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THE THEORY OF "INVOLUNTARY" CONTRACTS: THE JUDICIAL REWRITING OF UNREASONABLE COVENANTS NOT TO COMPETE

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Since it was first articulated in the sixteenth century,[1] commentators and courts have viewed the will theory of contracts as the bedrock of modern contract law.[2] Under this theory, courts have repeatedly held that judges do not make agreements between parties; they merely enforce contracts that the parties themselves have "willed" by their "agreement."[3] As a corollary to this theory, and since to hold otherwise would shear away the very basis of the judiciary's authority to decide contract disputes, courts also hold that judges have no authority to "rewrite" contractual terms. Despite these longstanding principles, there are circumstances where these prohibitions are not observed. For example, in a growing substantial minority of jurisdictions, judges "rewrite" the terms of "unreasonable" covenants not to compete to state "reasonable" terms that are different than the parties' actual agreement. The interplay of these decisions with the will theory of contracts and the need for an alternative theoretical basis to both support and limit this unique judicial remedy is the subject of this article.

In analyzing decisions that permit courts to rewrite the unreasonable terms of covenants not to compete with the will theory of con-

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1. *See* 1 ARTHUR CORBIN, CORBIN ON CONTRACTS §106 (1960).

2. *See* Morta v. Korea Ins. Co., 840 F.2d 1452, 1460 (9th Cir. 1988) (citing 1 CHARLES FRIED, CONTRACT AS PROMISE 132 (1981) ("These are indeed the laws of freedom.")). In this same vein, Judge Alex Kozinski recently praised the "sanctity of contracts" as "an important civilizing concept:"

> It embodies some very important ideas about the nature of human existence and about personal rights and responsibilities: that people have the right, within the scope of what is lawful, to fix their legal relationships by private agreement; that the future is inherently unknowable and that individuals have different visions of what it may bring; that people find it useful to resolve uncertainty by "mak[ing] their own agreement and thus designat[ing] the extent of the peace being purchased," . . . that courts will respect the agreements people reach and resolve disputes thereunder according to objective principles that do not favor one class of litigant over another; and that enforcement of these agreements will not be held hostage to delay, uncertainty, the cost of litigation or the generosity of juries.

Id.

3. *See* CORBIN, *supra* note 2, at 477 (A contract is made by the "voluntary agreement of men and not by the state. A man is not bound by a contractual duty unless he willed it so.").

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tracts, it is important to distinguish what is not at issue. The will theory of contracts does not assert that contract law is superior to other laws and permits private parties, through mutual agreements, to violate statutes, regulations or common law that would otherwise apply to them.[4] Instead, the will theory of contracts places mutual agreements to commit criminal acts, violations of civil laws, or other illegal bargains outside the boundaries of legally enforceable obligations. From this perspective, enforceable contracts are a subset of mutual agreements: all enforceable contracts are mutual agreements, but not all mutual agreements are enforceable contracts. Consistent with this analysis, where restrictive covenants contain unreasonable restrictions, a majority of jurisdictions either eliminate ("blue pencil")[5] these terms or void the entire restrictive covenant.[6]

The decisions that are the focus of this article, however, involve situations in which the courts do not simply refuse to enforce portions, or the entirety of the parties' covenant not to compete, but instead "rewrite" the "unreasonable" terms of the parties' restrictive covenant to bring them within the scope of "reasonableness," and hence, form enforceable contracts. From the perspective of the will theory of contracts, the substantial and growing minority of jurisdictions that permit courts to "rewrite" restrictive covenants in this fashion have seemingly created a new theory of contractual obligation, which I will refer to as "the theory of involuntary contracts." The focus of the analysis undertaken in Part I of this article is the source of the judiciary's authority to "rewrite" the terms of mutual agreements to contradict the parties' actual "will." Part II of this article contrasts "the theory of involuntary contracts" with the traditional judicial function. Part III describes the practical appeal of "the theory of involuntary contracts," and Part IV proposes a theoretical justification of the re-

4. *See generally* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986); Total Med. Management, Inc. v. United States, 104 F.3d 1314 (Fed. Cir. 1997); Love v. Pepersack, 47 F.3d 120, 123 n.4 (4th Cir. 1995) ("There is no positive federal right to contract at all times on all subjects.").

5. *See* Bridgestone/Firestone, Inc. v. Lockhart, 5 F. Supp. 2d 667, 683 (S.D. Ind. 1998); Weseley Software Dev. v. Burdette, 977 F. Supp. 137, 147 (D. Conn. 1997); Webcraft Techs., Inc. v. McCaw, 674 F. Supp. 1039, 1047 (S.D.N.Y. 1987); Valley Med. Specialists v. Farber, 950 P.2d 1184, 1188 (Ariz. Ct. App. 1997) (citing Phoenix Orthopedic Surgeons v. Peains, 790 P.2d 752 (Ariz. Ct. App. 1989), *vacated*, 982 P.2d 1277 (Ariz. 1999)); Ellis v. James V. Huron Assocs., Inc., 783 A.2d 615 (D.D.C. 1989); Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127 (Minn. 1980); Hartman v. W.H. Odell & Assocs., 450 S.E.2d 912 (N.C. Ct. App. 1994); Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co., 963 P.2d 204, 208 n.3 (Wash. Ct. App. 1998).

6. *See, e.g.*, Borden, Inc. v. Smith, 478 S.W.2d 744 (Ark. 1972); Richard P. Rita Personnel Serv. Int'l v. Kot, 191 S.E.2d 79 (Ga. 1972); Davis v. Albany Area Primary Health Care, Inc., 503 S.E.2d 909 (Ga. Ct. App. 1998); Harville v. Gunther, 495 S.E.2d 862 (Ga. Ct. App. 1998); Lee/O'Keefe Ins. Agency, Inc. v. Ferega, 516 N.E.2d 1313 (Ill. App. Ct. 1987); CAE Vanguard, Inc. v. Newman, 518 N.W.2d 652 (Neb. Ct. App. 1994); Cohen Realty v. Mayinik, 817 P.2d 747 (Okla. Ct. App. 1991); General Med. Corp. v. Kobs, 507 N.W.2d 381 (Wis. Ct. App. 1993).

writing of restrictive covenants that relies not upon contract law, but instead upon principles borrowed from the law of restitution.

I. THE WILL THEORY OF CONTRACTS DOES NOT PROVIDE ANY AUTHORITY FOR THE JUDICIAL REWRITING OF CONTRACTING PARTIES' AGREEMENTS

In jurisdictions that permit a court to "rewrite" the unreasonable terms of a covenant not to compete, and indeed, find that it is an abuse of discretion[7] for a court not to do so, judges have, in various instances, reduced (A) the geographic boundaries of the parties' agreement not to compete from (i) all of the United States to Massachusetts, New York and New Jersey,[8] or to Indiana,[9] (ii) 200 miles to 125 miles,[10] and (iii) 60 miles to 10 miles,[11] (B) the duration of an agreement not to compete from life to one year,[12] and (C) the scope of the non-competition language from "all computer software development" to activities that "compete with [a specific company] M.R.B., Inc."[13] The judicial "rewriting" of these contracts is, of course, entirely different than the sort of "writing" that is a part of the contracting parties' negotiation of the agreements' original terms. In "rewriting" the terms of the parties' original agreement, the court is not acting as an additional party to a contract negotiation. Indeed, in all of the above-referenced cases, where the court reduced the particular burden placed on a party by a covenant not to compete, it did so without regard to the relationship that these restrictions may have had on other terms of the parties' agreement in the original contract negotiations. For example, when the court reduced the geographic boundary of a covenant not to compete from 200 miles to 125 miles, the court did not also reduce the employee's salary by any percentage amount, much less by 37.5%.[14]

Courts that "rewrite" unreasonable terms of covenants not to compete offer a variety of justifications for this assertion of judicial authority. The courts of Missouri assert that because "equity" will not enforce an unreasonable covenant not to compete, the judiciary has

7. *See* Health Care Fin. Enters., Inc. v. Levy, 715 So. 2d 341, 342 (Fla. Dist. Ct. App. 1998); Santana Prods. Co. v. Von Kofrr, 573 So. 2d 1027, 1028 (Fla. Dist. Ct. App. 1997); Pinch-a-Penny of Pinnellas Co., Inc. v. Chango, 557 So. 2d 940, 941 (Fla. Dist. Ct. App. 1990).

8. *See* Kroeger v. Stop & Shop Cos., 432 N.E.2d 566, 568 (Mass. App. Ct. 1982).

9. *See* Smart Corp. v. Grider, 650 N.E.2d 80, 84-85 (Ind. Ct. App. 1995).

10. *See* Orchard Container Corp. v. Orchard, 601 S.W.2d 299, 302, 304 (Mo. Ct. App. 1980).

11. *See* Webb v. Hartman Newspapers, 793 S.W.2d 302-03, 305 (Tex. App.—Houston [14th Dist.] 1990, no writ).

12. *See Kroeger,* 432 N.E.2d at 571.

13. *See* Marshall v. Gore, 506 So. 2d 91, 92 (Fla. Dist. Ct. App. 1987).

14. *See Orchard,* 601 S.W.2d at 303-304.

the power to "modify"[15] unreasonable restrictions and to "enforce a broad agreement in a more restricted" fashion.[16] However appealing this assertion of power may seem, it is not supported by logic. The power to prohibit someone from taking certain action does not include the power to require that person to undertake a different course of action, for example prohibiting someone from voting until they have reached the age of eighteen does not include the power to require a person to vote once they have attained that age. For this reason, the assertion of judicial power to require the affirmative performance of certain acts cannot be premised merely upon the judicial power to prohibit other acts.

Under the will theory of contracts, the authority of a court to enforce a contract depends upon an intersection of wills between contracting parties as to the particular terms of their agreement. If no such intersection occurs, no contract exists. In reaching an agreement that Party A would not compete with Party B within 200 miles of Party B's business, the parties did not simultaneously agree to a geographic restriction of 199, 198, 197, or any other lesser mileage limit. Thus, if a geographic restriction of 200 miles is prohibited by the judiciary as an unreasonable restraint, the will theory of contracts does not support a "more restricted" contractual relationship between the parties since no "intersection of wills" between the parties as to any lesser geographic limit exists.

While restrictions on geography, time, and scope of activity contained in a covenant not to compete may be unreasonable, the courts of Mississippi hold that in determining the injunctive relief to which an employer may be entitled, the court shall balance the interest of the employer against that of the employee.[17] Specifically, the harm to the employer's "legitimate business interests"[18] occasioned by the absence of any "competitive prohibition"[19] must be balanced against the potential harm to the employee from enforcing the unreasonable restrictions. Accordingly, based on the court's obligation to balance these competing interests, the Mississippi courts assert that the judiciary has the authority to create a reasonable injunctive prohibition that is less restrictive than the terms of the parties' agreement. This analysis seemingly permits the Mississippi courts, under the guise of equity, to create an entirely new agreement between contracting parties

15. *See generally* Sigma Chem. Co. v. Harris, 794 F.2d 371 (8th Cir. 1986); Mid-States Paint & Chem. Co. v. Herb, 746 S.W.2d 613 (Mo. Ct. App. 1988) (citing Continental Research Corp. v. Scholz, 595 S.W.2d 396 (Mo. Ct. App. 1980)); *Orchard*, 601 S.W.2d at 303; R.E. Harrington, Inc. v. Frick, 428 S.W.2d 945 (Mo. Ct. App. 1968).

16. *See* Easy Returns Mid-West, Inc. v. Schultz, 964 S.W.2d 450 (Mo. Ct. App. 1998) (citing *R.E. Harrington,* 428 S.W.2d at 951).

17. *See generally* Hensley v. E.R. Carpenter Co., 633 F.2d 1106 (5th Cir. 1980); Taylor v. Cordis Corp., 634 F. Supp. 1242, 1251 (S.D. Miss. 1986).

18. *See* Redd Pest Control Co. v. Heatherly, 157 So. 2d 133, 136 (Miss. 1963).

19. *See Hensley*, 633 F.2d at 1110; *Taylor*, 634 F. Supp. at 1251.

based upon the judiciary's refusal at law to enforce the parties' "actual," but "illegal" agreement. In this regard, it suffers from the same defect in logic as the Missouri court's analysis. From the perspective of the will theory of contracts, however, the reasoning of the Mississippi courts also "places the cart before the horse." If the court's authority in equity to enforce contractual restrictions is dependent, as the Mississippi courts suggest, upon the legality of the parties' original contract, then the fact that the original contract is "illegal" should logically terminate the court's analysis. In such a circumstance, the court should simply dismiss the employer's request for injunctive relief.

The Pennsylvania courts assert that a judge "sitting in equity may *reform* an unenforceable non-compete covenant in an employment contract."[20] This assertion of judicial power not only violates the will theory of contracts, but is also inapposite to the long-standing equitable concept of "reformation" itself. For centuries, English and American courts have determined that where, as a result of fraud or mistake, the terms of the parties' agreement as set forth in a document are at variance with the parties' actual intentions, courts have the equitable power to "reform" the document to express the parties' actual agreement.[21] In placing a higher value on the parties' "actual" agreement than on the terms of a written document, equitable reformation affirms the principles underlying the will theory of contracts. In contrast, the exercise of a judicial power to "reform" the terms of a contract in derogation of the parties' actual agreement contradicts these principles.

The courts of Michigan and Texas base their power to "limit"[22] or "reform"[23] a restrictive covenant to state "reasonable limitations as to time, geographical area, and scope of activity"[24] upon express statutory authority. In this circumscribed area of contract law, the Michigan and Texas legislatures have not only determined that parties to an agreement not to compete must reach a "reasonable" agreement, but have also created a statutory mandate, which requires their courts to impose "reasonable" restrictions upon contracting parties who originally agreed to "unreasonable" restrictions. Because this grant of judicial authority is not premised on an exercise of common law or equitable jurisdiction, it is not susceptible to the sort of criticism that can be directed to the decisions of the courts of Missouri, Mississippi, and Pennsylvania. However, the assertion of such judicial authority is entirely inapposite to the theoretical underpinnings of the will theory

20. Hillard v. Medtronic, Inc., 910 F. Supp. 173, 177 (D. Pa. 1995) (emphasis added).

21. *See* Coleman Co. v. California Union Ins. Co., 960 F.2d 1529 (10th Cir. 1992); *see also* 66 AM. JUR. 2D *Reformation of Instruments* § 5 n.46 (1973).

22. *See* MICH. COMP. LAWS ANN. § 445.774a(1) (West 1989).

23. *See* TEX. BUS. & COM. CODE ANN. § 15.51(c) (Vernon Supp. 1990).

24. *Id.* § 15.50.

of contracts since it permits a court to bind parties to contractual terms to which they have never agreed.

While contrary to the principles underlying the will theory of contracts, this statutorily created judicial power is nevertheless curiously dependent upon the occurrence of a "meeting of the minds" between contracting parties. For example, in order for the Michigan and Texas courts to exercise their statutory power to "limit" or "reform" the parties' agreement to state a "reasonable" geographic restriction on competition, say 125 miles, the parties before the court must first have agreed on an "unreasonable" geographic restriction, say 200 miles, that the courts will not enforce. From a theoretical perspective, this requirement is highly perplexing and seemingly confounds the bedrock principles of the will theory of contracts.

II. REWRITING THE UNREASONABLE COVENANT NOT TO COMPETE AND THE LIMITATIONS ON THE TRADITIONAL JUDICIAL FUNCTION

In the context of collective bargaining agreements, courts have recognized the authority of an arbitrator to create and impose upon management and labor contractual terms to which they have not agreed. Courts that have done so, however, uniformly view the arbitrator's actions in creating such obligations as a non-judicial function.

> A provision to arbitrate when agreement upon a new contract proves impossible, as is the case here, is part of an existing agreement and refusal to comply therewith constitutes a breach. *This court is not asked to determine the provisions of a new contract or to perform any non-judicial function.* The drawing of the new contract will be in the hands of an arbitrator where the parties chose to place the authority and responsibility. The court is asked to do no more than enforce a provision of an existing contract, a traditional judicial function.[25]

From the perspective of contracting parties, an arbitrator's imposition of contractual terms to create a new collective bargaining agreement is far less compulsive than the judicial "rewriting" of the terms of unreasonable covenants not to compete. First, the parties to a collective bargaining agreement which incorporate such a provision agreed to permit a third party to create the terms of a future labor contract if they were unable to do so themselves. In contrast, the parties to a restrictive covenant did not. Second, the parties to a collective bargaining agreement agreed that an arbitrator — not a judge — could create their contractual terms. By training and experience, the arbitrator selected to render such an award would, presumably, be

25. Winston-Salem Printing Pressmen v. Piedmont Publ'g. Co., 393 F.2d 221, 227 (4th Cir. 1968) (emphasis added); *see also* Chattanooga Mailers Union Local No. 92 v. Chattanooga News-Free Press Co., 524 F.2d 1305, 1315 (6th Cir. 1975).

skilled and well versed in both the negotiation and resolution of disputes of this sort; whereas, a judge may, or may not, possess such expertise. Third, the evidence that is admissible in arbitration proceedings is not necessarily restricted to evidence that is admissible under the Rules of Evidence in a judicial proceeding, but might include information that could be brought to the bargaining table in the negotiation of a labor contract.

The creation of binding contractual terms through "the theory of involuntary contracts" also involves a considerable expansion of the traditional concept of justiciability. For example, in the context of requests for declaratory judgments, courts generally refuse to declare rights between parties where they are based on future, hypothetical, or speculative facts. Requests of this sort are often deemed "non-justiciable" and dismissed based upon a lack of "ripeness."[26] The allocation of future contingent risks involving hypothetical or speculative facts is, nonetheless, a large part of what parties negotiate and determine in creating contracts. Thus, in the context of rewriting the unreasonable terms of restrictive covenants, jurisdictions that empower their judiciary to create reasonable contractual provisions that apply to "future events that may or may not come to pass," seemingly require their courts to make judicial determinations in situations that in any other circumstance the judiciary might very well regard as "non-justiciable."[27]

In response to these criticisms, a proponent of "the involuntary theory of contracts" might argue that the utilization of a "reasonableness" standard to guide the court in providing an appropriate judicial remedy to an unreasonable covenant not to compete parallels the application of a "reasonableness" standard in tort law. This argument may be formulated as follows: (1) in negligence cases involving damages to persons or property, the judiciary requires all citizens to conform their actions to those of reasonable and prudent persons, (2) applying this same standard to permit the judiciary to revise the unreasonable terms of a covenant not to compete is merely an extension of this time-honored principle, thus (3) the judiciary should be empowered to rewrite the unreasonable terms of contracting parties' covenants not to compete. The argument is seriously flawed.

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26. *See* Ashcroft v. Mattis, 431 U.S. 171, 172 (1977) The court cited *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937), for the proposition that in order to invoke the court's authority to decide an issue, even through a declaratory judgment, there must first be a dispute which "calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts." *Id.* (quoting *Haworth*, 300 U.S. at 242).

27. Grace Holdings, L.P. v. Sunshine Mining & Ref. Co., 901 F. Supp. 853, 858 (D. Del. 1995) (citing Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 580-81 (1985)). "At the heart of the ripeness doctrine is the consideration that courts should not adjudicate 'contingent future events that may or may not occur as anticipated, or indeed may not occur at all.'" *Id.*

In applying the standard of reasonableness to assess tort claims, the scope of the judiciary's review is restricted to specific past or presently continuing factual circumstances rather than to future possibilities. In establishing the "bright lines" of particular contract terms, however, a court is required to deal with a mix of facts and future possibilities. As a result, the subject matter to which the standard of reasonableness is applied in creating the specific terms of a reasonable covenant not to compete is vastly different from the subject matter to which the standard of reasonableness is applied in determining negligence claims.

A second flaw in this argument lies in the fact that "reasonable" conduct covers a range of activity and is not restricted to the "bright lines" established by contract terms. For example, while driving a car at 60 miles per hour on a particular highway might under certain conditions and in certain traffic be unreasonable, driving at speeds between 20 and 50 miles per hour under the same circumstances may well be reasonable. Thus, assuming that in a particular circumstance the range of reasonable geographic restriction on non-competition is no more than 50 miles, the standard of reasonableness does not provide a court with a precise guide to set a particular "bright line" limit to lawful competition. In jurisdictions that require a court to rewrite the terms of an unreasonable covenant not to compete, the only articulated standard to test the rewritten terms is whether they are reasonable. Given this standard, a court might in the above-referenced example, properly, but arbitrarily select any range between 0 miles and 50 miles and nevertheless fully comply with the strictures of the law. While the grant of such a substantial range of discretion is traditional in procedural matters such as extensions of time to complete discovery, trial continuances and the like, courts are not generally granted such expansive discretion in determining substantive relief.

This latter criticism would, of course, be blunted if courts were required to rewrite the unreasonable terms of a covenant not to compete at the most restrictive limits of reasonableness. This solution, however, raises another problem. If, in rewriting an unreasonable covenant not to compete to state reasonable restrictions, a court is permitted to modify geographic, time, and scope restrictions, what theoretical basis exists to limit the courts' power to rewrite other terms of the parties' original agreement as well. For example, if geographic restrictions on competition within 500 miles of an employer's business is considered unreasonable, does such a covenant become reasonable if the employee is paid an additional $10,000 for this promise? Is this analysis altered if the employee is paid $100,000 for this promise? What if the employee is paid $1,000,000 for this promise? Conversely, if an employee was paid $1,000,000 not to compete within 500 miles of his employer's business and that geographic restriction is

later deemed unreasonable by the court and a 100 mile restriction is imposed, may the court also require the employee to remit $800,000?

From a judicial-process perspective, the problem is two-fold. First, if the theoretical basis for limiting the exercise of such power appears artificial or unpersuasive, then the legitimacy of the court's decision-making process — both long term and short term — will be threatened. Second, if the court exercises, or the legislature empowers the court to exercise, the power to rewrite one category of contractual terms, but does so without a sound rationale to distinguish that category of terms from other terms of parties' private agreements, then the unbridled potential for the expansion of such legislative/judicial power to other types of contracts threatens the substantial degree of security and certainty presently enjoyed and relied upon by contracting parties in American courts.

In considering overall theoretical problems posed by "the theory of involuntary contracts," it is also important to recognize that in contrast to bargains that will not be enforced by the courts because of their illegality, a court will only refuse to enforce the terms of a restrictive covenant if the employee objects. An act of prostitution, for example, is illegal no matter the amount of consent. In contrast, an employee's voluntary refusal to compete with a former employer within an unreasonable boundary for competition is not illegal or actionable. The reason for this distinction lies in the Constitution. The Thirteenth Amendment prevents a court from requiring an employee through an order of specific performance to render personal services.[28] This limitation is consistent with the logical principle discussed in Part I of this article that the power to prohibit someone from taking certain actions does not encompass the power to require that person to take other action.

III. THE PRACTICAL APPEAL OF THE INVOLUNTARY THEORY OF CONTRACTS

While "the theory of involuntary contracts" poses innumerable theoretical difficulties, the judicial rewriting of unreasonable covenants not to compete has great appeal in practice. For example, assume that in 1986, employer Smith hires employee Jones to work in design/customer relations at the Smith Company, and that as part of his employment package, Smith requires Jones to execute a covenant not to compete that prohibits Jones from competing with the Smith Company within 15 miles of its place of business for three years after his employment ceases. In 1996, Jones terminates his employment at the Smith Company and opens a competing business across the street. Further assume that a 15 mile restriction is unreasonable under the business conditions as they exist in 1996 and that the reasonable range

28. *See In re* Andrews, 80 F.3d 906, 912 (4th Cir. 1996).

for a geographic restriction on competition in 1996 only extends to 14 miles. Further assume that in 1986 (although that is not the issue before the court), a 15 mile geographic restriction on competition would have been reasonable. Under the circumstances, why is it fair to the Smith Company that after ten years of employment, Jones' long-standing agreement not to compete within 15 miles should be voided in its entirety under the will theory of contracts because the parties agreed upon geographic restrictions to competition, which, while reasonable in 1986, oversteps what is reasonable in 1996 by 1 mile?

From a practical perspective, permitting a court to "rewrite" the restrictive terms of the parties' ten-year-old agreement in a fashion that renders those terms reasonable in the current competitive environment, as opposed to eliminating all geographical restrictions on Jones' competition with the Smith Company, much more fairly balances the interests of the employee, employer, and the public. In this circumstance, what is wrong with asking a judge to exercise this authority? After all, if our legal process is to be considered workable in any context, we must have confidence that the judiciary, in this narrow circumstance, is fully capable of constructing a reasonable covenant not to compete.

IV. A Theoretical Justification for The Theory of "Involuntary" Contracts as a Proper Judicial Remedy to Unreasonable Covenants Not to Compete

The key to formulating a sound theoretical basis for "the theory of involuntary contracts" in the context of disputes involving the reasonableness of restrictive covenants is two-fold. First, in evaluating the utility of "the theory of involuntary contracts" as a judicial remedy, one must not only consider the theoretical defects seemingly attendant to this remedy, but must also consider the infirmities attendant to the judicial test that is applied to determine the enforceability of covenants not to compete. Second, in attempting to isolate a source for the court's authority to "rewrite" the terms of a restrictive covenant, one must shift focus from strict contract theory to equitable principles of restitution.

From the employer's perspective, the judicial test that is applied to determine the enforceability of covenants not to compete suffers from several infirmities: delay, uncertainty, and fuzziness. Determining the reasonableness of the terms of a restrictive covenant that was agreed to at one time based upon its application to a subsequent competitive landscape is clearly unfair. As noted in the Smith/Jones example, a 15 mile radius restriction that was reasonable in 1986 may well be unreasonable by 1996. One solution to this problem, of course, would be to require courts to assess the enforceability of a covenant not to com-

pete on the basis of what was reasonable at the time of the parties' original agreement. This solution, however, is at odds with the public policy underlying the requirement that covenants not to compete be reasonable. From a public policy perspective, the primary purpose for requiring that covenants not to compete be reasonable is to insure that the overall market remains competitive. However, if in assessing the enforceability of a particular restrictive covenant, no account is taken of the competitive environment that exists at the time that an employee is available to compete, this primary goal will be thwarted. Indeed, in the context of the rapidly changing competitive environment of computer software, judges are now setting injunctive time limits on prohibitions against competition that can be revisited during the term of the injunction and modified if the employee's particular expertise thereafter becomes part of the "public domain" or "stale."[29]

As previously noted, because of the strictures of the Thirteenth Amendment, the terms of even outrageously unreasonable covenants not to compete are not illegal *per se*, and may never become "illegal" until that point in time, if ever, that the employee elects to test their enforceability. For this reason, the enforceability of restrictive covenants is subject to an uncertainty that is outside the control of the courts, the employer, and in a certain sense, the employee. It is outside of the control of the courts and the employer because only the employee can challenge the enforceability of the restrictions. It is outside the control of the employee in the sense that at the time he enters into the agreement, the question of whether he will later choose to challenge its restrictive terms cannot be intelligently answered. The employee cannot presently determine his circumstances at the future point in time that the restrictive terms of the agreement apply, much less predict, once he finds himself in those presently unknown circumstances, whether at that future time he will then choose to test the enforceability of the covenant or not.

It must also be acknowledged that the reasonableness test, as it applies to covenants not to compete, is a "fuzzy" test. While its utility in assessing what is unreasonable past conduct in the context of negligence claims for property or personal injury is beyond dispute, the reasonableness standard cannot provide similar "bright line" boundaries where the subject matter being assessed is a mix of future and present facts within the milieu of an ever changing competitive landscape. As a result, since the test for reasonableness is admittedly "fuzzy," a certain "fuzziness" in the remedy might also be tolerated.

Negotiating a path through the theoretical and practical impediments of "the theory of involuntary contracts," while complicated, is possible. To do so, however, requires the inclusion and reordering of

29. *See* Weseley Software Dev. Corp. v. Burdette, 977 F. Supp. 137, 147 (D. Conn. 1997).

a number of policies that underlie our traditional jurisprudence of contract, equity, and remedies law. First, while agreements restricting competition are founded upon the will theory of contracts, the overriding policy attendant to the enforcement of contractually agreed upon restrictive covenants is not. The court's primary objective in assessing the legality of such restrictions is in ensuring a competitive environment that is fair to the interests of employers, employees, and the public. Thus, provided the "bright lines" set in individual cases fall within the range of reasonable restrictions, the grant of substantial discretion to the courts in setting restrictions in individual cases is not inconsistent with this primary objective.

The will theory of contracts cannot provide a theoretical basis to guide the courts in the exercise of this substantial discretion. However, based upon the interplay between the doctrine of hardship and parallels between an award of monetary damages in equity as restitution for unjust enrichment and an award of time, geographic, and scope restrictions in the context of enforcing covenants not to compete, a traditional theoretical guide does exist to support "the involuntary theory of contracts."

At the time the enforceability of the restrictive covenants contained in the parties' agreement can first be tested and subjected to judicial review, the employer has generally provided the employee with the full value of the consideration that the employee bargained for in reaching their overall agreement. Nevertheless, at that same point in time, the employee has only provided the employer with part of the consideration to their overall agreement. As a result, if at the time the terms of the restrictive covenant are first subject to judicial review, the court determines that those terms are unreasonable and hence unenforceable, the employee will be unjustly enriched. Therefore, the employer will suffer a hardship that is cognizable in equity, unless the employer receives appropriate restitution for the consideration that has already been paid to the employee.

The situation is analogous to a contractor who performs services or confers other benefits to the government under a contract that is later declared invalid "because not properly advertised, not authorized, or for some other reason."[30] In this circumstance, the contractor is granted restitution of the fair value of the goods or services under an "implied-in-fact contract"[31] that is supported by the equitable concepts of *quantum valebant* or *quantum meruit*.[32] The contractor will not, however, be awarded the amount of compensation contracted for in the original agreement with the government if that amount is outside market boundaries.

30. Prestex, Inc. v. United States, 320 F.2d 367, 373 (Ct. Cl. 1963).
31. *See* Gould, Inc. v. United States, 67 F.3d 925, 930 (Fed. Cir. 1995).
32. *See* United States v. Amdahl Corp., 786 F.2d 387, 397 (Fed. Cir. 1986).

The same principles applicable to government contractors in the above-referenced example also apply to employers involved in disputes with former employees over the reasonableness of restrictions contained in contractually agreed upon covenants not to compete. No one is permitted to attack an award of $2,000 (assuming the reasonable range for such services was $1,500 to $3,000) in restitutionary damages to the contractor who provides services to the government under a contract that is later invalidated. Likewise, no one should be permitted to question the court's award of a geographic restriction of 125 miles on the employee's competitive activities (assuming a reasonable restriction on these activities ranges from 50 to 150 miles) as restitution to the employer where the 200 mile restriction on competition contained in the parties' ten-year-old employment agreement is invalidated on the basis that it constitutes an unreasonable restriction on competition in the current market.

From this perspective, the source of the judiciary's authority to act under "the theory of involuntary contracts" flows from principles underlying the law of restitution, not the law of contracts, and accordingly, is not in conflict with the will theory of contracts. In contrast to traditional restitutionary damages, however, the "coin" of this restitutionary remedy is geographic, time, and scope restrictions rather than dollars and cents. This alternative theoretical basis for "the theory of involuntary contracts" provides a sound theoretical support for the judicial authority to "rewrite" certain terms of parties' private agreements, while at the same time restricting the exercise of this power to a limited and distinct set of circumstances.