No. 4-02-CV-90267 (S.D. Iowa, July 5, 2002)(Pratt)(available on Southern District website) (defendant aware of requirement for no compete agreement at commencement of litigation but never executed agreement (nor did he refuse to do so), injunction enforced based on Iowa Trade Secrets Act).

Glass, it is clear that this factor will be considered by the court. "[W]e find no compelling reason to overrule our prior decisions. This is especially true since we determine the covenant is invalid for [other] reasons . . . ." 338 N.W.2d at 381.

TRADE SECRETS LITIGATION

Lawsuits based upon contractual agreements restricting competitive activities continue to arise. Increasingly, however, either in conjunction with contractual restriction or separate from it, the courts are being asked to restrict competition by former employees based upon fiduciary duty or trade secrets theories. The increase in trade secrets litigation is likely due to a number of factors. First, as noted above, contractual restrictions are not always easily litigated. Second, many former employees are not contractually limited. Third, much of what provides the basis for analysis in contractual no compete cases involves the value of information and training provided to employees, not plain competition. As business increasingly relies upon information and technology (and, possibly, fewer employees have direct customer contact), trade secrets claims become more attractive. Last, with the enactment in 1990 by the Iowa General Assembly of the Uniform Trade Secrets Act, Chapter 550, Iowa Code, some of the uncertainties regarding trade secrets litigation have been lessened.

Under the common law, relief was available for misappropriation or theft of trade secrets. See Kendall/Hunt Publ. Co. v. Rowe, 424 N.W.2d 235, 245-46 (Iowa 1988); Basic Chem., Inc. v. Benson, 251 N.W.2d 220, 226 (Iowa 1977). In 205 Corp. v. Brandow, 517 N.W.2d 548 (Iowa 1994) (en banc), the Iowa Supreme Court considered the effect of the enactment of the Trade Secrets Act. Eschewing reliance upon case law regarding the common law right to protect trade secrets, the 205 Corp. court limited

definition of a trade secret under the Iowa Trade Secrets Act to that specifically set forth in the statute, Iowa Code §550.2(4). 517 N.W.2d at 549. However, the Iowa Supreme Court has later observed that "there is virtually no category of information that cannot, as long as the information is protected from disclosure to the public, constitute a trade secret." U.S. West Communications, Inc. v. Office of Consumer Advocate, 498 N.W.2d 711, 714 (Iowa 1993).[19] But see Diversified Fastening Systems, Inc. v. Rogge, 786 F.Supp. 1486, 1491 (N.D. Iowa 1991).[20] Although the 205 Corp. decision does not restrict the former employee (who was fired) from engaging in competition, the decision is significant in that there existed no contract relative to trade secrets and the case turns upon rights accorded all possessors of trade secrets.

Although the 205 Corp. decision is the first by the Iowa Supreme Court interpreting Iowa Chapter 550, it is not the first time that a court addressed rights of the parties under the statute. In Diversified Fastening, the court analyzed contractual

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[19] There is frequently an issue as to whether trade secrets are involved. In Economy Roofing & Insulating Co. v. Zumaris, 538 N.W.2d 641, 648 (Iowa 1995), the court held that the determination whether information constitutes trade secrets under the law is a "mixed question of law and fact." The legal question is whether information is of a type that might be a trade secret. The factual aspect is whether the information has economic value and has been treated as confidential. Id.

Frequently, customer lists serve as the basis of trade secrets claims. With respect to the legal aspect of the equation, the Iowa Supreme Court has noted that a customer list, under certain conditions, can be a trade secret. Basic Chem., Inc. v. Benson, 251 N.W.2d 220, 230 (Iowa 1977). See Lemmon v. Hendrickson, 559 N.W.2d 278, 280 (Iowa 1997). See also White Pigeon Agency v. Madden, 2001 W.L. 855366 (Iowa App. 2001). However, the Lemmon court made clear that it is not prohibited to call upon customers of a former employer recalled from memory. Id. at 280-81 (quoting Restatement (Second) of Agency § 396).

With respect to the factual aspects of trade secrets under the Iowa statute, the law requires that the information derive independent economic value from not being known or ascertainable and that the information is the subject of efforts "reasonable under the circumstances" to maintain secrecy. Iowa Code §550.2(4). The Iowa Supreme Court has described that as "information kept secret that would be useful to a competitor and require cost, time and effort to duplicate is of economic value." U.S. West Communications, Inc. v. Office of Consumer Advocate, 498 N.W.2d 711, 714 (Iowa 1993).

[20] The Diversified Fastening court declined to decide whether a common law trade secrets action was supplanted by Iowa Code Chapter 550 or whether the elements of the Iowa Tort apply equally to an action under Chapter 550. In 205 Corp., however, the Iowa Supreme Court held that the remedies under Chapter 550 are not exclusive and the statute does not preempt a tort cause of action. 517 N.W.2d at 551-52. The

restrictions with some problems [21] and, as well, whether or not Chapter 550 would, itself, restrict actions competitive with the former employer's business. In the context of a preliminary injunction, the court held that Chapter 550 did so restrict one of the defendants. See also, Barilla America, Inc. v. Wright, No. 4-02-CV-90267 (S.D. Iowa, July 15, 2002)(Pratt).

The Diversified Fastening court first held that one defendant, in his employment, had obtained access to plaintiff's trade secrets and had made copies of certain business records, shipment information and detailed information concerning plaintiff's "top 26 sales people, their territories and their sales volumes." 786 F.Supp. at 1488. Although much of the alleged confidential information the court held to be "readily ascertainable", it held other information was not. Id. at 1490, see Iowa Code §550.2(4) (trade secrets are not "generally known" and are not "readily ascertainable by proper means").

The Diversified Fastening court noted that neither a common law trade secrets action nor Chapter 550 applies to "prevent competition with an employer, except to the extent that competition utilizes trade secrets." 786 F.Supp. at 1491. With that said, however, the court went on to hold that "the only rational way to . . . to protect [plaintiff's] rights under Iowa Code Chapter 550, is to prevent defendant Rogge from being employed by [the new employer]." 786 F.Supp. at 1494. As an alternative

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court found significant the Iowa General Assembly's decision not to incorporate Section 7 of the uniform statute which "would have specifically displaced all other trade secret recoveries." Id. at 551.

[21] In Diversified Fastening, the time and geographic scope blanks were not filled in and, with respect to one defendant, the company had not executed the agreement. 786 F.Supp. at 1488. See Phone Connection, Inc. v. Harbst, 494 N.W.2d 445, 448 (Iowa App. 1992) (restrictive covenant enforced notwithstanding defendant's refusal to sign the agreement. Essentially, defendant was estopped from claiming restriction did not apply to him). See also Uncle B's Bakery, Inc. v. O'Rourke, 920 F.Supp. 1405, 1433 (N.D. Iowa 1996).

holding, the court issued a preliminary injunction pursuant to Iowa Code §550.3 preventing one of the defendants from working for his new employer. [22]

The types of cases in which such injunctive relief will be employed under the Trade Secrets Act to prohibit a new employment relationship (where no contractual restrictions exist) are, necessarily, limited. Such rulings, however, are not unprecedented. In Norand Corp. v. Parkin, 785 F.Supp. 1353 (N.D. Iowa 1990), Judge Hansen granted a temporary restraining order, notwithstanding the court's "concern that there is no non-competition agreement . . . and no non-disclosure agreement . . . ." 785 F.Supp. at 1355. Within the last several months, a decision of the United States District Court for the Southern District of Iowa reached the same result. Barilla America, Inc. v. Wright, No. 4-02-CV-90267 (S.D. Iowa, July 15, 2002)(Judge Pratt). In Barilla, there was no agreement restricting competition because the defendant had not signed one. Deciding the case on the basis of inevitable (or threatened) disclosure of trade secrets, the court enjoined defendant from working for any competitor of the plaintiff. The Barilla decision is available on the court's website. It is a fascinating case involving what anyone would clearly describe as trade secrets, the owner of which went to significant trouble and

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[22] Likewise, in Uncle B's Bakery, the court held the entirety of plaintiff's manufacturing process, "from ingredients through bagging, is sufficiently unique to constitute a trade secret under Iowa law." 920 F.Supp. at 1438. The court went on to hold that the statute or common law may serve as the foundation for a trade secrets injunction. Id. at 1430-31. As an alternative ground, injunction was premised upon the trade secrets claims. "[T]here is a significant danger of inadvertent disclosure . . . of confidential information in the course of [defendant's new] employment . . . ." 920 F.Supp. at 1435.

In Business Designs, Inc. v. Mid National Graphics, L.L.C., 2002 W.L. 987971 (Iowa App. 2002), the court decided that methods of selecting of materials and production approaches had economic value. Notwithstanding that the employer did not require the signing of non-competition or confidentiality agreements or policies, and a specific concession by the court that the plaintiff "did not do much internally" to keep information from being disclosed, the court held that the information at issue constituted trade secrets because the efforts were "reasonable under the circumstances." Judge Hecht dissented on the basis of the apparnet conflict between plaintiff's failure to "do much internally" and the finding that the efforts were, nonetheless, "reasonable". In Rockland Mfg. Co. v. Tucker, 2001 W.L. 1658676 (Iowa App. 2001), the court affirmed a ten year injunction, finding that "the identity of trade publications and trade shows that [plaintiff] can use to its best advantage" constituted trade secrets subject to court protection.

expense to protect.[23] Given the right circumstances—involving clear misappropriation of proprietary information and/or a situation in which the new employment is not possible without using the confidential information—Chapter 550 provides an alternative, non-contractual remedy that may potentially limit competitive activities.

CONCLUSION

In nearly all circumstances, litigation seeking to prevent former employees from working for competitors is risky and unpredictable. It is also contentious and, usually, emotion laden. Although there is a wealth of appellate court authority, for each reported decision there are many more trial court rulings. The number of factors that may determine the outcome of such litigation is surprisingly large and results from reported decisions are varied and inconsistent. The most important factor, in practical terms, probably boils down to the trial judge hearing any injunction case.

From the practice standpoint, drafting of restrictive covenants must be cautiously undertaken. The circumstances of the imposition of such restrictions, the individual employee's employment history with the firm, the circumstances of that employee's departure from the company and a number of other individual facts that will likely be added to the court's equitable balance must be considered. Personalities, necessarily, play

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[23] Other cases involving trade secret based injunctions (without contractual restrictions) include Emery Indus., Inc. v. Cottier, 202 U.S.P.Q. (BNA) 829 (S.D. Ohio 1978) (non-disclosure agreement executed but no non-competition agreement; court held injunction prohibiting non-disclosure to competitor would not be enforceable if employee allowed to retain new employment) and Air Products and Chem., Inc. v. Johnson, 296 Pa. Super. 405, 442 A.2d 114 (1982. See also B.F. Goodrich Co. v. Wohlgemuth, 192 N.E.2d 99 (Ohio App. 1963); Tie Systems, Inc. v. Telcom Midwest, Inc., 560 N.E.2d 1080, 1085-86 (Ill. App. 1990); Weedeater, Inc. v. Dowling, 562 S.W.2d 898, 901-02 (Tex. App. 1978); Travenol Laboratories, Inc. v. Turner, 228 S.E.2d 478, 485 (N.C. App. 1976); Thermotics, Inc. v. Bat-Jac Tool Co., 541 S.W.2d 255, 260 (Tex. App. 1976); Allis-Chalmers Mfg. Co. v. Continental Aviation and Eng. Corp., 255 F.Supp. 645, 654 (E.D. Mich. 1966).

an important role and it is foolish for any lawyer practicing in this area to pretend that they do not.

Because of the unpredictability of the area, the desire of employer-clients to rely almost totally upon written agreements must be strongly cautioned against at every stage. A position in court that essentially boils down to "because it says so here" will very likely be unsuccessful. Clients, however, usually think in those terms.

Practitioners should carefully consider restrictions that do not absolutely prohibit competition but impose liquidated damages for certain competition. Such an approach avoids the vagaries attendant to injunction proceedings. That kind of restriction was upheld in Dental East P.C. v. Westercamp, 423 N.W.2d 553, 555 (Iowa App. 1988). In certain businesses, such as accounting or the insurance industry, such an approach is commonly employed. See Burton E. Tracy & Co. v. Frink, 520 N.W.2d 316, 317-18 (Iowa App. 1994). By the same token, where a monetary penalty becomes a forfeiture of vested benefits, the forfeiture likely will be struck down as against public policy. See Van Hosen v. Bankers Trust Co., 200 N.W.2d 504 (Iowa 1972); Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984). But see Iowa Code of Professional Responsibility D.R. 2-108. Where circumstances are especially aggravated, protection is available under the Iowa Trade Secrets Act.

The clearest threat to the interests of a client (whether the former employer or the former employee) engaged in litigation seeking to limit post-employment competition is a simplistic approach. Finding a case that appears to square with the facts of the given situation only helps to increase the danger. As lawyers, we owe our clients the duty to be cautious under such circumstances.