THE USE OF NONCOMPETITION AGREEMENTS TO PROTECT PROPRIETARY INFORMATION: BAXTER INTERNATIONAL, INC. v. MORRIS

INTRODUCTION

As a result of the increase in employee mobility over the past few decades, many companies whose profits depend upon maintaining the confidentiality of critical business information have had to take measures to ensure that their former employees will not divulge this information to competitors. These companies have relied on three primary sources of protection: (1) the use of the law of trade secret misappropriation, (2) the use of covenants not to disclose, and (3) the use of employee noncompetition agreements. Of the three alternatives, the employee noncompetition agreement is generally deemed to be the most effective method of protecting trade secrets. In a noncompetition agreement, the employee usually agrees not to work in competition with his employer for a specified period of time and in a specified geographical area.

Courts subject noncompetition agreements to careful scrutiny because, by their nature, they place a restraint on trade. Courts will generally enforce noncompetition agreements only if they find them to be reasonable. To determine reasonableness, courts balance the interests of each of the parties to the agreement, as well as the public interest.

3. Hutter, 45 ALB. L. REV. at 314.
6. Id.
7. Edward M. Schulman, An Economic Analysis of Employee Noncompetition Agreements, 69 DENV. U. L. REV. 97, 98 (1992). See, e.g., Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 910 (Iowa 1986) (considering three factors in determining whether a noncompetition agreement was reasonable: (1) whether the restriction was reasonably necessary for the protection of the employer's business; (2) whether it was unreasonably restrictive of the employee's rights; and (3) whether it was prejudicial to the public interest); Osage Glass, Inc. v. Donovan, 693 S.W.2d 71, 75 (Mo. 1985) (en banc) (considering respective interests of employer and employee in finding noncompetition agreement to be reasonable); Rental Uniform Service of Florence, Inc. v. Dudley, 301 S.E.2d 142, 143 (S.C. 1983) (same).
In *Baxter International, Inc. v. Morris*, the United States Court of Appeals for the Eighth Circuit considered the enforceability of a noncompetition agreement between a biotechnology company and a former manager of the company. The biotech company argued that adequate protection of its trade secrets required that its noncompetition agreement with the employee be enforced. However, the Eighth Circuit determined that under Illinois law the noncompetition agreement was unreasonable and refused to enforce it. To support its determination, the Eighth Circuit found that the employer was adequately protected by a district court order that enjoined the employee from using or disclosing his employer's confidential information.

This Note describes the three means of protection that an employer has from a former employee's harmful use and disclosure of the employer's confidential information, specifically focusing on the high level of protection that is provided by the noncompetition agreement. This Note also explains the judicial evaluation of noncompetition agreements for reasonableness. This Note then suggests that in evaluating the Baxter noncompetition agreement, the Eighth Circuit erred by considering the protection provided by the district court injunction. This Note further suggests that the injunction crafted by the district court inadequately protected Microscan's proprietary information. Finally, this Note suggests that had the Eighth Circuit properly applied the reasonableness analysis, the noncompetition agreement in *Baxter* would have been enforced.

FACTS AND HOLDING

Dr. Roger J. Morris was a research scientist with a Ph.D. in physical biochemistry. In early 1988, Morris accepted employment with Microscan, a California-based division of Baxter Diagnostics, Inc. Baxter Diagnostics, Inc. is a wholly owned subsidiary of Baxter International, Inc. All three Baxter companies have their principal
places of business in Deerfield, Illinois, and are incorporated in Delaware.21

The employment agreement between Microscan and Morris emphasized that Morris would necessarily be entrusted with extremely confidential information about research and development in bacteria identification and diagnosis.22 As a consequence, Morris agreed to: "NOT RENDER SERVICES, DIRECTLY OR INDIRECTLY, FOR A PERIOD OF ONE YEAR AFTER THE TERMINATION OF MY EMPLOYMENT WITH [MICROSCAN] to any Competing Organization in connection with any Competing Product within such geographical limits as [Microscan] and said Competing Organization are, or would be, in actual competition."23 This agreement provided that for uniformity of interpretation, it was to be governed by Illinois law.24

While employed with Microscan, Morris researched and managed various projects involving bacteria identification and susceptibility determination, blood culture testing, and molecular probe technology.26 Morris also had access to Microscan's confidential business information and strategic business plans regarding these projects.26

On January 31, 1992, Morris voluntarily resigned from Microscan to accept employment with bioMerieux Vitek, Inc. ("Vitek").27 Morris' duties at Vitek included directing and managing bioscience research and development projects.28 Microscan and Vitek both manufacture, sell, research, and develop diagnostic equipment used in microbiological laboratories.29 While there are over 1200 biotech companies in the United States, Microscan and Vitek are virtually the only two competitors in their specific field.30 Vitek dominated the field, but Microscan had cut significantly into Vitek's market share with its recent development of a new system capable of rapidly identifying bacteria to determine what dosage of an antibiotic will inhibit its growth.31 No other company had successfully developed such a system.32

22. Baxter, 976 F.2d at 1192.
23. Id. (quoting the Joint Appendix at 18 Paragraph 5).
24. Id.
25. Id.
26. Id.
28. Baxter, 976 F.2d at 1192.
29. Id.
32. Id.
On February 25, 1992, Baxter filed a complaint in the United States District Court for the Eastern District of Missouri. In the lawsuit, Baxter sought: (1) to enjoin Morris from misappropriating trade secrets and (2) to enforce the noncompetition agreement. On March 4, 1992, Morris filed a motion seeking a declaration that California law was applicable to the noncompetition agreement notwithstanding the contractual provision that the agreement was to be governed by Illinois law. Morris argued that California had a materially greater interest in the effect of the noncompetition agreement than did Illinois. The district court granted this motion.

The district court found that Morris had acquired trade secrets and confidential information from Microscan that deserved protection. It crafted an injunction prohibiting Morris from "using or disclosing certain items of confidential information" acquired at Microscan for one year. The court, however, refused to enforce the noncompetition agreement, finding it to be void under California law.

Baxter appealed to the United States Court of Appeals for the Eighth Circuit, claiming that the district court erred in: (1) refusing to enjoin Morris from his employment with Vitek under the law of trade secret misappropriation, (2) limiting the injunction to one year, and (3) refusing to enforce Morris' noncompetition agreement.

Baxter first claimed that the law of trade secret misappropriation required that Morris be permanently enjoined from working at Vitek. Baxter asserted that because Microscan and Vitek compete in the same field of research and development, the disclosure of Microscan's trade secrets would be inevitable if Morris were permitted to work at Vitek. The Eighth Circuit rejected Baxter's argument. The court acknowledged that some of Microscan's technological and business planning information constituted trade secrets, and that Morris had acquired this information, but refused to disturb the district court in-

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33. Baxter, 976 F.2d at 1192.
34. Id. at 1192-93.
35. Id. at 1193.
36. See id. at 1196-97.
37. Id. at 1193.
38. Id. at 1194.
39. Id. at 1193.
40. Id. The district court ordered Morris to circulate a copy of its injunction against use or disclosure to persons at Vitek who would be in contact with Morris. Id.
41. Id.
42. Id.
43. Id.
44. Id. at 1194.
junction that simply prohibited Morris from disclosing this information. The court held that no abuse of discretion was evident. The court noted that evidence at trial indicated that Vitek did not seek Microscan’s trade secrets and that it was a common practice in the industry for employees to be hired away by competitors without disclosing trade secrets. The court further noted that Morris’ superior at Microscan testified that he had been able to transfer from a competitor to Microscan without disclosing trade secrets.

Baxter next claimed that the injunction crafted by the district court should not have been limited to one year. Baxter relied on the Missouri cases Carboline Co. v. Jarboe and National Rejectors, Inc. v. Trieman for the proposition that Missouri requires a permanent injunction for trade secret protection unless the defendant can prove facts that justify the shortening of the injunction.

The Eighth Circuit determined that Baxter’s reliance on Carboline and National Rejectors, Inc. was misplaced because in both cases the defendant was found to have used his former employer’s trade secrets. The court noted that there had been no such use of trade secrets by Morris. The court also cited the district court’s findings that Morris could fulfill his employment obligations at Vitek without disclosing trade secrets, that Vitek did not seek trade secrets from Morris, and that Morris’ information might not even be useful at Vitek. The court held therefore “that there was no error in the district court’s determination that limiting the injunction to one year adequately protects Baxter.”

45. Id. In determining that the information Morris acquired from Microscan constituted trade secrets, the Eighth Circuit relied on a six-factor analysis mandated by Missouri law. Id. at 1193. Those factors were:

(1) the extent to which the information is known outside of [a] business; (2) the extent to which it is known by employees and others involved in [that] business; (3) the extent of measures taken by [a company] to guard the secrecy of [its] information; (4) the value of the information to [the company] and to [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

46. Baxter, 976 F.2d at 1195.
47. Id. at 1194.
48. Id.
49. Id. at 1195.
50. 454 S.W.2d 540 (Mo. 1970).
51. 409 S.W.2d 1 (Mo. 1966) (en banc).
52. Baxter, 976 F.2d at 1195.
53. Id.
54. Id.
55. Id.
56. Id. The Eighth Circuit also held that the district court properly considered the fact that the noncompetition agreement drafted by Baxter to protect its trade secrets was limited to one year. Id.
Finally, Baxter argued that its noncompetition agreement with Morris should have been enforced. Baxter claimed that Illinois law, not California law, governed the enforceability of the agreement; and that under Illinois law, the agreement was reasonable. The court agreed with Baxter that Illinois law should have been applied. The court, however, rejected Baxter's contention that the agreement was enforceable under Illinois law.

The court applied a reasonableness analysis to the agreement. The court stated that restrictive covenants are enforceable only if reasonably necessary to protect a legitimate business interest of the employer. The court also stated that a reasonable covenant must have minimal negative impact, and impose little hardship upon the subject employee.

Applying the test, the court noted that the primary purpose of the agreement was to protect Microscan's interest in its trade secrets. It determined, however, that the legitimacy of this interest was diluted by: (1) the district court's findings that Morris would be able to work at Vitek without disclosing Microscan's trade secrets; (2) the undue hardship that Morris would suffer; and (3) the district court's use or disclosure injunction against Morris, which provided Baxter with "adequate protection."

The court therefore stated that the noncompetition agreement was "overbroad, unreasonably burdensome, and unnecessary."

57. Id.
58. Id.
59. Id. at 1197. In determining that Illinois law should govern, the Eighth Circuit noted that Missouri courts generally follow the parties' choice of law. Id. at 1195. The law of the state chosen, however, will not govern when application of this law would be contrary to a fundamental policy of a state which has a "materially greater interest than the chosen state in the determination of the particular issue." Id. at 1196. The district court had determined that California possessed a materially greater interest in the noncompetition agreement than Illinois because Morris was employed in California when he worked for Microscan. Id. at 1197. The Eighth Circuit held that this determination was in error. Id. The court noted that Morris no longer lived in California, and California had no more compelling an interest in protecting Morris from the shackles of his noncompetition agreement with Baxter than did Illinois. Id.
60. Baxter, 976 F.2d at 1197.
62. Baxter, 976 F.2d at 1197.
63. Id.
64. Id.
65. Id. The court determined that the agreement imposed undue hardship upon Morris despite Microscan's willingness to pay his salary for the year he was forbidden to work. Id.
66. Id.
BACKGROUND

An employer seeking to protect its confidential information from disclosure by former employees must initially determine which of the three sources of protection to use. The three sources are: (1) the use of the law of trade secret misappropriation; (2) the use of covenants not to disclose; and (3) the use of employee non-competition agreements. The noncompetition agreement is generally considered to provide companies with the greatest amount of protection.

I. EMPLOYEE NONCOMPETITION AGREEMENTS

Historically, courts were reluctant to enforce noncompetition agreements. The reason most often cited for this reluctance was that the agreements restrain trade. Courts advanced three theories as to how these agreements restrain trade. First, the agreements reduce both the economic mobility of employees and their personal freedom to pursue their own interests. Second, the agreements diminish competition by slowing down the dissemination of ideas, processes, and methods. Third, the agreements exploit the inferior bargaining position of the employees.

Modern courts also recognize the restraints on trade imposed by noncompetition agreements. However, most courts acknowledge that employers need to protect trade secrets and confidential information. In light of these conflicting interests, courts have generally subjected noncompetition agreements to a reasonableness analysis.
A. THE REASONABLENESS ANALYSIS

All but thirteen states use an essentially uniform reasonableness analysis in their evaluation of noncompetition agreements.79 This analysis provides that a noncompetition agreement imposes an unreasonable restraint on trade if: "[1] the restraint is greater than is needed to protect the promisee's legitimate interest, or ... [2] the promisee's need is outweighed by the hardship to the promisor and [3] the likely injury to the public."80

Illinois courts have repeatedly acknowledged the reasonableness analysis when evaluating noncompetition agreements.81 In Instrumentalist Co. v. Band, Inc.,82 the Illinois Appellate Court specifically stated that Illinois measures the reasonableness of the restrictions imposed by a noncompetition agreement "by their effect, if any, on the general public, the extent of the hardship imposed thereby on the restricted party and whether they are necessary to protect a legitimate business interest of the former employer."83

The first factor considered in the reasonableness analysis is whether the noncompetition agreement is greater than necessary to protect the employer's legitimate business interest.84 To enforce an agreement, a court must find a legitimate interest to be protected by the noncompetition agreement.85 An employer has no legitimate interest in preventing ordinary competition.86 However, it has long been recognized that an employer will be deemed to possess a legitimate interest in protecting its trade secrets and confidential information.87

80. Restatement (Second) of Contracts § 188 (1981).
84. Restatement (Second) of Contracts § 188 (1981).
85. Id.
In *Boisen v. Petersen Flying Service, Inc.*, the Nebraska Supreme Court determined that there was no legitimate interest to be protected by a noncompetition agreement between a company in the business of aerial spraying of herbicides and a former pilot of the company's spray planes. The Court stated that "an employer has a legitimate business interest in protection against 'competition by improper and unfair methods,'" but an employer is not entitled to enforcement of a restrictive covenant that merely protects the employer from "ordinary competition." The court considered "unfair competition" to include any "competitive endeavors by a former employee who has acquired confidential information or trade secrets pertaining to the employer's business operations." The court concluded that the pilot in *Boisen* did not obtain any confidential information or trade secrets from his former employer, and that his competition was ordinary. The court held that the company did not have a legitimate business interest to be protected and therefore invalidated the noncompetition agreement.

A legitimate business interest sufficient to warrant the enforcement of a noncompetition agreement was found in *Owens v. Penn Mutual Life Insurance Company*. In *Owens*, the United States Court of Appeals for the Eighth Circuit applied Arkansas law and enforced a noncompetition agreement against an insurance broker who was privy to the confidential customer lists of his former employer. The Court held that these lists were like trade secrets and that the broker's access to them would lead to "unfair competition." The court therefore held that the noncompetition agreement protected a legitimate interest.

The second factor considered under the reasonableness analysis is whether the noncompetition agreement imposes excessive hardship upon the promisor. In *Hekimian Laboratories, Inc. v. Domain Systems, Inc.*, the United States District Court for the Southern District of Florida held a noncompetition agreement between an engineer and

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88. 222 Neb. 239, 383 N.W.2d 29 (1986).
89. *Id.* at 246, 383 N.W.2d at 34.
90. *Id.* at 245, 383 N.W.2d at 33 (quoting Diamond Match Div. of Diamond Int'l Corp. v. Bernstein, 196 Neb. 452, 455, 243 N.W.2d 764, 766 (1976)).
91. *Id.* at 246, 383 N.W.2d at 34.
92. *Id.*
93. *Id.*
94. 851 F.2d 1053 (8th Cir. 1988).
96. *Id.*
97. *Id.*
his former employer to be enforceable. The Court determined that no undue hardship was imposed upon the employee under the terms of the noncompetition agreement because it provided that the employee was to receive half of his salary for the duration of the noncompetition period.

The Iowa Supreme Court also has addressed the employee hardship factor. In Iowa Glass Depot, Inc. v. Jindrich, the former manager of an auto glass installation store had agreed not to compete with his former employer after he left. The Court determined that enforcing the agreement created undue hardship because the manager only possessed a high school education and had little training for any other type of employment, and because he was experiencing severe financial trouble. The court held the agreement to be unreasonable.

The final factor considered in the reasonableness analysis is whether the agreement inflicts undue injury upon the general public. An enforceable noncompetition agreement must not inflict undue injury upon the public interest. In Dynamics Research Corp. v. Analytic Sciences Corp., the Massachusetts Appeals Court noted that restricting the use of postemployment restraints “promotes the public interest in labor mobility and the employee's freedom to practice his profession and in mitigating of monopoly.” The Restatement (Second) of Contracts notes that “the likely injury to the public [from a postemployment restraint] may be too great if it is seriously harmed by the impairment of [the employee’s] economic mobility or by the unavailability of the skills developed in his employment.”

B. Application of the Reasonableness Analysis

The operation of the reasonableness analysis is illustrated in the Restatement (Second) of Contracts. Illustration 9 of Section 188 provides:

101. Id. at 499.
103. 338 N.W.2d 376 (Iowa 1983).
104. Id. at 379.
105. Id. at 384.
106. Id. at 385.
108. Id.
111. RESTATMENT (SECOND) OF CONTRACTS § 188 cmt. c (1981).
112. Id. § 188.
A employs B as a research chemist in his nationwide pharmaceutical business. As part of the employment agreement, B promises not to work in the pharmaceutical industry at any place in the country for three years after the termination of his employment. B works for five years and acquires valuable confidential information that would be useful to A's competitors and would unreasonably harm A's business. B can find employment as a research chemist outside of the pharmaceutical industry. B's promise is not unreasonably in restraint of trade and enforcement is not precluded on grounds of public policy.113

Illinois courts use the reasonableness analysis to evaluate non-competition agreements.114 In Instrumentalist Co., the Illinois Appellate Court applied the reasonableness analysis in enforcing a non-competition agreement between a publisher and its former employee.115 The former employee had worked as the editor and advertising manager of the publisher's trade magazine, which was directed at school band and orchestra teachers.116 When the employee left the publisher, he possessed proprietary knowledge of the magazine.117

The court determined that the publisher demonstrated a legitimate business interest in protecting the close, personal relationships that are crucial to obtaining magazine advertising.118 The court also determined that the employee had gained these relationships solely through his positions as editor and advertising manager of the publisher's magazine.119 The court therefore enforced the noncompetition agreement, noting that the agreement "neither adversely affects the general public nor imposes an undue hardship on [the employee]."120 The court further noted that the area of business restricted by the agreement, namely the school band music area, comprised only a small portion of the entire music publishing area.121

In A.B. Dick Co. v. American Pro-tech,122 the Illinois Appellate Court enforced a noncompetition agreement between a reprographic firm and a former manager.123 Applying the reasonableness analysis,

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113. Id. § 188 cmt. g, illus. 9.
115. Instrumentalist Co., 480 N.E.2d at 1283.
116. Id. at 1276.
117. Id. at 1278.
118. Id. at 1283.
119. Id. at 1282.
120. Id.
121. Id. at 1282-83.
the court determined that the firm had a legitimate business interest in its customers. In finding a legitimate business interest, the court noted that in the reprographic business, the relationship between a firm and its customers is nearly permanent. The court also determined that this legitimate interest was not outweighed by the hardship imposed by the contract or by the effect of the contract upon the public.

The United States Court of Appeals for the Eighth Circuit has also applied the reasonableness analysis. In *Modern Controls, Inc. v. Andreadakis*, the Eighth Circuit applied Minnesota law to enjoin the plaintiff's former employee from working for a competitor for a period of two years under a noncompetition agreement. *Modern Controls* involved the computer industry. For both his new employer and his former employer, Andreadakis researched and developed highly technical computer data display devices. The Eighth Circuit determined that his former employer established a legitimate interest in the noncompetition agreement because Andreadakis acquired confidential information from the employer. The Court further determined that Andreadakis did not show that he would be harmed by having to accept other employment during the period of the injunction. The Eighth Circuit therefore held that the district court erred in failing to grant an injunction against Andreadakis because the noncompetition agreement appeared reasonable.

In *Sigma Chemical Co. v. Harris*, the Eighth Circuit held a noncompetition agreement between a chemical company and its former purchasing agent to be valid under Missouri law. The purchasing agent was responsible for maintaining product files that rated the quality of chemicals the company purchased from different suppliers. The ratings were highly valued in the industry and took years to develop. Upon determining that the employer had a legiti-

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124. *Id.*
125. *Id.* at 49.
126. *Id.* at 48.
127. *See* *Sigma Chemical Co. v. Harris*, 794 F.2d 371 (8th Cir. 1986); *Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264 (8th Cir. 1978).
128. 578 F.2d 1264 (8th Cir. 1978).
129. *Modern Controls*, 578 F.2d at 1266.
130. *Id.*
131. *Id.* at 1266, 1267.
132. *Id.* at 1270.
133. *Id.* at 1270 n.13.
134. *Id.* at 1270-71.
135. 794 F.2d 371 (8th Cir. 1986).
137. *Id.* at 373.
138. *Id.*
mate interest in the confidentiality of the product files, the Eighth Circuit affirmed the district court’s holding that it was reasonable to enjoin the employee from working for his former employer’s main competitor for a period of two years.139

II. COVENANTS NOT TO DISCLOSE

Covenants not to disclose are another method companies can use to protect proprietary information from disclosure by former employees.140 In a typical covenant not to disclose, employees agree not to disclose certain confidential information, such as trade secrets, to competitors during or for a limited period after their employment, but are not otherwise restricted from competing.141 Because they restrain an employee from putting information that he possesses to use, covenants not to disclose are generally subjected to a reasonableness analysis similar to that used to evaluate noncompetition agreements.142 However, they are more likely to be found reasonable than noncompetition agreements because they impose less hardship upon the restricted employee.143

Many courts have questioned the likelihood that employees in their new employment can keep the confidences of their former employers.144 In Modern Controls, a computer scientist was enjoined from conducting for a new employer the same type of research that he conducted for his former employer.145 The Eighth Circuit determined in Modern Controls that confidential information can be disclosed in ways more subtle than outright disclosure to a third party.146 The court noted:

Even in the best of good faith, a former technical or “creative” employee working for a competitor, or in a 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 of good faith cannot always be expected.147

139. Id. at 374.
140. Hutter, 45 ALB. L. REV. at 313.
141. 1 KURT H. DECKER, COVENANTS NOT TO COMPETE 56 (2d ed. 1993) [hereinafter DECKER].
143. DECKER, supra note 142, at 56.
145. Modern Controls, 578 F.2d at 1271.
146. Id. at 1270.
147. Id. (quoting Harlan M. Blake, Employee Agreements Not to Compete, 73 HARV. L. REV. 625, 669-70 (1960)).
The court held that merely prohibiting disclosure while permitting competitive employment would place the former employer's trade secrets at substantial risk.\(^{148}\) It therefore enforced the noncompetition agreement.\(^{149}\)

The Texas Appellate Court also has recognized the inevitability of disclosure that may occur with transient employees.\(^{150}\) In *Weed Eater, Inc. v. Dowling*,\(^{151}\) the court upheld a one-year injunction against Dowling, the employee, preventing him from working for one of Weed Eater's competitors.\(^{152}\) While at Weed Eater, Dowling had acquired information about the company's assembly line designs for flexible trimming devices.\(^{153}\) The court noted that despite his best efforts, Dowling would have trouble keeping Weed Eater's proprietary information from showing up in his new work product.\(^{154}\)

Similarly, in *Eastman Kodak Co. v. Powers Film Products, Inc.*,\(^{155}\) the New York Appellate Court enjoined a research chemist in the still photography industry from competitive employment with his former employer.\(^{156}\) The Court observed that "[t]he mere rendition of service along the lines of his [former] training would almost necessarily impart such knowledge to some degree. [The employee] cannot be loyal both to his promise to his former employer and to his new obligations to [his new employer]."\(^{157}\)

Some critics even contend that an employee's loyalty to a former employer terminates when he changes jobs.\(^{158}\) As early as 1959, noted scholars have recognized that many employees will disregard their former employers' interests and freely disclose proprietary information of those employers in their new employment.\(^{159}\)

\(^{148}\) *Id.*

\(^{149}\) *Id.* at 1271.

\(^{150}\) *Weed Eaters*, 562 S.W.2d at 902.


\(^{152}\) *Weed Eaters*, 562 S.W.2d at 902.

\(^{153}\) *Id.* at 901.

\(^{154}\) *Id.* at 902.

\(^{155}\) 179 N.Y.S. 325 (1919).

\(^{156}\) *Eastman Kodak*, 179 N.Y.S. at 331.

\(^{157}\) *Id.* at 330.


\(^{159}\) *See* Edward E. Furash, *Industrial Espionage*, HARV. BUS. REV., Nov.-Dec. 1959, at 170 (concluding after survey of executives and employees that "the practice of hiring away executives and employees is condoned by the majority of executives in this survey, and a large number of executives say they would practice it in order to gain information about competitors").
III. THE LAW OF TRADE SECRET MISAPPROPRIATION

The third method a company can use to protect its proprietary information from disclosure by former employees is the law of trade secret misappropriation. In trade secret misappropriation, one who divulges or who may inevitably divulge trade secrets of another is subject to injunctive remedies and liability for damages resulting from such divulgence. The concept of a trade secret is broad. By definition it may consist of any "formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." To establish trade secret liability, both the existence of a trade secret and the use or imminent use of the trade secret to the former employer's detriment must be shown.

It has been contended that the law of trade secret misappropriation does not afford the employer adequate protection because of the burden of proof imposed on the employer in such an action. The employer faces significant obstacles in establishing the actual or inevitable use of the confidential information.

In Greenberg v. Croydon Plastics Co., Inc., the United States District Court for the Eastern District of Pennsylvania recognized the burden that a company faces in establishing actual or inevitable use under the law of trade secret misappropriation. In Greenberg, a company alleged that its former employee misappropriated its secret method of flavoring mouthguards. The company encountered difficulty in establishing the actual use of the confidential information by the employee because it could only present circumstantial evidence. The court noted:

Plaintiffs in trade secret cases, who must prove by a fair preponderance of the evidence disclosure to third parties and use of the trade secret by the third parties, are confronted with an extraordinarily difficult task. Misappropriation and misuse can rarely be proved by convincing direct evidence. In most cases plaintiffs must construct a web of perhaps ambiguous

160. Hutter, 45 Ala. L. Rev. at 313.
161. Id. at 314.
163. Id. (quoting Water Serv., Inc. v. Tesco Chemicals, Inc., 410 F.2d 163, 171 (5th Cir. 1969)).
165. Hutter, 45 Ala. L. Rev. at 314.
169. Id. at 813.
170. Id. at 814.
circumstantial evidence from which the trier of fact may draw inferences which convince him that it is more probable than not that what plaintiffs allege happened did in fact take place. Against this often delicate construct of circumstantial evidence there frequently must be balanced defendants and defendants' witnesses who directly deny everything.\textsuperscript{171}

When a company encounters difficulty in proving inevitable use for an action in trade secret misappropriation, relief will not be granted until after the misappropriation occurs.\textsuperscript{172} Damages, however, are often difficult to calculate and to prove.\textsuperscript{173}

**ANALYSIS**

In *Baxter International, Inc. v. Morris*,\textsuperscript{174} Microscan had found it necessary to entrust Roger J. Morris with trade secrets and confidential information because he was a biochemist responsible for research and development for the company.\textsuperscript{175} Microscan was making great strides in its field, and it sought to protect this progress.\textsuperscript{176} It therefore required Morris and all of its scientists who worked with confidential information to sign noncompetition agreements before starting their employment.\textsuperscript{177} Microscan opted for the source of trade secret protection that is generally considered to provide the most protection.\textsuperscript{178}

**I. APPLICATION OF THE REASONABLENESS ANALYSIS IN BAXTER**

In *Baxter*, the United States Court of Appeals for the Eighth Circuit was to apply Illinois law to the noncompetition agreement in determining its enforceability.\textsuperscript{179} Illinois courts evaluate noncompetition agreements with the reasonableness analysis which is followed in most jurisdictions.\textsuperscript{180} Specifically under Illinois law, the reasonableness of a noncompetition agreement is measured by whether the agreement: (1) protects a legitimate business interest of the employer, (2)

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171. Id.
172. Closious & Schaffer, 57 S. Cal. L. Rev. at 549.
173. Osage Glass, 693 S.W.2d 71 at 75.
174. 976 F.2d 1189 (8th Cir. 1992).
176. Amended Brief for Appellants at 4-6, Baxter Int'l, Inc. v. Morris, 976 F.2d 1189 (8th Cir. 1992) (No. 92-2079EMSL).
177. Id. at 4.
179. Baxter, 976 F.2d at 1197.
180. See supra note 81 and accompanying text.
imposes an undue hardship on the employee, and (3) imposes an un-
due hardship on the general public.\textsuperscript{181}

Although the court in \textit{Baxter} purported to apply the reasonableness analysis, it skewed the traditional application of the test.\textsuperscript{182} The court correctly noted that the noncompetition agreement protected Microscan's interest in its trade secrets and confidential information.\textsuperscript{183} However, the court then held that the noncompetition agreement was not reasonable when weighed against three other factors.\textsuperscript{184} The first factor the court cited was the district court's determination that Morris would be able to work at Vitek without disclosing Microscan's trade secrets.\textsuperscript{185} The second factor the court cited was the dis-


tributional court's determination that the noncompetition agreement imposed undue hardship upon Morris.\textsuperscript{186} The third and most signifi-
cant factor the court cited was that the district court injunction pro-
vided Baxter with "adequate protection."\textsuperscript{187} The court determined that because the injunction prohibiting Morris from using or disclosing any confidential information he acquired at Microscan would, on its face, achieve the same objective as the noncompetition agreement, the noncompetition agreement was unnecessary and therefore unreasonable.\textsuperscript{188} The court's consideration of this third factor was an incor-
rect application of the reasonableness analysis.\textsuperscript{189}

In \textit{Instrumentalist Co. v. Band, Inc.}\textsuperscript{190} and \textit{A.B. Dick Co. v. Amer-
ican Pro-tech},\textsuperscript{191} the Illinois Appellate Court applied the reasonableness analysis and held the noncompetition agreements to be enforceable.\textsuperscript{192} Both cases involved an employer's interest in the protection of certain proprietary information.\textsuperscript{193} In neither case did the court consider the possible effect of a less restrictive order when determining the validity of the noncompetition agreements.\textsuperscript{194}

Prior to \textit{Baxter}, the Eighth Circuit had evaluated noncompetition agreements for reasonableness under the traditional analysis.\textsuperscript{195} In

\begin{flushleft}
\textsuperscript{182} \textit{See Baxter}, 976 F.2d at 1197.
\textsuperscript{183} \textit{See id.}
\textsuperscript{184} \textit{Id. See supra note 65 and accompanying text.}
\textsuperscript{185} \textit{Baxter}, 976 F.2d at 1197.
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{See supra notes 113-40 and accompanying text.}
\textsuperscript{190} 480 N.E.2d 1273 (Ill. App. Ct. 1985).
\textsuperscript{191} \textit{A.B. Dick Co. v. American Pro-tech}, 514 N.E.2d 45, 50 (Ill. App. Ct. 1987); \textit{In-
strumentalist Co.}, 480 N.E.2d at 1283.
\textsuperscript{192} \textit{A.B. Dick Co.}, 514 N.E.2d at 49; \textit{Instrumentalist Co.}, 480 N.E.2d at 1278.
\textsuperscript{193} \textit{See supra notes 114-27 and accompanying text.}
\textsuperscript{194} \textit{See Sigma Chemical Co. v. Harris}, 794 F.2d 371, 374 (8th Cir. 1986); \textit{Modern Controls v. Andreadakis}, 578 F.2d 1264, 1270 (8th Cir. 1978).
\end{flushleft}
two cases where noncompetition agreements were evaluated, the Eighth Circuit plainly held that a legitimate interest was present that outweighed any harmful consequences of enforcement. In Modern Controls, Inc. v. Andreadakis, the Eighth Circuit determined that a computer technology company possessed a legitimate interest in preventing disclosure of its research and development to a competitor. This competitor had hired away one of the company's former scientists to work in the same areas as he did for the former employer. The court also determined that enforcement of the agreement would impose little harm upon the employee. It weighed this minimal harm against the legitimate interest in trade secret protection and held the agreement to be reasonable under Minnesota law.

In Sigma Chemical Co. v. Harris, the Eighth Circuit determined that a chemical company had a legitimate interest in protecting the years of effort that went into developing its confidential product files. Upon consideration of the strength of this interest, it held a noncompetition agreement between the company and a former purchasing agent to be reasonable.

In neither Modern Controls nor Sigma did the court factor into its reasonableness analysis the effect of a less restrictive order not to disclose. Furthermore, the court in Modern Controls specifically questioned the utility of such an order, noting that "information may be disclosed in more subtle ways than outright disclosure to a third party."

A. Problems with the Court's Application of the Reasonableness Analysis

The Eighth Circuit's improper application of the reasonableness analysis could create problems both for the employer in Baxter and for other employers who seek to protect trade secrets through the use of noncompetition agreements.

First, the court's application of the reasonableness analysis has left Microscan protected only by an injunction against the disclosure of
its information.\textsuperscript{208} The court in \textit{Baxter} assumed that the injunction would be obeyed and that there is no inevitability of unlawful disclosure or use associated with a departed employee's working for a competitor.\textsuperscript{209} This assumption, however, has been seriously questioned.\textsuperscript{210} In prior cases, the Eighth Circuit and many other courts had rejected the effectiveness of orders not to disclose and the likelihood that employees in their new employment can keep the confidences of their former employers.\textsuperscript{211} In \textit{Modern Controls}, the Eighth Circuit noted that "[e]ven in the best of good faith, a former technical or "creative" employee working for a competitor, or in a 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."\textsuperscript{212}

In \textit{Eastman Kodak Co. v. Powers Film Products, Inc.}\textsuperscript{213}, the New York Appellate Court observed that "the mere rendition of service along the lines of his [former] training would almost necessarily impart such knowledge to some degree. [The employee] cannot be loyal both to his promise to his former employer and to his new obligations to [his new employer]."\textsuperscript{214} This assumption is supported by a \textit{Harvard Business Review} study, which indicates that terminated employees will often disregard their former employers' interests and freely disclose proprietary information of those employers in their new employment.\textsuperscript{215} That study indicates a substantial likelihood that Microscan's proprietary information may be in jeopardy with Morris employed at Vitek.\textsuperscript{216} Therefore, as a result of the Eighth Circuit's improper application of the reasonableness test, Microscan may have been left without adequate protection of its trade secrets.\textsuperscript{217}

Similarly, if the Eighth Circuit applied the reasonableness analysis in future cases the way it was applied in \textit{Baxter}, then other employers may be left without adequate protection of their proprietary information.\textsuperscript{218} This is because it will be practically impossible for a noncompetition agreement to be found enforceable.\textsuperscript{219} It is difficult to

\begin{footnotes}
\item[208] See \textit{Baxter}, 976 F.2d at 1197.
\item[209] See id.
\item[210] See supra notes 145-58 and accompanying text.
\item[211] See supra notes 145-58 and accompanying text.
\item[212] \textit{Modern Controls}, 578 F.2d at 1270 (quoting Harlan M. Blake, \textit{Employee Agreements Not to Compete}, 73 \textit{Harv. L. Rev.} 625, 699-70 (1960)).
\item[213] 179 N.Y.S. 325 (1919).
\item[214] \textit{Eastman Kodak Co. v. Powers Film Prod., Inc.}, 179 N.Y.S. 325, 330 (1919).
\item[216] See id.
\item[217] See supra notes 145-60, 166-74 and accompanying text.
\item[218] See supra notes 145-60, 166-74 and accompanying text.
\item[219] See infra notes 222-23 and accompanying text.
\end{footnotes}
conceive of a case where a less restrictive injunction that prohibits use or disclosure would not, on its face, serve the same ends as the noncompetition agreement. In Modern Controls, if the scientist had been enjoined from disclosing his former employer's research and development, then the noncompetition agreement in that case would have been unnecessary and therefore unreasonable. Likewise, in Sigma Chemical, if an order prohibiting the purchasing agent from disclosing any confidential information in the product files had been issued, then the noncompetition agreement in that case would therefore have been unnecessary and unreasonable. Simply put, future application of the Baxter approach could effectively destroy the employer's ability to protect its trade secrets through noncompetition agreements.

Without noncompetition agreements, employers would be forced to rely on the use of covenants not to disclose and the law of trade secret misappropriation for such protection. The law of trade secret misappropriation and covenants not to disclose are often inadequate for employers seeking to protect trade secrets. The law of trade secret misappropriation is inadequate because of the difficulty of proving actual or inevitable use of a trade secret by a former employee. Such actual or inevitable use must be proven in order to obtain an effective remedy, such as the prohibition of competitive employment. In Greenberg v. Croydon Plastics Co., Inc., the United States District Court for the Eastern District of Pennsylvania recognized the burden associated with proving trade secret misappropriation. The court noted that "[m]isappropriation and misuse can rarely be proved by convincing direct evidence," and that "in most cases plaintiffs must construct a web of perhaps ambiguous circumstantial evidence" to prove their case.

Covenants not to disclose are inadequate because their expectations are often illusory. Courts have determined that a claimed intention not to disclose or receive confidential information is in many
cases insufficient to negate the realistic threat of disclosure and the possibility of significant harm to a company.\textsuperscript{232}

In sum, the court skewed the reasonableness analysis by improperly considering whether the less restrictive injunction issued by the district court was sufficient to protect the employer in Baxter.\textsuperscript{233} As a result, the employer was left with inadequate protection of its trade secrets.\textsuperscript{234} Furthermore, other employers in the future may be unable to adequately protect their trade secrets.\textsuperscript{235}

II. PROPER REASONABLENESS ANALYSIS

If the court in Baxter had properly applied the traditional reasonableness analysis, then the noncompetition agreement at issue would have been enforceable.\textsuperscript{236} The first factor required of an enforceable noncompetition agreement is that it must protect a legitimate business interest of the employer.\textsuperscript{237} It is well recognized (and specifically recognized under Illinois law) that employers possess a legitimate interest in protecting themselves from “unfair competition.”\textsuperscript{238} The definition of unfair competition generally includes any competitive use by a former employee of confidential information or trade secrets pertaining to an employer’s business operations.\textsuperscript{239} If an employee does not obtain any confidential information or trade secrets from his former employer, then his competition would be merely “ordinary.”\textsuperscript{240} However, if an employee obtains and uses trade secrets, his competition would be unfair, and the employer has a legitimate interest in restraining that employee from competing.\textsuperscript{241}

In Baxter it was undisputed that Morris acquired trade secrets and confidential information from Microscan.\textsuperscript{242} His competition at Vitek thus should have been characterized as potentially unfair.\textsuperscript{243} Therefore, Microscan clearly had a legitimate interest to be protected by the noncompetition agreement, and the first step of the reasonableness analysis was satisfied.\textsuperscript{244}

\begin{itemize}
  \item \textsuperscript{232} See supra notes 145-58 and accompanying text.
  \item \textsuperscript{233} See Baxter, 976 F.2d at 1197.
  \item \textsuperscript{234} See supra notes 145-58, 166-74 and accompanying text.
  \item \textsuperscript{235} See supra notes 145-58, 166-74 and accompanying text.
  \item \textsuperscript{236} See infra notes 113-40 and accompanying text.
  \item \textsuperscript{237} RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).
  \item \textsuperscript{239} Boisen, 222 Neb. at 246, 383 N.W.2d at 34.
  \item \textsuperscript{240} Id. at 245, 383 N.W.2d at 33.
  \item \textsuperscript{241} Id. at 246, 383 N.W.2d at 34.
  \item \textsuperscript{242} Baxter, 976 F.2d at 1194.
  \item \textsuperscript{243} See supra notes 91-92 and accompanying text.
  \item \textsuperscript{244} See supra notes 91-94 and accompanying text.
\end{itemize}
The second factor the reasonableness analysis requires of an enforceable non-competition agreement is that it must not impose excessive hardship upon the employee.\textsuperscript{245} The court in \textit{Baxter} improperly determined that prohibiting Morris from working for Vitek for one year would inflict undue hardship upon him.\textsuperscript{246}

The court's analysis assumes that Morris' only choice was either to work at Vitek or not to work at all.\textsuperscript{247} This ignores the other employment opportunities available to Morris.\textsuperscript{248} Morris voluntarily resigned from Microscan.\textsuperscript{249} Moreover, there are more than 1200 biotech companies in the United States at which Morris could have sought employment.\textsuperscript{250} He chose to work at the only one that competed directly with Microscan.\textsuperscript{251}

Of the more than 1200 biotech firms, it is most likely that only Microscan and Vitek were in a position to put this confidential information possessed by Morris to effective business use.\textsuperscript{252} Allowing Morris to work for the company that was most likely to use this information in a manner which would be harmful to Microscan ignores the legitimate interests of Microscan.\textsuperscript{253}

Furthermore, it has been held that an employer's willingness to pay his employee during the period that the employee is bound to a noncompetition agreement diminishes the hardship the agreement imposes on the employee.\textsuperscript{254} Microscan agreed to pay Morris his full salary during the period that the noncompetition agreement was in effect.\textsuperscript{255} Complying with his covenant would not be a financial burden to Morris.\textsuperscript{256} Therefore, no undue hardship was placed on Morris, and the second step of the reasonableness analysis was satisfied.\textsuperscript{257}

The final factor considered in the traditional reasonableness analysis is that the noncompetition agreement must not inflict undue injury upon the general public.\textsuperscript{258} Courts have advanced three

\begin{itemize}
\item \textsuperscript{245} \textit{Restatement (Second) of Contracts} § 188 (1981).
\item \textsuperscript{246} See \textit{Baxter}, 976 F.2d at 1197.
\item \textsuperscript{247} See id.
\item \textsuperscript{248} See id.
\item \textsuperscript{249} Id. at 1192.
\item \textsuperscript{250} See \textit{Biotech Industry Growing on the Vine}, \textit{Houston Chron.}, Sept. 23, 1992, at B1, B5.
\item \textsuperscript{251} \textit{Baxter}, 976 F.2d at 1192.
\item \textsuperscript{252} See id.
\item \textsuperscript{253} See id.
\item \textsuperscript{254} See Hekimian Lab., Inc. v. Domain Sys., Inc., 664 F. Supp. 493, 499 (S.D. Fla. 1987) (stating that a provision compensating a former employee was a significant factor in balancing the interests of a former employee and the former employer).
\item \textsuperscript{255} \textit{Baxter}, 976 F.2d at 1197.
\item \textsuperscript{256} See \textit{Hekimian}, 664 F. Supp. at 499.
\item \textsuperscript{257} See id.
\item \textsuperscript{258} \textit{Restatement (Second) of Contracts} § 188 (1981).
\end{itemize}
arguments why noncompetition agreements restrain trade and therefore harm the public.\textsuperscript{259} In light of the specific circumstances of Baxter, however, these arguments are not persuasive.\textsuperscript{260} First, it is contended that these agreements restrain trade by reducing both the economic mobility of employees and their personal freedom to pursue their own interests.\textsuperscript{261} Considering the 1200 other companies with which Morris could have sought employment, this argument is not compelling.\textsuperscript{262}

Second, it is contended that these agreements diminish competition by slowing down the dissemination of ideas, processes, and methods.\textsuperscript{263} Focusing on the unique circumstances of Baxter, however, the converse of this proposition is actually true.\textsuperscript{264} Because Microscan and Vitek were participating in a two-competitor market, enforcing Morris' noncompetition agreement arguably would have increased competition.\textsuperscript{265} It would have denied Vitek, the dominant company in the field, access to a key employee of Microscan who had knowledge which could be used by Vitek to the detriment of Microscan.\textsuperscript{266} It would prevent the more powerful Vitek from buying out Microscan's research talent, and squeezing the only competitor out of the market.\textsuperscript{267}

Third, employees are viewed as being weak in bargaining strength, and it is believed that employers can frequently take advantage of them by imposing excessive post employment restrictions.\textsuperscript{268} This argument does not apply to the Baxter case.\textsuperscript{269} Morris was under no economic pressure to leave Microscan, and Vitek was presumably extremely interested in having Morris come to work there.\textsuperscript{270} Morris had very high qualifications and had accepted three different jobs in a

\begin{itemize}
\item \textsuperscript{259} Maureen B. Callahan, Comment, \textit{Post-Employment Restraint Agreements: A Reassessment}, 52 U. CHI. L. Rev. 703, 705-06 (1985).
\item \textsuperscript{260} See Baxter, 976 F.2d at 1192.
\item \textsuperscript{261} See Van Prod. Co. v. General Welding & Fabricating Co., 213 A.2d 769, 776 (Pa. 1965) (stating that to deny an employee the use of his wealth of experience would wipe out his livelihood).
\item \textsuperscript{262} \textit{Biotech Industry Growing on the Vine}, HOUSTON CHRON., Sept. 23, 1992, at B1, B5.
\item \textsuperscript{263} See Reed, Roberts Assoc., Inc. v. Strauman, 353 N.E.2d 590, 593 (N.Y. 1976) (stating that a healthy economy relies on competition enhanced by the uninhibited flow of services, talent, and ideas).
\item \textsuperscript{264} See Baxter, 976 F.2d at 1197.
\item \textsuperscript{265} See \textit{id.} at 1192.
\item \textsuperscript{266} See \textit{id.}
\item \textsuperscript{267} See \textit{id.}
\item \textsuperscript{268} See Reading Aviation Serv., Inc. v. Bertolet, 311 A.2d 628, 630 (Pa. 1989) (justifying the reasonableness test because of the inherently unequal bargaining positions of employer and employee).
\item \textsuperscript{269} See infra notes 271-72 and accompanying text.
\item \textsuperscript{270} See Baxter, 976 F.2d at 1192.
\end{itemize}
four-year period.\textsuperscript{271} He did not appear to be the typical employee who cannot adequately negotiate an employment contract.\textsuperscript{272}

In sum, Baxter's interest in protecting its trade secrets through a noncompetition agreement is legitimate.\textsuperscript{273} Such an interest can be outweighed under the reasonableness analysis only by a great imposition of hardship upon Morris or by significant public injury.\textsuperscript{274} Neither hardship nor public injury is evident in this case.\textsuperscript{275}

This analysis is consistent with the Restatement (Second) of Contracts.\textsuperscript{276} The reasonableness analysis that Illinois courts apply is comparable to that adopted by the Restatement.\textsuperscript{277} The Restatement provides a factual scenario in which a research scientist who learned valuable proprietary information through his employment agreed not to compete with a former employer after his employment had terminated.\textsuperscript{278} Although the research scientist would have been able to find work in the same profession where the proprietary information would have been of little use, he instead sought to work for an employer who would find the proprietary information useful.\textsuperscript{279} The Restatement asserts that, in such a situation, it is reasonable to enforce the noncompetition agreement.\textsuperscript{280}

Following this illustration, Morris' noncompetition promise should have been enforced.\textsuperscript{281} Morris acquired valuable information at Microscan that would be useful to Vitek and would harm Microscan's business if disclosed.\textsuperscript{282} Morris could find possible employment at over 1200 other biotech firms.\textsuperscript{283} Therefore, the noncompetition agreement does not unreasonably restrain trade.\textsuperscript{284}

CONCLUSION

In Baxter International, Inc. v. Morris,\textsuperscript{285} the United States Court of Appeals for the Eighth Circuit limited the amount of protection that an employer's trade secrets will be afforded from disclosure by former

\begin{footnotes}
\footnotetext{271}{Id.} \\
\footnotetext{272}{See id.} \\
\footnotetext{273}{See supra notes 76-98 and accompanying text.} \\
\footnotetext{274}{See Restatement (Second) of Contracts § 188 (1981).} \\
\footnotetext{275}{Baxter, 976 F.2d at 1197.} \\
\footnotetext{276}{Restatement (Second) of Contracts § 188, cmt. g, illus. 9 (1981).} \\
\footnotetext{277}{Dryvit, 477 N.E.2d at 39.} \\
\footnotetext{278}{Restatement (Second) of Contracts § 188, cmt. g, illus. 9 (1981).} \\
\footnotetext{279}{Id.} \\
\footnotetext{280}{Id.} \\
\footnotetext{281}{See Baxter, 976 F.2d at 1197.} \\
\footnotetext{282}{Id. at 1192.} \\
\footnotetext{283}{See Biotech Industry Growing on the Vine, Houston Chron., Sept. 23, 1992, at B1, B5.} \\
\footnotetext{284}{See Restatement (Second) of Contracts § 188, cmt. g, illus. 9 (1981).} \\
\footnotetext{285}{976 F.2d 1189 (8th Cir. 1992).}
\end{footnotes}
employees. By placing emphasis on a court's ability to craft a less restrictive injunction, the Eighth Circuit appears to have foreclosed any possibility of enforceable noncompetition agreements.

Companies will no longer be able to rely on this assured method of protecting their trade secrets. Companies will now only be able to seek trade secret protection from covenants not to disclose and from the law of trade secret misappropriation, both of which are not always reliable. By prohibiting companies the assured protection of their trade secrets, the Baxter holding could have a detrimental effect on the advancement of research and technology in our society. If a company can acquire trade secrets and research by hiring away its competitor's employees, such predatory hiring will become more attractive than independent effort.

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