A UNIFORM RULE FOR ENFORCEMENT OF NON-COMPETITION CONTRACTS CONSIDERED IN RELATION TO "TERMINATION CASES"

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The enforcement of non-competition contracts has always been a controversial legal topic. Traditionally, courts have been reluctant to uphold these contracts because they restrict a worker's right to be employed in a particular geographic area or occupation. The majority of non-competition contract cases decided by courts are cases in which the employee has voluntarily left his job. The goal of this comment is to propose a uniform test under which courts can consider enforcement of non-competition clauses. This test will be considered in relation to the manner in which courts consider the enforcement of non-competition clauses in the minority of cases in which the employer has fired the employee, which will be referred to as "termination cases." These cases will be examined in an effort to shed light upon the manner in which courts handle non-competition clause cases in general and to show that when considering non-competition clause cases, courts often focus on issues that are only ancillary to whether the non-competition clause should be enforced.

Part I of this comment illustrates the important issues that should be considered when enforcing non-competition agreements by analyzing two competing theoretical views of these contracts. Part II combines various parts of these theoretical approaches to establish the uniform test that courts can use in enforcing these agreements. Part III surveys various academic articles concerning the way that courts handle non-competition clause cases in general. This analysis will reveal that, historically, courts have not focused on the issues deemed to be important in Part I, but that courts have started to initiate methods of analysis that parallel the uniform test proposed in Part II. Finally, specific termination cases are analyzed to show that the various rules formulated to deal with these cases run contrary to the uniform test and the overall trends outlined in Part III.

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I. AN ANALYSIS OF COMPETING VIEWS

The sale of labor is one of the most difficult transactions to regulate and control. The common and statutory law surrounding employment issues tends to be complex and often contradictory. The reason employment law tends to be so confusing is that there are two fundamental interests competing against one another in nearly all employment law questions. With the sale of most fungible items, one does not have to worry about questions of morality or compassion for the item sold. The primary concerns in such a transaction are economic; the goal is to structure the transaction so that wealth is maximized for the purchaser and the seller.

Employment law essentially involves the sale of labor. Although labor is, in the final analysis, a fungible good, the economic concern—wealth maximization—is not the only interest involved. Courts and scholars also express concern over the plight of the worker in the transaction. The fact that the sale of labor involves the livelihood of the worker infuses questions of morality into the shaping of labor law and forces courts to deal with the personal concerns of the worker. These personal concerns in employment law will sometimes lead courts to abandon the economically efficient result in a particular situation if that result offends moral judgment by inflicting hardship upon the employee. Labor is not easily commodified because a moral bond exists between the worker and his work. As a result of this infusion of morality into the sale of labor, courts are reluctant to consider its sale without addressing moral concerns.

The interplay of morality and economics in the field of labor law is apparent in the way courts have typically enforced non-competition contracts. While there are valid employer interests that often are protected by these contracts, and while enforcement of these contracts often will lead to economically efficient results, courts are nonetheless reluctant to enforce

2. See id. (stating that many economists stay away from labor law because it is “founded on a policy that is the opposite of the policies of competition and economic efficiency that most economists support”).
These agreements. Instead, when faced with such a contract, most courts will inquire into whether the contract is "reasonable." This analysis runs contrary to the majority of contract cases in which courts will not inquire into the reasonableness of a contract after it has been breached. This inquiry into the reasonableness of non-competition contracts indicates that there is a general presumption against their enforcement.

The different reasonableness standards used by courts are often muddled and contradictory. The main reason for this confusion is the interplay between the economic and personal concerns discussed above. In non-competition clause cases the economic interest is represented by courts' attention to the "right of contract" of the employer and the upholding of the valid exchange that has taken place between the employer and the employee. However, personal concerns are represented through the courts' sympathy towards the worker and reluctance to limit his employment opportunities. This infusion of morality often prevents the enforcement of the contracts.

Before discussing the reality of how courts do handle non-competition contracts, it is useful to propose a model for how courts should handle non-competition contracts. Many articles have been written proposing such models. The model proposed here is different in that it attempts to accommodate both the economic and moral concerns that surround this topic. These competing concerns can be placed at opposite ends of a spectrum of alienability, with economic theory at one end advocating the complete alienability of labor, and personal theory at the other end advocating strict regulation of the sale of labor in order to protect the worker. By examining each of these positions, a viable middle ground

6. See id.
8. See Pynnonen, supra note 7, at 216 n.8.
10. See Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849, 1857 (1987) (proposing a spectrum with Karl Marx's theory symbolizing the inalienable end of the spectrum and Professor Posner's economic analysis representing the opposite end of the spectrum, one of complete alienability). In this discussion, Professor Radin's position will be considered as the opposite end of the spectrum, because Marx's views of universal commodification cannot reasonably be considered in the discussion of a model for action by United States courts.
can be reached. This middle ground isolates the important issues courts should consider in examining non-competition contracts and produces a uniform test for courts to apply.

A. The Economics End of the Spectrum

1. Pure Economic Theory

The purest form of economic analysis is one that does not account for any personal factors. Actually, such an analysis takes a rather simple approach to the law and human relations. Pure economic theory is most concerned with the goals of competition and economic efficiency. Under such a theory, the law must assume that people are rational agents most concerned with maximizing their wealth. Because of this fundamental drive for wealth maximization, people will naturally strive to interact in the way that will produce the most efficient results, maximizing the wealth of everyone concerned. The result of this analysis can best be described as a legal "hands-off" approach which advocates that courts and legislators should not interfere with the natural workings of the market.

This approach leads to a philosophy that proposes nearly complete alienation of all goods because of the belief that the free market will produce the most beneficial results for society as a whole. The theory posits that market transactions will place property in the hands of those who value it most, thus maximizing overall societal wealth, and that the market should not be restrained by regulations that restrict such transactions. This concept of free exchange readily supports the freedom

11. The purest form of economic analysis is commonly associated with University of Chicago scholars. "Chicago-style economics" is by no means a universally accepted theory of law and economics, and it is not the only economic theory that has been applied to the topic of non-competition clauses. See Zimarowski, supra note 4, at 417-18 (criticizing the application of "Chicago-style" law and economics to labor law). However, "Chicago-style" theory will be used in this discussion because of its hard line approach to law and economics.

12. See Posner, supra note 1, at 990.

13. See Posner, supra note 1, at 997 (discussing the cartelization of the labor movement). Posner's discussion of the National Labor Relations Act as a "cartelizing" of the labor movement reveals his belief that excessive legal intrusion into the market leads to inefficient results, which he claims are the opposite of the goals of "competition and economic efficiency that most economists support." Id. at 990.

14. See generally Richard A. Epstein, Symposium on Law and Economics: Why Restrain Alienation?, 85 COLUM. L. REV. 970, 970 (1985) (concluding that the only reason items should be made inalienable should be to control external harm caused by the particular item or when the item is part of a "common pool" and its sale will directly affect the rights of others).

15. See id. at 972.
to contract, since contracts permit parties to voluntarily exchange property. These beliefs also encompass the "economics" end of the labor law debate. Employees sell their labor through employment contracts; pure economic theory leads to the conclusion that such a sale should not be excessively regulated by the courts through labor laws.

2. "Strict" Economic View of Non-Compete Contracts

In relation to non-compete contracts, pure economic theory leads to a presumption in favor of the enforcement of these agreements rather than the current presumption against such contracts. A non-compete contract is viewed as a willing exchange between the employee and the employer. The employee gives up his right to engage in a particular occupation in a certain geographic area, or his right to use certain information. In exchange, the employer agrees to supply the employee with specialized training and information for the duration of his employment. Because the employer has a tangible interest to protect, either in the specific training that she is providing or in the information that she is bestowing on the employee, the employee's forfeiture of his right to work in a certain area can be considered a valid exchange for access to this interest. Under pure economic theory, the terms of the non-compete contract should not be examined after the fact. It should be treated like any other long-term supply contract that keeps a commodity off the market. The fact that the contract deals with an exchange of labor rather than a fungible commodity should not change the analysis, and the enforcement of the contract should be governed by the same principles that are applied to all other contracts.

3. The Moderate Economic View of Non-Compete Contracts

The major problem with pure economic analysis of these contracts is that it runs contrary to nearly three hundred years of precedent in which courts have inquired into the reasonableness of non-compete clauses after they have been breached. Pure economic theory, however, has been modified to encompass concerns for efficiency and alienability while at the same time explaining the reluctance of courts to enforce non-compete

16. See Callahan, supra note 5, at 705.
18. See Callahan, supra note 5, at 713-14. Callahan argues that non-compete contracts should not be invalidated as restraints on trade simply because they remove a source of labor from the market. She posits that long-term commodity contracts also remove an item from the market and are not considered restraints upon alienation.
contracts. This theory starts under the same premise, that non-compete contracts are an exchange by which employees give up the right to work in a certain area for the ability to receive specific training or information from the employer. It recognizes that what the employer bargains for in these contracts is not that the employee be prevented from working in a certain area, but that the employee not use specific training or information that the employer has supplied to him during the course of employment. This moderate theory is in line with strict economic theory in positing that there is an interest of the employer that deserves to be protected and that these contracts should not be per se invalid.

This theory further hypothesizes that if the employer was able to do so, she would not draft an agreement that included any geographic or occupational restraints on the employee but, instead, would draft an agreement that merely prohibited that employee from using specific information or training. It would be difficult, however, to characterize what skills the employee cannot use or to put in a contract what information it is that the employee is forbidden to take with him. Also, it would be nearly impossible to monitor the employee in his new working environment to determine whether he is violating the contract by using these skills or information. Therefore, non-compete contracts are written broadly to prohibit any employment where there is a risk that the employee could give the employer’s information to a competitor. This theory justifies court intervention in these contracts after a breach on the basis that the employer may have written the prohibition on labor too widely. This would make the contract economically inefficient because the employee would be giving up too much for receiving the information from the employer, and it justifies court intervention after the fact to adjust the contract so that it is efficient. The theory does not advocate interference in the contract for any personal or moral reasons related to the employee’s loss of the ability to work, but instead quantifies the employee’s contribution to the deal and advocates adjustment of the contract when the employee’s contribution exceeds the information or skills supplied by the employer. By not addressing the personal and moral concerns surrounding limitations on employment, economic analysis alone does not present the entire picture.

21. See id. at 98.
22. See id.
23. See id. at 98-99.
B. The Personal End of the Spectrum

1. Personhood Theory

One theory which infuses morality into the rules governing a capitalist economy is the “personhood” theory of property. Unlike pure economic theory, personhood theory rests upon the idea that certain items are inalienable and should be kept out of the marketplace. Items that are inalienable are those which are so connected to the personality or moral fiber of an individual that to assign a monetary value to them would “do violence to our deepest understanding of what it is to be human.” Thus, unlike the economic theories discussed, personhood theory dictates that the law should not only respect the free exchange of goods, but should also endeavor to protect the inalienability of those items that are endowed with personhood. Whether or not something is endowed with personhood involves a moral decision in relation to the particular piece of property that is being considered. Just because property is connected with personhood does not mean that it must be completely inalienable. Personhood theory of inalienability envisions a spectrum upon which on one end the most personal items are kept out of the market, and on the other end completely non-personal items are traded freely, and sale of items in the middle is regulated to the extent that they are personal.

2. Strict Personhood Analysis of Non-Compete Contracts

A strict application of personhood principles would invalidate the majority of non-compete contracts. The freedom to work as one chooses is a highly personal thing, and under personhood theory, it is something that should not be given up contractually. Therefore, non-compete contracts, which can be viewed as a sale of this right by the employee in order to receive the training or information of the employer, would be morally

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24. The originator of this theory is Professor Margaret Jane Radin. See generally Margaret J. Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982). It has been suggested that Professor Radin’s theory of personhood is loosely based upon the writings of Hegel in the nineteenth century, which first linked property to an individual’s personality. See Steven Cherensky, A Penny for Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood, 81 CAL. L. REV. 597, 643-44 (1993).


26. See id. at 1908.

27. See id. at 1856-57 (suggesting that infants, reproductive services, professional degrees, and blood are all examples of things whose “commodification is contested”).

28. See id. at 1907 (“[W]orkers who internalize marked rhetoric conceive of their own labor as a commodity separate from themselves as persons . . . .”).
wrong from a personhood standpoint. Thus, personhood theory would advocate invalidating these contracts. Just as strict economic analysis ignores whether or not the restrictions placed upon the employee are properly fitted to the purpose of the contract, strict personhood analysis focuses too much upon those restrictions and wholly ignores the interests protected by the contract, which are the protectable interests of the employer.

3. The Moderate Personhood View of Non-Compete Contracts

More moderate application of the personhood theory has been proposed in relation to employee contracts through which employees assign intellectual property rights to their employers. This argument advocates the invalidation of such contracts if the employee can demonstrate a personhood interest in the invention that he has contracted away. However, the argument also holds that if the employee cannot show the existence of such an interest, then the contract should be upheld, and all of the invention rights should revert to the employer as part of the terms of the contract.

This "all or nothing" approach could be extended to apply to non-compete contracts. If the employee can display some personal stake in what he is giving up, which would be the right to work at a particular occupation in a particular area, then the contract cannot be upheld. On the other hand, if the employee cannot show a personal connection to this right, then the contract will be enforced. Notice, however, that such a view does not affirmatively assert the interests of the employer. The employer's interests are only protected when the employee cannot express any personal stake in the work opportunities that he is forfeiting. A better analysis would respect the personhood or moral connection that the employer has with the information or specific training that she is attempting to protect and balance this against the personhood interests that the employee has in

29. Some states have or have had statutes that make non-competition agreements illegal on their face. See David A. Cathcart & Christopher J. Martin, Contracts with Employees: Covenants Not to Compete and Trade Secrets, R176 A.L.I.-A.B.A. LAB. & EMP. LAW 679, 704 (1989) (showing that California still has such a statute which prohibits agreements that restrict employment opportunities); Pynnonen, supra note 7, at 217 (Michigan once had such a statute).

30. See Philip J. Closius & Henry M. Schaffer, Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform, 57 S. CAL. L. REV. 531, 546 (1984) (stating that courts focus primarily upon the reasonableness of a covenant's restrictions upon a worker and do not focus upon the critical issue in non-compete clause cases, which is the protectable interests of the employer).

31. See Cherensky, supra note 24, at 601.

32. See id.
working in that particular area.

Such a balancing approach has been rejected in personhood theory because it is claimed that corporations cannot have the same personhood connection to their interests as do individuals.\textsuperscript{33} However, when dealing with non-competition clause cases, some of the interests protected can be said to have a moral, personal connection to the employer who is seeking to protect them. Non-competition contract cases usually involve local companies or professional organizations that are seeking to protect a specialized trade secret that they have accumulated through much research and expense,\textsuperscript{34} or client lists\textsuperscript{35} that they have amassed through years of work in a particular area. In applying a personhood theory moral test to these interests of the employer, it would be almost hypocritical not to extend some degree of personhood to them. It would be an affront to the individual employer or the people who have worked for her not to extend to them some personhood in the client contacts that they have made or in the special training skills that they have developed. True, corporations are economic entities, but any specialized training and information that has been cultivated by these companies has been developed by its individual workers. They have a moral connection to this information that they expect the corporation to protect. It would be unfair to allow newer employees to take this information with them to a competitor. This moral connection should be considered when deciding whether or not to enforce a covenant that keeps an employee from disseminating this information to such a competitor.

II. A UNIFORM RULE FOR ENFORCEMENT

It is clear that there are strengths and deficiencies in the arguments of both positions at either end of the alienability spectrum when they deal with non-competition contracts. However, it is possible to formulate a rule that will combine the strengths of both positions into a uniform test for enforcement. This test will focus upon the important interests a court should consider when deciding whether or not to enforce these contracts.

Economic theories about non-competition contracts are valuable insofar as they isolate the interests that are primarily ignored when

\begin{itemize}
\item \textsuperscript{33} See id. at 660.
\item \textsuperscript{34} See, e.g., Insulation Corp. of Am. v. Brobston, 667 A.2d 729, 731 (Pa. Super. Ct. 1995) (involving a non-competition agreement to protect practices that the company developed through using a sophisticated computer program).
\item \textsuperscript{35} See, e.g., Gelder Med. Group v. Webber, 363 N.E.2d 573, 577 (N.Y. 1977) (involving a non-competition contract issued to protect the patient base that the plaintiff had built through 20 years of providing medicine in the same community).
\end{itemize}
considering non-competition agreements—the interests of the employer.\textsuperscript{36} It is true that the effect of non-competition agreements is to restrict the area in which ex-employees can pursue a certain occupation for a particular amount of time after their employment has ended.\textsuperscript{37} However, the restrictions placed on the employment of the worker should not be viewed as the purpose of the agreement.

If the purpose of these non-competition agreements was to keep an employee from competing simply so that the employer could gain an economic advantage, they would be akin to involuntary servitude and certainly illegal. Such contracts would be a malicious attempt by the employer to limit where an employee could work solely to increase the employer's competitive place in the market. The employer would be limiting the employee's labor prospects, which are completely intertwined with the employee's personhood, for the protection of no personal interests of her own. Thus, the main purpose of these agreements cannot be seen as a limit to where the employee can work, but as a protection of the interests of the employer. The employer seeks enforcement of the agreement in an effort to keep the employee from using business tactics and contacts that rightfully belong to the employer. As economic theory reveals, the focus of courts when considering these agreements should be on the actual purpose behind the agreement, which is the protection of the employer's interests, and they should only be enforced to the extent that they protect these interests.\textsuperscript{38} Thus, if the employer has not contributed any specific information or training to the employee, the non-compete contract should not be enforced.

Where economic theory is deficient is in accurately establishing how courts should determine whether the agreement correctly fulfills its purpose. Moderate economic theory comes close to an appropriate balancing test when it posits that the agreement should only be enforced to the extent necessary to protect the quantifiable interests of the employer.\textsuperscript{39} Under this theory, courts would balance the quantifiable interests of the employer against the economic contributions that the employee has made to the relationship. These economic contributions of the employee are seen as "payment" to the employer for the particular training or information that the employee has received.\textsuperscript{40} This approach is deficient, however, in that

\textsuperscript{36} See Closius & Schaffer, supra note 30, at 544. Closius and Schaffer argue, as does this Comment, that the main thing courts should consider in the enforcement of non-competition agreements is the interest of the employer. They reach this conclusion, however, by comparing similar rules of the common law of agency with the enforcement of non-competition agreements. See id. at 547-51.

\textsuperscript{37} See Blake, supra note 19, at 626.

\textsuperscript{38} See Kohn, supra note 7, at 636-37.

\textsuperscript{39} See Rubin & Shedd, supra note 20.

\textsuperscript{40} See Kohn, supra note 7, at 645.
the employer's interests are tempered only to the extent that one can prove that the contract is inefficient; in other words, to the extent that one can show that the employee is paying too much.\textsuperscript{31} Such a rule fails to consider the personal stake that both the employee has in his labor and the employer has in the interests that she is seeking to protect.

Personhood theory illuminates factors, in addition to purely economic concerns, that the court should consider in determining whether a particular non-compete clause should be enforced. It shows the high value that employees place in their right to work, and justifies another reason, rather than simple efficiency, for limiting the enforcement of these agreements. Enforcement should come only when the agreement protects the employer's interests to the fullest extent necessary without infringing too much upon the personhood of the employee.\textsuperscript{42} By illuminating where economic theory is deficient, personhood theory need not be seen as contradicting the test that the more moderate economists put forward, but rather as complementing it. In essence, both the moderate economists and the moderate personhood theorists seek to achieve the same goal—enforcement of non-competition clauses only to the extent that is necessary to protect the interests of the employer. Thus, these theories can be combined to produce a uniform test that courts can follow when determining whether or not to enforce these agreements.

Each non-competition contract is an exchange. The first inquiry that a court should make in considering how to enforce a non-competition contract is an objective one that isolates the particular components that are a part of this exchange. By using an economic approach, the court will be able to isolate both the interests of the employer and of the employee that are at stake in this agreement. Second, the court should balance the economic and personal contributions of the employer and the interest she is seeking to protect against the economic and personal investments of the employee in that particular interest. If the employee's interests outweigh those of the employer, or if the employer simply has not given the employee any special training or information, then the non-compete contract should be invalidated. However, if the employer's economic and personal interests in information and training provided to the employee outweigh the interests of the employee, the contract should be enforced. Third, if the contract is enforceable, the court should consider the personal and moral stake that the employee has in his labor, and should limit the

\textsuperscript{31} See Rubin & Shedd, \textit{supra} note 20, at 98.

\textsuperscript{42} See Kohn, \textit{supra} note 7, at 646-647. Kohn separates the analysis of covenants into two distinct parts. His argument parallels the one presented here in that he argues that courts should focus primarily upon the purpose behind these agreements, which is to protect the employer's interests, and then engage in a factual inquiry, in which the court should determine whether the particular agreement is correctly formulated to protect those interests.
A hypothetical will illustrate how this uniform test would work in practice. After decades of hard work selling shingles in the tri-state area, David’s Shingles, a small corporation headed by David himself, has amassed a large client list. The client list is valuable because people only need new shingles at an average rate of every ten years, and the list documents the last time that each customer has purchased shingles. Use of the list eliminates many costly sales calls to people who are not ready to purchase new shingles. One of David’s longtime salespeople retires, and David hires Sabrina, an experienced salesperson, as a replacement. As a condition of employment, David requires that Sabrina sign a non-competition agreement, which states that if her employment with David is terminated, she will not engage in shingle sales for a period of five years. After one year, Sabrina grows tired of David’s workaholic attitude towards shingle sales and decides to leave to open up her own shingle selling business within the tri-state area. David challenges Sabrina’s new business as a breach of the non-competition contract. Sabrina’s defense is that she will not use any of the information that she obtained from her access to David’s client lists.

In employing the uniform test, the court faced with the case of David and Sabrina would first objectively attempt to isolate the exchange underlying the non-competition contract. Because Sabrina was already an experienced salesperson, it is clear that the only thing that David could be protecting with the non-competition clause is the client list. Thus, David was granting Sabrina access to this list, which would allow her to have steady and successful employment as a shingle salesperson, in exchange for Sabrina’s promise not to work for a competitor, where she would have the opportunity to use the knowledge she gained from the list against him. The court’s second inquiry would be to balance the personal and economic interests that David has in these lists against the personal and economic interests Sabrina has. Because David developed this list through years of hard work and expenditures, he has a greater stake in it than does Sabrina. Finally, the court should only uphold the agreement to the extent that it is necessary to protect David’s viable interest. Because the list only covers the tri-state area, Sabrina should only be prohibited from selling shingles there. Such a prohibition does not greatly infringe upon Sabrina’s personhood interest in her own labor because she is a qualified salesperson who can achieve sales employment in another area. However, because Sabrina has dedicated a year to shingle selling, she has established an economic and personal tie to the occupation. The court should consider this in determining the proper time restraint of the non-compete contract. Application of the uniform test leads the court to uphold the contract.
between Sabrina and David to the extent that it protects David's viable interests. Sabrina should be prohibited from working in the tri-state area in the shingle business for five years.

III. CURRENT ENFORCEMENT OF NON-COMPETITION CONTRACTS

Under the test proposed, courts would use a combination of economic and personhood theories to determine the interests that are actually at stake and then enforce agreements to the extent that they protect these interests. The history of enforcement of non-competition agreements, however, shows that this test has not been embraced by the courts. Traditionally, courts have not considered the purpose of non-competition agreements and instead have taken the position of the strict personhood theorists by primarily focusing upon the restraints that these agreements place upon the employee. Courts typically do not enforce the non-competition agreement if they find its restraints to be unreasonable.

A. Historical "Reasonableness" Approach

Looking at economic and personhood theories concerning the application of labor law has helped to isolate the factors that a court should consider in enforcing a non-competition clause. This section will look at how courts historically have handled such clauses to determine if they are acting in a manner consistent with the uniform test proposed.

The jurisdiction that most glaringly fails to consider the interests of the employer when considering non-competition agreements is California. Under the California Business and Professions Code § 16600, "any contract which prohibits an employee from fairly competing with his employer after the termination of his employment" is considered per se invalid. This treatment of non-competition contracts parallels the strict personhood analysis that was critiqued in Part I of this comment. Such an approach fails to consider the economic and personal interest that the employer has in the information that he is trying to protect through the agreement. The focus is wrongfully placed upon the restrictions that the contract imposes, rather than the interests it is trying to protect. It is almost as if lawmakers have been blinded by the fact that the contract limits the employment opportunities of the employee. This becomes especially apparent when one considers that California courts will enforce an

43. See Callahan, supra note 5, at 704.
44. See id. at 704-05.
45. See Cathcart & Martin, supra note 29, at 704.
46. See CAL. BUS. & PROF. CODE § 16600 (West 1997).
47. Id.
agreement that does not place a broad restriction on where the employee can work, but rather limits the information that the employee can use in his new job to information in which the former employer does not have a special interest.\textsuperscript{48} Thus, while California courts and lawmakers can recognize a protectable interest, they believe that this interest can never be great enough to justify an all-out restraint on employment, probably because of the personhood considerations surrounding the employee.

California is in the minority in adopting a position that favors a strict personhood analysis.\textsuperscript{49} In considering enforcement of non-competition agreements, most courts typically apply the reasonableness test\textsuperscript{50} that is outlined in the Restatement (Second) of Contracts:

(1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if:

(a) the restraint is greater than is needed to protect the promisee’s legitimate interest, or

(b) the promisee’s need is outweighed by the hardship to the promisor and the likely injury to the public.\textsuperscript{51}

This test seems to be in line with the uniform test. The court should consider enforcement of the agreement only so far as it protects valid interests of the employer. However, this is not how courts have applied the test. Typically, courts have divided the reasonableness inquiry into three separate parts that consider: 1) whether the agreement is reasonable as to the employer; 2) whether the agreement is reasonable as to the employee; and 3) whether the agreement is reasonable as to the public.\textsuperscript{52}

Courts have regularly applied this three-part reasonableness test in a way that gives the second prong more weight than the first prong.\textsuperscript{53} The courts consider the first prong as a threshold requirement—there must be a valid interest of the employer for the court to consider enforcement of the agreement at all.\textsuperscript{54} However, many jurisdictions then go on to isolate the

\textsuperscript{48} See id.

\textsuperscript{49} See Cathcart & Martin, supra note 29, at 704.


\textsuperscript{51} RESTATEMENT (SECOND) OF CONTRACTS § 188 (1979).

\textsuperscript{52} See, e.g., Central Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513, 518 (S.D. 1996).

\textsuperscript{53} The third prong of the test is rarely considered by modern courts. See Callahan, supra note 5, at 706. Callahan posits that this consideration for the public at large developed out of a fear expressed in early English cases that removing the worker from the particular trade would disrupt the entire market and that this concern is no longer expressed by courts because of the large size of the American marketplace. See id. at 724-25.

\textsuperscript{54} See Closius & Schaffer, supra note 30, at 541.
second prong and consider the reasonableness of the scope of the covenant only in relation to the restrictions that it places on the employee. Courts that analyze cases in this manner do not adequately take into account the protectable interests of the employer.  

By giving the reasonableness-to-employee prong of the test a life of its own, courts have shifted the focus of their enforcement decision away from the actual exchange that is governed by the non-competition agreement and toward the particular terms of the agreement. They are not considering the interests that the employer is sharing with the employee in consideration for the employee's promise not to work for a competitor, but rather the abstract fairness of the contract. Courts have invalidated whole agreements upon a finding that either the duration, geographic area, or activity prohibited by an agreement was unreasonable, without even considering whether the agreement protected viable interests of the employer. Such an analysis, which strikes down agreements if they are generally offensive to the personal interests of the employee, only considers half of the equation.

Some jurisdictions have made rigid rules placing limits on the time and area restrictions that a covenant must have to be "reasonable." As long as the court considers the restrictions to be reasonable, it will enforce a covenant regardless of whether it actually protects viable employer interests. Moreover, in cases in which the employer has a very large interest that needs to be protected, the court may not enforce the covenant simply because it finds some parts of it, considered in the abstract, to be unreasonable. Since there is no way for an employer to know what a particular court will consider reasonable, it is difficult for an employer to confidently write an enforceable covenant in some jurisdictions, even if the interests she seeks to protect are great.

B. Current Trends in Enforcement

The recent trend in many jurisdictions has been to correct the error of focusing solely upon the effect that the non-competition contract has on the worker. Instead, some courts have begun to engage in a more proper inquiry which first focuses upon the terms of the agreement in relation to the interests of the employer and then balances these terms against the interests of the employee. For example, Florida courts historically have

55. See id. at 544.
56. See id. at 543.
57. See Kohn, supra note 7, at 649.
58. See id. (describing reasonableness analysis in Georgia courts).
59. See Closius & Schaffer, supra note 30, at 546.
exhibited an "extreme distaste" for non-competition agreements and have often invalidated them under the belief that any restraint on trade and a worker's activities is unreasonable. However, under current Florida law, if the court determines that there is an interest of the employer that merits protection, the court will enforce the agreement unless the employee can prove that the agreement is unreasonable as it relates to him. If the employee can prove that there are unreasonable terms in the agreement, the court then has the authority to reformulate the agreement so that it is reasonable.

Ohio courts have established a test that is even more consistent with the uniform test. Ohio courts formerly refused to enforce non-competition contracts if they found that even one term of the agreement was unreasonable. This practice has been reversed, and Ohio courts currently uphold contracts to the extent that they are necessary to protect the legitimate business interests of the employer.

Thus, courts have gradually been reforming their approach to non-competition agreements to consider the interests of the employer in determining whether to enforce the agreements. One glaring exception to this overall trend, however, is found within recent decisions concerning the enforcement of non-competition agreements in termination cases.

IV. AN ANALYSIS OF COURT TREATMENT OF TERMINATION CASES

Courts have been slowly changing their approach to non-competition agreements. They are considering the interests that are truly the objective goals of the contract, rather than focusing solely upon the perceived unfairness of these contracts in relation to the employee. A clear and significant exception to this trend, exemplified by recent Florida and Ohio court decisions, concerns the enforcement of non-competition clause agreements in cases in which the employer terminates the employment relationship, which I have termed "termination cases."

Termination cases present an interesting study of non-competition contract enforcement for three reasons. First, different courts have formulated different rules for dealing with these cases, allowing for revealing comparisons. Second, enforcement in termination cases is a

61. See id. at 1119.
62. See id. at 1115.
64. See id. If the Ohio courts find that there are viable employer interests to be protected, but that the contract as written is unreasonable, they will rewrite the contract so that it protects those interests in a reasonable manner. See id.
relatively new issue in many jurisdictions. The case law is less extensive; however, the few cases that exist on point are usually very detailed in their analyses. Third, these cases provide a good illustration of how courts continue to allow the reasonableness test to have a life of its own, separate from what has been outlined as the true interests at stake in these cases. If a court is using the uniform test to consider enforcement, the method of termination of the employee should have little or no bearing upon whether or not the contract is enforced. The method of termination will never enter the enforcement equation because it does not relate to the exchange that takes place. That exchange is the basis for the non-competition contract. Despite this logic, courts place great weight on the method of termination and allow that factor to override the other important issues in these cases.

A. The Minority Rule: Termination Voids the Contract

The most stringent rule surrounding termination has been formulated by the Pennsylvania Superior Court in Insulation Corp. of America v. Brobston. In that case, the court held that the method of termination was a relevant factor to consider in determining whether enforcement of a non-competition clause was reasonable. The case involved a company that was engaged in the manufacturing of roofing and insulation products. The company began using a computer-assisted design system that was new to the industry and asked all employees to sign non-disclosure and non-competition agreements that would keep them from using any of the information at a future job and would keep them from working in any job where they might be able to utilize the information. Insulation Company ("Insulation") fired Brobston, claiming that his job performance was unsatisfactory nearly a year after he signed the non-competition agreement. Approximately five months after his termination, Brobston began working for one of Insulation's competitors—a direct violation of the non-competition agreement.

In deciding whether to issue an injunction to enforce the non-competition agreement, the court initially stated a standard that is somewhat consistent with the uniform test. The court wrote that it would only enforce the contract if it was, among other things, "necessary to

67. See id. at 737.
68. See id. at 731.
69. See id. at 731-32.
70. See id. at 732.
The court then reasoned, however, that it would not enforce a deal it considered to be "unduly oppressive on the former employee."\(^7\) While expressing both of these concerns, the court did not engage in a balancing test, but it instead focused solely upon the fairness of the covenant to Brobston. While the court found that Brobston, who was employed by Insulation for over ten years, "was privy to certain confidential corporate information such as overhead costs, profit margin, dealer discounts, customer pricing, marketing strategy and customer contract terms,"\(^7\) it still refused to enforce the non-competition clause against him. The court held that the non-disclosure covenant that Brobston had signed, which prohibited him from divulging this information to any future employer, effectively protected this information.\(^4\) If Brobston was working for a competitor of Insulation, however, how would one determine whether or not he was divulging this information or utilizing the specialized skills he developed while working for Insulation? Moreover, how would this agreement have been enforced on a daily basis if Brobston began working for a competitor of Insulation? Insulation had an economic and personal interest in this information that eclipsed any interest that Brobston had in it, and therefore the covenant should have been enforced to the extent necessary to protect this interest. Since there is no way to monitor whether Brobston was using this information in his new employment or to enforce the non-disclosure agreement on a daily basis, the only way to prevent Brobston from using the information and skills learned from the employer would have been to enforce the non-competition clause, preventing him from working for a competitor of Insulation.

In declining to enforce the clause, the court relied heavily upon the fact that Insulation fired Brobston:

The employer who fires an employee for failing to perform in a manner that promotes the employer's business interests deems the employee worthless. Once such a determination is made by the employer, the need to protect itself from the former employee is diminished by the fact that the employee's worth to the corporation is presumably insignificant. Under such circumstances, we conclude that it is unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as worthless to its legitimate business interests.\(^5\)

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71. Id. at 730-31.
72. Id.
73. Id. at 734.
74. Id. at 735.
75. Id. at 735 (footnote omitted).
This conclusion shows that the court improperly viewed the contract as an effort by Insulation to protect itself from Brobston's expertise as a salesman, an asset that is economically and personally attached to Brobston. The court believed that the purpose of the contract was to prevent Brobston from working for a competitor. While this may be the effect, the purpose of the contract was to safeguard the knowledge that Brobston had about Insulation's business techniques and client lists. The court should have focused its analysis on how necessary the contract was to protect these interests rather than the abstract reasonableness of enforcement in relation to the employee.

A rule which invalidates non-competition contracts where the employee was involuntarily terminated acts as an unreasonable hindrance to otherwise viable non-competition agreements. In Insulation, the court suggested that the employer's interests would be protected by the non-disclosure agreement but never actually explained how this would occur. Other courts have found an employee's involuntary termination to be dispositive of the issue of enforcing the non-competition clause. In SIFCO Industries v. Advanced Plating Technologies,76 the court stated:

[B]ecause we find that the individual defendants were involuntarily terminated, and conclude on that basis that SIFCO cannot as a matter of law enforce the non-competition provision of the Confidentiality Agreements, we need not reach the issue of whether the non-competition provision itself is 'reasonable in time and area, necessary to protect the employer’s legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee.'77

Evidently some courts completely ignore issues relevant to enforcement of the non-competition clause and contemplated by the uniform test. By focusing upon the method of termination, courts in states where involuntary termination is seen as invalidating a non-competition agreement allow an irrelevant issue to be dispositive.

B. The Majority Rule: Good Faith/Bad Faith Distinction

The majority of jurisdictions that deal with termination cases have distinguished between good faith and bad faith terminations. If the termination was done in good faith by the employer, the courts will not consider the termination to be a factor weighing against enforcement of the non-competition agreement. On the other hand, these courts, acting in

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77. Id. at 159 n.4 (quoting Weintraub v. Schwartz, 516 N.Y.S.2d 946, 948 (N.Y. 1979)).
equity, will refuse to enforce the non-competition contract if it is decided that the termination occurred in bad faith.78

The leading case that adheres to the good faith/bad faith distinction is *Rao v. Rao*.79 The plaintiff in *Rao* was a doctor who ran his own medical service corporation and hired the defendant to work for him as a surgeon.80 The defendant worked in a separate hospital from the plaintiff and developed his own client base separate from that of the plaintiff.81 After employing the defendant for almost four years, the plaintiff fired him "in bad faith" and sought to have the terms of a restrictive covenant enforced against him to keep the defendant from practicing in the hospital where the defendant had been working.82

Under the uniform test, the restrictive covenant in *Rao* would not have been enforced. The facts as presented show no recognizable interest of the employer that needs to be protected and, therefore, a restrictive covenant is neither necessary nor warranted. The defendant built up his practice with minimal help from the plaintiff, and the interests at stake in the case belong to the defendant because his personal and economic contributions outweigh the contributions of the employer.83 Essentially, the court held that the plaintiff's economic and personhood contributions to the skills and contacts acquired by the defendant were outweighed by the economic and personhood connections of the defendant to those same interests. The court expanded its holding, however, to find that the good faith requirement inherent in any contract formed in Illinois invalidates any non-competition contract if the employer terminated the employment relationship in bad faith. Since the defendant was terminated in bad faith, the non-competition clause was per se invalid.84 The court failed to state why such a holding was necessary or even relevant to the inquiry concerning enforcement of a non-competition clause except to state that non-competition clauses that "become effective when an employee is terminated without good cause [are] not reasonably necessary to protect an employer's good will."85 This holding is erroneous in that it is not good will that employers are trying to protect with non-competition contracts but rather recognizable interests in training or information.

One could claim that bad faith by the employer violates the employment contract in its entirety, including the non-competition clause.

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78. See Property Tax Representatives, Inc. v. Chatam, 891 S.W.2d 153, 156 (Mo. Ct. App. 1995).
79. 718 F.2d 219 (7th Cir. 1983).
80. See id. at 221.
81. See id.
82. See id. at 221-22.
83. See id. at 223.
84. See id.
85. See id. at 224 (footnote omitted).
If there are valid interests that the employer seeks to protect with this clause, however, it should not be invalidated so quickly. If an employer terminates an employee in bad faith, the employee should be compensated with money damages. It is not proper to compensate an employee by allowing him to compete against the employer using information and skills to which the employer has strong personal and economic ties, which is what courts do when they decline to enforce a non-competition clause because of a bad faith termination. In essence, the uniform test advocates that the court separate the non-compete portion of the employment contract from the rest of the agreement. It should be examined as a separate agreement, an exchange between the employer and employee, in which the employer shares information with the employee in exchange for the employee’s promise not to use it against her. As long as the employer has shared such information, the employee should be bound to honor his end of the bargain, regardless of how the employment relationship is ended. Thus, a bad faith termination should not allow the employee to break his promise. Instead, the employee can be compensated with monetary damages as a result of the broken contract for employment, and the non-competition clause should be enforced.

Other cases employ the flawed reasoning of the good faith/bad faith distinction. As one court held, if “the employee’s termination was arbitrary, capricious or in bad faith, [the court] can ‘lend the hand of equity’ in refusing to enforce the [non-competition] agreement.”6 This is another way of saying that non-competition contracts will not be enforced in cases of bad faith dismissal because it is unfair. The courts are willing to rule this way because non-competition contracts are seen as “restraints on free trade” and are “looked upon with disfavor”8 by the courts. This language indicates that in termination cases courts are harkening back to the reasonableness test that deals solely with the non-competition contract’s effect upon the employee. They are focusing on issues of fairness and morality solely in relation to the employee without engaging in the first inquiry of the uniform test, which is to isolate the issues that are important to both the employer and the employee in relation to the non-competition agreement.

The error in this analysis becomes apparent in a case like Property Tax Representatives, Inc. v. Chatam.8 In Chatam, the defendant, an appraiser for the plaintiff, had specialized knowledge of the way that the plaintiff did business and had close contacts with the plaintiff’s clients.89

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86. Empiregas v. Bain, 599 So. 2d 971, 975 (Miss. 1992) (quoting Frierson v. Sheppard Bldg. Supply Co., 154 So. 2d 151, 155 (Miss. 1963)).
88. 891 S.W.2d 153 (Mo. Ct. App. 1995).
89. See id. at 155.
Instead of focusing upon these interests, however, the court’s opinion focuses upon what it held to be the “central issue” in the case—whether or not Chatam was fired in bad faith. The court concluded that he was fired in bad faith and refused to enforce the non-competition clause without having addressed the employer’s need to have such a restriction to protect his client base.

Another example of how the application of the good faith/bad faith distinction can lead to improper results is provided by a Delaware case in which the court held that the fired employee, using information and client lists of his former employer, started a company to compete directly with his former employer “[a]lmost immediately after his termination.” Even though the court upheld the contract in this case, the court stated in dicta that if the employer had not had cause for terminating the employee, it would have voided the non-competition agreement and allowed the employee to compete. This result would have made little sense. The employee promised not to compete in exchange for gaining access to the employer’s client lists and information. The employer obviously held up his end of the bargain, considering that the employee used this information to compete against him.

Regardless of how the employment relationship was ended, a court should ensure that the employee upholds his end of the bargain and does not compete. This is especially true considering that by competing, the employee is using information to which the employer has strong personal and economic ties. These cases illustrate that a rule of enforcement that hinges upon the method of termination of the employee simply ignores the exchange that underlies the non-competition contract.

A different permutation of the David and Sabrina hypothetical will further illustrate this point. Instead of voluntarily leaving her employment as a salesperson for David’s shingle company, David terminates Sabrina’s employment in bad faith. The courts that adhere to the good faith/bad faith distinction would not uphold the non-competition contract in this case, thus allowing Sabrina to set up a business and use David’s customer lists to compete against him. However, this would not be the proper result under the uniform rule. The fact that David terminated Sabrina in no way gives Sabrina a greater personal or economic stake in the customer list. David’s

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90. See id. at 156-158 (“It is a central issue in this case whether PTRI had ‘cause,’ or ‘sufficient cause,’ or ‘good cause’ to discharge Chatam.”) (footnote omitted).

91. See id. at 157 (“We hold, as Chatam’s discharge was without good cause . . . that the trial court acted within its discretion in holding that the non-competition clause was unenforceable.”) (citation omitted).


93. See id. at *12. The court subsequently found that Lehman was fired for cause and upheld the non-competition agreement. Id. at *14.
interest in the list still outweighs Sabrina’s, and the non-competition contract should be upheld in order to protect his interest. It is unfair that Sabrina is terminated in bad faith, and David should be ordered to compensate her if this constitutes a breach of the employment contract. However, Sabrina’s compensation should be monetary damages and not the right to use David’s customer list, to which David has strong personal end economic ties.

C. The Uniform Test in Termination Cases

By focusing on the fairness of termination, a factor that has little logical bearing upon whether the non-competition contract should be enforced, courts stray far from the analysis put forth by the uniform test. Moreover, by looking to termination, courts are considering an irrelevant issue that further confuses their analyses. For example, one jurisdiction adheres to the rule that if an employee was fired for good cause, then the non-competition agreement will be upheld without any inquiry into the reasonableness of the contract’s terms, and that if the employee was fired without good cause the court will then look at the terms of the agreement and enforce it only if reasonable. This court bases its whole analysis of the contract on an event that has nothing to do with the exchange in question.

If a non-competition contract is seen as governing an exchange in which the interests of the employer are being shared and subsequently protected, then the method of termination is irrelevant to the decision of whether the contract should be enforced. Under the uniform test, enforcement would be strictly based upon whether any interests are being shared and the extent to which these interests need protection, measured by balancing the employer’s economic and personal contribution to them against the contributions made by the employee. After an enforcement decision is reached, the scope of the contract should then be limited to account for the employee’s right to engage in a particular occupation. Under the uniform test, the method of termination would be irrelevant to the analysis. While it does matter in relation to the overall employment relationship, it has no direct bearing upon the separate exchange that is the subject of the non-competition clause. Since the method of termination should not matter, the consideration of whether or not this termination was in bad faith is also not relevant to the enforcement of the non-competition clause. This issue only serves to further clutter an already confusing issue.

Not all jurisdictions are as confused in dealing with the termination

issue as the ones that have been presented. In *Granger v. Craven*, the court analyzed a non-competition clause using logic that parallels the uniform test. The case involved an employment relationship between two surgeons. The employer was a surgeon who had been working in Rochester, Minnesota (population 20,000) for over thirty years. He hired the employee, who had no prior experience in the Rochester area, to be his assistant. Under the terms of the employment contract, the employer would supply the employee with a room and equipment, and ninety percent of the employee’s patients would be referrals from the employer. The agreement also contained a non-competition clause, which stipulated that the employee could not work in medicine or surgery within twenty miles of Rochester for three years after the termination of the employment agreement. After two years of performance, the employer ended the employment relationship. The employee continued to work in the Rochester area in violation of the non-competition agreement.

The lower court refused to uphold the agreement for public policy reasons, stating that the employer had no right to limit where the employee-surgeon could practice, especially considering that the employer ended the employment relationship. However, the state supreme court overruled this decision. It held that the employee should not be allowed to threaten the employer’s practice by continuing to engage in surgery in the Rochester area. Instead of merely focusing on the perceived fairness issues concerning the employee, the court considered the “nearly [thirty] years of professional effort” that the employer had expended in establishing his reputation and patient base. The court held:

> It is obvious, therefore, that, when he employed defendant as an assistant, plaintiff had a legitimate interest to protect. The presence of such an interest is the first thing to look for when such a contract as this is challenged. Its presence is necessary to uphold the agreement and make it enforceable in equity or at

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95. 199 N.W. 10 (Minn. 1924).
96. See id. at 11.
97. See id.
98. See id.
99. See id.
100. See id.
101. See id. at 13.
102. See id. at 12-13. “It would be most uncomplimentary to defendant to suppose that he would not, were he to open an office in Rochester, attract to himself at once and automatically, a substantial number of plaintiff’s patients. . . . That consideration shows both the propriety of the restrictive covenant, and the sureness with which irreparable injury to plaintiff will follow unless defendant is restrained by injunction from a breach of that covenant.” *Id.*
103. See id. at 12.
Once the court recognized that the employer had a recognizable interest to protect, it considered the scope of the agreement in relation to the interest being protected and held that the three-year, twenty-mile restriction was reasonable. The court virtually ignored the method of termination and instead focused upon the actual interests at stake to determine whether the non-competition portion of the employment agreement should have been enforced. Such analysis is nearly identical to the uniform test proposed.

Courts in Florida have also refused to consider the termination question with respect to whether a non-competition clause should be enforced. In Twenty Four Collection v. Keller, Keller was an employee of the plaintiff, a chain of retail stores in South Florida. Her employment contract had a non-competition clause which prohibited her from working for one of Twenty Four's competitors for two years after the termination of her employment. After working at Twenty Four Collection for eighteen months, Keller was discharged and subsequently went to work for one of its competitors. In upholding the employment contract and granting Twenty Four an injunction against Keller, the court did not even consider the method of termination. It found that if Keller were to be allowed to work for a competitor, Twenty Four's injuries would "stem not only from solicitation of old customers, but use in a rival business of procedures, methods, trade practices, trade secrets and the like." Based upon this injury, the court upheld the non-competition contract, which it believed to be reasonable and necessary to protect these viable interests.

A focus upon the method of termination in non-competition clause cases clouds the issues that are at stake, leads to abstract and confusing rules, and shifts the court's attention away from the issues that are really important in such cases. In Insulation, the court considered the method of termination to be a major point of contention in the case. The court refused to uphold the non-competition contract partly because it found that when an employer fires an employee, the employer is considering the employee to be worthless. Therefore, the employer should not have an interest in whether the worthless employee works for a competitor. This logic is flawed because even a worthless employee can take with him the

104. See id. (citation omitted).
105. See id.
107. See id. at 1062.
108. See id.
109. See id.
110. Id. at 1063.
employer's trade secrets, training, and customer lists. As the dissent stated in *Insulation*: "the majority holds that an employer needs no protection against a worthless employee. However, that is not the proper focus. It is the discharged employee's knowledge of the business which is being restricted."112 What this overview of termination cases shows is that in the area of termination cases, courts often place too much weight upon issues that do not directly concern the enforcement of the non-competition clause, while ignoring issues that are central to its enforcement.

V. CONCLUSION

When dealing with non-competition agreements, courts should focus upon the actual exchange that is the basis of the agreement. The employer agrees to provide the employee with training, experience, or information in consideration for the employee's promise not to work in a situation where he could provide that information to a competitor. Under the uniform test proposed, courts would consider the economic and personal interests of the employer in the information or particular training that she is trying to protect, and balance that against the economic and personal interest of the employee in that information or training. By doing this, the court could determine which interest, if any, needs to be protected. The court would then enforce the non-competition agreement only to the extent necessary to protect the viable interest of the employer that remains after the balancing test. A look at how courts have historically treated non-competition agreements reveals that they tend to focus too greatly upon the reasonableness of the agreement in relation to the employee, rather than in relation to the employer's interests. Recent trends in case law, however, show courts granting greater attention to the recognizable interests of the employer. The way courts handle termination cases runs opposite to this trend, and shows how rules surrounding the enforcement of non-competition agreements can become clouded and confused when courts refrain from focusing upon the true purpose of these agreements. Courts should use the uniform test and center their inquiry in non-competition contract cases around the actual exchange that took place. This is especially true in termination cases where an issue that should have no bearing on the dispute has been allowed to dominate the litigation.

112. *Id.* at 738 (Del Sole, J., dissenting).