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EMPLOYMENT LAW—THE ELUSIVE ENFORCEABILITY OF EMPLOYMENT COVENANTS NOT TO COMPETE IN ARKANSAS

I. INTRODUCTION

A generation ago, a company hiring a new employee had a reasonable chance of employing that individual until he retired.[1] Under these circumstances, the company could share its practices, training, customer lists, trade secrets, and other confidential information with its employees with relatively little fear that one day that information might be used by competitors to gain an unfair market advantage. Since employees hoped to spend their entire careers with the company, they had a strong incentive not to take any action that might harm their employer.

In the modern work environment, most employees expect to work for many different companies during their career.[2] Furthermore, the United States employment market has become more concentrated with higher skilled workers.[3] While there are many benefits to this new pattern, it forces companies to face a difficult decision when determining how much information and training to share with individual employees.[4] As a result, an increasing number of companies are requiring employees to sign covenants not to compete.[5] A covenant not to compete, or noncompete agreement, is "a promise, in a[n] . . . employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer."[6] Although employers can use covenants not to compete to protect their confidential information, when courts find these agreements unenforceable, it leaves the company vulnerable to its competitors.[7] By hiring another company's former employees, a competitor can acquire valuable trade secrets and customer relationships. Conversely, when the agreements are enforced, employees may be unable to find work in the industry in which they are most experienced, and as a result, mobility in employment markets decreases.[8]

Although covenants not to compete have become more significant due to the recent evolution in employment markets, the question of whether and to what extent such agreements are enforceable extends back over 500 years to British common law.[9] Due to conflicting interests, many courts have struggled to create a rule that can be fairly applied in all circumstances.[10] Both the employer and the employee have valid interests that are implicated

by these agreements.[11] The employer has a need to protect its trade secrets, confidential information, and customer relations.[12] On the other hand, the employee has a need to continue making a living in the industry where he is most skilled.[13]

Specifically, Arkansas courts have struggled to determine whether customer relationships are a protectable interest[14] and what may be included in a reasonable geographic limitation of a covenant not to compete.[15] Former employees can infringe on customer relationships in a few different ways: Former employees can solicit business from the clients they served while working for the employer, simply accept unsolicited business from these clients, or accept business from new clients who happen to live in a geographic area covered by the noncompete agreement. Geographic limits function differently depending on what interest is being protected by the covenant not to compete. Agreements intended to protect the employer's customer relationships may be inherently limited if they only cover the employer's clients. However, in agreements that prevent the employee from working for and sharing trade secrets with competitors, there is no such natural limit. In order to create predictable rules that protect the most important interests, Arkansas courts should enforce covenants not to compete that protect customer relationships from solicitation, and they should determine the reasonableness of geographic limits based on what employer interest is being protected.

This note will first discuss the history of covenants not to compete and the variety of interests courts have considered in evaluating the enforceability of these contracts.[16] Next, it will discuss how Arkansas courts have addressed covenants not to compete as well as the conflicts in Arkansas case law concerning two specific issues: (1) whether customer relationships and lists are a protectable interest, and (2) what geographic limitation is required for a valid covenant not to compete.[17] This note concludes that the rules employed in Arkansas cases are applied inconsistently due to conflicting policy concerns and result-oriented applications.[18] Although extremely conservative drafting can create an enforceable covenant not to compete, the current Arkansas rules force employers to leave parts of the business unprotected from unfair competition or risk the court invalidating the agreement. Consequently, the current Arkansas rules need to be revised, and this note proposes a solution that balances the various interests involved.[19]

II. BACKGROUND

The general principles underlying modern rules for covenants not to compete were developed at common law to address issues relevant at that time. However, over the past 500 years, modern issues have forced courts to attempt to adapt these principles. Different jurisdictions have taken different approaches. Arkansas courts evaluate the same basic aspects of covenants

not to compete as other jurisdictions, but, like most jurisdictions, Arkansas courts have developed their own case law on noncompete agreements.

A. Common Law

Originally, all covenants not to compete in employment agreements were unenforceable restraints on trade.[20] However, this is probably because the early decisions that created this rule involved cases of restraints that were unusual for their time in history.[21] Even the majority of these early cases that considered noncompete agreements unenforceable at least evaluated the "geographical scope, duration, or reasonableness in terms of the underlying facts" in determining that the agreements were invalid.[22]

As courts began to enforce some of these agreements, the framework that emerged for judging covenants not to compete was a balance between the employer's interest, the employee's interest, and the public's interest.[23] Although the specific rules have changed at various times in history and across various jurisdictions, these three interests are still the criteria upon which most jurisdictions build their rules for this area of law.[24]

B. Covenants Not To Compete In Modern Law

Today, covenants not to compete are still generally considered restraints on trade.[25] Under modern jurisprudence, however, restraints on competition, though often disfavored, are generally enforceable unless they are against public policy.[26]

1. *Balance of Interests*

As mentioned above, under the law of most jurisdictions, the enforceability of covenants not to compete depends upon a balance between three interests: (1) the employer's interest, (2) the employee's interest, and (3) the public's interest.[27] Covenants not to compete are intended to protect employers from former employees who acquire valuable trade secrets, training, confidential information, or customer relationships during their employment and then seek to use it to gain an unfair advantage over the former employer.[28] Covenants not to compete, however, cannot be used to protect an employer from ordinary, fair competition.[29] Interests of employees that should be guarded when evaluating covenants not to compete include limitations on future employment and expertise acquired prior to employment.[30] Public interests that warrant consideration mirror those of the employee in having access to the best jobs and income potential given the employee's experience and expertise.[31] In order to create covenants not to compete that effectively balance these interests, most jurisdictions require that covenants not to compete be limited in duration and applicable geographic area.[32]

2. *Statutes and the Blue Pencil Doctrine*

Although some jurisdictions have created statutes to determine whether and when covenants not to compete are enforceable,[33] many of those jurisdictions have encountered similar problems as the jurisdictions in which only case law exists.[34] Also, courts in some jurisdictions employ the "blue pencil doctrine."[35] Under this rule, when dealing with unreasonable and otherwise void covenants not to compete, courts can simply strike the unreasonable portions, when possible, leaving the rest of the agreement intact.[36] This allows the court to give effect to the reasonable provisions of the agreement without imposing unreasonable restraints on the employee.[37]

C. Arkansas Case Law

Arkansas does not have a statute outlining the rules regarding when covenants not to compete are to be enforced, so Arkansas courts have developed case law to handle these agreements.[38] Generally, Arkansas courts note that covenants not to compete are not favored by the law.[39] Originally, courts evaluated the enforceability of covenants not to compete using the broad rules for contracts in restraint of trade.[40] These rules required any restraints be reasonable, although no guidelines were given for what determined reasonableness.[41] It is commonly noted in cases that "[t]he enforceability of a covenant not to compete depends upon its reasonableness in light of the particular facts of the case."[42] This loose framework, however, has allowed Arkansas courts to be extremely inconsistent with regard to the factors they consider, how much weight they give to each, and what is necessary to satisfy each requirement. Furthermore, Arkansas does not use the blue pencil doctrine, so the agreements are either enforced in their entirety or not at all.[43]

Eventually, after several years of Arkansas courts issuing opinions without a framework for their decisions, the Arkansas Court of Appeals set out a specific rule for the enforceability of covenants not to compete in *Rebsamen Insurance v. Milton*.[44] The court held that "the employer must meet these three requirements: (1) the employer has a valid interest to protect; (2) the geographical restriction is not overly broad; and (3) a reasonable time limit is given."[45] However, the general rule that the reasonableness of each case be determined "in light of the particular facts of the case" is still applied to covenants not to compete.[46] Unfortunately, the courts have implemented this rule inconsistently, causing the state of the law to remain confusing and unpredictable.[47]

1. *General Principles*

Although the Arkansas cases are inconsistent on several issues in this area of the law, there are a few principles that the courts have either applied consistently or, at least, have never specifically held invalid. First, all the cases that consider which interests of the employer qualify as protectable reflect that, at a minimum, trade secrets, special training, and confidential information are valid protectable interests.[48] While the courts have not enforced all agreements including covenants not to compete that protect trade secrets, those that are not enforced are invalidated on other grounds.[49] Second, although the issue of geographic limitation is very murky, in the cases where the covenant not to compete was limited to solicitation of the clients with whom the employee had the opportunity to build a relationship, the geographic limit has been considered reasonable.[50] Finally, a time limit of two years or less is generally reasonable for a covenant not to compete.[51] Again, although there are cases where an agreement that contained a two-year restriction was not enforced, the holdings in those cases were based on either the geographic limitation or the interest protected by the agreement.[52]

While these guidelines provide a limited framework for an enforceable covenant not to compete, the criteria are so limited that any covenant fitting within these parameters leaves many employer interests unprotected. For instance, any employer seeking to protect trade secrets would not want to prevent an employee from merely interacting with the same clients again but would also want to prevent the employee from working for companies with whom the employer directly competes. Also, many employers whose salesmen are the primary face of the company cannot protect their interests unless covenants protecting customer relationships are enforceable—a point that is much disputed in Arkansas case law.

2. *Areas of Conflict*

There have been inconsistent holdings concerning two of the three elements for enforceable covenants not to compete in Arkansas: the valid interest of the employer and the reasonable geographic limitation. Although some of the perceived ambiguity can be reconciled by closer inspection of the holdings, some contradictions in the case law need to be resolved.

a. Valid interest of the employer: Customer relationships and lists

Whether customer relationships and lists are valid interests that warrant protection under Arkansas law is a critical issue. If they are valid interests, then businesses can significantly inhibit a former salesman from using his industry contacts in his future employment and from engaging in fair com-

petition.[53] For salesmen, these contacts are a significant portion of the benefit gained from their work experience in any given industry. Businesses are also able to interfere with the customers' right to choose what salesman or serviceman they want to use if customer relationships and lists constitute protectable interests.[54] If they are not protectable, however, employers whose primary interaction with clients is through salesmen or servicemen are left vulnerable to potential unfair competition from their former employees.[55] These employees will likely take customers with them if they leave the employer for another company.[56]

There are two ways that an employer can protect their customer relationships and lists: true non-compete agreements and non-solicitation agreements.[57] True non-compete agreements, when enforced, prevent the employee from competing at all in a given industry, in the stated geographical area, after employment. Non-solicitation agreements, however, only prevent the employee from soliciting business from former clients. The most significant result of this distinction is that non-compete agreements often force the employee to move or change industries after employment, but non-solicitation agreements do not.[58] As a result, in some states, non-solicitation clauses are more easily enforced than true non-compete agreements.[59] Although both types of agreements appear in Arkansas cases addressing covenants not to compete, the Arkansas courts do not differentiate between the two and, instead, deal with both of them under the same stated rules.[60]

i. *Cases determining that customer relationships are not a valid interest*

In several cases, Arkansas courts have held that an employer's interest in preventing a former employee from appropriating the employer's customers is not a valid interest. The Supreme Court of Arkansas looked exclusively at the interest the employer sought to protect in order to determine that a covenant not to compete was invalid in *Orkin Exterminating Co. v. Weaver*.[61] Weaver, a salesman for Orkin Exterminating Co., agreed not to compete with Orkin Exterminating in specific areas for two years after his employment.[62] The court determined that there were no trade secrets, confidential information, or special training involved and that, as a salesman, Weaver only had access to the customers he served.[63] The only employer interests involved were customer lists and relationships, which the court held were not valid protectable interests.[64] Therefore, the court concluded that the agreement attempted to protect Orkin Exterminating Co. from ordinary competition by former employees rather than unfair competition.[65] Accordingly, the court invalidated the agreement, stating that this type of protection is not available under Arkansas law.[66]

Similarly, in *Evans Laboratories, Inc. v. Melder*,[67] the Arkansas Supreme Court held that a covenant not to compete, which restricted a former

employee from accepting unsolicited business from a client that the employee serviced while working for the former employer, was invalid.[68] Here, the restriction was for two years, and the only interest discussed was the employer's relationship with its customers.[69] The court held that the agreement was invalid because the restriction preventing acceptance of unsolicited requests interfered with the "public's right to the availability of a serviceman it prefers to use" and was therefore an unreasonable restraint on trade.[70] While this particular holding does not prevent an employer from prohibiting an employee from soliciting business from the employer's clients, it significantly limits the employer's ability to protect the relationships that salesmen develop with customers.[71] Although not specifically stated, this case implies that without trade secrets to protect, a covenant not to compete designed to protect the employer's interest in a salesman's relationships with customers is unenforceable.[72] Consequently, this case also implies that customer relationships alone are not a protectable interest.

Finally, in *Rebsamen Insurance v. Milton*,[73] the Arkansas Court of Appeals determined that the employer's customer relationships were not a protectable interest.[74] When Milton began working for Rebsamen Insurance, he signed an agreement not to "engage in the business of insurance or any other business in which the Employer Rebsamen is engaged" for two years after his employment with Rebsamen.[75] Milton readily admitted that he had access to information about Rebsamen's customers and that he remembered when their policies expired.[76] However, because Milton was not employed by Rebsamen long enough to have developed customer relationships, and because the court found no trade secrets or company assets at risk, the court determined that the employer had no valid interests to protect.[77] Therefore, the agreement failed to satisfy the element requiring covenants not to compete to protect a valid interest of the employer.[78] Although *Rebsamen Insurance v. Milton* provided the current Arkansas rule specifically enumerating the three elements for a valid covenant not to compete, it also created questions regarding what circumstances satisfy those requirements.[79]

ii. *Cases determining that customer relationships are a valid interest*

In other cases, Arkansas courts have held exactly the opposite—that customer relationships *are* a protectable interest. *Borden, Inc. v. Smith*[80] required the Arkansas Supreme Court to consider a covenant not to compete that only protected customer relationships.[81] Although the court did not enforce the covenant not to compete in this case, it was not invalidated based on the interest the employer sought to protect.[82] The court noted that there were no trade secrets involved and that the only interest protected by the agreement was the customer relationships.[83] However, it did not view this as

grounds to nullify the agreement, implying that customer relationships are a protectable interest.[84]

In *Borden Inc. v. Huey*,[85] the court unmistakably held that customer relationships are vital interests of the employer, and they warrant protection.[86] Once again, Huey was a salesman who had no access to special training or trade secrets, but he did build relationships with Borden's customers.[87] Finding the covenant valid and enforceable, the court specifically noted the employer's vulnerability to former employee salesmen who have personally interacted with customers.[88] In fact, the court stated that "[t]he most important single asset of most businesses is their stock of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer."[89]

In *Girard v. Rebsamen Insurance Co.*,[90] the Arkansas Court of Appeals upheld a covenant not to compete that precluded a former employee from soliciting or accepting any business from any account that he served while working for the former employer.[91] As in the cases mentioned above, the covenant in this case protected only customer relations and not trade secrets or confidential information.[92] Relying on *Huey*, the court unequivocally determined that customer relations are a protectable interest.[93] Once more, in this case, the former employee, Girard, was a salesman who had direct contact with customers.[94] By signing the covenant not to compete, Girard agreed not to solicit or accept any insurance business from any account he serviced while working for his employer, Rebsamen, for a period of two years after his employment ended.[95] Despite previous holdings that might have implied differently, the court found this agreement enforceable.[96]

b. Geographic restrictions

The precise geographic area an employer can fairly shield from competition with a former employee has also caused much confusion in the case law. Case holdings range from refusing to enforce covenants not to compete that are limited to the geographic area where the employer competes to enforcing an agreement without any geographic restriction at all.

i. *Cases where agreements were invalidated for covering the entire area in which the employer operates*

The Arkansas Supreme Court held, in *Borden, Inc. v. Smith*, that the covenant not to compete was an unreasonable restraint on trade based solely upon the geographic area included.[97] The covenant not to compete in this case covered the entire trade area in which Borden, Inc. participated, which prohibited Smith from competing in at least fifty-nine counties in Arkansas.[98] The court noted that Smith's territory at the time of the trial only included three counties, and he only worked in two of those counties as an

employee of Borden, Inc.[99] As a result, the court held that the geographic restriction was unreasonable.[100]

Using similar logic, the court in *Borden, Inc. v. Huey* enforced a covenant not to compete that limited the geographic restriction to the county seats of the counties in which Huey had worked.[101] Notably, the court concluded that this geographic coverage was reasonable because it only included areas in which the employee actually worked.[102]

In 1999, the Arkansas Supreme Court decided *Bendinger v. Marshalltown Trowell Co.*,[103] a landmark case in the area of covenants not to compete.[104] The court held that a covenant not to compete was void due to over-breadth without a geographic restriction, even though Marshalltown was a national company.[105] Bendinger was an industrial engineer who worked for Marshalltown Trowell Co.[106] During his employment, he signed a covenant not to compete that restricted him from "directly or indirectly render[ing] service to a business competitor of [Marshalltown]" for two years following his employment.[107] When Marshalltown demoted Bendinger, he found a job with Kraft Tool Co. of Kansas, another company in the same industry.[108] Both Marshalltown and Kraft competed on a nationwide basis, so Marshalltown argued that it was reasonable for a covenant not to compete covering the entire nation to be enforceable.[109] The court disagreed, however, and refused to enforce the covenant not to compete.[110]

ii. *Cases where agreements that either covered the entire area where the employer operates or contained no geographic restriction were enforced*

In other cases, Arkansas courts have upheld covenants not to compete with broad geographic restrictions or even no geographic restriction at all. For example, the court in *Advanced Environmental Recycling Technologies, Inc. v. Advanced Control Solutions, Inc.*[111] upheld a covenant not to compete that covered the whole area in which the employer did business, which in this case was the entire state of Arkansas.[112] The covenant not to compete precluded the employee, a vice-president who performed electrical control work, from "directly compet[ing] with Employer" in any capacity for two years following the termination of employment.[113] Supporting its finding that the covenant not to compete was valid and enforceable, the court relied on evidence that Advanced Control Solutions actually did operate throughout the state of Arkansas.[114] Unlike the court in *Borden, Inc. v. Smith*, the court in this case did not even address whether the former employee had actually worked in all the areas covered by the agreement.[115]

The court also had to determine whether a covenant not to compete could be enforceable despite a complete lack of geographic restriction in *Girard v. Rebsamen Insurance Co*.[116] This case is frequently cited in support

of the claim that a covenant is not required to have a geographic restriction.[117] However, many cases have argued that *Girard's* holding has limited application due to the inherent geographic restriction built into the agreement.[118] Because Girard was only restricted from doing business with the customers of Rebsamen whom he had serviced while he was working for Rebsamen, the covenant could only apply to the geographic area where those customers were.[119] Therefore, although the court determined that this covenant was enforceable despite the lack of geographic restriction, this holding only stands for the principle that a geographic limitation is not necessary when the agreement is inherently limited.[120]

Freeman v. Brown Hiller, Inc.[121] also addressed the question of whether a covenant not to compete can be enforced without a geographic restriction.[122] During her employment with Brown Hiller, Freeman, an insurance-sales representative, signed a covenant not to compete that restricted her from soliciting any business from any customers of Brown Hiller after she resigned from the company.[123] The Arkansas Court of Appeals held that the agreement was valid and, comparing the case to *Girard*, stated that a geographic restriction was not necessary.[124] The court relied on the holding in *Girard* to distinguish this case from *Milton*, although it admitted that, unlike this case, *Girard* was limited to only the customers serviced by the former employee.[125] The court went on to state that the covenant not to compete in this case was much less broad than the one in *Milton* without stating how the two were different.[126]

III. ANALYSIS

"Hard cases . . . are apt to introduce bad law."[127] This principle applies particularly well to cases involving covenants not to compete. Although all the cases either quote the same rules for covenants not to compete or at least look to the same basic attributes, as shown above, the actual outcomes have been quite varied. In order to avoid disadvantaging employers or employees the courts have made result-oriented decisions. This approach has created an unpredictable area of law that burdens everyone. The Arkansas Supreme Court should make the hard choice to create predictable rules so that at least some parties, either employers or employees, are protected against the potential harms caused by these agreements. Furthermore, if the court creates predictable rules, then even the parties that are not protected by the new rules will at least have the benefit of knowing, at the time the agreement is made, that the court will not protect their interests.

Legislative action alone is not a complete solution to the problems in this area of the law. Although some states have opted to enact statutes governing when covenants not to compete should be enforced, unless courts enforce these statutes consistently, the same problems can arise under statutes as under case law.[128] While a statute could give lower courts and con-

tract drafters some guidance, resolution of the problems in this area of law would still require consistent application by the Arkansas Supreme Court and the Arkansas Court of Appeals, and the statute would still have to resolve the issues discussed in Part II. Therefore, while the best resolution requires either the legislature or the Arkansas Supreme Court to develop rules for covenants not to compete that can be consistently applied, the most important requirement for a complete solution to the problems in this area of the law is that the courts apply the new rules consistently.

A. Result-Oriented Analysis

In *Orkin Exterminating Co. v. Weaver*, the only element the court discussed in determining the validity of the agreement at issue was the interest protected, but the court also looked at the actual effect of Weaver's competition with Orkin Exterminating.[129] Significantly, the court noted that Weaver only stole, at most, eighteen of Orkin's 702 monthly customers.[130] Although the court never specifically stated that this was a sufficient reason to invalidate the agreement,[131] the court appeared to believe that enforcing the agreement in this situation would be unfair because the adverse effect on Orkin was so minimal.

Likewise, in *Borden, Inc. v. Huey*, in addition to the court's discussion of the geographic restriction, the time limit, and the interest protected, the court supported its decision by pointing to the actual harm the employee caused the employer by competing in the industry.[132] In this case, Borden, Inc. lost between $10,000 and $15,000 as a result.[133] Since this loss was significant, the court seemed to imply that invalidating the covenant not to compete would be inequitable.[134]

The *Girard* court acknowledged the conflict between its holding and the holding in *Milton.* In *Girard*, the court determined that customer relationships are a protectable interest, whereas the holding in *Milton* provided otherwise.[135] In an attempt to reconcile the two holdings, the *Girard* court pointed out all the distinguishing facts that made the agreement at issue less restrictive than the one in *Milton*.[136] However, the court did not reconcile the direct conflict between the two holdings concerning customer relationships.[137] If anything, by attempting to reconcile the two holdings through a comparison of distinguishing facts, the court implicitly admitted that it decided *Girard* based on what seemed most equitable in light of the distinguishing facts rather than a direct application of the stated rule.

Although *Freeman v. Brown Hiller, Inc.* was primarily concerned with geographic restrictions, the Arkansas Court of Appeals also attempted to distinguish its holding and the holding in *Girard* from the holding in *Milton.* In order to explain the respective outcomes, the court looked to all the other facts in the cases that made the results seem fair.[138] Rather than clarify the

logic of the decision, however, this explanation implied that the decision was actually result oriented.

Finally, in *Bendinger v. Marshalltown Trowell Co.*, the court stated that the noncompete agreement was overbroad due to the lack of a geographic limitation.[139] Interestingly, the court also specifically noted that the noncompete agreement in *Girard*, which was upheld despite its lack of geographic limit, was valid because it did not require the former employee to move to a different city in order to continue working in the same industry.[140] In *Bendinger*, however, the former employee was prevented from working in the industry at all for the two years following his employment with Marshalltown.[141] This implies that the employee's inability to continue working in the same industry was the primary reason the court invalidated the covenant not to compete.[142]

B. Proposed Resolutions

Given the inconsistencies illustrated above, the courts have essentially left companies without guidance as to what they can protect and how to protect it. In order to allow Arkansas businesses to create effective, reliable covenants not to compete, the Arkansas courts need to create a predictable framework for determining the enforceability of these agreements. Although this may inherently lead to some harsh decisions, such results will be exceptions rather than the norm. The average case will be fairer because both parties involved will be able to predict whether the agreement will be enforced. To do this, the courts will have to decide what interests are protected and what geographic restrictions are reasonable.

1. *Protectable Interests of the Employer*

To resolve these conflicts and determine whether customer relationships and lists are protectable interests, the court must resolve the conflict regarding what type of competition is unfair. There are two types of competition commonly addressed in these cases: accepting unsolicited business from former customers and soliciting business from clients with whom an individual worked while employed with another company. In the cases where the courts classified customer lists as a valid interest to protect, the court either implicitly or explicitly held that the resulting competition was unfair.[143] Correspondingly, in the cases where courts determined that customer lists and relationships are not valid interests to protect, the court considered the competition normal and fair.[144]

a. Accepting unsolicited business from former customers

If accepting unsolicited business from former customers is unfair competition, then customer relationships and lists are a protectable interest. This is true because accepting unsolicited business is the least invasive or competitive form of interaction a former employee could have with former clients. If this is unfair competition, then any other interaction would certainly be unfair competition as well, including soliciting business from former customers. Preventing this form of competition, however, is a highly invasive interference with the public's right to choose their salesman or serviceman.[145] Under this approach, even if a client decides of their own initiative that they would rather work with the former employee, they would be unable to so because the employee would be forced to decline their business. Although these clients would eventually be able to work with the former employee again, they would have to wait until the proscribed time limit in the covenant not to compete expired, which in Arkansas could be up to two years.[146]

Either way the courts decide this issue, there will be parties injured by the courts' enforcement of this rule. Nevertheless, it is still better for the courts to make a rule and enforce it uniformly so that the parties will be able to plan ahead, knowing how the courts will act. Although the cases have oscillated between *protecting all* customer relationships and not protecting any, the case that addressed the clearest example of an agreement prohibiting a former employee from accepting unsolicited business was *Milton.*[147] Milton agreed not to compete with Rebsamen in any business, and the court declined to enforce the agreement.[148] Although other issues complicated this holding, it is the most direct instruction that Arkansas courts have given on this point.

Going forward, the courts should follow *Milton* and decline to enforce agreements that prohibit accepting unsolicited business from former customers. Accepting unsolicited business should be considered normal competition because consumers should be free to choose the serviceman or salesman with whom they wish to do business. If a customer makes the unsolicited decision to change companies in order to continue working with a specific employee, then the customer is choosing based on the employee's talents, not the employer's product, and the customer should be allowed to make this decision. Furthermore, the employee should be allowed to benefit from his superior talents.

b. Soliciting business from clients with whom an individual worked while employed with another company

If accepting unsolicited business from former clients is *unfair competition*, then soliciting business from former clients would certainly be unfair

competition, and this point would not need to be addressed. If accepting unsolicited business is *normal, fair competition*, as suggested above,[149] then the courts still need to decide where they stand on soliciting such business. If the court determines that soliciting business from former clients is also normal, fair competition, then customer relationships and lists are clearly not a protectable interest because this is the most direct, invasive way that a former employee could take advantage of these interests.

Importantly, courts could still decide that soliciting business from former clients is unfair competition even if they decide that accepting unsolicited business from former clients is fair competition. In this situation, the courts would need to clarify that, while customer lists and relationships are valid, protectable interests, only non-solicitation agreements are reasonable means to protect these interests. Under this rule, agreements not to compete at all after employment would not be reasonable.

The most recent case addressing the split concerning whether to enforce non-solicitation agreements was *Freeman v. Brown Hiller, Inc.*[150] Although the court in this case considered important issues regarding geographic restrictions, it also addressed a covenant under which Freeman agreed not to solicit business from any of Brown Hiller, Inc.'s customers after her employment.[151] The court determined that the agreement was enforceable because customer relationships are a protectable interest and because the agreement was a reasonable means of protection.[152]

Courts should apply this rule going forward. Solicitation is the most invasive type of competition from former employees that employers face. If former employees are allowed to solicit business from the customers with whom they worked, the former employees will be allowed to gain all the benefit from contacts built by the employer, and employers will have no way to retain customers. Furthermore, if non-solicitation agreements were not enforceable, customer relationships could not be protected at all. As a result, agreements not to solicit business from former clients should be enforced because this kind of competition is unfair.

c. Length of employment

As the *Milton* court implied, whether the employee has sufficient time to develop the relationships in question can also effect whether it seems equitable to enforce a covenant not to compete.[153] Therefore, the court must determine whether it wants to make the length of employment a factor to consider when determining if customer relationships are a protectable interest. The court could rule that customer relationships are only protectable when the duration of employment meets a minimum time limit. However, because it is impossible to determine the length of time necessary to develop a significant relationship with a client, including this factor would create unpredictability in the application of this rule. If an important purpose of

law is to be predictable, then this rule is not advisable. Therefore, courts should not consider length of employment; rather they should simply enforce covenants not to compete that prevent solicitation of former clients. Under this rule, the holding in *Milton* might still stand, but it would have to be decided on different grounds.[154]

Under these proposed rules, covenants not to compete intended to protect customer relationships and lists must provide that the former employee is not allowed to solicit business from former clients. However, the agreement cannot prohibit the employee from accepting unsolicited business from former clients, or the agreement will be unenforceable. Furthermore, it does not matter how long the employee works for the employer; a short duration of employment will not render the agreement unenforceable.

Following the proposed rules, *Orkin Exterminating Co. v. Weaver* would be overturned. Since the covenant not to compete in *Weaver* was invalid because the court held that customer relationships were not a protectable interest,[155] the covenant would be enforceable under the proposed rules.

2. *Reasonable Geographic Restrictions*

The inconsistencies in enforceable geographic restrictions exist partly because different types of companies have different needs, and courts have seen that what is fair to protect in some industries prevents ordinary, fair competition in others.[156] In order to create equitable rules governing the geographic areas that covenants not to compete may cover, courts must differentiate between cases where the protected interest is only customer relationships and cases where the protected interest includes trade secrets, special training, or confidential information.

a. Geographic restrictions on covenants not to compete that protect only customer relationships and lists

For companies that use salesmen and servicemen, the interest protected by a covenant not to compete is often primarily customer relationships.[157] In such situations, it makes sense to base the geographic restriction on where the employee worked, the clients of the employer, or the clients that the employee served while working for the former employer.[158] As illustrated in *Borden, Inc. v. Smith* and *Borden, Inc. v. Huey*, any of these restrictions addresses the employer's vulnerability without preventing the employee from continuing to work in the industry.

Of the three potential rules mentioned above, which rule is the most logical depends on whether customer relationships alone are the protectable interest or whether the agreement is intended to protect customer lists as well. If customer relationships are the only interest in question, then the agreements should only cover the customers the employee served during his

employment. These are the only customers with whom the employee would have a relationship, so there is no need to include any other customers, whether they are customers of the employer or not, in the restriction.

Covenants not to compete that protect customer lists as well should be limited to the customers of the former employer. This rule is the most narrowly tailored to fit the needs of the parties. If the protected interest is customer relationships and lists, there is no need to prevent the former employee from doing business with customers inside a specific geographic area, but with whom neither the salesman nor the former employer have a relationship and who would not have appeared on any client lists. This rule also fully protects the employer by preventing the employee from using either customer relationships or customer lists to gain an unfair advantage. Conversely, limiting the restriction to only the clients served by the employee in these circumstances would allow the employee to take unfair advantage of access to customer lists after leaving the employment.

Although these restrictions may not be easily described in geographic terms, as illustrated by *Girard*, this type of restriction inherently limits the geographic area that a covenant can cover because clients are tied to the geographic area in which they live.[159] This eliminates the need for a specific geographic restriction in these cases. Therefore, in cases where the only interest protected is customer relationships, covenants not to compete should be limited to the clients served by the former employee, not by a geographic area. In cases where customer relationships *and lists* are the only interests, covenants not to compete should be limited to the clients of the former employer rather than by geographic boundaries.

c. Geographic restrictions on covenants not to compete that protect trade secrets, special training, or confidential information

When trade secrets, special training, and confidential information are protected by the covenant not to compete, the employer is really seeking to prevent competitors from benefitting from this unique information and training. Unlike customer relationships and lists, trade secrets, training techniques, and confidential information are not tied to the specific geographic area where the employee worked. [160] This information can be used to build a successful business anywhere. In these cases, because this information and training can be used anywhere, it is more logical to base the restriction on the area in which the former employer operates rather than the area in which the former employee worked. That is the only way to protect the employer from unfair competition.

Even given this distinction, Arkansas case law still has conflicts on this issue. This is reflected in *Advanced Environmental Recycling Technologies, Inc. v. Advanced Control Solutions, Inc.* and *Bendinger v. Marshalltown Trowell Co.*, both of which involved agreements not to work for a compet-

ing company. In *Advanced Environmental Recycling Technologies, Inc.*, the court upheld a covenant not to compete covering the entire area in which the former employer operated.[161] The court in *Bendinger*, however, declined to enforce a covenant because it completely precluded the employee from working in that industry.[162]

Given the large areas that companies can cover, in order to resolve the conflict on this point, the Arkansas Supreme Court must decide between two valid, competing interests. The court can either protect employers from unfair competition by a former employee, or protect employees from being precluded from working in a given industry for the length of time covered by the covenant not to compete.

The most recent case that the Arkansas Supreme Court has considered that addressed this point is *Bendinger*, in which the court decided to protect the employee's ability to work and not enforce the covenant not to compete.[163] Arkansas courts should adhere to the principles announced in this case because they provide the most equal protection for all parties. This rule allows employers to completely protect themselves against unfair competition by former employees as long as the protection will not completely prevent the employee from working in the United States. Simultaneously, this rule protects employees' ability to work in a given industry at all times. Although each party may desire more protection, neither party is forced to lose all protection. Therefore, where a covenant not to compete does not contain terms like those present in *Girard* that naturally limit the geographic scope,[164] the agreement should be void if it does not contain a geographic limitation. Furthermore, the geographic limitation should not include the entire nation, even if the company actually operates nationally. This allows companies to protect their trade secrets from competitors as long as doing so does not completely prevent an employee from continuing to work in the industry.

IV. CONCLUSION

Covenants not to compete require courts to balance many different and competing interests, a fact that has led to confusing and inconsistent applications in many jurisdictions.[165] Thus far, Arkansas case law has produced complicated and unpredictable holdings, so Arkansas courts need to create clear rules for the enforceability of covenants not to compete and then enforce those rules consistently. Specifically, the courts should enforce covenants that protect customer relationships and lists by precluding former employees from soliciting business from the customers of the former employer. However, the courts should not enforce covenants that prevent acceptance of unsolicited business. Also, Arkansas courts should require covenants not to compete to have geographic restrictions appropriate for the interest being protected. This means that the requirements for geographic limitations will

vary depending on whether the employer seeks to protect only customer relationships or lists or whether trade secrets, training, or confidential information is also present. Where the covenant not to compete only protects customer relationships, the agreement should be limited to the customers with whom the former employee had contact. Where the covenant not to compete only protects customer lists, it should be limited to customers of the employer. Finally, where the covenant protects trade secrets, training, or confidential information, the covenant not to compete should include a geographic limitation that, at most, confines the restriction to the area where the employer is involved in the industry in question, but the geographic restriction should be required to be smaller than the entire nation.

By applying these rules consistently, the Arkansas courts can create a predictable area of law that will allow employers and employees to protect their interests without resorting to speculation regarding what will and will not be enforceable.

Victoria J. Malony[*]

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1. *See* Norman D. Bishara, *Covenants Not To Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 292 (2006).
2. *See id.* at 292, 295–96 ("employees might leave the firm, strike out on their own, and compete with the firm that helped them develop valuable skills in the first place").
3. *Id.* at 295.
4. *See* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 627 (1960).
5. Bishara, *supra* note 1, at 295–297.
6. BLACK'S LAW DICTIONARY 161 (3d pocket ed. 2006); *accord* John M. Norwood, *Non Compete Agreements in Arkansas: Can They Be Enforced?*, 2009 ARK. L. NOTES 141, 141 (2009).
7. *See* Blake, *supra* note 4, at 627.
8. *See id*; Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 878 (2010).
9. *See* Blake, *supra* note 4, at 626.
10. *See* John W. Bowers, Stacey L. Katz & Charles W. Backs, *Covenants Not to Compete: Their Use and Enforcement in Indiana*, 31 VAL. U. L. REV. 65, 66 (1996) ("[C]ovenants not to compete still present vexing and complicated issues, often resulting in ambiguous and confusing precedent. This legal confusion stems at least in part from the tension between a person's freedom to contract and the public policy which invalidates restraints on trade.").
11. *See* Blake, *supra* note 4, at 627.
12. *See id.*
13. *See id*.
14. *See infra* Part II.C.2.a.
15. *See infra* Part II.C.2.b.
16. *See infra* Part II.A–B.
17. *See infra* Part II.C.
18. *See infra* Parts III.A, IV.

19. *See infra* Part III.B.
20. Blake, s*upra* note 4, at 631–32.
21. *See id.* at 632, 637.
22. *See id.* at 637.
23. *See id.* at 626–27, 630.
24. *See id.* at 626–27.
25. RESTATEMENT (SECOND) OF CONTRACTS § 188(2) (1981).
26. RESTATEMENT (SECOND) OF CONTRACTS § 186 cmt. a (1981) ("Whether a restraint is reasonable is determined in the light of the circumstances of the transaction, including not only the particular facts but general social and economic conditions as well. The promise is viewed in terms of the effects that it could have had and not merely what actually occurred.").
27. Blake, s*upra* note 4, at 626–27, 630.
28. *Id.* at 627.
29. *Id.* at 674–75.
30. *Id.* at 684–86.
31. *Id.* at 686–87.
32. *Id.* at 674–75.
33. Alabama, California, Colorado, Florida, Hawaii, Louisiana, Michigan, Missouri, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, and Wisconsin all have statutes that govern the enforceability of covenants not to compete. 1 BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY xlv (Robert A. Blackstone & Arnold H. Pedowitz eds., 5th ed. 2006).
34. David M. Gregory, *The Elusive Covenant Not to Compete*, 123 BANKING L.J. 323, 323–24 (2006) (discussing the battle between the Texas statute governing noncompete agreements and the state's case law). *See also* Peter R. Ulanowicz, *Taking the Fight to the Bullies: Tortious Interference Liability for Both Employer and Attorney on Baseless Restrictive Covenants, Part I*, FLA. B.J., Jan. 2011, at 28, 28 (discussing the difficulties in determining whether covenants not to compete are enforceable in Florida, which has a statute governing this area).
35. Bowers, *supra* note 10, at 79–80.
36. *Id.*
37. *Id.*
38. MALSBERGER, *supra* note 33, at 711.
39. *E.g.*, Duffner v. Alberty, 19 Ark. App. 137, 139, 718 S.W.2d 111, 112 (1986).
40. *See* Orkin Exterminating Co. of Ark. v. Murrell, 212 Ark. 449, 456, 206 S.W.2d 185, 188–89 (1947).
41. *See* Borden, Inc. v. Smith, 252 Ark. 295, 299, 478 S.W.2d 744, 747 (1972).
42. Rebsamen Ins. v. Milton, 269 Ark. 737, 742, 600 S.W.2d 441, 443 (Ark. Ct. App. 1980).
43. Christina Rose Conrad, Note, Bendinger v. Marshalltown Trowell Co.*: The Need for Compromising Competition in Arkansas: A Look at the Limits of Covenants Not To Compete*, 53 ARK. L. REV. 903, 926–27 (2000); *see also* Bendinger v. Marshalltown Trowell Co., 338 Ark. 410, 418–19, 994 S.W.2d 468, 472–73 (1999) ("The court has held that the contract must be valid as written, and the court will not apportion or enforce a contract to the extent that it might be considered reasonable.").
44. *See* 269 Ark. 737, 742–43, 600 S.W.2d 441, 443–44 (Ark. Ct. App. 1980). Although this is an Arkansas Court of Appeals case, this rule has been reiterated in subsequent decisions by both the Arkansas Court of Appeals and the Arkansas Supreme Court. *See* Advanced Envtl. Recycling Techs., Inc. v. Advanced Control Solutions, Inc., 372 Ark. 286, 297–98, 275 S.W.3d 162, 172 (2008); Duffner v. Alberty, 19 Ark. App. 137, 139, 718 S.W.2d 111, 112 (1986).
45. *Milton*, 269 Ark. at 742–43, 600 S.W.2d at 443–44.

46. *Id.* at 742, 600 S.W.2d at 443.

47. *Id.* at 746–48, 600 S.W.2d at 445–46 (Newbern, J., dissenting).

48. *See* Evans Labs., Inc. v. Melder, 262 Ark. 868, 870, 562 S.W.2d 62, 64 (1978); Orkin Exterminating Co. v. Weaver, 257 Ark. 926, 928–30, 521 S.W.2d 69, 70–71 (1975); *Milton*, 269 Ark. at 744, 600 S.W.2d at 444.

49. *See* Bendinger v. Marshalltown Trowell Co., 338 Ark. 410, 419–20, 994 S.W.2d 468, 472–73 (1999). In its discussion of the Arkansas Trade Secrets Act the court acknowledged that trade secrets existed in this case. *Id.* at 420, 994 S.W.2d at 473. This point, however, was not addressed in the court's discussion of the covenant not to compete. Rather, as noted above, the court declined to enforce the covenant not to compete due to the lack of geographic limitation, a point unrelated to the interest the employer sought to protect. *Id.*, 994 S.W.2d at 473.

50. *See* Girard v. Rebsamen Ins. Co., 14 Ark. App. 154, 159–62, 685 S.W.2d 526, 529–30 (1985) (holding that the covenant not to compete was enforceable because it only applied to the customers that Girard actually serviced).

51. *See generally* Advanced Envtl. Recycling Techs., Inc. v. Advanced Control Solutions, Inc., 372 Ark. 286, 298, 275 S.W.3d 162, 172 (2008) (restriction prohibiting solicitation of the employer's clients and direct competition for two years was reasonable); Freeman v. Brown Hiller, Inc., 102 Ark. App. 76, 82–83, 281 S.W.3d 749, 755 (2008) (analogizing a two-year restriction to that in *Girard*); *Girard*, 14 Ark. App. at 160, 685 S.W.2d at 529 ("Appellee's proof also establishes the reasonableness of the two-year restriction.").

52. *See Bendinger*, 338 Ark. at 418, 994 S.W.2d at 472 (holding that the covenant not to compete was unenforceable due to the lack of a geographic limitation, not due to the two year time limit); *Evans Labs.*, 262 Ark. at 870, 562 S.W.2d at 64 (holding that the covenant not to compete was unenforceable due to its interference with the public's right to choose a serviceman, not due to the two year time limit); *Orkin Exterminating*, 257 Ark. at 929, 521 S.W.2d at 71 (holding that the covenant not to compete was not enforceable due to the lack of a protectable interest, not due to the two year time limit).

53. *See* Federated Mut. Ins. Co. v. Bennett, 36 Ark. App. 99, 102–04, 818 S.W.2d 596, 598–99 (1991).

54. *See Evans Labs.*, 262 Ark. at 870, 562 S.W.2d at 64.

55. *See* Blake, *supra* note 4, at 627.

56. *See supra* note 2 and accompanying text.

57. *See* William Lynch Schaller, *Jumping Ship: Legal Issues Relating to Employee Mobility in High Technology Industries*, 17 LAB. LAW. 25, 39 (2001).

58. *See id.*

59. *See* Stephen Dorvee, *Intellectual Property Protection: Avoiding Disputes*, ASPATORE, Oct. 2009, at 8, *available at* 2009 WL 3344406.

60. *See infra* Part II.C.2.A.i-ii.

61. 257 Ark. 926, 929, 521 S.W.2d 69, 71 (1975).

62. *Id.* at 927, 521 S.W.2d at 70. The court did not specifically state which geographic areas were covered by the agreement. The opinion does, however, note that the contract included a provision providing that

> if a court should find the territorial restrictions to be unreasonable, then the testrictions [sic] are to be limited to any portions of the entire territory that were worked by the employee during any period of 90 days or more within the last twelve months preceding the termination of the agreement.

Id. at 930–31, 521 S.W.2d at 72. However, the court decided not to evaluate the validity of such a clause because the agreement was invalid due to the lack of a valid employer interest. *Id.*, 521 S.W.2d at 72.

63. *Id.* at 928–29, 521 S.W.2d at 70–71.

64. *Id.* at 929–30, 521 S.W.2d at 71.

65. *Id.* at 929, 521 S.W.2d at 71.
66. *Id.* at 930, 521 S.W.2d at 71.
67. 262 Ark. 868, 562 S.W.2d 62 (1978).
68. *Id.* at 870, 562 S.W.2d at 64.
69. *Id.*, 562 S.W.2d at 64. Although there was no geographic limitation mentioned in this case, the geographic area was inherently limited because the restriction in question only applied to customers that Melder serviced while working for Evan Laboratories, Inc. *See id.*, 562 S.W.2d at 63.
70. *Id.*, 562 S.W.2d at 64.
71. *Id.* at 872–73, 562 S.W.2d at 65–66 (Fogleman, J., dissenting).
72. In a harsh dissent, Justice Fogleman asserts that too much emphasis was placed on the lack of trade secrets in this case and that this condition should only be one factor to consider rather than determinative. *Id.* at 872, 562 S.W.2d at 65 (Fogleman, J., dissenting). He goes on to emphasize the importance of customer relationships to a business. *Id.* at 873, 562 S.W.2d at 65–66 (Fogleman, J., dissenting). He concludes by quoting the holding from *Borden v. Huey*, where the court recognized customer relations as a legitimate employer interest, and he states that the same logic should have been applied in this case. *Id.* at 876–77, 562 S.W.2d at 67 (Fogleman, J., dissenting).
73. 269 Ark. 737, 600 S.W.2d 441 (Ark. Ct. App. 1980).
74. *Id.* at 743–744, 600 S.W.2d at 444.
75. *Id.* at 738–39, 600 S.W.2d at 441.
76. *Id.* at 742, 600 S.W.2d at 443.
77. *Id.* at 743–44, 600 S.W.2d at 444.
78. *Id.*, 600 S.W.2d at 444.
79. This case also has a strong dissent asserting that the court "ma[de] too much" of the absence of trade secrets. *Milton*, 269 Ark. at 745–46, 600 S.W.2d at 445 (Newbern, J., dissenting). Like Justice Fogleman in *Evans Labratories., Inc. v. Melder*, Justice Newbern contends that the existence or non-existence of trade secrets is merely a factor to be considered and is not meant to be determinative. *Id.*, 600 S.W.2d at 445 (Newbern, J., dissenting) ("To say the employment involved no 'trade secrets' is not equivalent to saying the employer had no interest to protect.").
80. 252 Ark. 295, 478 S.W.2d 744 (1972).
81. *Id.* at 299, 478 S.W.2d at 746–47.
82. *Id.*, 478 S.W.2d at 746–47.
83. *Id.*, 478 S.W.2d at 746–47.
84. *See id.*, 478 S.W.2d at 746–47.
85. 261 Ark. 313, 547 S.W.2d 760 (1977).
86. *Id.* at 316, 547 S.W.2d at 761–62.
87. *Id.* at 314–15, 547 S.W.2d at 761.
88. *Id.* at 316, 547 S.W.2d at 761–62.
89. *Id.*, 547 S.W.2d at 761.
90. 14 Ark. App. 154, 685 S.W.2d 526 (1985).
91. *Id.* at 156, 685 S.W.2d at 527. As with *Rebsamen v. Milton*, this case is a court of appeals case, but it has been cited in subsequent decisions by the Arkansas Supreme Court. *See* HRR Ark., Inc. v. River City Contractors, Inc., 350 Ark. 420, 431, 87 S.W.3d 232, 239 (2002); Bendinger v. Marshalltown Trowell Co., 338 Ark. 410, 418, 994 S.W.2d 468, 472 (1999).
92. *Girard*, 14 Ark. App. at 157–58, 685 S.W.2d at 527–28.
93. *Id.*, 685 S.W.2d at 527–28.
94. *Id.* at 158, 685 S.W.2d at 528.
95. *Id.* at 156, 685 S.W.2d at 527.
96. *See id.* at 157–60, 685 S.W.2d at 527–29.

97. Borden, Inc. v. Smith, 252 Ark. 295, 299, 478 S.W.2d 744, 747 (1972).
98. *Id.*, 478 S.W.2d at 747.
99. *Id.*, 478 S.W.2d at 747.
100. *Id.*, 478 S.W.2d at 747.
101. Borden, Inc. v. Huey, 261 Ark. 313, 314, 547 S.W.2d 760, 760 (1977).
102. *Id.* at 315–16, 547 S.W.2d at 761–62.
103. 338 Ark. 410, 994 S.W.2d 468 (1999).
104. *See* Conrad, *supra* note 43, at 921–922.
105. *Bendinger*, 338 Ark. at 418, 994 S.W.2d at 472.
106. *Id.* at 413–14, 994 S.W.2d at 469–70.
107. *Id.* at 414, 994 S.W.2d at 470.
108. *Id.*, 994 S.W.2d at 470.
109. *Id.* at 418, 994 S.W.2d at 472.
110. *Id.*, 994 S.W.2d at 472.
111. 372 Ark. 286, 275 S.W.3d 162 (2008).
112. *Id.* at 289, 275 S.W.3d at 165. Also, as noted below, in *Girard v. Rebsamen Insurance Co.* the court upheld a covenant not to compete that lacked any geographic limitation at all. 14 Ark. App. 154, 156, 158, 685 S.W.2d 526, 527–28 (1985). However, this is explained, not by any inconsistency in the law, but by the inherent limitation created by the terms of the agreement in this case. *See id.* at 159–60, 685 S.W.2d at 528–29; *Bendinger*, 338 Ark. at 419–20, 994 S.W.2d at 473.
113. *Advanced Envtl. Recycling Techs., Inc.*, 372 Ark. at 288–89, 275 S.W.3d at 165.
114. *Id.* at 298, 275 S.W.3d at 172.
115. *Id.*, 275 S.W.3d at 172.
116. *Girard*, 14 Ark. App. at 156, 159, 685 S.W.2d at 527–28.
117. *See Bendinger*, 338 Ark. at 418, 994 S.W.2d at 472.
118. *Id.* at 419–420, 994 S.W.2d at 473.
119. In fact, the restriction does not cover any complete geographic area because it is limited only to specific customers. Therefore, this restriction is even more limited than any that designate a geographic area. *See Girard*, 14 Ark. App. at 159–60, 685 S.W.2d at 529.
120. *Id.*, 685 S.W.2d at 529.
121. 102 Ark. App. 76, 281 S.W.3d 749 (2008).
122. *Id.* at 81, 281 S.W.3d at 754.
123. *Id.* at 78, 281 S.W.3d at 752.
124. *Id.* at 82–83, 281 S.W.3d at 755–56.
125. *Id.*, 281 S.W.3d at 755–56.
126. *Id.*, 281 S.W.3d at 755–56.
127. Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Exch.) 406; 10 M. & W. 108, 116.
128. *See supra* notes 33–34 and accompanying text.
129. Orkin Exterminating Co. v. Weaver, 257 Ark. 926, 929, 521 S.W.2d 69, 71 (1975).
130. *Id.*, 521 S.W.2d at 71.
131. *Id.*, 521 S.W.2d at 71.
132. Borden, Inc. v. Huey, 261 Ark. 313, 315–16, 547 S.W.2d 760, 761 (1977).
133. *Id.*, 547 S.W.2d at 761.
134. *Id.*, 547 S.W.2d at 761.
135. Girard v. Rebsamen Ins. Co., 14 Ark. App. 154, 159–60, 685 S.W.2d 526, 528–29 (1985).
136. *Id.*, 685 S.W.2d at 528–29. Milton was restricted from competing in any business, whereas Girard was only restricted from competing in insurance, and the agreement with Milton restricted him from working with any of Rebsamen's clients, while Girard's agree-

ment only restricted him from working with the clients that he served. *Id.*, 685 S.W.2d at 528–29.

137. *Id.*, 685 S.W.2d at 528–29.

138. Freeman v. Brown Hiller, Inc., 102 Ark. App. 76, 82–83, 281 S.W.3d 749, 755 (2008).

139. Bendinger v. Marshalltown Trowell Co., 338 Ark. 410, 418, 994 S.W.2d 468, 472 (1999).

140. *Id.* at 419–20, 994 S.W.2d at 473.

141. *Id.* at 420, 994 S.W.2d at 473.

142. *See id.* at 419–20, 994 S.W.2d at 473.

143. Borden, Inc. v. Huey, 261 Ark. 313, 547 S.W.2d 760 (1977); Freeman v. Brown Hiller, Inc., 102 Ark. App. 76, 281 S.W.3d 749 (2008); Girard v. Rebsamen Ins. Co., 14 Ark. App. 154, 685 S.W.2d 526 (1985); *see supra* Part II.C.2.a.ii.

144. Evans Labs., Inc. v. Melder, 262 Ark. 868, 562 S.W.2d 62 (1978); Orkin Exterminating Co. v. Weaver, 257 Ark. 926, 521 S.W.2d 69 (1975); Rebsamen Ins. v. Milton, 269 Ark. 737, 600 S.W.2d 441 (Ark. Ct. App. 1980); *see supra* Part II.C.2.a.i.

145. *See Evans Labs., Inc*., 262 Ark. at 870, 562 S.W.2d at 64.

146. *See supra* Part II.C.1.

147. *See Milton*, 269 Ark. at 739–40, 600 S.W.2d at 442.

148. *Id.* at 738–39, 744 600 S.W.2d at 441, 444.

149. *See supra* Part III.B.1.a.

150. 102 Ark. App. 76, 78, 281 S.W.3d 749, 752 (2008).

151. *Id.*, 281 S.W.3d at 752.

152. *Id.* at 82–83, 281 S.W.3d at 755.

153. *Milton*, 269 Ark. at 743, 600 S.W.2d at 444.

154. *See id.*, 600 S.W.2d at 444.

155. *See generally* Orkin Exterminating Co. v. Weaver, 257 Ark. 926, 929, 521 S.W.2d 69, 71 (1975).

156. In *Bendinger*, the employee was an industrial engineer. Bendinger v. Marshalltown Trowell Co., 338 Ark. 410, 413, 994 S.W.2d 468, 469 (1999). Therefore, the employer had limited need to protect customer relationships or lists because the employee did not have the kind of access to clients that the salesmen in so many other cases had. Also, in *Advanced Environmental Recycling Technologies, Inc. v. Advanced Control Solutions, Inc.*, the employee was a vice-president, so he had less access to customer relationships than the employees in other cases who were salesmen. 372 Ark. 286, 288, 275 S.W.3d 162, 165 (2008); *See* Evans Labs., Inc. v. Melder, 262 Ark. 868, 870, 562 S.W.2d 62, 63 (1978); Borden, Inc. v. Smith, 252 Ark. 295, 296, 478 S.W.2d 744, 745 (1972); Girard v. Rebsamen Ins. Co., 14 Ark. App. 154, 156, 685 S.W.2d 526, 527 (1985).

157. *See Smith*, 252 Ark. at 299, 478 S.W.2d at 746–47; *Girard*, 14 Ark. App. at 158, 685 S.W.2d at 528.

158. *See supra* note 156.

159. *Girard*, 14 Ark. App. at 159–60, 685 S.W.2d at 529.

160. *See* Blake, *supra* note 4, at 679.

161. *Advanced Envtl. Recycling Techs., Inc.*, 372 Ark. at 298, 275 S.W.3d at 172. The geographic area covered by this agreement was the entire state of Arkansas. *Id.* at 289, 275 S.W.3d at 165.

162. Bendinger v. Marshalltown Trowell Co., 338 Ark. 410, 418, 420, 994 S.W.2d 468, 472–73 (1999). Marshalltown Trowell Co. and Kraft Tool Co., the competitor for whom Bendinger sought to work, both operated on a national basis. *Id.* at 418, 994 S.W.2d at 472. Although this geographic area is substantially larger than the area covered by the restriction in *Advanced Environmental Recycling Technologies, Inc.*, either agreement would have the effect of forcing the employee to move in order to continue working in their industry.

163. *Id.*, 994 S.W.2d at 472; *see supra* Part II.C.2.b.i.

164. *See supra* note 112.

165. Blake, s*upra* note 4, at 626.

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