

# The Enforceability of Non-Compete Agreements in Nevada, Including an Analysis of Geographic Limitations

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## Introduction

Nevada jurisprudence has long recognized the legality of contractual non-compete agreements.<sup>2</sup> Generally speaking, if an agreement is reasonable in terms of its geographic scope and time, it will be enforced. Historically, Nevada courts have been reluctant to extend non-competes beyond Las Vegas, Reno, Clark County, and Nevada. However, due to the Internet, companies that previously conducted business in only one particular town or state are now able to offer their services globally. As a consequence, should Nevada courts still consider geographic restrictions reasonable, meaningful, or viable? This article discusses the basic legal requirements of non-compete agreements in Nevada, analyzes whether or not conventional concepts of geographic restrictions still apply, and addresses what a proponent of such an agreement must prove in order to obtain a preliminary injunction.

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<sup>2</sup> For the purpose of this article, a non-compete agreement is defined as a contract which restricts or limits a party from competing with a business after termination of employment.

# 1. State Statutes Governing Non-Compete Agreements

Nevada Revised Statute 613.200 provides:

Prevention of employment of person who has been discharged or who terminates employment unlawful; criminal and administrative penalties; exception.

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4. The provisions of this section do not prohibit a person, association, company, corporation, agent or officer from negotiating, executing and enforcing an agreement with an employee of the person, association, company or corporation which, upon termination of the employment, prohibits the employee from:

- (a) Pursuing a similar vocation in competition with or becoming employed by a competitor of the person, association, company or corporation; or
- (b) Disclosing any trade secrets, business methods, lists of customers, secret formulas or processes or confidential information learned or obtained during the course of his or her employment with the person, association, company or corporation,<sup>3</sup>

if the agreement is supported by valuable consideration and is otherwise reasonable in its scope and duration.

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<sup>3</sup> [NRS 613.200\(4\)](#). The proscriptions contained in the Nevada Unfair Trade Practices Act, at [NRS 598A.010-.280](#) specifically do not apply to restrictive covenants, “which are part of a contract of sale for a business and which bar the seller of the business from competing with the purchaser of the business sold within a reasonable market area for a reasonable period of time.” [NRS 598A.040\(5\)\(a\)](#). Presumably, the proscriptions would be applicable at least to unreasonable employment agreement covenants. [NRS 598A.030](#) provides,

- 1. The legislature hereby finds that:
  - (a) The free, open and competitive production and sale of commodities and services is necessary to the economic well-being of the citizens of the State of Nevada.
  - (b) The acts of persons which result in the restraint of trade and commerce:
    - (1) Act to destroy free and open competition in our market system and, thereby, result in increased costs and the deterioration in quality of commodities and services to the citizens of the State of Nevada.
    - (2) Result in economic hardships in the form of increased consumer prices and increased taxes upon many citizens of the State of Nevada least able to bear such increased costs.
- 2. It is the policy of this state and the purpose of this chapter to:
  - (a) Prohibit acts in restraint of trade or commerce, except where properly regulated as provided by law.
  - (b) Preserve and protect the free, open and competitive nature of our market system.
  - (c) Penalize all persons engaged in such anticompetitive practices to the full extent allowed by law, in accordance with the penalties provided herein.

## 2. What Is an Employer’s Protectable Interest?

Customer contacts and good will are protectable interests, but only in geographic areas where the former employer has done business.<sup>4</sup> In *Camco, Inc. v. Baker*, the Nevada Supreme Court held that a non-compete was unreasonable, and consequently unenforceable, as to a city in which the former employer had not signed a lease or begun construction of a store, or a future territory for possible expansion.<sup>5</sup>

## 3. What Is the Employer’s Burden of Proof in Order to Demonstrate the Existence of an Enforceable Non-Compete Agreement?

A former employer must be able to demonstrate that the non-compete agreement is supported by consideration and that its terms are reasonable.<sup>6</sup> With respect to “reasonableness,” Nevada still looks to the case of *Hansen v. Edwards*, 83 Nev. 189, 426 P.2d 792 (Nev. 1967), where the court explained,

“[a]n agreement on the part of an employee not to compete with his employer after termination of the employment is in restraint of trade and will not be enforced in accordance with its terms unless the same are reasonable. Where the public interest is not directly involved, the test usually stated for determining the validity of the [non-competition] covenant as written is whether it imposes upon the employee any greater restraint than is reasonably necessary to protect the business and good will of the employer. A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted. The period of time during which the restraint is to last and the territory that is included are important factors to be considered in determining the reasonableness of the agreement.<sup>7</sup>

## 4. Does the Execution of a Non-Compete Agreement at the Inception of an Employment Relationship Provide Sufficient Consideration to Render the Agreement Enforceable?

Nevada case law does not specifically address the question of what amount or type of consideration is sufficient to support a non-compete agreement. However, the Nevada Supreme

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<sup>4</sup> *Camco, Inc. v. Baker*, 113 Nev. 512, 936 P.2d 829 (Nev. 1997).

<sup>5</sup> *Id.* at 520, 936 P.2d at 834.

<sup>6</sup> *See id.* at 518, 936 P.2d at 832.

<sup>7</sup> *Hansen*, 83 Nev. at 191-92, 426 P.2d at 793 (citations omitted); *see also Ellis v. McDaniel*, 95 Nev. 455, 458-59, 596 P.2d 222, 224 (Nev. 1979) (“There is no inflexible formula for deciding the ubiquitous question of reasonableness. However, because the loss of a person’s livelihood is a very serious matter, post-employment anti-competitive covenants are scrutinized with greater care....”).

Court in *Hansen* ruled that non-compete agreements executed at the inception of employment are legal and binding.<sup>8</sup>

## **5. Will a Change in the Terms and Conditions of Employment Provide Sufficient Consideration to Support a Non-Compete Agreement Which Was Executed After Employment Began?**

Nevada courts have yet to address this issue. However, the Nevada Supreme Court has analyzed the enforceability of a non-compete agreement on a former employee when a business sells its interests. In *Traffic Control Services, Inc. v. United Rentals Northwest, Inc.*, 120 Nev. 168, 87 P.3d 1054 (Nev. 2004), the court addressed the question whether a non-compete entered into between an employer and employee is assignable and enforceable by the employer's purchaser. The court held that a non-compete agreement is not enforceable by a purchaser of a business because such a covenant is personal in nature and, therefore, unassignable as a matter of law, unless the employee expressly consented to its assignment and was given separate and independent consideration.<sup>9</sup> In reaching its decision, the court reasoned that, "[t]he sale of a business fundamentally alters the nature of an employment relationship."<sup>10</sup>

## **6. Will Continued Employment Provide Sufficient Consideration to Support a Non-Compete Agreement Which Was Entered Into After the Employee Began Working?**

In *Camco, Inc. v. Baker*, the Nevada Supreme Court held that continued employment constituted valid consideration for an at-will employee's post-hire agreement not to compete with a former employer. The court in *Camco* adopted the majority position on this issue, explaining:

[t]his court has held that an at-will employee's 'continued employment' after formal delivery of [an employment] handbook provides sufficient consideration for modifying the employment agreement by inclusion of the handbook provisions. We agree. A non-competition provision is no more than a modification to the original employment contract, and thus the law articulated in *Southwest Gas* is dispositive.<sup>11</sup>

The court in *Camco* also noted that, "[c]ourts have concluded that in an at-will employment context 'continued employment' is, as a practical matter, equivalent to the employer's 'forbearance to discharge'; many courts have concluded that the consideration is equally valid phrased as a benefit to

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<sup>8</sup> *Hansen*, 83 Nev. at 192, 426 P.2d at 793.

<sup>9</sup> *Traffic Control Servs., Inc.*, 120 Nev. at 172, 87 P.2d at 1057.

<sup>10</sup> *Id.*, 120 Nev. at 172, 87 P.2d at 1058.

<sup>11</sup> *Camco*, 113 Nev. at 517, 936 P.2d at 832.

the employee or a legal detriment to the employer.<sup>12</sup> Finally, the court concluded, “There is no substantive difference between the promise of employment upon initial hire and the promise of continued employment subsequent to ‘day one’.”<sup>13</sup>

## **7. What Factors Do Nevada Courts Use to Determine Whether Time and Geographic Restrictions in the Non-Compete Are Reasonable?**

The Nevada Supreme Court has yet to formally re-examine the geographic location and period of time non-competes will last in view of the globalizing nature of the economy. Accordingly, the current list of decisions has consistently defined the enforceable time period of non-competes, as well as narrowly construed their geographic limitations.<sup>14</sup>

## **8. Who Has the Burden of Proving the Reasonableness or Unreasonableness of the Non-Compete?**

The question of who has the burden of proof as to reasonableness or unreasonableness has not been specifically addressed by Nevada case law. Presumably, like most jurisdictions, the employer bears this burden in an action seeking to enforce a non-compete agreement.<sup>15</sup>

## **9. What Type of Time or Geographic Restrictions Has the Court Found to Be Reasonable?**

### **Reasonable:**

In *Ellis v. McDaniel*, the court held that an orthopedic surgeon’s two-year non-compete agreement, which was limited to the practice of general medicine only (not orthopedic surgery), and in the geographic area serviced by a medical clinic (five-mile radius of Elko), was reasonable.<sup>16</sup>

### **Reasonable:**

In *Hansen v. Edwards*, the court determined that a non-compete which limited a podiatrist from competing in the City of Reno was reasonable. (Note that the agreement did not include a time limitation; therefore, the court unilaterally applied a one-year limitation period.)<sup>17</sup>

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<sup>12</sup> *Id.*, 113 Nev. at 517, 936 P.2d at 832 fn.7; see *Mattison v. Johnston*, 730 P.2d 286, 286 (Ariz. Ct. App. 1986); *Zellner v. Stephen D. Conrad, M.D., P.C.*, 183 A.D.2d 250 (N.Y. App. Div. 1992).

<sup>13</sup> *Camco*, 113 Nev. at 517, 936 P.2d at 832; see *Copeco, Inc. v. Calg*, 632 N.E.2d 1299, 1301 (Ohio 1992).

<sup>14</sup> See *Ellis v. McDaniel*, 95 Nev. at 459, 596 P.2d at 224 (holding that non-compete was enforceable in 5-mile radius of Elko and limited to two years); see also *Sheehan & Sheehan v. Nelson*, 121 Nev. 481, 491, 117 P.3d 219, 225 (Nev. 2005) (upholding covenant not to compete that did not prevent signatory to agreement from performing work for independent entity located outside geographic restriction, regardless of whether signatory resided in and conducted business within geographic limitation).

<sup>15</sup> See *Howard Schultz & Assocs. v. Broniec*, 236 S.E.2d 265, 268 (Ga. 1977); *Ma & Pa, Inc. v. Kelly*, 342 N.W.2d 500, 502, (Iowa 1984); *Snyder’s Drug Stores, Inc. v. Sheehy Props., Inc.*, 266 N.W.2d 882, 885 (Minn. 1978).

<sup>16</sup> *Ellis*, 95 Nev. at 459-60, 596 P.2d at 225.

### **Unreasonable:**

In *Camco, Inc. v. Baker*, the court examined a set of four non-compete agreements purporting to bar four former pawn shop management employees (one store manager, two regional managers, and one director of operations) from competing in any area within 50 miles of (1) any store either existing or under construction, and (2) any location targeted for corporate expansion by the employer. The court held the restriction “applying to areas ‘targeted’ by Camco for ‘corporate expansion’ is completely unreasonable.”<sup>18</sup>

### **Unreasonable:**

In *Jones v. Deeter*, 112 Nev. 291, 913 P.2d 1272 (Nev. 1996), the court considered a non-compete which contained a five-year limitation within a 100-mile radius of the former employer. The court ruled that the non-compete was unreasonable and entirely unenforceable because it placed too great a hardship on the former employee and was not reasonably necessary to protect the former employer’s interests.<sup>19</sup>

### **Unreasonable:**

In *Hotel Riviera v. Torres*, 97 Nev. 399, 632 P.2d 1155 (Nev. 1981) (trial court affirmed by Nevada Supreme Court on different grounds), the court held that a non-compete which contained an unlimited time period was unreasonable, and by extension, unenforceable.<sup>20</sup>

## **10. Can the Court Modify a Non-Compete Agreement?**

Courts in Nevada have not hesitated to modify, or “blue pencil” non-compete agreements if their terms are overbroad. For example, in *Ellis v. McDaniel*, the court modified the non-compete in order to permit plaintiff to practice orthopedic surgery, observing that:

Although an injunction against Dr. Ellis’ practice as a general practitioner is a reasonable restraint in order to protect the good will of the Elko Clinic, a prohibition against his practice as an orthopedic surgeon, a specialty in which none of the doctors at the Clinic is engaged, is not justified.... Thus, in the instant case, the public interest in retaining the services of the specialist is greater than the interest in protecting the integrity of the contract provision to its outer limits. Finally, assessing the relative hardships, we conclude that the loss to Dr. Ellis and the public by enforcing the covenant is far in excess of the threatened danger to the clinic resulting from a limited enforcement of the restriction to permit Dr. Ellis to practice his

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<sup>17</sup> *Hansen*, 83 Nev. at 191, 426 P.2d at 793.

<sup>18</sup> *Camco*, 113 Nev. at 520, 936 P.2d at 834.

<sup>19</sup> *Jones*, 112 Nev. at 296, 913 P.2d at 1275.

<sup>20</sup> *Hotel Riviera*, 97 Nev. at 400-01, 632 P.2d at 1156-57.

specialty. We therefore exercise our equitable powers by denying enforcement of the covenant to the extent it purports to prohibit Dr. Ellis from practicing orthopedic surgery. Concurrently, we will enforce the covenant by prohibiting Dr. Ellis from engaging in the general practice of medicine within the time and space limitations set out in the contract.<sup>21</sup>

## **11. If the Employer Terminates the Employment Relationship, Is the Covenant Enforceable?**

Nevada case law does not specifically address this question; however, several Nevada district court judges have stated orally and in trial orders that it is relevant whether or not an employee was terminated with or without cause.<sup>22</sup>

## **12. If the Court Finds an Employee Has Breached a Non-Compete, Will the Court Measure the Period of Injunction From the Date of Termination of Employment or From the Date of the Court Order?**

Nevada courts use both starting dates. In *Hansen v. Edwards, supra*, the court held, “[t]he circumstances of this case warrant a confinement of the area of the restraint to the boundary limits of the City of Reno and a time interval of one year commencing February 10, 1967, the date of the [issuance of the] injunction.”<sup>23</sup> However, in *Ellis v. McDaniel, supra*, the court concluded, “[W]e will enforce the covenant by prohibiting Dr. Ellis from engaging in the general practice of medicine within the time and space limitations set out in the contract.”<sup>24</sup>

## **13. Forum Selection Clauses and Choice of Law**

Under Nevada law, “parties are permitted to select the law that will govern the validity and effect of their contract.”<sup>25</sup> However, the following limitations are imposed on the right to choose the applicable law: “The parties are required ... to act in good faith and not for the purpose of evading the law of the real situs of the contract. Additionally, the situs must have a substantial relationship to the transaction and the agreement must not be contrary to the public policy of the forum.”<sup>26</sup>

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<sup>21</sup> *Ellis*, 95 Nev. at 459-60, 596 P.2d 222, 224-25.

<sup>22</sup> See, e.g., Trial Order, *Jenson Total Servs., Inc. v. Thermal Dynamics, Inc.*, No. 07-A-540910, 2007 WL 7308444 (Nev. Dist. Ct. 8<sup>th</sup> Nov. 5, 2007) (J. Villani) (denying Plaintiff’s Motion for Preliminary Injunction and citing *Sifco Industries, Inc. v. Advanced Plating Techs., Inc.*, 867 F. Supp. 155 (S.D.N.Y. 1994) for the proposition that employer’s action in terminating employee without cause necessarily destroys mutuality of obligation on which covenant not to compete rests).

<sup>23</sup> *Hansen*, 83 Nev. at 192, 426 P.2d at 794.

<sup>24</sup> *Ellis*, 95 Nev. at 459, 596 P.2d 225.

<sup>25</sup> *Engel v. Ernst*, 102 Nev. 390, 395, 724 P.2d 215, 216 17 (Nev. 1986).

<sup>26</sup> *Id.*; see also *Pentax Corp. v. Boyd*, 111 Nev. 1296, 1298, 904 P.2d 1024, 1026 (Nev. 1995).

In *Engel*, the Nevada Supreme Court reviewed a lower court's decision not to enforce a choice of law provision in favor of Colorado law because, in the lower court's view, the contract contained a covenant not to compete that offended Nevada public policy. The Nevada Supreme Court concluded that, if the contract did in fact contain such a provision, it would have upheld the lower court's decision not to enforce the choice of law provision.<sup>27</sup> However, because it determined that the provision in question actually was a liquidated damages clause having legitimate underpinnings—and not a covenant not to compete of the sort that would violate Nevada public policy, the Nevada Supreme Court held that the parties' selection of Colorado law was enforceable.<sup>28</sup>

In the context of enforcing non-compete agreements, the issue of forum selection clauses appears in cases where employees work for a business in one state, but the non-compete agreement is governed by the laws of another jurisdiction. The question then becomes: which law applies? The case of *Meras Engineering, Inc., v. CH20, Inc.*, No. C-11-0389 (EMC), 2013 WL 146341 (N.D. Cal. 2013), is particularly instructive with respect to this issue because non-compete agreements are illegal in California (there are several narrow exceptions).<sup>29</sup> In *Meras Engineering*, two California residents signed employment agreements whereby they agreed to be bound by the laws of Washington State. They proceeded to directly compete with their employer, and the employer sued under them in Washington. The employees counter-sued in California federal court, arguing that because they were California residents and conducted their work in California, their non-competes were void. The court disagreed, holding that by voluntarily signing the employment agreements, they knew they were subject to the laws of Washington State; therefore, the case had to be resolved in Washington.<sup>30</sup>

## **14. The Advent of the Internet and Its Effects on Geographical Limitations Contained in Non-Compete Agreements**

Non-compete agreements constitute a venerable and important part of how businesses legitimately protect their confidential information and customer relationships. Clearly, Nevada courts view such provisions with skepticism and they are narrowly construed. However, with the advent of the Internet, companies that used to sell their products or services within a limited geographic area are now able to conduct business on a global scale. Accordingly, companies that sell products and services solely online require national, and sometimes international, geographic scopes

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<sup>27</sup> See *Engel*, 102 Nev. at 395-96, 724 P.2d at 217.

<sup>28</sup> *Id.*

<sup>29</sup> See California Business & Professions Code § 16600 *et seq.*, and *Edwards v. Arthur Andersen LLP*, 189 P.3d 285 (Cal. 2008).

<sup>30</sup> *Meras Eng'g., Inc.*, 2013 WL 146341 at \*15. It is critical to draft forum selection clauses very carefully. Courts scrutinize whether the specific language of a forum selection clause is exclusive, and therefore mandatory, not permissive, and whether the language encompasses the particular claims raised. A lack of clarity or ambiguity in the language of a forum selection clause or resulting from coterminous, inconsistent agreements weighs against finding forum selection to be mandatory. A well drafted clause includes exclusive language and an express waiver of objections to personal jurisdiction and to venue, and is not inconsistent with clauses in other agreements that may be part and parcel of the relationship between the parties.



in order to adequately protect the companies' legitimate business interests. Although the Internet presents new issues in determining the reasonableness of a geographic restriction, courts have applied the public policy considerations behind non-compete laws to find a solution. Surprisingly, courts have had few opportunities to address the particular issue of how the Internet affects the reasonableness of a geographic scope within a non-compete provision.

One unpublished case from the Eighth Judicial District Court in Las Vegas took on the issue of a non-compete provision that contained a very wide-reaching geographic restriction. *In Network Learning, Inc. v. Sisy*, Case No. 08-A-577960 (Nev. Dist. Ct. 8<sup>th</sup> 2009), the defendant executed a non-compete agreement with his employer that restricted him from working for a competitor for two years throughout the United States. The defendant eventually resigned from Network Learning and formed his own business for the purpose of directly competing with the plaintiff in the identical jurisdictions where Network Learning offered its services. The district court granted Network Learning's motion for a preliminary injunction throughout the United States, but decreased the time restriction to one year. In reaching its decision, the district court stated:

I don't believe that Defendants have really offered anything new or of substance such that the injunction should be denied. As I indicated before, it's a discretionary, somewhat fact-based decision every time I get one of these. I will agree that normally the ones I get are the ones that are easier from a territorial standpoint whether it's plumbers—I think our last one was a pest control service, but basically the same type where it is localized. So the cases from around the country, and most of them obviously are federal court cases, were very instructive. I still need to use the Nevada standard on these.

The cases that have been cited to the Court on what is essentially an unlimited territorial non-compete clause underscored the point that Mr. Rosenthal made that where a plaintiff can show, for instance, a national customer base that such a territorial restriction might be appropriate.

...I don't believe that under these specific facts of this case the geographical restriction within the United States is overbroad given their national scope, limited customer base and the widespread nature of the customer base across the nation. So I think the geographical restriction in this case is not overbroad. Given that unlimited geographical restriction in considering the potential harm to Mr. Sisy, I am going to find that the time period is unduly restrictive. Even the Nevada courts, in *Hansen* they modified the non-compete clause to one year and limited it to in the Reno city limits. I can tell, the greater the territorial limitation, the shorter the potential restriction on the employee's right to work. So I'm going to find that the time period here is unduly restrictive, modify it to one year from the date of termination which was May of 2008. I'm going to grant the preliminary injunction under those

circumstances. I'm going to order that the Defendants are enjoined from utilizing any property, data, or information owned or originating or generated by the Plaintiff or its customers. I am going to enjoin the Defendant from contacting customers and clients of the Plaintiff; [and] ... from engaging in activities in direct competition with Plaintiff, and from being employed with any company competing with Plaintiff.<sup>31</sup>

## **15. Under What Circumstances Are Courts Likely to Enforce a Non-Compete With No Geographical Limits?**

One scenario where courts will enforce non-competes with no geographic limits is where the employee, either because of the large size of the company, or because technology like the Internet allowed a small company to reach a large geographical area, actually worked for the employer in a national or global capacity. For example, in *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905 (Ind. App. 2011), the former employer manufactured, sold, and leased large heaters in steel mills, portable heater units, heater parts, air conditioning systems and related goods; the restrictive covenant provided, in part, that the former employee would not compete with his former employer by directly or indirectly working with any company involved in the “manufacture, marketing, leasing, distribution, or sale of products in, or services related to, heaters or heating or air conditioning systems and related parts and components markets in any of the states listed on Exhibit A, attached hereto.”<sup>32</sup> Later, it became known to the former employer that the former employee had a side business, unknown to the former employer, which competed in one market, namely, the market for the sale of portable heater parts. The former employer then filed suit against the former employee. The appellate court upheld the trial court’s order granting the former employer a preliminary injunction enforcing the restrictive covenant. The appellate court also affirmed the trial court’s decision to blue pencil the restrictive covenant’s geographical scope, wherein the trial court struck from the restrictive covenant those states with which the former employee did not have contact while employed by his former employer. Accordingly, the restrictive covenant, as upheld, prohibited the former employee from competing in the 13 states with which he did, in fact, have contact while employed by his former employee.<sup>33</sup>

Similarly, the court in *Talk Fusion, Inc. v. Ulrich*, No. 8:11-CV--T-33AEP, 2011 WL 2681677 (M.D. Fla. June 21, 2011), upheld a non-solicitation agreement with a broad geographical scope that encompassed “all markets in which Talk Fusion conducts business.”<sup>34</sup> The business at issue in that case involved the sale of video communication products for personal and commercial use. The former independent contractor sales associates began to work for a competitor, and began soliciting

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<sup>31</sup> Transcript of Hearing on Plaintiff’s Motion for Preliminary Injunction, *In Network Learning, Inc. v. Sisy*, Case No. 08-A-577960, at 23-27 (Nev. Dist. Ct. 8<sup>th</sup> Feb. 12, 2009) (on file with author).

<sup>32</sup> *Coates*, 942 N.E.2d at 910.

<sup>33</sup> *Id.* at 921.

<sup>34</sup> *Talk Fusion, Inc.*, 2011 WL 2681677, at \*6.

other of Talk Fusion’s independent contractor sales associates to work for the competitor. In the independent contractor agreement, the former independent contractors had acknowledged and agreed that “because network marketing is conducted through networks of independent contractors disbursed across the entire United States and internationally, and business is commonly conducted via the Internet and telephone, an effort to narrowly limit the geographic scope of this non-solicitation provision would render it wholly ineffective. Therefore, Associates and Talk Fusion agree that this non-solicitation provision shall apply to all markets in which Talk Fusion conducts business.”<sup>35</sup> The court held that “[i]n light of the dynamic and wide-reaching nature of digital sales and social media-based marketing, and the highly restrictive temporal scope of the restrictive covenant [six months],” the geographic scope was reasonable.<sup>36</sup> The court, in effect, found that the very nature of the business meant that the former independent contractors had competed across the entire United States and internationally.<sup>37</sup> Accordingly, like *Coates*, the *Talk Fusion* case turned on the broad geographic nature of the business.

Another enforcement scenario involving a non-compete with a broad geographic scope exists in the scenario of a highly-ranked employee, or an employee in possession of highly sensitive competitive information. In *Zambelli Fireworks Mfg. Co., Inc. v. Wood*, 592 F.3d 412 (3<sup>rd</sup> Cir. 2010), plaintiff owned and operated one of the oldest and largest fireworks companies in the country, doing business in more than 40 states. The former employee worked for the company for seven years. The former employer, a family company with no family member who wanted take over the company, believed that the former employee was going to be the “next generation” and “future of the company,” a belief which led the former employer to pay for the former employee to get specialized certifications and licensing. The former employer ended up being acquired by another, larger company, and the former employee did not like the changes to the company. The former employee then left and went to work for a competitor. The Third Circuit Court upheld the district court’s holding enforcing the nation-wide restrictive covenant.<sup>38</sup> The court was primarily interested in the fact that the former employer had a legitimate business interest in its customer goodwill, and in the specialized training and skills that the former employee acquired on their dime, while working for them. Due to the highly sensitive information possessed by the former employee, the court was unconcerned about the national geographic scope, the somewhat lengthy two-year restriction, and the very broad scope of prohibited activity, namely, the fact that the former employee was prohibited from “engage[ing] in any manner in the pyrotechnic business.”<sup>39</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Zambelli Fireworks Mfg. Co.*, 592 F.3d at 416.

<sup>39</sup> *Id.*

Courts have also permitted broad geographic limitations where the scope of the restrictive covenant is narrowly tailored to address only particular clients and/or products or services with which the former employee actually worked during the course of his or her employment. In *Salas v. Chris Christensen Systems, Inc.*, No. 10–11–00107–CV, 2011 WL 4089999 (Tex. App. Waco Sep. 14, 2011), the former employer manufactured and distributed high quality dog grooming products used by dog show enthusiasts around the world. The former employee, Salas, was the Vice-President of Sales and Education Director. On appeal, the appellate court upheld the trial court’s imposition of a permanent injunction, which enjoined the former employee from “directly or indirectly interfere[ing] with, or endeavoring] to entice away from the Company any clients or account with whom the Employee had direct contact with at any time during his or her employment at Company, or for or with any other person, firm, corporation, partnership, joint venture, association, or other entity whatsoever, which is or intends to be engaged in providing or manufacturing pet supplies and related products manufactured and distributed by Company.”<sup>40</sup> The court upheld the five-year temporal limitation of the agreement, and although the non-compete did not contain a geographical limitation, the court found that “limiting the applicability of the covenant to particular client bases is an acceptable substitute for a geographic limitation in a non-compete agreement.”<sup>41</sup>

Similarly, in *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 732 S.E.2d 676 (Va. 2012), the Supreme Court of Virginia held that “[t]he lack of a specific geographic limitation is not fatal to the covenant [in that case] because the non-compete clause is so narrowly drawn to this particular project and the handful of companies in direct competition...”<sup>42</sup> The plaintiff, an information technology contractor for the federal Defense Logistics Agency, subcontracted with the defendant, a consulting firm that provided the services of one of its programmers. The subcontractor agreement contained a 12-month non-compete, providing that it would not directly or indirectly “(a) enter into a contract as a subcontractor with Accenture, LLP and/or DLA to provide the same or similar support that PSS is providing to Accenture, LLP and/or DLA and in support of the DLA Business Systems Modernization (BSM) program; [or] (b) enter into an agreement with a competing business and provide the same or similar support that PSS is providing to Accenture, LLP and/or DLA and in support of the DLA Business Systems Modernization (BSM) program.”<sup>43</sup> The defendant ultimately terminated its subcontractor and began working for Accenture, doing the same work for Accenture that it did for the plaintiff. The plaintiff successfully sued and was awarded \$172,395.96 in compensatory damages for defendant’s breach of the non-compete agreement. The defendant challenged this award on appeal, but it was affirmed.<sup>44</sup>

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<sup>40</sup> *Salas*, 2011 WL 4089999, at \*18-\*19.

<sup>41</sup> *Id.* at \*19.

<sup>42</sup> *Preferred Sys. Solutions, Inc.*, 732 S.E.2d at 682.

<sup>43</sup> *Id.* at 680.

<sup>44</sup> *Id.* at 690.

Finally, in *KJR Management Co., LLC v. First Web Search, LLC*, a Nevada district court judge held that because the employer's computer search optimization and marketing business was highly competitive and not limited by traditional geographic considerations, the non-compete agreement signed by the employee was enforceable throughout the United States.<sup>45</sup>

## 16. What Must an Employer Prove to Obtain a Preliminary Injunction in Order to Enforce a Non-Compete Agreement?

In order to obtain a preliminary injunction, an employer must meet the requirements of Nev. R. Civ. P. 65. Thus, a preliminary injunction seeking to preserve the status quo is normally available upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable harm for which compensatory damages is an inadequate remedy.<sup>46</sup>

In determining whether a former employer enjoys a reasonable probability of success on the merits of its case seeking an injunction to enforce a non-compete, the court must consider whether the provisions of the covenant are likely to be found reasonable at trial.<sup>47</sup> Lack of a subsequent employer's privity to a covenant not to compete does not bar the former employer from obtaining injunctive relief against the subsequent employer if the subsequent employer breached the covenant in active concert with the principal party subject to the covenant and with knowledge of the covenant.<sup>48</sup> As explained by the Nevada Supreme Court in *Las Vegas Novelty v. Fernandez*:

The court's failure to specifically articulate its reasons for issuing a permanent injunction does automatically void the injunctive order if the reasons for the injunction are readily apparent somewhere in the record and are sufficiently clear to permit meaningful appellate review. *Id.* at 118, 787 P.2d at 775; *see also Sowers v. Forest Hills Subdivision*, 129 Nev. --, --, 294 P.3d 427, 434 (2013). If the court had merely enjoined Alfred [the former employee] according to the terms of the covenant, the injunctive order would be reviewable and, hence, valid, because the reasons for its issuance are apparent elsewhere in the record and meaningful appellate review would be possible. Absent a statement of reasons, this court

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<sup>45</sup> Trial Order, *KJR Mgmt. Co., LLC v. First Web Search, LLC*, No. A549570, 2009 WL 6597820, at \*3 (Nev. Dist. Ct. 8<sup>th</sup> Jan. 6, 2009)(citing *VAIS Arms, Inc. v. Vais*, 383 F.3d 287, 295-96 (5<sup>th</sup> Cir. 2004); *Natsource LLC, Paribello*, 151 F. Supp. 2d 465 (S.D.N.Y. 2001); *Weseley Software Dev. Corp. v. Burdette*, 977 F. Supp. 137, 144 (D. Conn. 1997); *Marcam Corp. v. Orchard*, 885 F. Supp. 294, 299 (D. Mass. 1995); and *Business Intelligence Servs., Inc. v. Hudson*, 580 F. Supp. 1068, 1073 (S.D.N.Y. 1984)); *see also Accelerated Care Plus Corp. v. Diversicare Mgmt. Servs. Co.*, No. 3:11-cv-00585-RCJ-RAM, 2011 WL 3678798, at \*4 (D. Nev. Aug. 22, 2011) (granting temporary restraining order enforcing non-competition agreement with one-year duration and unlimited geographical scope against two former management level employees and new employer).

<sup>46</sup> *See Camco v. Baker*, 113 Nev. at 520, 936 P.2d at 834.

<sup>47</sup> *Id.*

<sup>48</sup> *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 787 P.2d 772 (Nev. 1990).

cannot meaningfully review the limitations on enforcement of the covenant imposed by the district court. Why the district court limited the radius of enforcement from 20 miles to 10 miles from [the former employer] is especially unclear, given [the former employer's] allegations and affidavits suggesting that some of [its] important clients are located ... between 10 and 20 miles from (the former employer's business)].<sup>49</sup>

## 17. How Can an Employer Establish Irreparable Harm?

A former employer must show irreparable harm in order to obtain an injunction enforcing a noncompetition covenant, but the court need not reach that issue where the former employer has failed to show a reasonable likelihood of success on the merits.<sup>50</sup> The district court maintains discretion in determining whether to grant a preliminary injunction, and the Nevada Supreme Court will only reverse a decision “where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.”<sup>51</sup> The Nevada Supreme Court has found that “acts committed without just cause which unreasonably interfere with a business or destroy its credit or profits, may do an irreparable injury.”<sup>52</sup> The court has also found that a district court’s finding of evidence that a former employee competed with his former employer, solicited his former employer’s employees, disparaged his former employer and disclosed his former employer’s confidential information, and misappropriated its trade secrets supports a demonstration of irreparable harm.<sup>53</sup>

## 18. What Damages Can an Employer Recover?

The substantial risk of losing patients to an employee is itself an adequate basis for a reasonably designed restraint.<sup>54</sup> In the short time that Hansen opened his office after terminating the employment contract, he acquired approximately 180 of Edwards’ customers. The court held that Edwards should have the opportunity to recoup this loss and, in addition, to readjust his office routine which had previously been geared to Hansen’s association.<sup>55</sup>

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<sup>49</sup> *Id.*, 106 Nev. at 119, 787 P.2d at 776.

<sup>50</sup> See *Camco*, 113 Nev. at 18, 936 P.2d at 834; *Boulder Oaks Cmty. Ass’n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (Nev. 2009).

<sup>51</sup> *Boulder Oaks Cmty. Ass’n*, 125 Nev. at 403, 215 P.3d at 31 (internal quotations omitted).

<sup>52</sup> *Sobol v. Capital Mgmt.*, 102 Nev. 444, 446, 726 P.2d 335, 337 (Nev. 1986); see also *Finkel v. Cashman Prof'l, Inc.*, 270 P.3d 1259, 1263 (Nev. 2012) (holding that district court’s finding of evidence that former employee competed with former employer, solicited former employer’s employees, disparaged former employer and disclosed former employer’s confidential information, and misappropriated its trade secrets supports demonstration of irreparable harm).

<sup>53</sup> *Finkel*, 270 P.3d at 1263.

<sup>54</sup> See *Hansen*, 83 Nev. at 192, 426 P.2d at 793-94.

<sup>55</sup> *Id.*

A plaintiff may not recover liquidated damages for a merely technical violation of a non-compete agreement; to trigger a liquidated damages clause, the breach must be material.<sup>56</sup>

## **Conclusion**

Clearly, the Internet and the new world-wide nature of commerce have thrown a monkey wrench into well-established principles governing non-competes. Limiting the geographic scope of non-compete agreements to a particular city or state is simply no longer realistic. Claims that geographic restrictions have become obsolete are premature, as more and more courts have demonstrated a willingness to take on the issue. Further, if employers take more care in drafting their agreements and justify within the contracts why the geographic restriction is so broad, courts will be more inclined to enforce them and grant injunctive relief.

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<sup>56</sup> See *Sheehan & Sheehan*, 121 Nev. at 491, 117 P.3d at 225 (sale-of-business context).