

Non-Compete, Non-Solicitation and Confidentiality

After the Job Is Done

By

Tom Singer

Axilon Law Group, PLLC
115 N. Broadway, Suite 310
P.O. Box 987
Billings, MT 59103-0987
(406) 294-9466
(406) 294-9468 (facsimile)
e-mail: tsinger@axilonlaw.com

© Tom Singer, 2009

Non-Compete, Non-Solicitation and Confidentiality:

After the Job Is Done

All too often, lawyers get the telephone call only when the battle lines have already formed: an employee or partner or franchisee has resigned and joined a competitor or opened a new business and is taking customers or is using a business concept, perhaps in violation of contractual covenants or trade secret laws, and the former employer or partnership or franchiser is threatening to sue. Both parties run to their attorneys wondering if they have a case.

Sometimes, though, clients actually think ahead: the owner or buyer of a business fears that her employees, a former owner, disgruntled franchisees, or others with knowledge of the business may open a competing business, so she asks her lawyer to insert an iron-clad covenant in a buy-sell agreement, an employment contract, an employee handbook, or a franchise or distribution agreement, intending to preclude any competition, disclosures of confidential information, and solicitation of customers or other employees by the employee, seller, or prospective franchisee. Of course, once the employee, seller, or prospective franchisee is asked to sign such an agreement, another lawyer often gets asked: "Should I sign it?"

The clients all want to know if such agreements are enforceable, and they all want a simple answer. Unfortunately, there is no simple answer. The answer in any situation will depend on a balancing of the personal and societal interests involved. The interests being balanced are central to what many people think of as the American way of life: a

free market and a free society.

I. Why Are These Issues So Difficult?

Businesses seek to protect their client lists, business methods, and other intellectual property because it is a vital component of the goodwill on which they depend for their income stream and opportunity for growth. Knowing that most of their intellectual property resides in the memories of their owners and employees, established businesses hope to discourage owners and employees from leaving and going into competition, and they seek the law's help in doing so. On the other hand, employees and business partners and franchisees depend on their own capabilities and experiences to make a living, and want the freedom to improve their own lot, whether by joining a competitor or by establishing one.

When an employee or partner or franchisee leaves a business and goes into competition, one or the other may file litigation. When that happens, the court is forced to choose not only between the conflicting personal interests of the parties but also between the competing public interests at stake. On the one hand, economists stress the public's interest in fully protecting the property rights of the producers of intellectual property, arguing that in the absence of complete protection, producers will not capture all of the gains resulting from their efforts, and too little intellectual property will be produced, with negative consequences for the economy and the society. See, e.g., Michael J. Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* 152-53 (1986). On the other hand, the society also has an interest in affording

economic liberty to individuals, particularly entrepreneurs who generate new ideas and new jobs. That interest is both philosophical and economic. Professor Ronald Gilson of Stanford Law School has argued that the contrast between the California courts' historic refusal to enforce employee covenants not to compete (under a statute similar to Montana's) and the Massachusetts courts' application of the "rule of reason" (and consequent willingness to enjoin violations of such covenants) could explain the difference between California's Silicon Valley and Boston's Route 128 in the growth of the high-tech industry after World War II. Both areas grew up around major universities. Largely because of lucrative government-funded research contracts, Route 128 had three times as many people employed in technology as Silicon Valley in 1965. Yet, thirty years later, Silicon Valley had surged ahead. By 1990, its technology employment was double Route 128's; in 1995, Silicon Valley reported the highest gains in export sales of any metropolitan area in the United States, an increase of thirty-five percent over 1994, while Boston was not in the top five. Ronald J. Gilson, "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete," 74 N.Y.U. L. Rev. 575, 587 (1999).

Professor Gilson attributes Silicon Valley's blossoming to "knowledge spillovers between firms through voluntary cooperation and involuntary employee movement." *Id.*, 586. In other words, ideas shared among employees of different companies, often because they changed employers, "repeatedly restart[ed] the industrial life cycle through new innovation...." *Id.* In the 1970s, employee turnover averaged more than thirty-five

percent a year at Silicon Valley electronics firms. *Id.*, 590. Some firms early in Silicon Valley's development had tried to restrain turnover by enforcing covenants not to compete, but the California courts refused to cooperate and employers soon accepted "high velocity employment." *Id.*, 596. In Massachusetts, on the other hand, where courts enforced post-employment covenants not to compete, long-term stability in employment and vertically integrated companies that did not share information outside the firm became the norm. *Id.*

Professor Gilson cautions that the Silicon Valley's response to high velocity employment may be attributable in part to the industry or to some accident of geography, and he does not encourage states to emulate California's broad prohibition of covenants not to compete. He suggests, instead, that the rule of reason already applied in most states to post-employment covenants not to compete affords courts the opportunity to consider the public interest in encouraging economic development – specifically the development of industrial districts composed of firms in a related industry (what economists call "potential agglomeration economies"). His analysis would provide a basis for parties to present expert testimony concerning the "knowledge structure" of the industry in which the clients were involved, and for courts to enforce post-employment covenants more aggressively in those industries dependent on "discrete innovation" (where an invention clearly is not the first step in a series of important technical advances – e.g., a ballpoint pen) as opposed to those industries involved in "cumulative technologies" (where it can be anticipated that fundamental technological advances are

both possible and will build on existing technology – e.g., computers). *Id.*, 628-29.

Gilson does not say how his analysis might apply to covenants not to compete in business purchase or franchise agreements, or to covenants not to disclose or solicit in any context. He acknowledges that California’s ban on restraints of trade makes exceptions for contracts for the sales of businesses and dissolutions of partnerships but he does not comment or speculate about whether those exceptions diminished Silicon Valley’s prosperity. It probably didn’t matter. Silicon Valley grew so fast it created a bubble, a bubble that burst soon after Gilson’s article was published.

II. Doesn’t Montana Follow California Law?

As Professor Gilson notes, the California statutes banning restraints on trade and defining the exceptions were part of the Field Code, which California adopted in 1872. *Id.*, 613-19. In 1895, Montana also adopted the Field Code, including the provisions on restraints on trade, and for many years, Montana’s “interpretation of these sections w[as] guided by the construction given them by the Supreme Court of California.” *Treasure Chemical, Inc. v. Team Laboratory Chemical Corp.*, 187 Mont. 200, 204, 609 P.2d 285, 287 (Mont., 1980).

The statute broadly banning restraints on trade is still in place in both states, but beginning in the 1980s, the exceptions for sales of businesses and dissolutions of partnerships were rewritten in both states so that California’s exceptions are broader than Montana’s geographically and in other ways. Compare Cal. Bus. & Prof. Code §§ 16601, 16602 & 16602.5 with §§ 28-2-704 & 705, MCA. For example, the exception for the

sale of “the goodwill of a business” was amended in California in 2002 to explicitly enforce covenants that bind owners of corporate stock or units in a partnership or LLC when they sell their ownership interest in the entity. The amendment apparently overturned a 2001 court decision that held the exception did not apply to a medical corporation's repurchase of a departing doctor's stock because goodwill had not been a factor in the price. *Hill Medical Corp. v. Wycoff*, 86 Cal.App.4th 895, 907, 103 Cal.Rptr.2d 779, 788 (2001). As the California legislature has expanded the exceptions, the California courts have continued to enforce the broad ban on restraints of trade vigorously, holding that the exceptions “reinforce the conclusion that covenants not to compete in contracts other than for sale of goodwill or dissolution of partnership are void.” *Thompson v. Impaxx, Inc.*, 113 Cal.App.4th 1425, 1428, 7 Cal.Rptr.3d 427, 429 (2003). In fact, the public policy against covenants not to compete in employment contracts is so strong in California that an employee who refuses to sign such a covenant and is fired has a claim against the employer for wrongful termination. *Id.*; *D'Sa v. Playhut, Inc.*, 85 Cal.App.4th 927, 102 Cal.Rptr.2d 495 (2000).

In Montana before 1985, the Court followed California’s lead and was “less prone to enforce restrictive covenants between employer and employee than where the restriction is part of a contract for sale of a business in which goodwill may be a part of the property sold.” *J. T. Miller Co. v. Madel*, 176 Mont. 49, 52-53, 575 P.2d 1321, 1323 (1978). However, in 1985, the Court changed direction and applied to employment contracts the same three-part “rule of reason” test it had applied to other non-compete

provisions. *Dobbins, Deguire & Tucker, PC, v. Rutheford, MacDonald, & Olson* (1985), 218 Mont. 392, 708 P.2d 577, 580. Under the test, a covenant not to compete is enforceable so long as:

(1) The covenant should be limited in operation either as to time or place; (2) the covenant should be based on some good consideration; and (3) the covenant should afford a reasonable protection for and not impose an unreasonable burden upon the employer, the employee or the public.

The Court has consistently reaffirmed the *Dobbins* standard, but over the last decade, the Court also has consistently held that all of the post-employment covenants presented to it failed to meet the standard and therefore were unenforceable. See *Joseph Eve & Co. v. Allen*, 1998 MT 189, 290 Mont. 175, 964 P.2d 11; *Reier Broadcasting Co., Inc. v. Kramer*, 2003 MT 165, 316 Mont. 301, 72 P.3d 944; *Montana Mountain Products v. Curl*, 2005 MT 102, 327 Mont. 7, 112 P.3d 979; *Access Organics, Inc. v. Hernandez*, 2008 MT 4, 341 Mont. 73, 175 P.3d 899. During that time, the Court has faced a non-compete in a business sale or partnership dissolution context only once and, in notable contrast to the results in cases involving post-employment covenants, it found the non-compete covenant in a stock sale agreement enforceable. *Snow Country Construction, Inc., v. Laabs*, 1999 MT 279, 296 Mont. 520, 989 P.2d 847.

The Court will have an opportunity this year to consider the enforceability of provisions in a medical partnership agreement that reduce the buy-out paid to partners who leave the partnership and then compete with it. *Mungas, et al. v. Great Falls Clinic, LLP*, DA 09-0046. That case will provide an opportunity for the Court to clarify the

distinction between post-employment covenants and contracts for the sale of goodwill.

The distinction makes sense. There is an inherent disparity in bargaining power between most employers and most employees that is not true in most business transactions.

Moreover, in a post-employment covenant not to compete, the party who is precluded from earning a living by using the knowledge and experience acquired in the industry has not had the opportunity to create and build an equity interest in a business.

III. What Is the Court's Latest Ruling on Post-Employment Covenants?

In *Access Organics, Inc. v. Hernandez*, 2008 MT 4, 341 Mont. 73, 175 P.3d 899, the Montana Supreme Court finally gave teeth to the second part of the *Dobbins* test: “(2) the covenant should be based on some good consideration.” The Court refused the Plaintiff-Employer’s attempt to enforce non-compete agreements against former employees who had opened a competing business because the employees had not signed the agreements until several months after they began their employment and had not received any additional consideration when they signed. The Court reversed the District Court’s injunction, noting that the burden of proving an agreement does not violate the statute falls on the party seeking to enforce it, and that burden is high because Montana public policy strongly disfavors restraints on trade.

The Court said that consideration exists if an employee enters a non-compete at the time of hiring because the non-compete is a condition of employment the employee can consider in accepting or rejecting the offer, but when an employer presents an “afterthought” covenant, “the employer and employee are not on equal bargaining

ground: the employee is vulnerable to heavy economic pressure to sign the agreement in order to keep his job.” *Id.*, ¶ 25. Nonetheless, afterthought agreements may be valid if supported by independent consideration, such as a raise or promotion, a specific guarantee of employment for a definite period, or access to trade secrets or other confidential information. *Id.*, ¶¶ 22 & 26.

The Court’s decision is a puzzle. On one hand, in holding that Access Organics failed to meet its burden of proof to show the agreement was supported by good consideration, the Court ignored the rule that the burden of proving failure of consideration falls on the party asserting the defense. See *Larson v. Green Tree Financial Corp.*, 1999 MT 157, ¶ 25, 295 Mont. 110, 983 P.2d 357. On the other hand, by suggesting that any raise (no matter how small) or any pledge of job security (no matter how tenuous) could provide consideration for an afterthought agreement, the Court undermines its purported concern about employees being “vulnerable to heavy economic pressure to sign the agreement in order to keep [a] job.” In those respects, the Court’s language does not justify the result.

Regardless, the result is consistent with all of the Montana cases involving post-employment covenants not to compete over the past decade in finding some avenue for avoiding enforcement of the covenants.

- In *Montana Mountain Products v. Curl*, 2005 MT 102, ¶ 17, 327 Mont. 7, 112 P.3d 979, the Court said: “Here, based on the information in the offers of proof, Curl’s only option to practice her trade in the vicinity of where she resides is to work in some way for a subcontractor of Montana Silversmiths. That, however, is exactly what her covenant not to compete prohibits. Because the covenant prohibits Curl from engaging in her profession, we conclude that it is

unreasonable and therefore an unlawful restraint on trade.” The Court chose to disregard the fact that Curl’s “trade” or “profession” was business management. She supervised people who had the special skills required to be a subcontractor for Montana Silversmiths, but she did not have those skills herself.

- In *Reier Broadcasting Company, Inc., v. Kramer*, 2003 MT 165, 316 Mont. 301, 72 P.3d 944, the Court refused to enjoin the former head football coach of the MSU Bobcats from breaching a covenant not to compete included in a four-year contract the coach had signed with a local radio station to be an announcer on a weekly “Cat Chat” program. The station agreed to pay the coach \$10,200 per year under the contract, but when MSU switched its broadcast rights to another station and directed the coach to breach his contract, the station sued to bar the coach from broadcasting for the competitor or anyone else. The court refused the injunction based on §27-19-103(5), Mont. Code Ann., which “prohibits the use of injunctive relief to prevent a party to a personal services contract from performing services elsewhere during the life of the contract.” 2003 MT 165 at ¶19. The Court reasoned that barring the coach from working for the competitor would effectively force him to perform for the station, which would amount to specific enforcement of the employment contract in violation of §27-19-103(5) and §27-1-412, which lists contracts that cannot be specifically enforced, the first of which is “an obligation to render personal service or to employ another therein.” The Court refused to enforce the contract at the same time it said, “we do not hold that the underlying contract was invalid. The issue presented is not whether the contract is valid, but rather, whether the contract can be specifically enforced by means of an injunction. ... The issue of whether Reier has other legal remedies for the alleged breach of contract is not before the Court.” *Id.* at ¶ 20.
- In *Joseph Eve & Co. v. Allen*, 1998 MT 189, 290 Mont. 175, 964 P.2d 11, the District Court and Supreme Court both held that a covenant not to compete in an accountant’s employment agreement was enforceable, but nevertheless refused to enforce it because the plaintiff accounting firm had breached the contract by refusing to turn over client files to the former employee.

IV. What About Tortious Interference Claims Against the New Employer?

In *Curl*, the employer sued the former employee to enforce the non-compete and also sued the former employee’s new employer for interference with contractual and business relations. Noting that those claims were premised on the assumption that Curl’s covenant not to compete was valid, and having found that covenant void, the Court

rejected the claims.

Generally, a competitor that induces or entices an employee to leave her employer in order to work for the competitor is not liable to the former employer. See generally, Annot., “Liability for Inducing Employee Not Engaged for Definite Term to Move to Competitor,” 24 ALR 3d 821, §3. However, the competitor may be liable if he has an unlawful or improper purpose, or uses unlawful or improper means. *Id.* at §4. Unlawful or improper apparently means malicious, wholly unjustified, or untruthful. And there are cases in which a former employer can prevail on claims for tortious interference. A recent example in which the former employer recovered over \$2 million in compensatory and exemplary damages is *Nova Consulting Group, Inc., v. Engineering Consulting Services, Ltd.*, 2008 WL 3889995 (5th Cir.) (Applying Texas law).

In 2002, Conseco Finance Servicing Corporation received a jury verdict awarding \$3.5 million in compensatory damages and \$18 million in punitive damages against North American Mortgage Company in federal court in St. Louis on claims of unfair competition and unlawful interference with business expectations. Conesco claimed that North American hired away 15 branch managers from Conesco finance offices in five states, and that some of the employees wrongly took business leads. Sue Reisinger, “Unfair-Competition Claim: \$21.5M verdict for employee raid,” *National Law Journal*, April 22, 2002, p. A17. On appeal, the punitive damage award was remitted to \$7 million based on due process grounds, but the judgment was otherwise affirmed. *Conseco Finance Servicing Corp. v. North American Mortgage Co.*, 381 F.3d 811 (8th Cir. 2004).

A much older case is *American League Baseball Club v. Pasquel*, 187 Misc. 230, 63 N.Y.S.2d 537 (1946), where the New York Yankees managed to get a temporary injunction restraining the Mexican League from inducing Yankee's baseball players to repudiate their contracts. (That case and *Reier Broadcasting* suggest a revision to an old adage; when judges try to play ball, they make bad law.)

V. What If the Covenant Discourages But Doesn't Prevent Competition?

Many contractual clauses that get described as covenants not to compete, including the clauses at issue in *Dobbins* and *Joseph Eve*, do not prohibit competition. Instead, the clauses require a former employee who competes to pay compensation to the employer for business lost as a result of the competition. Though the Montana Supreme Court has never acknowledged it, such clauses are in actuality liquidated damage provisions, and should be evaluated as such.

Until 2003, the Montana Supreme Court assessed liquidated damage provisions using the common law test under which “[t]he most important facts to be considered are whether the damages were difficult to ascertain, and whether the stipulated amount is a reasonable estimate of probable damages or is reasonably proportionate to the actual damages sustained at the time of the breach.” *Morgen v. Big Sky of Montana*, 171 Mont. 268, 273, 557 P.2d 1017, 1020 (1976), quoting *Waggoner v. Johnston*, 408 P.2d 761, 769 (Okla. 1965).

The Court unexpectedly changed the rules governing liquidated damages in *Arrowhead School District No. 75 v. Klyap*, 2003 MT 294, 318 Mont. 103, 79 P.3d 250.

The Court held that “the proper way to ... analyze liquidated damages clauses [is] from the perspective of whether or not the clause is unconscionable as indicated by the nature of the bargaining process between the parties.” *Id.* at ¶48. Unconscionability focuses on two determinations: one, whether the clause is a contract of adhesion, and two, whether the contractual terms are unreasonably unfavorable to the drafter. *Id.* Making those determinations in *Arrowhead School District*, the Court held that a teacher contract requiring the teacher to pay 20% of his salary to the school as liquidated damages if he quit after July 20 (*Id.* at ¶5, n. 2) was a contract of adhesion (*Id.* at ¶60), but was not unconscionable. (*Id.* at ¶72) Though the Court applied the law of unconscionability, it considered the same facts it would have considered in applying the law of liquidated damages. Thus, it is hard to predict that any real substantive change in outcomes will occur as a result of the Court’s decision.

VI. What About the Doctrine of Inevitable Disclosure?

Where employers have been stymied in their efforts to enforce covenants not to compete, they have sometimes tried other approaches. One that has enjoyed some recent success is the doctrine of “inevitable disclosure,” by which “a plaintiff may prove a claim of trade secret misappropriation by demonstrating that defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets.”

PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995).

The Montana Supreme Court has not considered the doctrine of inevitable disclosure, but the predicates for invoking the doctrine are in place. Montana has adopted

a version of the Uniform Trade Secrets Act, which prohibits actual or threatened misappropriation of trade secrets. §30-14-401, et seq., MCA. A trade secret is information that derives independent economic value from not being generally known or readily ascertainable to competitors and is the subject of efforts to maintain its secrecy. §30-14-402(4), MCA.

Furthermore, the Montana Supreme Court has held that an employee's duty of loyalty to the employer precludes use of information confidentially given to her or acquired by her during the course of employment. *Id.* at §§393, 394, 395, 396; *Best Dairy Farms v. Houchen*, 152 Mont. 194, 448 P.2d 158 (1968) (recognizing that confidential customer information may be protected, although information was not confidential in that case). Everything an employee acquires by virtue of the employment belongs to the employer, whether acquired lawfully or unlawfully or during or after expiration of the term of employment. §39-2-102, MCA. Of course, an employee is entitled to use the experience gained in the employment "so long as he does not violate his employer's confidence." *J.T. Miller Co. v. Madel*, 176 Mont. 49, 575 P.2d 1321 (1978) (information at issue was not confidential).

The duty not to misuse confidential information is not limited to trade secrets or items marked or stated to be confidential, but applies to information the employee should know the employer would not care to have revealed to others or to be used in competition. Restatement (Second) of Agency §395 comment b. Even after terminating employment, the employee has duties to avoid using information unfairly to his former

employer and to avoid taking advantage of continuing confidential relations created during the employment. *Id.* §396(b) & (d) and comment b; see *Jet Courier Service, Inc. v. Mulei*, 771 P.2d 486 (Colo. 1989).

To enforce such duties, courts long ago developed a doctrine of inevitable disclosure “in a series of cases involving the threatened misuse of valuable, technical trade secrets by former employees hired away by competitors seeking to gain entry into highly competitive markets.” Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and An Alternative Policy Approach*, 45 *Am. Bus. L.J.* 107, 149 (2008). That common law doctrine was expanded significantly in 1995 by the Seventh Circuit’s decision in *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1269 (7th Cir. 1995). Where prior cases had applied the doctrine only to technical knowledge, *PepsiCo* applied it to knowledge of a market and competitive business strategies, and the *PepsiCo* court did not demand evidence of bad faith or wrongful intent on the part of the former employee. Garrison & Wendt, pp. 155-56. Other courts promptly followed the lead of the Seventh Circuit. *Id.*

However, the *PepsiCo* opinion triggered scholarly criticism that the Seventh Circuit’s formulation could allow employers to circumvent employee non-compete law and thereby upset the delicate policy balance between an employee's interest in mobility and an employer's interest in protecting its proprietary information. *Id.*, p. 157. And many courts now have retreated from the broadest reading of *PepsiCo* or have rejected the doctrine outright, at least by name – although some commentators believe the

rationale behind the *PepsiCo* decision may still be influential. Id.; Gale R. Peterson, Trade Secret Law Update 2008: Including Restrictive Post-employment Covenants, PLI 14th Annual Institute on Intellectual Property Law 1057-62 (September-October 2008).

Should the issue arise in Montana, it should be informed by the same private and public interests that underlie non-compete litigation. Twenty years ago, the Montana Supreme Court held that non-disclosure agreements are governed by the same restraint of trade analysis as non-compete agreements. *State Medical Oxygen and Supply, Inc. v. American Medical Oxygen Co.*, 240 Mont. 70, 75, 782 P.2d 1272, 1275 (1989).

VII. How Do Courts Know If They Are Promoting or Stifling Competition?

Joseph Schumpeter famously identified the "process of Creative Destruction" as the "essential fact about capitalism." Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* 83 (5th ed. 1976). Naturally, those capitalists who are enjoying current success in the market are not very excited about participating in a "process of creative destruction," particularly when the visible agent of that process is a highly-capable and once-trusted former employee (or partner or franchisee). And the currently-successful capitalists understandably argue that they will be less inclined to invest in new ideas and ventures if the law refuses to help them protect their investments. They see covenants not to compete, confidentiality and non-solicitation agreements, trade secret laws, and legal principles such as the doctrine of inevitable disclosure as tools to encourage investment and promote competition.

But those same covenants, agreements, laws, and legal principles are seen by

others as weapons conferred on (or demanded by) the rich and the powerful in order to enlarge or extend their success and disable the process of creative destruction by discouraging budding entrepreneurs and competitors.

Both views are true, more or less, depending on the relative bargaining power of the parties, the types of trade secrets and confidential information for which protection is sought, the technical nature and maturity of the industry, the amount of investment required to enter the industry, the availability of capital to start-up businesses, and other factors. Although such factors are seldom if ever explicitly addressed in court cases, it is more than plausible that such factors play an inexplicit role in the courts' reasoning.

VIII. So What Do We Tell Our Clients?

Whatever factors are at play in the court cases, though, there is no talisman or formula by which the cases can be resolved quickly and inexpensively. Litigation between competitors under any theory of liability or defense is fact-intensive and a crap shoot. It probably is more difficult for a large, out-of-state employer or franchiser probably to enforce a covenant that puts a former employee out of work than it will be for a restaurant or other commercial tenant to enforce a covenant in a lease barring competitive or other non-conforming uses in the same commercial building. Compare *American Speedy Printing Centers, Inc. v. J & K Ventures, Inc.*, 1997 U.S. Dist. LEXIS 13269 (D. Mich. 1997)(franchiser unable to enforce facially-reasonable covenant against former franchisee operating similar business in same location where he had operated the franchise because the franchiser was no longer competing in that geographic location,

disregarding franchiser's obvious interest in finding another franchisee and resuming competition in that location) with *O'Neill v. Ferraro*, 182 Mont. 214, 596 P.2d 197 (1979)(restaurant in Bozeman hotel enforced covenant against landlord) and *Haggerty v. Gallatin County*, 221 Mont. 109, 717 P.2d 550 (1986)(ski area barred from leasing to unrelated business). And a covenant that is overbroad is more likely to be "blue-pencilled" by the court in a contract for sale of a business than in an employment contract. *Western Media, Inc. v. Merrick*, 224 Mont. 28, 727 P.2d 547 (1986); *Dumont v. Tucker*, 250 Mont. 417, 822 P.2d 96 (1991). But no result is foreordained.

To the question of whether a particular covenant not to compete is or is not enforceable, any pat answer is wrong.