Comments

THE GROWING DISFAVOR OF NON-COMPETE AGREEMENTS IN THE NEW ECONOMY AND ALTERNATIVE APPROACHES FOR PROTECTING EMPLOYERS' PROPRIETARY INFORMATION AND TRADE SECRETS

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I. INTRODUCTION

Traditionally, American courts have viewed covenants not to compete ("CNCs") with disfavor because they operate as a restraint of trade.[1] Nevertheless, state law varies widely with some state legislatures more willing to protect, and some courts far more willing to enforce CNCs than others. The divergence in state law is largely attributable in part to the reality that CNCs do not fit comfortably into a single area of law but instead involve concepts from both contract law and trade secret law. Where a court views the proper place for CNCs on the continuum between

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1. *See, e.g.*, Lucente v. Int'l Bus. Mach. Corp., 310 F.3d 243, 254 (2d Cir. 2002) (stating that the Second Circuit "disfavor[s] restrictive covenants in the employment context," enforcing them "only to the extent they are reasonable and necessary to protect valid business interests"); Roth v. Gamble-Skogmo, Inc., 532 F. Supp. 1029, 1031 (D. Minn. 1982) ("Generally, Minnesota courts look with disfavor on restrictive covenants in employment contracts because they operate as a restraint of trade."); Robinson v. Boohaker, Schillaci & Co., 767 So. 2d 1092, 1094 (Ala. 2000) ("Alabama law strongly disfavors prohibitions that restrain one from exercising a lawful profession, and this Court has routinely refused to enforce such prohibitions."); Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L. J. 223, 225 (2006-2007) (stating that "[m]ost courts . . . note that the law looks at [CNCs] with 'disfavor' and subjects them to careful scrutiny"). *But see* Maw v. Advanced Clinical Commc'ns, Inc., 179 N.J. 439, 447 (N.J. 2004) (holding that do-not-compete provisions are not per se illegal, and that it is inaccurate to describe current case law, which allows enforcement of reasonable non-compete agreements, as a "clear mandate" that disfavors such agreements).

pure contract law and trade secret law dictates, in part, the enforceability of such agreements. Under pure contract law theory, courts will not scrutinize the adequacy of consideration or vitiate an otherwise valid contract in order to protect a party who made a bad deal.[2] In contrast, courts routinely scrutinize the reasonableness of CNCs based on strong public policy considerations against restricting a person's livelihood.[3] CNCs can also be viewed as protecting employer information or know-how that does not quite rise to the level of trade secrets. Where enforced, CNCs expand the protections afforded to trade secrets under the Uniform Trade Secret Act ("UTSA")[4] because the information protected includes not only trade secrets but also proprietary business information.[5] Additionally, whereas recovery under the UTSA requires a showing of threatened or actual misappropriation, an employer seeking to enforce a CNC need not allege bad faith.[6]

In Part II of this comment, I argue that because state courts and legislatures are increasingly unwilling to enforce CNCs, employers can no longer rely solely on such agreements to protect their legitimate business interests in trade secrets and other proprietary business information.[7] In

2. HUGH COLLINS, THE LAW OF CONTRACT 60 (2003) (stating that "[a]lthough the doctrine of consideration requires an exchange of something, it leaves it to the parties to determine what they value and the price which they are prepared to pay for any item").

3. The careful or heightened scrutiny which courts apply to contracts restricting an employee's ability to choose where he wants to work is unsurprising in light of the outright prohibition on contracting oneself into involuntary servitude. *See* Bailey v. Alabama, 211 U.S. 452 (1908) (holding unconstitutional an Alabama statute that criminalized the mere failure or refusal to serve where an employee was indebted to an employer since it was akin to forced servitude which was illegal under the Thirteenth Amendment). In both cases, public policy favors employee mobility, individual choice and the superiority of inalienability rights over the traditional hands-off approach courts otherwise use to decide contract cases.

4. UNIFORM TRADE SECRETS ACT OF 1979 § 1(4), 14 U.L.A. 542 (1979).

5. *See, e.g.*, Cont'l Grp., Inc. v. Kinsley, 422 F. Supp. 838, 844 (D. Conn. 1976) (upholding a restrictive covenant on the basis of an employee's knowledge of information regarding a product's stage of production that did not qualify as a trade secret).

6. *See, e.g.*, Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 175 (S.D.N.Y. 2006) (granting a preliminary injunction enjoining an employee from working for a competitor of his former employer in the skincare and cosmetics industry where the former employee had signed a CNC since, "even assuming the best of good faith, it is doubtful whether the defendant could completely divorce his knowledge of the trade secrets from any . . . work he might engage in" (internal citation omitted)); *Cont'l Grp.*, 422 F. Supp. at 845 (D. Conn. 1976) (applying New York Law) (holding that an eighteen-month restrictive covenant precluding an employee from working for a competitor in the injection molding plastics industry was reasonable despite no proof of actual disclosures, reasoning that "[i]t is enough if the second employer's work is sufficiently similar to that of the first employer to make likely the risk of disclosure by the employee in the course of his subsequent employment").

7. While this comment focuses exclusively on the legitimate business interest employers have in trade secrets and proprietary business information, other legitimate business interests recognized by the courts and protectable by CNCs in some jurisdictions

light of this reality, in Part III, I examine the relative strengths and weaknesses of a number of alternative approaches available to employers both ex-ante, upon hiring an employee, and ex-post, after the employee leaves, to protect trade secrets and other proprietary business information from falling into the hands of a competitor. In the main, the best approach for any given employer will depend upon the type of information it needs to protect, and that approach may include a combination of ex-ante and ex-post measures.

II. INCREASING DISFAVOR OF CNCS

Of late, CNCs have come under increasing attack by courts, legislatures, and scholars. Recent precedent suggests courts will apply heightened scrutiny to CNCs, representing a shift in the law in favor of employee mobility.[8] Legislatures and scholars also argue that CNCs are not well suited to the changing nature of the employment relationship and inhibit innovation in a high-tech economy.[9]

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include customer goodwill, customer contacts, and investments in training. *See* Swift, *supra* note 1, at 233-36 (explaining the criteria courts have used to determine legitimate business interests from training, customer contacts, and goodwill). Overreliance on CNCs is particularly problematic where an employer competes nationally or internationally since some states and foreign jurisdictions refuse to enforce CNCs even in light of choice of law clauses. *See* Thomas M. Hogan, *Uncertainty in the Employment Context: Which Types of Restrictive Covenants are Enforceable?*, 80 ST. JOHN'S L. REV. 429, 439-40 (2006) (stating that some courts, most notably those in California, have refused to respect choice of law clauses and have struck down certain CNCs formed in other states as against the public policy of California); Johan Lubbe, Robert Fischer & Shawn Kee, *Cross-border restrictive covenants*, 1 LAB. & EMP. BENEFITS 39, 41 (2001-2008) (noting that "[i]n a few jurisdictions, such as India, post-employment [CNCs] are illegal and unenforceable" and that in other jurisdictions such as China, CNCs are only enforceable against certain categories of employees, including senior management and senior technicians).

8. 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, 111-12 (Spring 2008) (stating that "[t]he emerging trend in the law of employee noncompete agreements suggests that courts are generally more inclined to invalidate employee noncompete agreements than [they have been in prior decades] and that the law of employee noncompete agreements is becoming more protective of the employee's interest in mobility").

9. *Id.* at 112 (stating that "[t]he emerging new trend in the law of employee [CNCs] suggests that courts are generally more inclined to invalidate employee [CNCs]" and that courts are "becoming more protective of the employee's interest in mobility" in part because of the "fundamental changes taking place in the economy and in the workplace"); Hogan, *supra*, note 7, at 431 (arguing that "in an era of high employee mobility, it is sometimes difficult to rationalize the need for [restrictive covenants]").

A. *Courts Apply Increasingly Heightened Scrutiny in Reviewing the Enforceability of CNCs*

In light of the public policy in favor of employee mobility, courts generally enforce CNCs only to the extent that they are reasonable in scope (geographically and temporally) and necessary to protect a legitimate business interest.[10] In addition to these factors, courts have given increasing weight to the following two factors: "(1) whether the agreement is injurious to the public, and (2) a balancing of the harms between the employer's legitimate interest and the harshness to the employee."[11]

Traditionally, courts have limited the type of legitimate interests that a CNC may protect[12] and have required that such agreements be "narrowly tailored to preclude only those positions . . . necessary to protect" such interests.[13] Some commentators note that recent precedent, including opinions from states that traditionally have enforced CNCs, demonstrates the current universal reluctance of courts to enforce such agreements "[i]n recognition of our currently dismal economy and the need to permit people to work . . . ."[14] While a thorough review of recent opinions concerning the enforceability of CNCs is beyond the scope of this comment, two recent opinions demonstrate this pro-employee trend.

1. New York: *IBM Corp. v. Johnson*

In *International Business Machines Corp. v. Johnson*, a 2009 opinion from the United States District Court for the Southern District of New York, the court denied IBM's request for a preliminary injunction to enjoin its former Vice President of Corporate Development from working for Dell, one of IBM's biggest competitors in the computer technology industry.[15]

In New York, a party seeking a preliminary injunction must demonstrate two elements: "(1) the likelihood of irreparable injury in the absence of an order or injunction; and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of the hardships 'tipping

10. *See* Hogan, *supra* note 7, at 442 (summarizing the case law from various jurisdictions supporting the two prong test for determining whether to enforce an CNC).

11. Swift, *supra* note 1, at 231.

12. *Id.* at 233 (stating that courts, in general are willing to protect three groups of legitimate business interests: (1) an investment in training, (2) trade secrets, and (3) customer good will).

13. *Id.* at 236 n.66 (citing precedent establishing this requirement).

14. Russell Beck, *Beyond the noncompete*, COMPUTERWORLD, June 2, 2009, *available at* http://www.computerworld.com/s/article/9133835/Beyond_the_noncompete.

15. Int'l Bus. Machs. Corp. v. Johnson, 629 F. Supp. 2d 321, 323 (S.D.N.Y. 2009).

decidedly' in the movant's favor."[16] In *Johnson*, the court first determined that IBM failed to prove a likelihood of success on the merits because Johnson signed his CNC on the wrong signature line, demonstrating, at best, an ambiguous intent to enter into the CNC.[17]

The court next turned to the alternative theory under which the Second Circuit has held that a party may obtain injunctive relief in the context of CNCs—by the employer's showing (1) a sufficiently serious question going to the merits plus (2) hardship tipping decidedly in the employer's favor.[18] After noting that this case satisfied the first prong, the court focused on a balancing of the hardships, finding that "IBM would undoubtedly suffer harm absent an injunctive order" since Mr. Johnson "has inside strategic business information about IBM, and disclosure of that information would harm the Company."[19] Nevertheless, the court found that "IBM ha[d] overstated its case" because Johnson "d[id] not have the sort of information that is considered quintessential trade secret information—detailed technical know-how, formulae, designs, or procedures."[20]

In ultimately denying IBM's request for injunctive relief, the court focused on equitable factors, highlighting the current bleak state of the economy. The court held that "[t]he damage to Mr. Johnson's career and the risk that he will be sentenced to an early retirement, *especially during these volatile economic times*, cannot be underestimated"[21] and thus "forcing Mr. Johnson . . . to abstain from plying his trade for a year would cause him not insubstantial harm."[22] Finally, the court supported its holding on more general grounds by invoking New York's public policy, which "strong[ly] disfavor[s] . . . non-competition covenants in

16. *Id.* at 329.

17. *Id.* at 333 (reasoning that "IBM faces a daunting, if not insurmountable, task in convincing a finder-of-fact that it treated Mr. Johnson's ambiguous conduct as an acceptance of its offer to enter into a [CNC]").

18. *Id.*

19. *Id.* at 335 (stating that

> According to IBM, Mr. Johnson is aware of IBM's past, present, and future business strategies as well as the acquisitions, transactions, and divestitures that IBM is considering. Because of his work as head of IBM's Corporate Development group, Mr. Johnson knows IBM's strategies for growth . . . Mr. Johnson is aware of its assessment of its clients' needs, its competitors' strategies, its opportunities, and its strategies for carrying out its business objectives. Mr. Johnson knows in which areas, companies, and technologies IBM will invest, at what times, and with what expected rates of return.

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20. *Id.*

21. *Id.* at 337 (emphasis added).

22. *Id.* at 336.

employment contracts."[23]

While this case is unique because the CNC between IBM and Johnson was of questionable validity, the District Court's reasoning does evince a shift in willingness to enforce CNCs. Traditionally, New York had been willing to grant preliminary injunctions "where the movant competes directly with the prospective employer and the transient employee possesses *highly confidential* or technical knowledge."[24] Here, the court acknowledged that Johnson possessed highly confidential information, that Dell was a competitor of IBM, and that IBM would be harmed if the injunction were denied. Nevertheless, the court decided in favor of Johnson, relying heavily on public policy concerns, which it considered all the more pressing in light of the current economic downturn. In sum, this case signals a ratcheting up of the harm an employer must show before a New York court will enjoin an employee from working for a competitor even where a potentially valid CNC exists.

2. California: *Edwards v. Anderson* and *Dowell v. Biosense Webster, Inc.*

In California, by far the most employee-friendly state, courts have interpreted California Business & Professions Code, § 16600[25] as almost completely banning CNCs. As applied by the courts, California law allows for CNCs in only three narrow circumstances: those agreements related to (1) the sale or business, (2) dissolution of a partnership, or (3) termination of a member's interest in a limited liability company.[26]

23. *Id.* at 337.

24. Earthweb, Inc. v. Schlack, 71 F. Supp. 2d 299, 309 (S.D.N.Y. 1999) (emphasis added).

25. CAL. BUS. & PROF. CODE § 16600 (West 2009) ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.").

26. *See, e.g.*, Dowell v. Biosense Webster, Inc., 102 Cal. Rptr. 3d 1, 8 (Cal. Ct. App. 2009) (describing the three exceptions to California Bus. & Prof. Code, § 16600 which otherwise bans non-compete agreements:

> One who sells the goodwill of a business, or all of one's ownership interest in a business entity (which includes partnerships or corporations), or substantially all of its operating assets and goodwill, to a buyer who will carry on the business may agree with the buyer not to carry on a similar business within a specified geographic area, if the business will be carried on by the buyer (Bus. & Prof. Code, § 16601); upon dissolution of a partnership or dissociation of a partner, such partner may agree not to carry on a similar business within a specified geographic area, if the business will be carried on by remaining partners or anyone deriving title to the business or its goodwill (Bus. & Prof. Code, § 16602); and a member of a limited liability company may agree not to carry on a similar business within a specified geographic area, so long as other members or anyone deriving title to the business or its goodwill carries on a like business

According to California courts, "section 16600 evinces a settled legislative policy in favor of open competition and employee mobility."[27] Unlike in New York and other states where courts perform an *ad hoc* balancing of employee and employer interests, in California, the legislature has pre-determined that the balancing of interests always tips in favor of the employee.[28]

Further, in California, an employer's use of an illegal CNC (one falling outside of the three narrow exceptions) violates California's unfair competition laws.[29] Thus, beyond refusing to enforce a CNC, a California court can assess penalties against an employer for trying to enforce an overly broad CNC.[30]

In two recent opinions California courts have rejected or cast serious doubt on two judicially created exceptions to California's ban on CNCs. As a result, it appears that all CNCs will be void as a matter of law in California unless they fall into one of the three statutorily based exceptions to § 16600.

In 2008, the California Supreme Court in *Edwards v. Arthur Anderson*[31] rejected the "narrow restraint" exception to California's prohibition on CNCs adopted by the Ninth Circuit Court of Appeals in *Campbell v. Trustees of Leland Stanford Jr. Univ.*[32] In *Campbell*, the Ninth Circuit interpreted § 16600 to ban only those CNCs which *completely* restrained an employee from practicing his "profession, trade or business."[33] The Ninth Circuit remanded the case for the District Court to determine whether the CNC at issue completely barred the employee from practicing his trade (and thus was void) or whether it was a valid narrow restraint, only barring him from pursuing "a small or limited part of [his]

(Bus. & Prof. Code, § 16602.5).

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27. *Id.* at 10.

28. *Id.* (stating that, in California "[t]he interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change" (quoting Diodes, Inc. v. Franzen, 67 Cal. Rptr. 19, 26 (Cal. Ct. App. 1968))).

29. CAL. BUS. & PROF. CODE § 17200 (2010) (defining unfair competition as including "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ").

30. *See, e.g.*, Application Grp., Inc. v. Hunter Grp., Inc., 72 Cal. Rptr. 2d 73, 88-91 (Cal. Ct. App. 1998) (holding that § 17200 makes violations of other provisions of the California Business & Professional Code independently actionable).

31. Edwards v. Anderson LLP, 189 P.3d 285, 291-92 (Cal. 2008).

32. Campbell v. Bd. of Trs. of Leland Stanford Jr. Univ., 817 F.2d 499, 502 (9th Cir. 1987).

33. *Id.*

business, trade or profession."[34]

In *Edwards*, Arthur Anderson (AA) argued that its eighteen-month CNC should be enforced because it did not *completely* restrain its employee, Edwards, from practicing his profession.[35] Instead, AA asserted that the CNC at issue only narrowly restrained Edwards from "performing professional services of the type he had provided while at AA, for any client on whose account he had worked during 18 months prior to his termination."[36]

The California Supreme Court declined to follow the Ninth Circuit, noting that no California state court had adopted the "narrow restraint exception."[37] The court reasoned that the language of § 16600 is "unambiguous" and "if the Legislature intended the statute to apply only to restraints that were *unreasonable* or *overbroad*, it could have included language to that effect."[38] Notably, the *Edwards* court declined to comment on another judicially created exception to § 16600, the so-called "trade secret exception," since Edwards did not dispute the portion of his employment agreement that prohibited him from disclosing trade secrets.[39]

Two California Courts of Appeal have recently addressed the "trade secret exception" issue left open by *Edwards,* both casting serious doubt on its viability. First, in *The Retirement Grp. v. Galante*, the Court rejected an argument by an employer that its non-solicitation agreement was valid under the "trade secret exception," reasoning:

> [Section] 16600 bars a court from specifically enforcing (by way of injunctive relief) a *contractual* clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the employee's new business, but a court may enjoin *tortious* conduct (as violative of either the Uniform Trade Secrets Act and/or the unfair competition law) by banning the former employee from using trade secret information to identify existing customers, to facilitate the solicitation of such customers, or to otherwise unfairly compete with the former employer.[40]

The court went on to explain that conduct which is violative of the

34. *Id.* (quoting Boughton v. Socony Mobil Oil Co., 41 Cal. Rptr. 714, 716 (Cal. Ct. App. 1964)).

35. *Edwards*, 189 P.3d at 290-91.

36. *Id.*

37. *Id.* at 285.

38. *Id.* at 285-86 (emphasis added).

39. *Id.* at 289 n.4 ("We do not here address the applicability of the so-called trade secret exception to section 16600, as Edwards does not dispute that portion of his agreement or contend that the provision of the noncompetition agreement prohibiting him from recruiting Andersen's employees violated section 16600.").

40. Ret. Grp. v. Galante, 98 Cal. Rptr. 3d 585, 593 (Cal. Ct. App. 2009).

UTSA or unfair competition laws is enjoinable "not because it falls within a judicially-created exception to the [section] 16600 ban on contractual non-solicitation clauses, but is instead enjoinable because it is wrongful *independent* of any contractual undertaking."[41]

In a similar vein, the Court of Appeals in *Dowell v. Biosense Webster* enjoined an employer from enforcing a CNC and a non-solicitation clause in an employee's employment agreement based on the unambiguous language of § 16600 and further held that the employer's use of an illegal employment agreement violated the § 17200 prohibition on unfair competition.[42] In so holding, the court rejected the employer's argument that its CNC fell within the "trade secret exception" to § 16600.[43] The court stated that "[e]ven assuming the exception exists . . . it has no application here . . . because the [CNC and non-solicitation agreement] are not narrowly tailored or carefully limited to the protection of trade secrets, but are so broadly worded as to restrain competition."[44] Further the court stated in dicta that it "doubt[ed] [the] continued viability" of such an exception.[45]

These holdings cast serious doubt on the ability of California employers to enter into CNCs to protect trade secrets, regardless of how narrowly such agreements are tailored. After these holdings it appears that California employers are seriously limited in their ability to protect trade secrets unless they can show actual or threatened misappropriation under California's version of UTSA.[46] At that point, unfortunately, it may be too late to prevent the harm caused by disclosure to a competitor.

B. State Legislatures' Narrowing of the Permissible Scope of CNCs and Movement to Outlaw CNCs

While California's § 16600 statue is the most hostile to CNCs, a number of other state legislatures are becoming decidedly more employee-friendly in limiting enforcement of CNCs. Some have limited the applicability of CNCs by profession, excluding, most notably, doctors, lawyers and broadcast professionals;[47] and at least one state legislature has

41. *Id.* (emphasis added).
42. Dowell v. Biosense Webster, Inc., 102 Cal. Rptr. 3d 1, 3-5 (Cal. Ct. App. 2009).
43. *Id.* at 11.
44. *Id.*
45. *Id.*
46. CAL. CIV. CODE § 3426 (West 2009).
47. Delaware and Illinois preclude the use of CNCs for physicians and broadcast industry employees, respectively. *See* Alison Lobron, *Free Labor Market: Ban on Non-compete Contracts Promoted as a Way to Foster Innovation*, COMMONWEALTH, Summer 2009, at 34 (stating that "[u]nder Massachusetts law, certain groups—such as doctors, lawyers, and broadcasters—cannot be asked to sign [CNCs]").

limited CNCs to senior management level employees.[48]

Massachusetts has previously contemplated banning CNCs altogether or severely narrowing the types of permissible CNCs in light of California's perceived economic advantage in attracting successful technology start-ups often formed by ex-employees of other technology companies.[49] While it appears unlikely that the Massachusetts legislature will outlaw CNCs, a recently proposed bill would limit the ability of employers to restrain employees beyond one year and require employers to provide consideration beyond continued employment to employees who sign a CNC after beginning employment.[50]

C. *The New Economy and the New Employment Relationship*

In an attempt to explain the increasing disfavor of CNCs by courts and legislatures, scholars have focused on the changing nature of the employment relationships and the manner in which innovation occurs in today's high-tech economy.

1. Employability As the Quid-Pro-Quo of the New Employee Relationship

Michael Garrison and John Wendt argue that CNCs are "ill suited" to the realities of the current American economy "where job insecurity and employee mobility are key features."[51] Garrison and Wendt contrast what they conceptualize as the old "industrial employment relationship," characterized by "long-term commitments from employers and employees, advancement within a firm, and job security"[52] with the "new employment relationship," stating:

> The new employment relationship is more uncertain and flexible than the industrial model. A new psychological contract is

48. Swift, *supra* note 1, at 244 (noting that in Colorado, per COLO. REV. STAT. ANN. § 8-2-113(2)(d) (West 2003), CNCs are limited to only "executive and management personnel and officers and employees who constitute professional staff to executive and management personnel").

49. *See* Lobron, *supra* note 47, at 33 (stating that "some entrepreneurs and venture capitalists have latched onto non-competes, and [Massachusetts state Representative Will] Brownsberger's bill, as a way to make the Massachusetts entrepreneurial climate as open and mobility-friendly as they perceive California's to be").

50. *See* Russell Beck, *Massachusetts Noncompete Bill Refiled*, FAIR COMPETITION LAW BLOG (Jan. 20, 2011) http://faircompetitionlaw.com/2011/01/20/massachusetts-noncompete-bill-refiled/ (summarizing a noncompete bill filed with the Massachusetts House of Representatives and sponsored by Representative Lori Ehrlich (D-Marblehead) and Representative William Brownsberger (D-Belmont)).

51. Garrison & Wendt, *supra* note 8, at 168.

52. *Id.* at 165.

> emerging that reflects the realities of the new workplace. Under the new implicit quid pro quo, employers do not make a long-term commitment of employment and job security in exchange for the loyalty of the employee. Rather, if the employer makes any implied commitment at all, it is that employment will provide employees with the skills and experiences necessary to make them competitive in the market. *Employability*, not employment, is what the employer implicitly offers in exchange for the employee's efforts and productivity.[53]

Thus, in light of high employee mobility in the current economy, CNCs seem particularly burdensome insofar as they limit employees' ability to bring their acquired skills to a new employer.

2. The New Model of Corporate Innovation

Employers who oppose limitations on CNCs argue that such agreements foster innovation and strengthen the economy by encouraging companies to invest in research and design ("R&D") without fear that their competitors will poach knowledgeable employees or that such employees will leave to start their own directly competing business.[54]

However, in sharp contrast to this argument, recent research from the UCLA Anderson School of Management shows that enforcement of CNCs actually tends to be accompanied by *decreased* spending on R&D.[55] Further, other research shows that an employee who signs a CNC is *less likely* to develop new ideas for an existing employer since the employee knows he will not be able to profit from the idea or start a new business

53. *Id.* at 166-67.

54. *See, e.g.*, Wade Roush, *Compromise Bill Would Allow, But Scale Back, Noncompete Agreements in Massachusetts*, XCONOMY BOSTON, (July 20, 2009), http://www.xconomy.com/boston/2009/07/20/compromise-bill-would-allow-but-scale-back-noncompete-agreements-in-massachusetts/ (stating that employers in Boston who oppose the proposed legislation to ban restrictive covenants argue that CNCs are needed to keep employees from leaving with company secrets and starting directly competitive businesses); *see also*, Scott Kirsner, *Dear Captains of Industry: Where is the Data to Support Your Position on Noncompetes*, BOSTON GLOBE, (Aug. 4, 2009, 7:20 AM) http://www.boston.com/business/technology/innoeco/2009/08/dear_captains_of_industry_wher.html (stating that companies in Boston that oppose a recently introduced bill banning non-competes argue that "noncompetes are 'essential tools to attract and retain employees,'" and that today's start-ups will not be able to "mature into successful firms if their top performers are easily poached").

55. Mark J. Garmaise, *Ties that Truly Bind: Non-competition Agreements, Executive Compensation and Firm Investment*, UCLA Anderson, *available at* http://personal.anderson.ucla.edu/mark.garmaise/noncomp7.pdf (concluding that "that increased enforceability [of CNCs] leads to . . . lower and more salary-based compensation, reduced post-transfer compensation, lower R&D spending and reduced capital expenditures per employee").

using that concept.[56] In fact, a third study concludes that biotech companies located in jurisdictions where CNCs are strictly enforced spawn fewer new start-ups.[57]

Scholars of innovation argue that CNCs are ineffective as a legal tool in the new economy since they are based on an outdated conception of the corporation as the author and inventor.[58] Scholars contrast the old "mass production" or "industrial" system, where innovation occurred in a linear process from idea to product within a single company, with the new "synthetic" or "network" system where an invention "is neither originated nor fully developed by a single corporation."[59] In the new economy, networks of individuals from different firms, along with government and academic institutions share ideas and problem solve as a group in order to innovate.[60] In a forthcoming article, Mark Lemley and James Pooley argue that employee mobility makes possible these idea "spillovers" which "[f]ar from interfering with incentives, empirical evidence suggests . . . actually drive further innovation."[61] Other empirical research shows that firms in high-technology industries are more likely to increase R&D expenditures in light of significant intra-industry spillovers.[62]

In sum, these findings on employee mobility and corporate innovation lend support to courts' and legislatures' increasing disfavor of CNCs. That being said, there are still valid policy reasons and legal arguments in support of offering some level of protection to employers' trade secrets and propriety information.

III. ALTERNATIVES TO CNCS

In light of the perceived shortcomings of CNCs as a legal tool to protect employer interests, legislatures and courts have developed alternative statutes and legal doctrines to protect employers' trade secret and proprietary business information without overly burdening employees or stifling innovation.

56. *See* Mark A. Lemley & James H.A. Pooley, *California Restrictive Employment Covenants After Edwards (draft)*, SOCIAL SCIENCE RESEARCH NETWORK, *available at* http://ssrn.com/abstract=1295606 (supporting the idea that California's more restrictive CNC policy promotes innovation).

57. Toby E. Stuart & Olav Sorenson, *Liquidity Events and the Geographic Distribution of Entrepreneurial Activity*, ADMIN. SCI. Q., Jun. 2003, at 175-201.

58. Catherine L. Fisk, *Knowledge Work: New Metaphors for the New Economy*, 80 CHI.-KENT L. REV. 839, 846 (2005) (citing DuPont and Disney, the inventors of nylon and author of Mickey Mouse, respectively, as perceived corporate inventors in "both law and popular conception").

59. *Id.* at 847.

60. *Id.*

61. Lemley & Pooley, *supra* note 56, at 6.

62. *Id.* at 6-7.

The first three alternatives I discuss, namely the inevitable disclosure doctrine, the UTSA, and the Computer Fraud and Abuse Act ("CFAA"), involve ex-post-facto legal rules that can be used by an employer to enjoin a former employee from taking action, or continuing to take action, that would injure the employer. The last four alternatives I discuss, garden leave clauses, forfeiture-for-competition ("FFC") clauses, "no-poach" agreements, and "no-fault poaching truces," like CNCs, involve ex-ante approaches that a company can take to limit the likelihood that a key employee will disclose trade secrets or other proprietary business information to a competitor or open a competing start-up utilizing such information.

A. The Inevitable Disclosure Doctrine

The doctrine of inevitable disclosure holds that where an employee possesses trade secrets and, according to some courts, other proprietary business information,[63] he can be temporarily or even permanently restrained from working for a competitor in a similar capacity because doing so would inevitably lead to disclosure of such information regardless of the employee's good faith.[64] As discussed below, this doctrine has come under attack by courts and commentators as a form of *de facto* CNC for which the employee did not bargain. As such, it is unlikely that this doctrine will supply much additional security to an employer seeking to protect its trade secrets and other proprietary business information from falling into the hands of a competitor.

1. The Modern Formulation of the Inevitable Disclosure Doctrine: *PepsiCo v. Redmond*

Most scholars and courts cite the 1995 Seventh Circuit case of *PepsiCo, Inc. v. Redmond*[65] as providing the modern formulation of the inevitable disclosure doctrine.[66] *PepsiCo* arose out of a competition in the

63. While information, such as the stage of product development, is not traditionally thought of as a trade secret, New York courts have been willing to protect such information as so-called "trade-like secrets" under the doctrine of inevitable disclosure. *See, e.g.*, Lumex, Inc. v. Highsmith, 919 F. Supp. 624, 628 (E.D.N.Y. 1996) (applying New York Law) (enjoining a former employee from working for a competitor where it was found that the employee would inevitably disclose trade secrets and other proprietary business information such as stage of product development); Cont'l Grp., Inc. v. Kinsley, 422 F. Supp. 838, 845 (D. Conn. 1976) (enforcing a CNC to protect against the release of employer's information).

64. Garrison & Wendt, *supra* note 8, at 149.

65. PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1264 (7th Cir. 1995).

66. *See, e.g.*, Garrison & Wendt, *supra* note 8, at 152-53.

1990s between PepsiCo and Quaker Oats to dominate the sports-drink segment of the beverage market.[67] Quaker Oats was at the top of the market with its popular Gatorade brand, and PepsiCo developed All Sport to compete.[68] The Seventh Circuit enjoined Redmond, a former high-level PepsiCo executive with intimate knowledge of PepsiCo's marketing plans and strategies for All Sport, from working for Quaker Oats for six months *notwithstanding Redmond's failure to sign a CNC.*[69]

In so holding, the Court first noted that Redmond possessed "extensive and intimate knowledge" of PepsiCo's strategies and market plans, which it considered trade secrets.[70] The Court further observed that, given the similarity of Redmond's new position with Quaker Oats to his old position with PepsiCo, it would be impossible for him not to use his knowledge of PepsiCo's strategies unless he had an "uncanny ability to compartmentalize information."[71] Pointing to Redmond's lack of candor in securing his new position as evidence that misappropriation of PepsiCo's confidential information was inevitable, the court ultimately held that an injunction was proper even if his conduct was innocent.[72]

2. *The Current Assault on the Inevitable Disclosure Doctrine: American Airlines, Inc. v. Imhof*

The *PepsiCo* opinion generated a large amount of scholarly criticism based on the perception that the inevitable disclosure doctrine acted as an after-the-fact CNC for which the employee did not bargain.[73] In the aftermath of *PepsiCo,* many state courts either rejected the doctrine outright or required a showing of more than "inevitability"—i.e. "inevitability plus bad faith" on the part of the former employee.[74] Even

67. *Id.* at 153.
68. *Id.*
69. *Id.*
70. *PepsiCo*, 54 F.3d at 1270.
71. *Id.* at 1269.
72. *Id.* at 1271.
73. *See, e.g.*, Garrison & Wendt *supra* note 8, at 157 (stating that "[c]ritics argue that the adoption of the *PepsiCo* formulation has the potential to allow employers to circumvent employee noncompete 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").
74. *Id.* at 158-59 (reviewing case law that either rejects the inevitable disclosure doctrine or imposes an "inevitability plus," noting that "[s]everal jurisdictions have either rejected the inevitable disclosure doctrine outright or have seriously questioned its legitimacy from a public policy standpoint"). Thus far, California, Florida, Maryland, and Virginia have rejected the inevitable disclosure doctrine outright, and other jurisdictions, like Arkansas, have limited use of the doctrine to very "rare circumstances," specifically rejecting use of the doctrine where the new employer takes reasonable steps to ensure that the employee's duties do not require use of the prior employer's confidential information.

those state courts that appeared to initially embrace the doctrine have subsequently narrowed its application. For example, New York courts were initially receptive to the doctrine; however, recent precedent casts doubt on the continued viability of the doctrine as a substitute for a CNC.

In *American Airlines, Inc. v. Imhof*, the United States District Court for the Southern District of New York refused to apply the inevitable disclosure doctrine to enjoin Charles Imhof, a former American Airlines sales manager, from working for Delta Airlines, one of American's biggest competitors, absent an express CNC between Imhof and American.[75] Before dealing with the particulars of the case, the Court expressed strong disfavor for using the inevitable disclosure doctrine as a substitute for an express CNC. The Court stated, "the inevitable disclosure doctrine treads an exceedingly narrow path through judicially disfavored territory" and as such, "must be applied with great care."[76] The Court gave three reasons for the judicial disfavor of the inevitable disclosure doctrine:

> For one thing, its application can have the effect of binding the former employee 'to an implied-in-fact restrictive covenant' not to compete to which the former employee never explicitly agreed. This 'runs counter to New York's strong public policy against such agreements and circumvents the strict judicial scrutiny they have traditionally required.'
>
> Second, the doctrine, if applied too readily, would tend to suppress healthy competition borne of 'the uninhibited flow of services, talent and ideas.'
>
> Third, inherent in the doctrine are the 'drawback[s] . . . that courts are left without a frame of reference because there is no express non-compete agreement to test for reasonableness' and that there are few guideposts for assessment of the likelihood that disclosure or misuse actually will occur.[77]

Turning to the facts of the case before it, the court held that despite the similarity of the Imhof's previous position at American and his new position at Delta, American was unlikely to prevail on an inevitable disclosure theory since it "failed to show that [Imhof] carrie[d] in his head specific confidential information that would be of any material benefit to Delta."[78] Assuming, without deciding, that American's inevitable

M. McClure, *Arkansas Court Limits Use of Inevitable Disclosure Doctrine*, (Jan. 2, 2010), www.aremploymentlaw.com.

75. Am. Airlines, Inc. v. Imhof, 620 F. Supp. 2d 574, 587 (S.D.N.Y. 2009).

76. *Id.* at 582.

77. *Id.* at 581-82.

78. *Id.* at 586. The court further stated that "it is well to bear in mind that we are dealing with an individual responsible for sales of a widely used service as distinct, for

disclosure theory nevertheless presented a substantial question "that is a fair ground for litigation," the court then turned to a balancing of the hardships between American and Imhof.[79]

In ultimately denying American's request for a preliminary injunction, the court focused on the hardship to Imhof, stating the issuance of an injunction would prevent Imhof from working in a sales capacity for any airline in the New York region.[80] The court reasoned that the harm to Imhof would be "substantial" since it would be "quite unlikely that Mr. Imhof, a 49–year old man with a family to support *during troubled financial times*, could find employment, at least at a comparable level of compensation."[81]

Thus, the *Imhof* Court, in rejecting the inevitable disclosure doctrine, applied reasoning similar to that of other recent courts in declining to enforce CNCs by focusing on the particular hardship an employee faces in the current economy. In sum, since the continued viability of the inevitable disclosure doctrine is questionable in many jurisdictions, an employer would be ill-advised to rely on this doctrine to protect its trade secrets, particularly the type of "soft" confidential marketing information at issue in *Imhof*. As the *Imhof* court concluded:

> If American were as deeply concerned about the risk of Mr. Imhof going to work for a competitor as it now professes, it had the means to prevent it. It could have offered Mr. Imhof an employment contract containing a reasonable covenant against post-employment competition. Had it done so, and had Mr. Imhof accepted, American would not be in the position of which it now complains.[82]

Based on *Imhof* and other recent cases, the doctrine of inevitable disclosure appears to be a poor substitute for a CNC with only a very small minority of courts allowing employers to invoke the doctrine to enjoin a former employee from working for a competitor in the absence of an otherwise valid CNC.

B. The Uniform Trade Secrets Act

The Uniform Trade Secrets Act ("UTSA"),[83] which has been adopted in some form by the vast majority of states, is another mechanism available to employers to protect their trade secrets from falling into the hands of a

example, from a food chemist privy to the secret formula for Coca-Cola . . . ." *Id.* at 582.

79. *Id.*

80. *Id.* at 586.

81. *Id.* (emphasis added).

82. *Id.* at 587.

83. UNIFORM TRADE SECRETS ACT, 14 U.L.A. 437 (1985).

competitor.[84] Under the UTSA, a court can enjoin a former employee from working for a competitor if "actual or threatened misappropriation" can be shown—i.e., that the employee has either already stolen or intends to steal his former employer's trade secrets.[85]

While some courts appear to conflate claims of inevitable disclosure and claims of threatened misappropriation under UTSA, as one court has clarified, "[t]he inevitable disclosure doctrine appears to be aimed at preventing disclosures *despite* the employee's best intentions, and the threatened disclosure doctrine appears to be aimed at preventing disclosures based on the employee's [bad] intentions."[86]

As a practical matter it is much harder to prove an employee's bad faith as required under the UTSA than to prove the existence of a valid CNC. In fact, employers often enter into a CNC in order to avoid having to prove the elements of trade secret misappropriation, including (1) that the information the departing employee possesses is in fact a trade secret and (2) that the employee has malicious intent to profit off of the employer's proprietary information.

Because the UTSA protects only information that qualifies as a trade secret, employers cannot use the UTSA as a substitute for an otherwise valid CNC to protect other equally valuable forms of proprietary business information such as marketing plans or competition analysis.[87] In contrast, at least some courts have been willing to protect non-trade secret proprietary business information in enforcing a CNC or under the doctrine

84. Graham M. Liccardi, *The Computer Fraud and Abuse Act: A Vehicle For Litigating Trade Secrets in Federal Court*, 8 J. MARSHALL REV. INTELL. PROP. L. 155, 158 (Fall 2008) (stating that "[e]very state in the United States has laws protecting trade secrets [and f]orty-seven jurisdictions including the District of Columbia have adopted the Uniform Trade Secrets Act ("UTSA"), or some variation thereof, as the basis for its trade secret misappropriation cause of action").

85. UNIFORM TRADE SECRETS ACT, *supra*, note 83.

86. Barilla Am., Inc. v. Wright, 2002 U.S. Dist. LEXIS 12773, *25-*26 (S.D. Iowa, July 5, 2002) (emphasis added).

87. In defining what constitutes a "trade secret" many states turn to the RESTATEMENT (SECOND) OF TORTS § 757 (1939), which states that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [the owner] the opportunity to obtain an advantage over competitors who do not know or use it." Comment (b) to § 757 of the Restatement suggests that six factors should be considered when determining whether an employee's knowledge constitutes a "trade secret": "(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *Id.* at cmt. b.

of inevitable disclosure.[88]

In sum, while the UTSA provides some protection for an employer that both possesses technical trade secrets and can prove that its former employee acted in bad faith, it does not serve as an adequate substitute for a reasonable CNC.

C. The Computer Fraud and Abuse Act

A third ex-post alternative to CNCs is the Computer Fraud and Abuse Act ("CFAA") which, as interpreted by the courts, gives employers a civil cause of action against former employees who access a computer or system without authorization or in excess of authorized access, and cause specific types of damage or loss to the employer.[89]

Specifically, the CFAA provides six civil causes of action, five of which are particularly relevant to an employer seeking to protect its trade secrets or other proprietary business information.[90] Under the CFAA courts can grant compensatory or injunctive relief where an employer can show that its former employee,

(1) intentionally accesse[d] a computer without authorization or exceed[ed] authorized access, and thereby obtain[ed] information from any protected computer;[91]

(2) knowingly and with intent to defraud, accesse[d] a protected computer without authorization, or exceed[ed] authorized access, and by means of such conduct further[ed] the intended fraud and obtain[ed] anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period;[92]

(3) knowingly cause[d] the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;[93]

(4) intentionally accesse[d] a protected computer without authorization, and as a result of such conduct, recklessly

88. *See supra* discussion accompanying note 61.

89. 18 U.S.C.A. § 1030 (West 2008); *see also* Michael R. Levinson & Christopher E. Paetsch, *The Computer Fraud and Abuse Act: A Powerful New Way to Protect Information*, INTELLECTUAL PROP. NEWSLETTER (Am. Bar Ass'n, Chicago, Ill.), Spring 2002, at 24 ("Any information, whether or not it is secret, can be protected under the CFAA. All that most sections of the statute require is that the information be stored on a computer.")

90. *Id.* at 161.

91. *Id.* (citing 18 U.S.C. § 1030(a)(2)(c)).

92. *Id.* (citing 18 U.S.C. § 1030(a)(4)).

93. *Id.* (citing 18 U.S.C. § 1030(a)(5)(A)).

cause[d] damage;[94] or

(5) intentionally access[ed] a protected computer without authorization, and as a result of such conduct, cause[d] damage and loss.[95]

While on its face the CFAA appears to be a promising alternative to CNCs,[96] recent precedent from a number of courts limits the apparent protections afforded by this statute in the employee competition context by narrowly construing two phrases in the statute: (1) "without authorization" and (2) "damage" or "loss."

1. Circuit Courts Are Split Regarding Meaning of "Without Authorization" and "In Excess of Authorization"

An initial stumbling block for employers seeking to invoke the protections of the CFAA is certain courts' narrow interpretation of the phrases "without authorization" and "exceeds authorized access." An employer must show that an employee's computer access violated at least one of those tests in order to recover. While the CFAA defines "exceeds authorized access" as "access[ing] a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter" this definition begs the question of whether and when authorization ends and when it is exceeded, leaving it for courts to decide.[97]

For example, while it is clear that a terminated employee who accesses his or her former employer's confidential documents does so "without authorization," the issue becomes cloudier when a current employee, with authorized access to his employer's computer system, uses the system in a manner that is disloyal to his employer (e.g., for the benefit of a future employer or to engage in a competing enterprise). Indeed, Circuit Courts are split as to whether a disloyal employee can be held to have acted "without authorization" or "in excess of authorization" as required to show a violation of the CFAA.[98]

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94. *Id.* (citing 18 U.S.C. § 1030(a)(5)(B)).

95. *Id.* (citing 18 U.S.C. § 1030(a)(5)(C)).

96. Liccardi, *supra* note 84, at 160. While initially enacted in 1984 as a criminal anti-hacking law aimed at protecting classified information stored on government computers, the CFAA was amended in 1994 to include a civil enforcement provision and again in 1996 to expand its scope to any "computer used in interstate commerce or communication," which arguably includes any computer hooked-up to the Internet. *Id.* at 160 n.46.

97. 18 U.S.C. § 1030(e)(6).

98. Linda K. Stevens & Jesi J. Carlson, *The CFAA: New Remedies for Employee Computer Abuse*, SCHIFF HARDIN LLP (Mar. 2008), www.schiffhardin.com/binary/stevens_carlson_ibj_0308.pdf; *see also* Liccardi, *supra* note 84, at 163 (noting the court split).

In general, courts addressing the issue have taken two positions: a broad approach and a narrow approach. Under the broad approach, "some courts . . . have ruled that an employee's authorization to access his employer's computer system ends when he acts against his employer's interest thereby rendering his conduct 'without authorization.'"[99] In contrast, under the narrow approach, other courts have ruled that "employee malfeasance of this type generally is beyond the reach of the [CFAA]."[100]

a. The Broad Interpretation: Shurgard Storage Ctrs. v. Safeguard Self-Storage

The broad interpretation, first advanced by the District Court for the Western District of Washington in *Shurgard Storage Ctrs., v. Safeguard Self Storage*[101] and subsequently adopted by the Seventh Circuit,[102] holds that an employee exceeds authorization *whenever* he takes actions disloyal to his employer.

In *Shurgard*, the employer, a leader in the self-service storage industry, allowed Eric Leland, one of its employees, access to its confidential marketing and business development plans during his employment.[103] While still employed by Shurgard, Leland received an employment offer from defendant Safeguard, a direct competitor of Shurgard. Leland then sent emails containing Shurgard's trade secrets to Safeguard.[104] Shurgard, in turn, brought CFAA claims against Safeguard.

The court denied Safeguard's motion to dismiss the CFAA claims based on Safeguard's argument that as an employee of Shurgard, the defendant did not access Shurgard's proprietary information "without authorization."[105] The court held that Leland's access to Shurgard's information was no longer "authorized" when he began acting as an agent of Safeguard against the interests of his employer.

The court based its holding on the Restatement (Second) of Agency § 112 which states that "[u]nless otherwise agreed, the authority of an agent terminates if, without knowledge of the principal, he acquires adverse

99. Stevens & Carlson, *supra* note 98.

100. *Id.* at 98; *see also* Liccardi, *supra* note 84, at 163 (explaining the broad approach).

101. Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc., 119 F. Supp. 2d 1121 (W.D. Wash. 2000).

102. Int'l Airport Ctrs., L.L.C. v. Citrin, 440 F.3d 418, 420-21 (7th Cir. 2006) (adopting a broad interpretation of the term "without access" and finding a former employee liable under the CFAA where he destroyed files on his company-owned laptop prior to returning it to his former employer, and the company lacked copies of the files).

103. *Shurgard Storage Ctrs.*, 119 F. Supp. 2d at 1122-23.

104. *Id.*

105. *Id.*

interests or if he is otherwise guilty of a serious breach of loyalty to the principal."[106] According to the court, the employee accessed his computer "without authorization" as soon as he acted in a manner harmful to his current employer and beneficial to his prospective employer.[107]

b. Narrow Interpretation: LVRC Holdings v. Brekka

The narrow approach, adopted by the Ninth Circuit, rejects the application of agency principles to the CFAA. Under the Ninth Circuit's holding, liability under the CFAA does not turn on whether there is a breach of the duty of loyalty under state law, but instead focuses on whether an employee has *permission* to access a computer.

In *LVRC Holdings, L.L.C. v. Brekka*, the Ninth Circuit rejected LVRC's CFAA claims against one of its former employees, Christopher Brekka, who had accessed and emailed himself a number of LVRC's proprietary documents prior to terminating his employment to start a competing company.[108] The court rejected the broad approach adopted by the Seventh Circuit, reasoning that "[n]o language in the CFAA supports LVRC's argument that authorization to use a computer ceases when an employee resolves to use the computer contrary to the employer's interest."[109]

According to the *LVRC* court, "authorization" depends on actions taken by the employer, not the employee. Authorization ceases only when the employer rescinds the employee's right to use the computer.[110] The court concluded, "Brekka's use of LVRC's computers to email documents to his own personal computer did not violate [the CFAA] because Brekka was authorized to access the LVRC computers during his employment with LVRC."[111]

In sum, whether an employer will be able to prove that a departing employee violated the CFAA by accessing the employer's computer without authorization, or in excess of authorization, turns almost exclusively on whether the employer's state has adopted a broad or narrow approach as discussed above.

2. Narrow Interpretation of Damages or Loss

Another potential pitfall for employers attempting to obtain injunctive

106. *Id.* at 1225 (citing RESTATEMENT (SECOND) OF AGENCY § 112 (1958)).
107. *Shurgard Storage Ctrs.*, 119 F. Supp. 2d at 1225.
108. LVRC Holdings L.L.C., v. Brekka, 581 F.3d 1127, 1128 (9th Cir. 2009).
109. *Id.* at 1133.
110. *Id.*
111. *Id.* at 1137.

relief under the CFAA is recent precedent adopting a narrow interpretation of what constitutes "loss" or "damage." The CFAA defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information."[112] The CFAA further defines "loss" as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service."[113]

Despite these definitions, some courts have been willing to entertain employers' CFAA claims for damages stemming from the loss of trade secrets. More recent precedent, however, suggests that a number of federal judges are unwilling to consider trade secret losses as "losses" for the purpose of the CFAA, reasoning that the "underlying concern of the Act [is] damage to data" and that "[t]he statute was not meant to cover the disloyal employee who walks off with confidential information."[114]

In *Mintel Int'l Grp., Ltd. v. Neergheen*, the District Court for the Northern District of Illinois rejected an employer's CFAA claim against an allegedly disloyal employee, reasoning that:

> [T]he plain language of the [CFAA] appears to refer to situations in which data is lost or impaired because it was erased or otherwise destroyed, or in which computer networks or databases are disabled. Thus, this Court, like other courts in this district, finds that copying, e-mailing or printing electronic files from a computer database is not enough to satisfy the damage requirement of the CFAA. Rather, there must be destruction or impairment to the integrity of the underlying data.[115]

The court dismissed the employer's CFAA claim, finding that the

112. 18 U.S.C. § 1030(e)(8) (2006).

113. 18 U.S.C. § 1030(e)(11) (2006). As an alternative to proving damages in the amount of at least $5,000, an employer can recover if it can show one or more of the following aggravating factors: "the modification or impairment of a medical examination of one or more individuals, . . . 'physical injury to any person,' . . . 'a threat to public health or safety,' or . . . 'damage affecting a government computer used for national security, defense, or justice.'" Liccardi, *supra* note 84, at 162 (citing 18 U.S.C.A. § 1030(c)(4)(A)(i)(I)-(V) (West 2008)).

114. Kluber Skahan & Assocs. v. Cordogan, Clark & Assocs., No. 08-CV-1529, 2009 WL 466812, at *8 (N.D. Ill. Feb. 25, 2009) (quoting Am. Family Mut. Ins. Co. v. Rickman, 554 F.Supp.2d 766, 771 (N.D. Ohio 2008)); *see also* Garelli Wong & Assocs., Inc., 551 F. Supp. 2d at 708-09 (N.D. Ill. 2008); Sam's Wines & Liquors, Inc. v. Hartig, No. 08 C 570, 2008 WL 4394962, at *4 (N.D. Ill. Sept. 24, 2008) (finding no damage or loss for the purpose of the CFAA in situations involving alleged trade secret theft from an employer's computer network).

115. Mintel Int'l Grp., Ltd. v. Neergheen, No. 08-CV-3939, 2010 U.S. Dist. LEXIS 2323, at *31 (N.D. Ill. Jan. 12, 2010).

former employee had not erased any of the employer's documents "nor did he install any destructive software that would compromise the integrity of the data or disable [the employer's] computers or its networks."[116]

In sum, whether the CFAA will provide an additional basis of relief for employers confronted with an employee "jumping ship" to work for a competitor depends on how the employer's jurisdiction interprets the key phrases: (1) "without authorization" or "in excess of authorization" and (2) "damage or loss." Due to the unclear scope of the CFAA and certain courts' views that the Act is inapplicable to employer/employee competition and trade secret disputes, the CFAA is a far from perfect substitute for a valid CNC.

D. *Garden Leave Agreement*

The first alternative ex-ante approach, the so-called "garden leave" clause ("GLC"), is quite similar to a CNC in that it prohibits a former employee from working for a competitor for a set duration; however, under a GLC, unlike a typical CNC, the employer agrees to pay the employee during non-compete term. This approach, which has been used by employers in the United Kingdom ("U.K.") for many years, is "based on the quaint idea that the employer pays the employee to stay at home and tend to his or her 'garden.'"[117]

Like CNCs, GLCs protect employers' interests in trade secrets and other proprietary business information and prevent competition from key employees.[118] Further, "[j]ust as with a [CNC], if the employee fails to abide by the garden leave clause, the employer may apply to the appropriate court for an injunction that would enforce the provision."[119]

While at first blush GLCs appear to be no different than CNCs containing a severance package, the two provisions differ in two separate but related ways. First, an employee bound by a GLC "remains an employee of his former employer during the garden leave period" and as such continues to owe his former employer a duty of loyalty.[120] Second, whereas employees bound by a typical CNC do not receive health insurance or other employment benefits during the term of the non-

116. *Id.* at *32.

117. Jeffrey S. Klein & Nichols J. Pappas, *'Garden Leave' Clauses in Lieu of Non-Competes*, 241 N.Y. L.J. 24 (2009), *available at* http://www.weil.com/files/Publication/50a64bcb-b139-426d-a8f713cf1a430214/Presentation/PublicationAttachment/f8b82b04-0d1d-4232-b345-1b653061cadf/Garden_Leave.pdf (examining employers' use of garden leave clauses as a substitute for CNCs).

118. *Id.*

119. *Id.*

120. *Id.*

compete, employees subject to a GLC are entitled to such benefits.[121]

Although courts in the U.K. routinely enforce GLCs, very few courts in the U.S. have addressed the issue.[122] Nevertheless, commentators have argued that U.S. courts would likely enforce GLCs because U.S. courts have routinely enforced similarly-structured CNCs.[123] In determining whether to enforce a CNC, courts look at the harm caused to the employee, along with other factors. Where U.S. courts have upheld a CNC as reasonable they have routinely pointed to the following terms that are similar to those of GLCs: (1) the employer provides health insurance during the term of the non-compete;[124] and (2) where it grants the employee the choice of whether or not to leave the employer.[125] Both of these factors, which are also present in a typical GLC, mitigate any undue burden to the employee.

While GLCs present a promising alternative to CNCs, there are two main drawbacks. First, GLCs are more costly to employers because they require payment of salary and benefits for a period during which the employers receive no services from the employee.[126] Second, while U.S. courts have upheld CNCs with durations of a year or more based on the length of time an employer's legitimate interests in trade secrets or other proprietary information remain valuable,[127] courts in the U.K. and the U.S.

121. *Id.* A number of CNCs that have come before the courts have provided for the continuation of salary and health care benefits during the term of the CNC. Courts look at such terms favorably in determining whether to enforce an otherwise valid CNC. *See, e.g.*, Lumex, Inc. v. Highsmith, 919 F. Supp. 624, 629-36 (E.D.N.Y. 1996) (enforcing a CNC where the employer agreed to pay the employee's salary and continue providing health benefits during the term of the CNC); Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 182 (S.D.N.Y. 2006) (enforcing the same).

122. Klein & Pappas, *supra* note 117.

123. *Id.*

124. *Id. See supra* text accompanying note 121 (suggesting that courts consider contract terms providing for employee health care benefits in the decision of whether to enforce a CNC); *see also* Ticor Title Ins. Co. v. Cohen, 173 F.3d 63, 71 (2d Cir. 1999) (upholding a six-month CNC despite the failure of the employer to pay the employee during the term of the CNC where the employee received $600,000 annually during the course of his employment).

125. *See, e.g.*, Bus. Intelligence Servs., Inc. v. Hudson, 580 F. Supp. 1068, 1070 (S.D.N.Y. 1984) (holding that a former employee would not be unduly burdened by the enforcement of a restrictive covenant enjoining him from working for a competitor because he could have continued on with her former employer). Under a garden leave clause, it is typically the employee's resignation that starts the clock on the non-compete period. Klein & Pappas, *supra* note 117.

126. Klein & Pappas, *supra* note 117.

127. *See Bus. Intelligence Servs.*, 580 F. Supp. at 1072-73 (enforcing a one-year nationwide restrictive covenant preventing a top executive from working for a competitor in the computer software programming industry because the employee's knowledge would be competitively advantageous to both BIS and its competitors for at least a year).

have not been asked to uphold a GLC beyond a ninety-day period.[128] While U.S. courts could theoretically enforce GLCs of longer durations, the lack of precedent makes it unclear whether GLCs would provide a sufficient alternative to CNCs in situations where, for example, the employee possesses trade secrets or proprietary information whose value extends beyond ninety days.[129]

E. Forfeiture-for-Competition Clauses and the Employee-Choice Doctrine

Another promising ex-ante option is the so-called "forfeiture-for-competition" ("FFC") clause, which conditions the payment of stock or cash awards to an (executive) employee on that employee's honoring an agreement not to work for a competitor for a certain amount of time after terminating his or her employment.[130] If the employee does compete, he or she will not only forfeit any unvested compensation, but may also have to return previously awarded benefits.[131]

While such agreements appear similar to traditional CNCs, several key differences make FFC clauses more acceptable to legislatures and a majority of courts, thereby making them more readily enforceable by employers.

First, FFC clauses, unlike CNCs, are contained in a separate employee benefits plan rather than laid out in the employment agreement.[132]

Second, unlike a CNC, an FFC clause does not limit an employee's mobility *per se*. Instead, it merely conditions payment of additional awards on an employee's not competing. New York courts in particular have long preferred FFC clauses to CNCs because FFC clauses do not impose "unreasonable restriction [upon] the liberty of a man to earn his living [since] he may be relieved of the restriction by forfeiting a contract right or

128. Klein & Pappas, *supra* note 117.

129. *Id.*

130. Michael Starr & Amy L. Strauss, *Non-Competition by Employee Choice*, HOGAN LOVELLS (Jan. 2004), http://www.hoganlovells.com/files/Publication/133ad50f-cd29-48e6-ba2b-ff4524141b2b/Presentation/PublicationAttachment/2ceacfff-9cd7-427a-be1a-0dd6b786bd0b/Non_comp%20By%20Employee%20Choice.pdf. An FFC clause typically appears in an employee's stock option, bonus or other deferred or incentive-based compensation plan. Klein & Pappas, *supra* note 117.

131. Starr & Strauss, *supra* note 130.

132. This creates additional problems since the Employee Retirement Income Security Act of 1974 ("ERISA") controls many aspects of employee benefit plans and expressly forbids FFC provisions in most employee benefits plans. *See* Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1053(a)(3)(B) (2006). However, many executive compensation agreements are *not* covered by ERISA. *See* Jeffrey S. Klein & Nicholas J. Pappas, *"Forfeiture-For-Competition" Agreements*, THE METRO. CORPORATE COUNSEL, Feb. 2004, at 11.

by adhering to the provisions of his contract."[133]

Third, and along the same lines, FFC clauses, unlike CNCs, are not held to a standard of reasonableness under the approach adopted by a majority of jurisdictions (although a minority of courts do impose a reasonableness test in determining whether to enforce a FFC clause).[134] While CNCs must be reasonable in time, geographic scope, and tied to a legitimate business interest,[135] under the majority approach to FFC clauses, courts will enforce such a clause "without regard to its reasonableness if the employee has been afforded the choice between not competing (and thereby preserving his benefits) or competing (and thereby risking forfeiture)."[136]

While a lack of reasonableness requirement appears to unfairly favor the employer, a fourth difference between CNCs and FCC clauses lessens the burden upon employees; the remedy for a breach of an FFC clause does not include injunctive relief (which is available for breach of a reasonable CNC) and only includes recovery for damages. This difference weakens the suitability of an FFC clause as a replacement for a CNC because an employee who elects to forgo additional compensation under the terms of an FFC clause in order to compete with her employer cannot be enjoined from doing so.

In sum, FFC clauses have many benefits. They encourage employee retention and loyalty and promote innovation and corporate growth by linking an executive's pay to long-term corporate profitability. Nevertheless, an FFC clause cannot operate as a perfect alternative to a reasonable CNC. Although an FFC clause makes it less attractive for an employee to compete, it fails to provide a cause of action to enjoin her from doing so.

Effective FFC clauses may, however, provide a benefit unavailable to an employer under a CNC, as noted above. Specifically, if the employee elects not to compete in exchange for greater benefits, the employer

133. Kristt v. Whelan, 164 N.Y.S.2d 239, 243 (N.Y.S.2d 1957) (holding that an employee forfeited his rights as beneficiary to a pension trust created by his employer where the payment of such funds were conditioned on the employees agreement not to work for a competitor and the employee chose to work for a competitor. The court reasoned that the agreement was fair since the employee had "the choice of preserving his rights under the trust by refraining from competition . . . or risking forfeiture of such rights by exercising his right to compete . . . ").

134. Missouri, Indiana and New York are among the states following the majority approach and do not impose a test of reasonableness. Nebraska, Wisconsin, Connecticut and Texas adopt the minority approach and subject FFC to a test of reasonableness.

135. *See, e.g.*, BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1223 (N.Y. 1999) (utilizing a reasonableness test whose factors analyzed include whether a CNC is tied to a legitimate interest of the employer and whether the CNC is reasonable in time and geographic scope).

136. Lucente v. Int'l Bus. Machs. Corp., 310 F.3d 243, 254 (2d Cir. 2002).

protects not only trade secrets and other "legitimate business interests," but also all other information and skills possessed by the departing employee, from falling into the hands of a competitor.

F. "No-Poach" Agreements

Another ex-ante alternative to CNCs is entry by employers into so-called "no-poach" agreements whereby employers in a given industry agree among themselves (usually informally) not to recruit one another's employees. Such agreements may provide an effective means of keeping trade secrets and other proprietary information from falling into the hands of a competitor. That being said, whether such agreements are enforceable remains an open question and appears to vary based on the industry, the terms of the agreement, and the application of anti-trust laws.

In the technology sector, the Department of Justice recently filed a simultaneous complaint and proposed settlement agreement in the District Court for the District of Columbia stemming from allegations that major technology firms, including Google, Yahoo, Apple, and GenTech, effected a no-poach agreement in violation of anti-trust laws. The agreement allegedly restricted the parties from cold-calling each other's employees.[137] While admitting to the no-poach agreement, Google's Associate General Counsel, Amy Lambert, clarified that, "[Google's] policy only impacted cold calling, and [Google] continued to recruit from [other firms who were part of the no-poach agreement] through LinkedIn, job fairs, employee referrals, or when candidates approached Google directly."[138] Nevertheless, the DOJ alleged that the "no-poach" agreement ran afoul of anti-trust laws by significantly restricting employee mobility and artificially depressing salaries of highly skilled workers in the tech industry.[139] Many anti-trust experts sided with the DOJ's position arguing that "[b]y agreeing not to hire away top talent, the [high-tech] companies could [have been] stifling competition and trying to maintain their market

137. Press Release, Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010) (available at http://www.justice.gov/atr/public/press_releases/2010/262648.htm) [hereinafter "DOJ Sept. 24, 2010 Press Release"].

138. Nancy Gohring, *Google, Apple, Others Settle Over No-Poaching Deals*, COMPUTERWORLD (Sept. 27, 2010), http://computerworld.co.nz/news.nsf/careers/google-apple-others-settle-over-no-poaching-deals.

139. Thomas Catan & Brent Kendall, *U.S. Tech Probe Nears End*, WALL ST. J., Sept. 17, 2010, at B2, *available at* http://online.wsj.com/article/SB10001424052748703440604575496182527552678.html#printMode (stating that according to the DOJ, the "no-poach" agreements "amount to an effort by companies to limit competition for talent, harming employees' ability to get the best jobs and wages [and reducing the incentives for people to enter professions in high demand], according to people familiar with the matter").

power unfairly . . . ."[140]

The proposed agreement, if accepted by the court, would remain in force for five years and prevent the named tech companies from "entering, maintaining or enforcing any agreement that in any way prevents any person from soliciting, cold calling, recruiting, or otherwise competing for employees."[141] In a press release issued on the same day that the complaint and proposed settlement were filed, the DOJ indicated that it was investigating other tech companies for entering into similar "no-poach" agreements.[142] While the settlement agreement and continued scrutiny by the DOJ seriously undermine the potential of "no-poach" agreements to serve as a substitute for CNCs in the tech industry, such agreements may remain viable in other industries, provided that they do not suppress employee salaries.

G. No-Fault Poaching Truces or "Fair-Poaching" Agreements

A final ex-ante approach, so-called "no-fault poaching truces" or "fair-poaching" agreements, involves intra-industry agreements not to restrict employee mobility provided that the defecting employee limits the information he takes with him to his new employer. A number of brokerage firms have signed a no-fault poaching truce in an effort to reduce legal fees associated with litigating restrictive covenants.[143] Under this agreement, called "The Protocol for Broker Recruiting" or "The Protocol," the 500 plus brokerage firms signatories agree to permit brokers to move freely between firms, but limit the information that a departing broker may take with him to his new firm in order to protect each firm's proprietary information.[144] Unlike the "no-poach" approach allegedly taken by tech-

140. Cecilia Kang, *Antitrust Probe Targets Tech Giants, Sources Say*, WASH. POST, June 3, 2009, at A3, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/06/02/AR2009060203412.html; *see also* Miguel Helft, *U.S. Inquiry Into Hiring at High-Tech Companies*, N.Y. TIMES, June 3, 2009, at B2, *available at* http://www.nytimes.com/2009/06/03/technology/companies/03trust.html (detailing the Department of Justice's investigation into possible anti-trust violations caused by the recruiting practices of a number of the largest technology corporations, based on information from "people with knowledge of the investigation").

141. DOJ Sept. 24, 2010 Press Release, *supra* note 137, at 2.

142. *Id.* at 3 ("Today's complaint arose out of a larger investigation by the Antitrust Division into employment practices by high tech firms. The division continues to investigate other similar no solicitation agreements").

143. *See* Suzanne Barlyn, "How to Switch Firms . . . and Not Get Sued," WALL ST. J., Sept. 20, 2010, at R9, *available at* http://online.wsj.com/article/SB10001424052748703846604575447924199878014.html#printMode (describing the Protocol as "a set of guidelines intended to end legal wrangling between firms while safeguarding clients' privacy and freedom to move their accounts when their brokers switch between firms that observe the procedures").

144. *Id.* (noting that "Protocol signatories generally agree not to sue one another when

firms, the "no-fault" poaching truce approach has the effect of enhancing employee mobility while protecting the true interests of the brokerage firms.

While the Protocol is, in theory, a good solution that balances the interests of brokerage firms and employees, firms do not always honor the Protocol in practice, particularly where the employee's new employer is not a signatory.[145] When financial firms bring legal action to enjoin a former employee from working for a competing firm, one of the main benefits of the Protocol, the savings in legal fees, is lost.[146] With that said, Protocol signatories that bring suit are rarely successful where the employee has acted in accordance with the Protocol. In addressing the issue, courts have typically denied Protocol signatories' requests for injunctive relief, regardless of whether the new employer was a signatory. These courts reasoned that by signing the Protocol, financial firms are tacitly agreeing that no harm results when financial advisors switch firms.[147]

A "no-fault poaching" agreement may be a good alternative to a CNC in certain sectors, like the brokerage industry where client lists are at issue.

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their advisers switch firms, provided the advisers follow certain rules"). Specifically, the Protocol provides that:

> If departing [brokers] and the new firm follow this protocol, neither the departing [advisor] nor the firm that he or she joins would have any monetary or other liability to the firm that the [advisor] left by reason of the [advisor] taking the information identified below or the solicitation of the clients serviced by the [advisor] at his or her prior firm, *provided*, however, that this protocol does not bar or otherwise affect the ability of the prior firm to bring an action against the new firm for "raiding." The signatories to this protocol agree to implement and adhere to it in good faith.

PROTOCOL FOR BROKER RECRUITING 1 (2004) (emphasis in original).

145. Dan Jamieson, *Brokers Feel Mobility Is Still Threatened*, INVESTMENT NEWS (June 16, 2008), http://www.investmentnews.com/article/20080616/REG/832686944 (stating that the Broker Protocol "isn't always being honored, according to some attorneys familiar with the situation").

146. Barlyn, *supra* note 143, at R9.

147. *See, e.g.*, Smith Barney Div. of Citigroup Global Mkts., Inc. v. Griffin, No. 08-0022-BLS1, 2008 WL 325269, at *8 (Mass. Super. Jan. 23, 2008) (declining to grant an injunction where a broker left one firm that was a signatory of the Brokerage Protocol for a firm that was not a signatory, reasoning that where a firm:

> [P]ermits its financial advisors to leave for 38 other financial institutions [who are signatories to the Protocol] and solicit their former clients with Client Information they took from [the firm], it cannot credibly contend that the harm that will result if [defendants are] allowed to do the same at a 39th firm is so substantial and so irreparable . . .

as to require an injunction). The court further explained that "'[b]y setting up such a procedure for departing brokers to take client lists, [the financial services firm] tacitly accepts that such an occurrence does not cause irreparable harm.'" *Id.* at *7 (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Brennan, No. 1:07CV475, 2007 WL 632904, at *2 (N.D. Ohio Feb. 23, 2007)).

However, in industries where the employer is more concerned with other forms of proprietary business information and trade secrets, it is unclear whether such an approach would work well.

Thus, the usefulness of "no-poach" and "no-fault poaching" agreements as alternatives to CNCs may vary greatly by industry. "No-fault poaching" agreements appear to best balance the competing interests of employers and employees and work well when the member firms abide by them; however, because courts appear to enforce such agreements against member firms *regardless* of whether the poaching employer is a member or not,[148] firms may be discouraged from signing on.

IV. CONCLUSION

In conclusion, it appears that the best way for an employer to protect both trade secret information and other proprietary business information is to take a combination of ex-ante and ex-post approaches. From an ex-ante perspective, and despite courts' increasing disfavor, CNCs appear to remain a viable option for employers (in any state other than California) seeking to protect their legitimate interests in trade secrets, client lists, client goodwill, and other proprietary business information. With that said, CNCs will only be enforced where the employer limits such agreements to key employees who possess the above information, and narrowly tailors the terms to meet the precedent in the employer's jurisdiction regarding reasonableness in scope, geography, and types of employment.

Outside of CNCs, there does not appear to be a single alternative ex-ante legal tool that would afford the same scope of protection to employers for about the same cost. While GLCs appear to present the most promising ex-ante alternative, such clauses cost more than the traditional CNC and may provide insufficient protection in light of the shorter duration of GLCs which courts have upheld in the past. Further, if an employee violates a GLC, an employer will still have to expend considerable funds in filing for an injunction and still must satisfy the overarching reasonableness requirement.

Another promising ex-ante alternative in a majority of jurisdictions appears to be supplementing or replacing CNCs with FFC clauses. Because FFC agreements do not implicate public policy concerns regarding a person's ability to earn a living, but instead condition stock awards or other deferred compensation on an employee's not working for a

148. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Brennan, No. 1:07CV475, 2007 WL 632904, at *2 (N.D. Ohio Feb. 23, 2007) (holding that mere agreement to the Protocol constitutes tacit acceptance that transfers of client contact information do not cause irreparable harm, regardless of whether the former employee leaves to work for a signatory or a non-signatory to the Protocol).

competitor for a set period of time, a majority of courts view such agreements more favorably. Such clauses protect an employer's trade secrets and proprietary business information and, in a majority of jurisdictions, such clauses are not subject to the overarching reasonableness requirements that make the validity of CNCs and GLCs uncertain and costly to litigate. On the other hand, FFCs are not a perfect alternative since an employer's recovery for an employee's violation of an FCC is limited to monetary relief and courts seem unwilling to enjoin such employees from engaging in a competitive enterprise.

To rank ex-post alternatives becomes much more difficult because states vary widely in their willingness to allow an employer to assert a cause of action under statutory and judge-made alternatives to allegedly unfair competition by former employees. Determining the best ex-post option for employers highly depends on: (1) the type of information the employer seeks to protect; (2) the jurisdiction in which the employer resides; and (3) whether the employer can demonstrate bad faith on the part of its ex-employee.

If the employer has established procedures to protect specified trade secrets and can show that the employee engaged in conduct exhibiting a bad faith intent to misappropriate those trade secrets, many jurisdictions will permit claims for injunctive relief under the UTSA.

Alternatively, if the employer is more concerned with an employee misappropriating proprietary business information, or if the information cannot reasonably be classified as a trade secret, the CFAA may provide injunctive relief in jurisdictions that have adopted a broader view of that Act. Provided that the employer can show that the employee accessed files on his employer's network computer in a manner that was disloyal to the employer, many courts will assume that the employee acted "without authorization." If the employer can then satisfy the "damages or loss" requirement(s), those courts will allow recovery, including injunctive relief. Unfortunately, as discussed above, courts widely diverge in their willingness to apply the CFAA in the context of employee disloyalty and unfair competition because the CFAA was enacted to protect damage to computer systems and data stored on those systems, not to act as an additional means of protecting an employer's proprietary information.