Covenants-not-to-compete are fairly common in the business world. For example, a purchaser of a business may want assurances that his investment will not be soured by the seller going into competition after the sale. Or an employer might be concerned that a key employee, should he or she ever leave his or her position, may take a substantial part of the employer's business with him. While these concerns are common enough, the counselor who is called upon to assist in negotiating or drafting a covenant-not-to-compete should not assume that an easy task lies ahead. Those who rely on clauses out of a form book or the black letter law in a legal encyclopedia risk disastrous results.

The current state of Nebraska law is uncertain, particularly in regard to restrictions against competition in a geographic area or in regard to the length of time the restriction should exist. The consequence of this uncertainty is that if the legal draftsman has not correctly anticipated the current state of judicial thinking, the covenant will, in all likelihood, be held invalid and unenforceable. Extreme caution must be exercised in this area because the validity of the covenant depends on a judicial determination of whether the covenant is "reasonable." The Nebraska Supreme Court has held a covenant-not-to-compete valid if the restriction is "reasonable," in that the covenant: (1) is "not injurious to the public;" (2) is "not greater than is reasonably necessary to protect the employer in some legitimate interest;" and (3) is "not unduly harsh and oppressive on the employee." Although some states have statutes governing this subject, Nebraska relies strictly upon judicial precedent and interpretation.

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While judicial precedent may be one of the crowning glories of common law, occasionally it is meandering and confusing. In some states, while there may be a certain amount of ambiguity in not knowing whether a particular restriction may be deemed "reasonable," the judicial consequence of finding a covenant unreasonable will be conciliated by equity. Often, a state court will "reform" a covenant so as to sustain the reasonableness of the covenant and, hence its validity. For example, a territorial restriction might be reduced in its geographic dimensions if the restriction is deemed too broad. However, in Nebraska, if the drafter of the covenant makes a mistake, there will be no remedy in equity. In Nebraska, a covenant that is deemed unreasonable, even to the slightest degree, will be declared invalid and unenforceable. The Nebraska courts will give no comfort to any notion of reforming a covenant. The Nebraska Supreme Court has emphatically stated that "it is not the function of courts to reform unreasonable covenants-not-to-compete solely for the purpose of making them legally enforceable." For years the Nebraska Supreme Court has remained firm in this position. This is true even where the parties have otherwise agreed in the contract that a court would have the power to modify an objectionable provision of a covenant so as to make the whole covenant valid, reasonable, and enforceable. But the Nebraska Supreme Court has decided to follow a minority position which provides "that reformation is tantamount to the construction of a private agreement and that the construction of private agreements is not within the power of the courts."

The purpose of this article is to highlight the development of the "reasonableness" standard in Nebraska with respect to covenants-not-to-compete and to outline some of the confusing aspects of Nebraska


4. See, e.g., Weber v. Tillman, 913 P.2d 84, 95-96 (Kan. 1996). In Tillman, the court stated:

Where the territory designated in the contract . . . is found to be more extensive than necessary to provide reasonable protection against professional encroachment, courts of equity have the power to reduce such territory to the extent reasonably necessary to ensure the contemplated protection and enforce the contract to that extent and deny enforcement as to the remainder of the territory. It is the duty of courts to sustain the legality of contracts in whole or in part when fairly entered into, if reasonably possible to do so, rather than to seek loopholes and technical legal grounds for defeating their intended purpose.

Id.


case law on this subject, particularly in regard to the concept of a territorial restriction. By bringing this confusion to the attention of the Bar, a practitioner will be aware of the mine fields that he or she may have to cross in negotiating and drafting these covenants. Furthermore, by bringing this confusion to the attention of the Bench, a future opportunity will undoubtedly occur wherein these matters might be clarified. In my view, the Nebraska Supreme Court has a duty to make the reasonableness standard vis-à-vis' covenants-not-to-compete as clear as possible so that employers, businessmen, and attorneys will have an unmistakable guidepost when drafting covenants-not-to-compete.

A. REASONABLENESS OF TIME AND SPACE REQUIREMENTS

In the early Nebraska case of Mollyneaux v. Wittenberg, the Nebraska Supreme Court recognized the validity of a covenant-not-to-compete in conjunction with the sale of a business. The covenant prohibited the defendants, as sellers of a hotel, from operating any other hotel on certain lots in the town of Sutton for a period of two years. The plaintiffs argued the covenant was void because it was "in restraint of trade." The court held otherwise, stating:

The contract not to use the premises for hotel purposes was a limitation in itself, necessarily confining it, as to place, to the particular lots and building, and the time was limited to "two years." These limitations clearly relieve the agreement of any objection made to it on the ground that it is obnoxious to the common-law rule governing contracts in restraint of trade, if, coupled with the above limitations, the contract was reasonable. A contract made upon a valuable consideration, and which does not impose an unreasonable restraint upon engaging in business, is valid.

Four years later, in 1898, the Nebraska Supreme Court in Downing v. Lewis followed the reasonableness standard articulated in Mollyneaux. The Downing case involved the sale of a laundry business in which the seller was restricted from competition in Kearney for a period of five years. The supreme court found this time restriction to be reasonable. Conversely, in 1905, in Roberts v. Lemont, the Nebraska Supreme Court refused to uphold a covenant-not-to-compete in the sale of a business where the covenant did not contain limi-

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7. 39 Neb. 547, 58 N.W. 205 (1894).
10. 56 Neb. 386, 76 N.W. 900 (1898).
11. 73 Neb. 365, 102 N.W. 770 (1905).
tations on time or territory. The defendant, after selling his insurance business in Norfolk, agreed to "quit the business." The court held that "ordinarily a contract prohibiting one of the parties from carrying on a specific trade or business, without any limitation as to time and place, is against public policy and void."

In 1924, the Nebraska Supreme Court in Dow v. Gotch upheld a covenant-not-to-compete contained in an employment contract. Dow operated a beauty parlor in Grand Island, employing Gotch. Eventually, Gotch left Grand Island to take a post-graduate course in Chicago. But before she left, Dow and Gotch agreed that Dow would pay her one hundred dollars to defray expenses, provided that upon her return to Grand Island, she would resume her employment with Dow for at least twelve months thereafter. Furthermore, Gotch agreed that upon her return from Chicago, she would not go into competition with Dow in Grand Island. However, no time limitation was placed upon this covenant-not-to-compete. Nevertheless, following Gotch's return, and after only several months of employment with Dow, Dow allowed Gotch to leave and seek employment in Wyoming. When the Wyoming employment did not prove satisfactory, Gotch returned to Grand Island and went into competition with Dow. Dow sued to enforce the non-competition contract and successfully enjoined Gotch from operating her business.

The Nebraska Supreme Court noted that covenants-not-to-compete were once rendered void by the courts of England in an earlier era only because the typical employee was not expected to travel far from his birthplace. Hence, such a restriction would deprive him of his livelihood. However, the supreme court upheld the covenant, noting that, because modern America was a highly mobile society, the reasoning underlying the old rule had departed. The court held that equity now lies with the employer, not the employee, reasoning that:

While we recognize the principle that estoppel does not serve to give relief to one who relies upon a void contract, it seems well-nigh intolerable that a party should be permitted to take a sum of money from another, upon solemn agreement not to compete with such other, and then use what she has received in doing the very thing which she agreed not to do, while still retaining the money so paid.

14. Id. at 368, 102 N.W. at 771.
15. 113 Neb. 60, 201 N.W. 655 (1924).
17. Dow, 113 Neb. at 64-65, 201 N.W. at 657.
18. Id.
In 1936, the Nebraska Supreme Court further outlined its reasonableness standard for covenants-not-to-compete in an employment contract in *Personal Finance Co. of Lincoln v. Hynes.*

In *Personal Finance,* the Nebraska Supreme Court recognized that "[a] contract restricting employment in a competitive business for one year within the city, or the environs or trade territory, imposes reasonable conditions and is valid and enforceable." 

Even though the *Dow* case and the others mentioned previously are part of the historic legal record in Nebraska on this issue, the truly definitive Nebraska case for the reasonableness standard in covenants-not-to-compete in the modern era is *Securities Acceptance Corp. v. Brown.* In *Securities Acceptance,* the plaintiff was in the consumer loan business, employing Brown at its North Platte branch office. After Brown was hired, he signed a contract that included a covenant-not-to-compete. The covenant provided, in part, that:

For a period of eighteen months after the termination of his employment for any reason . . . the Employee will not engage in any way directly or indirectly in any business competitive with the Employer's business, nor solicit in any other way or manner work for any competitive business in any city or the environs or trade territory thereof in which the Employee shall have been located or employed by the Employer.

A number of years later, Brown was promoted to the position of supervisor. This required him to work out of the company's home office in Omaha. Because Brown and his family did not wish to move to Omaha, he left the company and began working for a competitor in North Platte. Securities Acceptance sued Brown to enforce the covenant and enjoin him from working for any of their competitors.

The Nebraska Supreme Court examined the legal history in Nebraska of covenants-not-to-compete, citing *Dow, Mollyneaux, Roberts,* and many other cases. The court concluded that, in principle, such covenants could be valid. However, in order for the validity to be sustained in any particular situation, covenants-not-to-compete had to meet three general requirements when partially restraining one's trade. The covenant-not-to-compete must be: (1) reasonable in the sense that it is not injurious to the public; (2) reasonable in the sense that it is no greater than is reasonably necessary to protect the em-

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19. 130 Neb. 547, 265 N.W. 541 (1936).
ployer in some legitimate interest; and (3) reasonable in the sense that it is not unduly harsh and oppressive on the employee.\(^{23}\)

As to the first test, i.e., whether the restriction was injurious to the public, the Nebraska Supreme Court stated that, under the prior decision in \textit{Personal Finance}, a restriction on employment was not injurious to the public as it relates to a consumer loan business. However, the court in \textit{Personal Finance} made no analysis as to whether or not the public would be harmed by such a restriction on employment. In fact, in very few Nebraska cases is such an examination made in any detail, and it is not clear what criteria the court would apply to determine reasonableness under this category.

Insofar as the third test, whether or not the restriction is unduly harsh and oppressive upon the employee, the Nebraska Supreme Court in \textit{Securities Acceptance} did discuss Brown's personal situation, but concluded its discussion by citing \textit{Dow}, wherein the court recognized that our society is now highly mobile.\(^{24}\) The third test adopted by the court in \textit{Securities Acceptance}, i.e., considering the harshness of the covenant on an employee, does not appear to play a prominent role in Nebraska case law except in a general, theoretical sense.

For example, in \textit{Farmer's Underwriters Association v. Eckel},\(^{25}\) the defendants, two insurance agents, were enjoined for one year from soliciting policyholders in their former employer's district.\(^{26}\) Both of the defendants were young fathers of four children. They possessed no other income source, no other skills, and no formal education beyond high school. While the operation of the covenant-not-to-compete in this case would create hardships for both defendants and their families, the court nevertheless upheld the covenant. The Nebraska courts appear to find "harshness" in those cases where the covenant is unnecessary, e.g., the employer does not need protection or the covenant is too broad. Harshness, then, has less to do with individual hardships than it does with covenant invalidity, generally.

What is significant in Nebraska law is the second test outlined by the court in \textit{Securities Acceptance}, i.e., whether there is something special about the employee's position in a business that would require an employer have need of protection. When such a need for protection is found, then the issue is whether the covenant is proportionate to that need. If the employer has a need for protection, the reasonable-

\(^{23}\) \textit{Securities Acceptance}, 171 Neb. at 417, 106 N.W.2d at 463.
\(^{24}\) See infra notes 17-18 and accompanying text.
\(^{25}\) 185 Neb. 531, 177 N.W.2d 274 (1970).
ness of the restriction, and thus its validity, is usually measured by the covenant's time and territorial limitations.

The Nebraska Supreme Court, in Securities Acceptance, enunciated its view as follows:

It is clear that if the nature of the employment is such as will bring the employee in personal contact with the patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him, by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge or acquaintance with the patrons or customers of his former employer, and thereby gain an unfair advantage, equity will interfere on behalf of the employer and restrain the breach of a negative covenant not to engage in such competing business, either for himself or for another, providing the covenant does not offend against the rule that as to the time during which the restraint is imposed, or as to the territory it embraces, it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer.27

The court did not go into a lengthy analysis of Brown's duties to Securities Acceptance. The court found it sufficient that changes in the competitor's business initiated by Brown were the result of the knowledge Brown gained while he was an employee of Securities Acceptance. Brown also admitted that he called upon and talked with former customers of Securities Acceptance. Thus, as a matter of general legal principles, the court found the restrictive covenant valid except for one technical detail that proved to be the Achilles' heel for the entire non-compete agreement, which resulted in the court invalidating the whole agreement.

This detail was a clause in the covenant that restricted Brown from competing for a period of eighteen months in any city in which he may have been employed by Securities Acceptance. Brown was employed in the North Platte office for many years and lived in the immediate area. He was promoted to the Omaha office, but quit after working in Omaha for only one and one-half months. Brown subsequently went to work for a competitor in North Platte. Consequently, Securities Acceptance sought to enforce the covenant in the North Platte area commencing from the time that Brown had terminated his employment with the Omaha office. What rendered the covenant

27. Securities Acceptance, 171 Neb. at 418-19, 106 N.W.2d at 464 (citing Annotation, Validity and Enforceability of Restrictive Covenants in Contracts of Employment, 9 A.L.R. 1456, 1468 (1920)).
wholly invalid was the fact the covenant covered any city in which Securities Acceptance had an office. The court raised the following hypothetical:

In other words, if Brown had been last located or employed in the office at North Platte some 20 years prior to leaving his employment with Securities Acceptance, the provision would still be effective to restrain him from seeking employment in North Platte in the field in which Securities Acceptance is engaged for 18 months thereafter. We do not think such provision is necessary to protect Securities Acceptance insofar as it is operating a loan business in North Platte, or any other city.\(^{28}\)

While the court also said that such a covenant was unduly harsh on Brown and any other employee, it was the time and territorial factors that doomed the covenant.

As a matter of interest, had the drafters of covenant-not-to-compete in \textit{Securities Acceptance} followed the language of the covenant in \textit{Personal Finance}, the covenant might have been upheld at least with respect to the time restriction specified in the covenant. The covenant in \textit{Personal Finance} prohibited the employee from competing "in any city or the environs or trade territory thereof in which I shall have been located or employed within one year prior to such termination."\(^{29}\)

Many Nebraska cases have been decided since \textit{Securities Acceptance}, and most Nebraska cases have found the covenant-not-to-compete invalid. Either the court found no reason for the employer to have any need of protection or found some defect in the restriction in terms of space or time. For example, in \textit{Diamond Match Division of Diamond International Corp. v. Bernstein},\(^{30}\) the court refused to uphold a covenant which would have restricted an ordinary match salesman from becoming employed by a competitor because the employer did not need special protection.\(^{31}\) The Nebraska Supreme Court reasoned that, although the plaintiff's business was highly competitive and salesmen routinely competed for the same customers, no trade secrets were involved, and customer lists and prices were known to all competitors. Furthermore, the court noted that the salesmen required no unusual training and there was, in fact, substantial turnover among salesmen. Additionally, the court noted that the defendant had no unusual or unique talents and was simply a hard worker. The

\(^{28}\) \textit{Securities Acceptance}, 171 Neb. at 424, 106 N.W.2d at 467.


\(^{30}\) 196 Neb. 452, 243 N.W.2d 764 (1976).

court stated if the defendant was not employed by a competitor, some
other salesman with presumably equal ability would be. The court
held that the covenant-not-to-compete would do little to restrict the
plaintiff company's ordinary competition. The covenant, then, would
serve only to impose undue hardship upon the defendant salesman,
while failing to protect the plaintiff from unfair or improper
competition.\footnote{32}

Again, in Brewer v. Tracy,\footnote{33} the Nebraska Supreme Court refused
to enforce the covenant-not-to-compete between an employee and his
employer. In Brewer, an employee who drove a garbage truck was re-
stricted, following the employee's termination, from working for a
competitor located within fifteen miles of Hebron, Nebraska, for a pe-
riod of five years.\footnote{34} The lower court refused to uphold the covenant,
concluding that it was invalid on the basis of both time and territorial
restrictions.

The Nebraska Supreme Court upheld the trial court's refusal to
enforce the covenant. The supreme court questioned whether there
was a need for an employer in the trash hauling business to have this
kind of protection. The court also agreed with the trial court that five
years was an unreasonable amount of time to restrict the "right of the
working man to labor."\footnote{35} The court concluded that the territorial re-
striction was simply too broad, stating that "a [covenant which re-
stricts] a laborer from engaging in an occupation, if valid at all, must
be restricted to the area in which the personal service was per-
formed."\footnote{36} The court determined that nothing in the record would jus-
tify a restriction on the defendant-employee engaging in the trash
hauling business in the nine other communities within the territorial
restriction, communities in which neither the plaintiff-employer nor
the employee had ever worked.

In 1982, the Nebraska Supreme Court decided a significant case,
Philip G. Johnson & Co. v. Salmen.\footnote{37} In Johnson, Salmen was an
accountant in Grand Island and worked as a sole practitioner. Sal-
men subsequently merged his practice with that of a larger accounting
firm, Philip G. Johnson & Co., which operated offices in eight different
Nebraska cities. Salmen became a partner and worked out of the Has-
tings office. The partnership agreement provided that a withdrawing
partner would not, during a three year period after withdrawal, solic-
t or accept professional engagements from clients or former clients of

\begin{itemize}
  \item \footnote{32} Diamond Match, 196 Neb. at 456, 243 N.W.2d at 766-67.
  \item \footnote{33} 198 Neb. 503, 253 N.W.2d 319 (1977).
  \item \footnote{34} Brewer v. Tracy, 198 Neb. 503, 504, 253 N.W.2d 319, 320-21 (1977).
  \item \footnote{35} Brewer, 198 Neb. at 506, 253 N.W.2d at 322.
  \item \footnote{36} Id.
  \item \footnote{37} 211 Neb. 123, 317 N.W.2d 900 (1982).
\end{itemize}
the partnership, or from offices and agents of such clients. In the event that the covenant was breached, the withdrawing partner would have to pay certain fees to the partnership. Salmen withdrew from the partnership and subsequently serviced clients who were previously serviced by Johnson. Johnson brought an accounting action against Salmen based upon the partnership agreement. Although this author recognizes an argument can be made that the withdrawal of a partner is more akin to a sale of a business than it is to an employer-employee relationship, the supreme court in Johnson noted that “a partner with such a minor interest as that held by Salmen is in a real sense no different than an employee.”

The covenant-not-to-compete in Johnson was essentially an agreement not to solicit former or present partnership clients for three years, which did not include a territorial restriction. The covenant did not restrict Salmen from the practice of accounting, but only from soliciting and servicing clients or former clients of Johnson. Nevertheless, the court invalidated the covenant as being too broad because it restricted Salmen from earning fees from clients or former clients with whom Salmen may have never worked. The court stated “[w]hatever interest Johnson may have in its present clients, it certainly can have none in its former clients; in any event, the forfeiture of fees is not limited to those generated from serving Johnson clients in Hastings, where Salmen rendered his personal services.” Although the court noted that the accounting practice may require accountants to serve clients in cities other than where the accountant’s offices are located, in the case at hand, the restriction included former Johnson clients and clients which Salmen had not served and did not know. On that ground alone, the court held the covenant was impermissibly broad. The significance is that the court recognized a valid covenant in an employment contract may only extend to soliciting clients or customers with whom the employee had a personal connection. Therefore, because the covenant restricted Salmen from contacting clients or former clients of the partnership that he never knew or never worked for, the covenant was too broad and consequently, invalid.

In Johnson, the plaintiff argued that a court should have the power to modify a restrictive covenant if it was too broad. However, the Nebraska Supreme Court declined to follow this suggestion. It noted that in Securities Acceptance and Brewer, the court did not modify the agreement. The court concluded:

39. Johnson, 211 Neb. at 129, 317 N.W.2d at 904.
Whatever might be the situation in an appropriate case, the instant matter is not one wherein we are disposed, should we ever be, to rewrite the contract. Far too many variables are involved; among them are geographical area, period of time, classes of clients, percentage of fees to be forfeited, and to whom such fees must be paid.\textsuperscript{40}

Two months after Johnson was decided, the Nebraska Supreme Court seemed to have a slight shift of gears. In Dana F. Cole & Co. v. Byerly,\textsuperscript{41} a case which also dealt with the practice of accounting, the Nebraska Supreme Court upheld a covenant-not-to-compete.\textsuperscript{42} In Cole, Byerly was an employee-manager who signed an agreement wherein, for a period of two years following termination of his employment, Byerly would not compete within a radius of seventy-five miles from the city limits of Atkinson, Nebraska. Trial testimony showed that when various managers had left branch offices, the employer usually lost 40\% of its clients in that area. Thus, the employer felt that it needed protection. Testimony also indicated that 70\% to 80\% of employer's clients were located within the seventy-five mile radius territory. The court noted that the employer had the need to protect itself from the risk of an office manager taking clients with him when he left its employ. While the court was concerned that trade area subject to control under the covenant seemed broad, no evidence was introduced to show that the area was actually smaller. The court nevertheless concluded that the covenant was valid, stating:

\begin{quote}
On the basis of the evidence adduced at the trial, we find that the contract between the plaintiff and the defendant is valid. The evidence shows that the branch managers have a very personal relationship with the clients served. On the basis of past experience, Dana F. Cole & Company had the need to protect itself from the risk of an office manager taking clients with him when he left its employ. While the trade area within which the covenant controls seems broad, there is no evidence introduced which would show that the area is actually smaller. In fact, Mr. Hinze testified that 75 to 80 percent of the clients were located in the 75-mile radius. There is no inequality in bargaining power, and even though enforcing the covenant against Mr. Byerly would impose a burden upon him, it is still reasonable in light of the evidence produced.\textsuperscript{43}
\end{quote}

For many years after Johnson and Cole were decided, a seesaw existed as to which opinion had the greater influence. The Nebraska

\textsuperscript{40} Id. at 131, 317 N.W.2d at 905.
\textsuperscript{41} 211 Neb. 903, 320 N.W.2d 916 (1982).
\textsuperscript{42} Dana F. Cole & Co. v. Byerly, 211 Neb. 903, 907, 320 N.W.2d 916, 919 (1982).
\textsuperscript{43} Cole, 211 Neb. at 907, 320 N.W.2d at 918-19.
Supreme Court in *Boisen v. Petersen Flying Service, Inc.* mentioned and acknowledged both the Johnson and Cole opinions. Boisen was a crop spraying pilot for Petersen Flying Service. Boisen signed a covenant which provided that if he left Petersen, he would not work for Peterson’s competitors within fifty miles of Minden, Nebraska for a period of ten years. When Boisen was terminated, he brought suit for declaratory judgment to invalidate the covenant.

The Nebraska Supreme Court found no legitimate reason for the covenant. The court said that covenants-not-to-compete are not valid to protect an employer from “ordinary competition” but only from “unfair competition.” Thus, the court’s analysis centered on determining what constituted unfair competition. The court focused on an employee’s opportunity to appropriate the employer’s goodwill by initiating personal contacts with the employer’s customers. The court stated “[w]here an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee’s resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition.” The court also recognized an employer may have a legitimate need for protection if confidential information or trade secrets are involved. However, in this case, goodwill was irrelevant because Boisen had little contact with Petersen’s customers, a prerequisite for developing goodwill. In addition, Boisen did not hold any confidential information or trade secrets. The court concluded that Petersen’s objective in the covenant-not-to-compete was the prevention of prospective competition which would ultimately reduce its revenue. The court simply stated, “[a] covenant-not-to-compete, as a partial restraint of trade, is available to prevent unfair competition by a former employee but is not available to shield an employer against ordinary competition.”

44. 222 Neb. 239, 383 N.W.2d 29 (1986).
47. *Boisen*, 222 Neb. at 247-48, 383 N.W.2d at 34-35.
cluded that, under the circumstances, the covenant in question did not protect a "legitimate business interest" and was, therefore, invalid as unreasonable.

The Nebraska Supreme Court expounded on the use of covenants-not-to-compete when protecting against unfair competition in *American Security Services, Inc. v. Vodra*.\(^48\) In *American Security*, Vodra signed a covenant-not-to-compete with American Security Services, Inc. ("American Security"). Vodra agreed that, for a period of three years following employment termination, he would not solicit business from any customer or former customer of American Security where he had: (1) worked upon the customer's premises; (2) acted in a supervisory capacity in regard to those premises; or (3) acted as a salesman for American Security in securing the customer's business. Vodra was involved with only two customers; the Nebraska State Fair and Fonner Park, a race track in Grand Island. After Vodra left American Security, he secured a contract with Fonner Park for himself. Of importance to this case was the fact Vodra was unsuccessful in securing a contract with Fonner Park while he was employed with American Security.

The court in *American Security* discussed the distinction between unfair competition and ordinary competition analyzed previously in the *Boisen* case. In so commenting, the court stated that "a key for distinguishing 'unfair competition' from 'ordinary competition' is an employee's appropriation of 'goodwill' properly belonging to the employer."\(^49\) The court continued:

> In reference to an employer-customer relationship, goodwill is that "[v]alue which results from the probability that old customers will continue to trade or deal with the members of an established concern. [Good will] is the probability that old customers will resort to the old place or seek old friends, and the likelihood of new customers being attracted to well advertised and favorably known services."\(^50\)

The court concluded that Vodra's attempts to capitalize on American Security's expenditures of time and effort encouraged unfair competition by appropriating American Security's goodwill to Vodra. The court pointed out that the covenant was only a non-solicitation agreement involving only two customers; Fonner Park and the State Fair Grounds. As far as time went, the court found the three-year restriction reasonable. The court found that Vodra was young, unmarried

\(^{48}\) 222 Neb. 480, 492, 385 N.W.2d 73, 81 (1986).


\(^{50}\) *American Sec.*, 222 Neb. at 487, 385 N.W.2d at 78 (quoting *Jackson v. Caldwell*, 415 P.2d 667, 670 (Utah 1966)).
and in good health and, therefore, the covenant would not be a hardship for him. Interestingly, the court pointed out that American Security had also acted in good faith, whereas Vodra had not. Thus, the supreme court found that the covenant which Vodra had signed was reasonable and, therefore, enforceable.

B. THE DEMISE OF TERRITORIAL RERAINTS IN EMPLOYMENT CONTRACTS

Then in 1987, in Polly v. Ray D. Hilderman & Co., the Nebraska Supreme Court took a turn towards substantially narrowing the conditions under which the covenant-not-to-compete might be deemed valid. Like the Johnson and Cole cases, Polly involved employment in an accounting practice. Polly was an accountant who became an employee of Roy D. Hilderman & Co. ("Hilderman"). Polly was paid a bonus upon bringing his clients to Hilderman. However, when the bonuses stopped upon termination of Polly’s employment with Hilderman, Polly filed suit. Hilderman attempted to defend on the basis of a restrictive covenant in the written employment contract between the parties. The employment contract appeared to prohibit Polly from practicing accounting or bookkeeping for three years within thirty-five miles of any of the three offices maintained by Hilderman.

While the court found that Hilderman had a legitimate business interest in customer goodwill which it could protect using a post-employment covenant-not-to-compete, the court nevertheless found the covenant unreasonable. Citing Johnson, Cole, and American Security, the court held that the restrictive covenant was invalid because it operated to restrict Polly from soliciting or working for Hilderman’s clients with whom Polly had not worked for and did not even know. The court further held that the scope of the covenant-not-to-compete was greater than was reasonably necessary to protect Hilderman’s legitimate interest in customer goodwill and was, thus, unenforceable. The supreme court in Polly reiterated its holding in Boisen in which the court determined that one of the reasons a covenant-not-to-compete is unreasonable and unenforceable was because the employee had no personal and business-based contact with the employer’s customers or prospective customers. The court held that “[s]uch a covenant may be valid only if it restricts the former employee from working for or soliciting the former employer’s clients or accounts with whom the former employee actually did business and has personal contact.”

While the court’s action invalidating the covenant in *Polly* may have been correct based upon the precedent of *Securities Acceptance* and *Brewer*, the court’s characterization and understanding of the previous cases was wrong. As can be seen in the quote from *Polly*, the court was now suggesting that the only valid restrictive covenants would be those covenants prohibiting solicitation of previously existing customers or clients with whom the employee had personal contact.

The court’s reasoning is inconsistent with the *Cole* decision. In *Cole*, the territorial restraint was upheld because it was conceivable that the employee-manager could solicit business from some clients, both old and new, with whom he had no previous relationship. A territorial restriction implies that both old and new clients, for a period of time, cannot be solicited by the employee, whether or not the employee had prior contact with them. Therefore, a territorial restraint, by its very nature, does not fit within the court’s reasoning in *Polly*.

The *Polly* court was also wrong in its understanding of the nature of goodwill. It did not carefully examine its opinion in *American Security*, wherein the Nebraska Supreme Court stated that goodwill “is the probability that old customers will resort to the old place or seek old friends, and the likelihood of new customers being attracted to well advertised and favorably known services.” It would be incorrect to confine goodwill only to old customers. Goodwill is related to reputation which also influences the decisions of new customers. It is reputation, combined with the delivery of personal service, that should establish an employer’s need for protection.

In *Vlasin v. Len Johnson & Co., Inc.*, the reasoning in *Polly* was applied to defeat a covenant-not-to-compete. Vlasin was an insurance salesman who was promoted to a general manager. Upon his promotion, Vlasin entered into a management agreement that contained a covenant where, upon termination with Johnson, he would not enter into the insurance business within a fifty mile radius of the City of Ogallala. Vlasin later left his employment after Johnson was purchased by another insurance company. Vlasin petitioned for declaratory judgment attacking the restrictive covenant. While the court thought there was justification for a restrictive covenant because Vlasin had the opportunity to appropriate customer goodwill, it nevertheless held that the covenant was too broad and unenforceable. In the court’s opinion, territorial restraints were no longer valid, citing the *Polly* case. The court decided the case without addressing the rea-

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53. *American Sec.*, 222 Neb. at 487, 385 N.W.2d at 78 (citation omitted) (emphasis added).
sonableness of either the time or territorial restraints. Rather, the supreme court held that because the covenant attempted to restrict Vlasin from soliciting or working with anyone, not merely those Johnson clients with whom Vlasin did business and had personal contact, the scope of the covenant was greater than reasonably necessary to protect Johnson's legitimate interest in customer goodwill, and was, therefore, unreasonable and unenforceable.55

The thinking in Polly and Vlasin was reaffirmed in the case of Whitten, D.D.S., P.C. v. Malcolm.56 In Malcolm, a young dentist, Malcolm, was hired by an established dentist, Whitten. Malcolm signed a covenant-not-to-compete prohibiting Malcolm from competing with Whitten, upon termination of the relationship, within a twenty-five mile radius of Whitten's offices in Falls City, Nebraska, and Sabetha, Kansas. The opinion is not clear as to whether Malcolm worked in both offices or only the office in Falls City. However, the court, looking solely to the Polly and Vlasin opinions, condemned the very existence of territorial restrictions and held the covenant invalid. The court in Malcolm again recited the general rule from Polly: A covenant-not-to-compete may be valid only if it restricts the former employee from working for, or soliciting, the former employer's clients with whom the former employee actually did business and had personal contact. But the court recognized that the covenant prohibited Malcolm from practicing dentistry in any type of business entity within a twenty-five mile radius, even though Whitten did not treat every individual within the twenty-five mile radius. The court did not find it necessary to determine whether the one year time limitation, or the twenty-five mile radius territorial restriction, was reasonable because the agreement was invalid on grounds that it did not limit Whitten's interest to protection of his existing client base. The court held that because Malcolm was restricted from working with anyone in the described area, the covenant was unreasonably broad in protecting the legitimate business in customer goodwill, and thus was overreaching and unenforceable.57

Subsequent to Malcolm, the language used by the Nebraska Supreme Court in Presto-X-Co. v. Beller suggests that territorial restrictions, at least in regards to covenants-not-to-compete in the context of employment, are dead in Nebraska. Presto-X-Co. did not involve employment, but, rather, the sale of a business. The court in Presto-X-Co. again explained that covenants-not-to-compete in em-

Employment agreements are valid only if the covenant restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and had personal contact. The court distinguished between employment situations and the sale of a business when it stated that "[w]e have narrowly defined the permissible scope of covenants-not-to-compete contained in employment agreements to include only this form of 'customer specific' restraint."59 But with respect to covenants-not-to-compete ancillary to the sale of a business, the supreme court noted that a different test is used, and that this test is not as narrow as the one used for covenants-not-to-compete related to employment. For example, the court noted where the sale of a business involves a list of specifically identified customers, as was the case in Presto-X-Co., there may be legitimate reasons why the purchaser must also restrict the seller from competing in a reasonably defined geographic area to protect the benefit of his bargain.60

In sum, although Dow and Cole were never overruled, the distinct impression from the Polly, Vlasin and Whitten opinions is that territorial restraints are no longer valid in employment cases. Covenants-not-to-compete are only allowed in employment contracts when dealing with non-solicitation agreements involving former or present clients/customers. The problem is that the opinion in Presto-X-Co. did not give any reasoned analysis for why there should be any distinction between employment and the sale of a business in regard to territorial restrictions. I can think of none.

C. A WORD ABOUT TERRITORIAL RESTRICTIONS ANCILLARY TO THE SALE OF A BUSINESS

The Nebraska courts have been more willing to uphold covenants-not-to-compete ancillary to the sale of a business. The Nebraska courts have generally been more willing to uphold promises to refrain from competition made in connection with the sale of goodwill than those made in connection with contracts of employment.61 Nebraska has recognized the legitimate need of one who purchases a business to reasonably protect himself against competition from the seller. The purchase of the property and business of another, in itself, is sufficient consideration to support a covenant-not-to-compete in the same business arena in the same vicinity. Such covenants will not be found un-

reasonable "when they are ancillary to any valid contract made in
good faith and are apparently necessary to reasonably protect the par-
ties, or either of them." 62

Nevertheless, the covenant-not-to-compete in Presto-X-Co. was
struck down by the Nebraska Supreme Court. The contract involved
the sale of a pest control business and a covenant which restricted the
seller from competing for a period of ten years or within one hundred
miles radius of the existing trade area, i.e., Columbus, Nebraska, ser-
viced by the seller. 63

While, as a matter of legal principle, Nebraska courts recognize
the validity of territorial restrictions, the court in Presto-X-Co. struck
down the covenant involved because the record did not present any
evidence that either the time or the territorial restriction was reason-
able. In spite of Presto-X's argument that the industry standard was
a ten year restriction on competition with the buyer of a business, the
court stated that no evidence had been presented to support the ten-
year restraint as being necessary to protect goodwill. In fact, the only
relevant evidence of an industry standard was a five-year restriction
on a business seller from contacting former clients. The court ac-
knowledged its previous holdings where such restraint was considered
reasonable when securing the "useful life" of a sold customer list. How-
ever, in the instant case, there was no evidence suggesting that a
ten-year restriction was reasonably necessary to protect the goodwill
purchased by the buyer. 64

Likewise, the court held that the record failed to establish that
the covenant-not-to-compete was reasonable in territorial scope. The
covenant defined the territorial scope as 100 miles of the existing
trade area served by Beller. Because Beller serviced accounts in Co-
lumbus, Norfolk, Albion, Seward, Fullerton, Schuyler, and Fremont
prior to the sale, Presto-X contended that Beller was precluded by the
covenant from engaging in the pest control business within a 100-mile
radius of each of those communities. While there may have been a
plausible basis for restricting competition within the trade area actu-
ally served by Beller, the record did not support why Presto-X needed
to restrain competition 100 miles around each of the named locations
in order to protect the value of the assets purchased. 65 The court con-
cluded that the covenant was unenforceable because:

[T]he scope and duration of the restraint on competition im-
posed by the covenant-not-to-compete ancillary to the sale of

62. Presto-X-Co., 253 Neb. at 60-61, 568 N.W.2d at 238.
63. Id. at 57, 568 N.W.2d at 236-37.
64. Id. at 63-64, 568 N.W.2d at 240.
65. Id.
Beller's business was greater than reasonably necessary to protect the legitimate business interests of Presto-X. Therefore, the covenant is contrary to public policy and void. An unreasonable covenant-not-to-compete is of no effect, and its scope cannot be judicially reformed in order to make it enforceable.66

To require some evidence that a specific restriction is reasonable would appear to be a logical requirement. However, what may seem logical to a lawyer is not always what may seem practical to a businessman. Contracts involving the sale of a business, including covenants-not-to-compete, are products of negotiation. Various items in the contract may not be based upon objective facts. Rather, they are based upon experience, intuition and the art of bargaining. In many instances, particularly in the sale of small businesses, it may be doubtful whether the parties involved have performed any economic analysis that would justify a particular time or territorial restriction.

The possibility exists, therefore, that the opinion in Presto-X-Co. may become problematic for time and territorial restrictions contained in contracts involving the sale of businesses. The prudent lawyer should advise his clients to endeavor in being objective when negotiating contracts of this kind and that some record be kept supporting why particular restrictions were adopted by the parties.

D. THE POSSIBLE RESURRECTION OF TERRITORIAL RESTRAINTS

Nevertheless, any announcement of the demise of this concept would be, perhaps, premature. Several months before the opinion in Presto-X-Co., the Nebraska Supreme Court decided the case of Moore v. Eggers Consulting Co., Inc.67 Moore was employed as a personnel recruiter for Eggers, a personnel placement business. Moore signed an employment contract with a covenant containing both a non-solicitation provision and a territorial restriction. The non-solicitation provision prohibited Moore from soliciting "any client of the employer with whom the employee worked or called upon or has knowledge of because of his employment by the employer during the last three (3) years of employment with the employer, where such business opportunity would be in any way competitive with the employer."68 The covenant also restricted Moore from competing anywhere in the continental United States. The covenant-not-to-compete sought to re-

66. Id. at 65, 568 N.W.2d at 241.
strict Moore from soliciting or working for any client of Eggers that Moore had knowledge of, including those that Moore did not personally work with and had never met. The court held that the scope of the covenant was too broad because Moore was prohibited from entering into business with anyone he had knowledge of, instead of only Eggers' clients with whom Moore had conducted business and had personal contact. Interestingly, the court noted that Moore, while employed by Eggers, focused almost exclusively on placements in the Midwest. The court stated that "[w]ithout any explanation for the reason that the geographical restriction should include the continental United States, it is clear that preventing Moore from working anywhere in the continental United States is greater than is reasonably necessary to protect Eggers' legitimate business interest . . . and is, therefore, unreasonable and unenforceable."69

What is interesting about the foregoing language is the court's consideration of the unreasonable nature of the territorial restriction, i.e., the continental United States. Why did the court discuss territorial restrictions in a case involving an employment contract? After all, if territorial restraints were no longer valid in employment covenants after the decisions in Polly, Vlasin, and Whitten, it should have been irrelevant as to whether the territorial restriction was too broad. Although the court invalidated this particular covenant on other grounds, the court's "geography" discussion may indicate that the court was having second thoughts about territorial restrictions.

The latest case on this subject, Professional Business Services Co. v. Rosno,70 suggests that the court may indeed be in the process of changing its mind. This case, like so many previous cases, also involved employment in the accounting practice. Rosno entered into an agreement with Professional Business Services Co. ("PBS") to provide accounting services. The contract contained, among other things, the following covenant:

Rosno further covenants and agrees that in the event of the termination of his employment, for whatever reason, he shall not directly or indirectly solicit, contact or perform services for any of Employer's clients for his own benefit or as an officer, director, shareholder, partner, advisor, consultant or employee of any third party. Said Post-Term Covenant shall continue for a period of two (2) years following such termination or separation for any reason whatsoever and shall in-

69. Moore, 252 Neb. at 403, 562 N.W.2d at 540.
70. 256 Neb. 217, 589 N.W.2d 826 (1999).
clude the area located within twenty-five (25) miles of Lincoln, Nebraska.71

After Rosno’s employment ended, PBS sued Rosno for violation of this covenant. The trial court dismissed the case on the basis of the Moore opinion, with its prohibition of unreasonable no-solicitation agreements. The Nebraska Supreme Court reversed the trial court’s ruling, holding that PBS had stated a cause of action and that such a covenant could conceivably be valid. The supreme court discussed Moore, noting that the opinion implied the recognition of the validity of territorial restrictions, although the specific limitations in Moore were too broad. The court concluded that PBS should be allowed to proceed with its lawsuit because the petition alleged that Rosno had substantial contact with virtually all of PBS’ clients. If Rosno was being restricted from working for or soliciting PBS’ clients with whom he actually conducted business and had personal contact, then the covenant-not-to-compete with respect to all of PBS’ clients could be enforceable. The court, therefore, concluded that the allegations in the petition “indicate[d] that the noncompete covenant may be proper . . . .”72

It should be noted that the covenant in Rosno might not have actually been a territorial restraint at all, but merely a non-solicitation agreement with a territorial limitation. However, contrary to the actual wording of the covenant, both the parties and the court apparently framed the issue in the case on the assumption that they were dealing with a territorial restriction. Therefore, the opinion in Rosno is of significant importance regardless of the actual wording of the covenant in this case.

E. CONFUSION

In citing Cole with approval, the court in Rosno signaled that territorial restrictions are not dead in Nebraska. Assuming there is life still left in territorial restrictions contained in employment covenants-not-to-compete, the question remains as to how much life and what guidance exists for the legal draftsman? Thus, the Rosno opinion raises many unanswerable questions.

The Rosno court stated that Cole was an exception to the general rule announced in Polly; that an employment covenant “may be valid only if it restricts the former employee from working for or soliciting the former employer’s clients or accounts with whom the former em-

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72. Rosno, 256 Neb. at 227, 589 N.W.2d at 833.
ployee actually did business and has personal contact.” The court distinguished Polly from Moore by stating that Polly set forth a “general rule,” thus implying that the rule was not absolute. It then noted that the court in Polly “observed that Cole, by virtue of its facts, presented an exception to the general rule.” The question then becomes: Why is this an exception? What is the basis for determining the exception? Is the exception only open to accountants and accounting firms, or are there other occupations that might fit into this exception to the general rule?

Furthermore, is it necessary to prove that, in order for a territorial restriction to be valid in an employment covenant-not-to-compete, the employee must have had personal contact with virtually all existing customers? Such a requirement cannot be reconciled with the very nature of territorial restrictions in covenants-not-to-compete. Territorial restraints are a blanket prohibition rather than something that is customer specific. Understandably, there may be legitimate reasons for such a restriction. For example, the court in Presto-X recognized that “there may be legitimate reasons why the purchaser must also restrict the seller from competing in a reasonably defined geographic area in order to protect the benefit of his bargain.” Why should the rationale in Polly not be equally applicable to an employer in an employment situation?

If the goodwill of the employer, and its possible misappropriation by the employee, justifies the covenant, then a proper understanding of goodwill is required. Goodwill is the general reputation of the employer. The general reputation or goodwill of an employer embraces more than existing customers or clients with whom an employee has worked. It also embraces other existing customers and potential customers. While, in all likelihood, an employee's departure will have its greatest impact upon those customers with whom he has had contact, his leaving may also have a significant impact, in many situations, upon other existing customers and on potential customers. The ability of the employee to misappropriate that goodwill, i.e., reputation, should be the primary issue in determining whether the covenant-not-to-compete is valid.

While in many situations personal contact and personality will be of great significance, the Nebraska Supreme Court has over-emphasized this factor. Situations may exist in which an employee possesses confidential information or trade secrets and yet has had no contact

74. Rosno, 256 Neb. at 225-26, 589 N.W.2d at 832.
75. Id. at 226, 589 N.W.2d at 832.
with any customer. An employer might legitimately have the need for protection in a specific territory. For example, suppose a restaurant in the Omaha area imports, at great expense, a master chef from Paris. The expectation is that the chef would have great ability to enhance the restaurant’s reputation and increase the number of customers coming into the restaurant. Yet, the chef might never leave the kitchen, having no contact whatsoever, on a personal basis, with any customer. Or even if the chef did have personal contact with customers on occasion, who could keep track of whom all those people might be? Nevertheless, the restaurant should be justified in seeking to protect its investment in the chef by a covenant-not-to-compete. To be effective, such a covenant would have to be territorial in scope! In many situations, then, a territorial restriction makes more practical sense than a customer-specific or non-solicitation agreement.

CONCLUSION

The foregoing indicates that the current state of Nebraska law in this area is fraught with uncertainty. Given that the Nebraska Supreme Court will not easily change its view on reforming covenants of this kind, in equity, it would seem imperative that the Nebraska Supreme Court take a more critical view of the Nebraska case law in this area and clarify the law. It is unfair to businessmen, both employers and employees alike, and to legal draftsmen to have this state of confusion continue.

The Nebraska Supreme Court should recognize that its decisions in Polly, Vlasin, and Whitten are inconsistent with Dow, Cole and Rosno. As a matter of general legal principle and clarity, either reasonable territorial restrictions should be allowed or they should not. It makes no sense to say that they should be allowed for beauticians, loan officers and accountants, but not for dentists or insurance salesmen.

While one can argue the merits of territorial restrictions as a matter of general public policy, as a matter of judicial policy I believe that the Nebraska Supreme Court erred in its Polly, Vlasin, and Whitten decisions. By ignoring or misconstruing its own precedent, the court in those opinions indicated that it would only uphold non-solicitation restrictions but not territorial ones. This is surely an example of unnecessary judicial lawmaking. In terms of judicial policy, Whitten should be overruled, with Dow, Cole and Rosno regarded as the general rule rather than as the exception.

Additionally, a number of situations exist in which a territorial restriction would be more practical and make more sense logically than would a non-solicitation agreement. Previous customer contact is not the sole basis for goodwill nor the only reason why an employer
might need the benefit of a covenant-not-to-compete. For those situations, territorial restrictions should be recognized as valid.

Until the Nebraska Supreme Court clarifies its position on these matters, what should the practitioner do? A draftsman who wants to follow the safest possible approach would assume that, in an employment situation, Whitten is still the law and, therefore, draft only a non-solicitation agreement—if that is possible. An exception would exist only for accountants and, perhaps, beauticians and loan officers.

Of course, it is conceivable that a non-solicitation clause might not always work. A general manager might not have had close customer contact, but might nonetheless do serious damage to an employer if he or she went into competition. Therefore, the practitioner that is compelled to deal with a situation in which a non-solicitation agreement may not be that helpful, or the practitioner who is willing to be more risky, might consider drafting alternative restrictions, i.e., a covenant not to solicit and another defining a territorial restriction. The draftsman could then combine those two covenants with a severability clause. It is an established legal principle "that a stipulation [that] is unenforceable because of illegality does not affect the validity and enforceability of other stipulations in the agreement, provided they are severable from the invalid portion and capable of being construed divisibly."77 Thus, "the parties to a contract often insert a provision that if any part of the contract is subsequently found to be illegal, the remaining portion shall not be affected."78 Although the matter is not completely free from doubt,79 one would hope that the Nebraska Supreme Court would at least follow this general rule. Consequently, if the territorial restriction was subsequently rendered invalid, at least the covenant-not-to-solicit might stand a chance of surviving.

Also, if one is going to use a territorial restriction, whether in an employment contract or in a contract for the sale of a business, it is important to consult with the client so that the particular restrictions, drawn in terms of time and space, are reasonable and that some objective evidence of their reasonable nature is identified.

It is unfortunate to be so vague and uncertain when describing this situation. But, this is reality. I would like to assume that our courts will accept responsibility for this condition and dispel the clouds of confusion at the next judicial opportunity. If this is not done, then legislation should be seriously considered.

78. 1 WINSOR C. MOORE, NEBRASKA PRACTICE § 646 (1964).