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Feature Article

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The Continuing Viability of Illinois' Legitimate Business Interest Test: A Deeper Look into *Reliable Fire Equip. Co. v. Arrendondo*

I. Introduction

American courts have long expressed a reluctance to enforce agreements that act as restraints of trade or competition. Illinois is no exception. Notwithstanding this reluctance, for over 117 years, courts have upheld agreements precluding competition by former employees if the restraint on competition imposed by the agreement is considered to be "reasonable." *See Hursen v. Gavin*, 162 Ill. 377, 44 N.E. 735 (1896) (involving a restrictive covenant included in the sale of a livery and undertaking business that precluded the purchaser from engaging in the livery and undertaking business for a period of five years in the City of Chicago). What is "reasonable" has recently been the subject of much discussion and debate in the Illinois courts. Historically, Illinois courts have required employee non-compete agreements to be reasonably limited in time and geographical scope, and designed to protect a legitimate business interest of the employer (the legitimate business interest test). *See Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 76, 866 N.E.2d 85, 98 (2006).

In recent years, the legitimate business interest test has been the subject of increasing criticism by the Illinois courts. The viability of the test was first called into question in a special concurring opinion issued by Justice Robert Steigmann of the Illinois Appellate Court, Fourth District in *Lifetec, Inc. v. Edwards*, 377 Ill. App. 3d 260, 275-80, 880 N.E.2d 188, 200-04 (4th Dist. 2007) (Steigmann, J., concurring). A couple of years later, Justice Steigmann wrote the decision in *Sunbelt Rentals, Inc. v. Ehlers* in which he concluded that the Illinois Supreme Court had never embraced the legitimate business interest test, and then he rejected the test entirely. *Sunbelt Rentals, Inc. v. Ehlers*, 394 Ill. App. 3d 421, 431, 915 N.E.2d 862, 870 (4th Dist. 2009). The ripples of the *Sunbelt* decision reached the Second District the following year in *Steam Sales v. Summers*, 405 Ill. App. 3d 442, 937 N.E.2d 715 (2d Dist. 2010), and later was squarely addressed in *Reliable Fire Equip. Co. v. Arrendondo*, 405 Ill. App. 3d 708, 940 N.E.2d 153 (2d Dist. 2010).

In *Arrendondo*, the appellate court issued an 85-page opinion that disagreed with *Sunbelt* and reaffirmed the viability of legitimate business interest test. *See Arrendondo*, 405 Ill. App. 3d at 708. The Illinois Supreme Court then accepted a petition for leave to appeal. The high court agreed with the appellate court that the legitimate business interest test remains a viable test to be employed in evaluating the enforceability of an employee covenant not to compete, and thus, expressly overruled *Sunbelt*. Importantly, however, it disagreed with the appellate court as to the appropriate test for determining whether an employer possesses a legitimate business interest worthy of protection. As discussed below, the court adopted a "totality of the circumstances"

test for determining whether an employer possesses a legitimate business interest in lieu of a more rigid two-pronged approach that had been utilized by the appellate court for decades. *Reliable Fire Equip. Co. v. Arrendondo*, 2011 IL 111871, ¶ 44. As discussed below, the Illinois Supreme Court's decision marks a significant change in the law that will affect the way non-compete agreements are drafted and litigated.

II. The Appellate Court Split

To fully understand the decision of the Illinois Supreme Court in *Arrendondo*, discussion of two appellate cases is necessary: (1) *Sunbelt*, and (2) *Steam Sales*. These cases (along with the appellate decision in *Arrendondo* itself) caused the major split in the appellate districts over the viability of the legitimate business interest test, and prompted the supreme court to not only decide that issue, but also to set forth the proper application of the test for future cases going forward.

A. *Sunbelt Rentals Inc. v. Ehlers*

The facts of *Sunbelt* are relatively straightforward. Sunbelt, a company engaged in the sale and rental of industrial equipment, sued its former employee, Neil Ehlers, and his new employer, Midwest Aerials & Equipment Company (Midwest), in order to enjoin defendants from violating restrictive covenants in Ehlers' employment agreement with Sunbelt. *Sunbelt Rentals, Inc.*, 394 Ill. App. 3d at 422. Upon joining Sunbelt as a sales representative, Ehlers had signed a written employment agreement that contained restrictive covenants preventing Ehlers from competing with Sunbelt for a period of one year after the date of his termination and competing with Sunbelt within a 50-mile radius of any of Sunbelt's stores. *Id.* at 422-23. Ultimately, Ehlers terminated his employment with Sunbelt and less than twelve months later, began to work in a sales position with Midwest, a competitor of Sunbelt. *Id.* at 424.

On appeal, the Fourth District affirmed the trial court's entry of a preliminary injunction, enjoining Ehlers and Midwest from violating the restrictive covenant in Ehlers' employment agreement. *Id.* at 433. In addressing the enforceability of the restrictive covenant, the court limited its analysis to solely its time-and-territory restrictions. *Id.* at 430-31. Relying on the Illinois Supreme Court's most recent decision on non-compete agreements at the time, *Mohanty v. St. John Heart Clinic, SC*, 225 Ill. 2d 52 866 N.E.2d 85 (2006), the appellate court concluded that an evaluation of the employer's legitimate business interest was not necessary because the legitimate business interest test has never been recognized by the Illinois Supreme Court. *Id.*

According to *Sunbelt*, the legitimate business interest test constitutes no more than "judicial gloss" and adds nothing to the analysis of the enforceability of employee non-compete agreements. *Id.* at 431. The court based this determination on its interpretation of *Mohanty* as standing for the proposition that the legitimate business interest test is no longer, and in fact may never have been, the law in Illinois because *Mohanty* did not mention the test in its analysis of the non-compete clause that was at issue in the case before it. *Id.* at 430-31.

B. *Steam Sales Corp. v. Summers*

Almost a year after *Sunbelt*, the Second District again addressed restrictive covenants in *Steam Sales Corp. v. Summers*, 405 Ill. App. 3d 442 (2d Dist. 2010). In that case, Steam Sales Corporation sued its former employee, Brian Summers, for breach of his employment agreement. *Id.* at 444. Summers' employment agreement contained a restrictive covenant that generally prevented him from competing with Steam Sales for a period of two years after termination of his employment. *Id.* at 445-46. Notwithstanding the agreement, upon his termination from Steam Sales, Summers' joined a competing company. *Id.* at 445. Steam Sales then filed a complaint seeking to enjoin Summers from providing products or services to any customer to which Steam Sales had sold while Summers was a Steam Sales employee: to enjoin Summers from using or possessing

Steam Sales' confidential and proprietary information; and to order Summers to return all such information to Steam Sales. *Id.* at 445-46.

On appeal, the Second District affirmed the entry of a preliminary injunction in favor of Steam Sales and held that Summers had violated the restrictive covenant in his employment agreement. Among the issues that were raised was whether, under *Sunbelt*, the employer was required to show that the restrictive covenant was necessary to protect its legitimate business interests in order for the covenant to be enforceable. The court began its analysis by stating that, as recently as 2005, the Second District had recognized the "legitimate-business-interest" test. *Id.* at 456-57 (quoting *The Agency, Inc. v. Grove*, 362 Ill. App. 3d 206, 214, 839 N.E.2d 606, 614 (2d Dist. 2005) ("Courts will not enforce a covenant not to compete unless the terms of the agreement are reasonable and necessary to protect an employer's legitimate business interests. A legitimate business interest exists where: (1) because of the nature of the business, the customers' relationship with the employer are near-permanent and the employee would not have had contact with the customers absent the employee's employment; or (2) the employee gained confidential information through his employment that he had attempted to use for his own benefit.")) The court in *Steam Sales Corp.*, however, also noted that the two-pronged reasonableness test recognized by the Fourth District in *Sunbelt* and applied by the Illinois Supreme Court in *Mohanty v. St. John Heart Clinic, S.C.*, is "firmly rooted" in Illinois Supreme Court precedent. *Id.* at 457.

The court proceeded to comment that application of the two-pronged reasonableness test, as opposed to the legitimate business interest test, can lead to different results in cases where the employer is unable to establish the legitimate business interest test's prerequisites of "near-permanent" customer relationships or the protection of confidential information. *Id*. at 457-59. The court, however, declined to resolve the issue of which of the two tests was the correct one because application of the legitimate business interest test was not outcome determinative in the case. *Id.* at 457. The court explained that the facts before it demonstrated that Steam Sales enjoyed a near-permanent relationship with its customers, thereby creating a legitimate business interest worthy of protection. *Id*. at 458. In making this determination, the court weighed several factors: (1) the length of time required to develop the clientele; (2) the amount of money invested to acquire clients; (3) the degree of difficulty in acquiring clients; (4) the extent of personal customer contact by the employee; (5) the extent of the employer's knowledge of its clients; (6) the duration of the customer's association with the employer; and (7) the continuity of the employer-employee relationships. *Id.*

C. *Reliable Fire Equip. Co. v. Arrendondo*

Less than two months after *Steam Sales*, the Second District issued another decision involving an employee non-compete agreement, *Reliable Fire Equip. Co. v. Arrendondo*, 405 Ill. App. 3d 708, 940 N.E.2d 153 (2d Dist. 2010). The facts of *Arrendondo* are typical of those found in many cases involving non-competition agreements: an employee leaves his or her former employer to join or form a competing business and the former employer sues the employee to enforce the employee's non-compete agreement. In 1998, plaintiff, Reliable Fire Equipment Company (Reliable), hired Arrendondo as a fire alarm systems salesman. *Id.* at 710. After commencing his employment, Arrendondo signed an employment agreement that sought to protect plaintiff's confidential information and contained "[n]on-competition and non-solicitation" provisions. *Id.* at 720. Those provisions were as follows:

> ***Non-competition and non-solicitation*:**
> During the term of the Employee's employment hereunder and for a period of one (1) year after the date of his/her termination of employment for any reason, Employee will not, individually or on behalf of any proprietorship, partnership, corporation or any other person or entity:
>
> (a) Engage in any sales, sales support or sales supervisory capacity in any business in the states of Illinois, Indiana or Wisconsin which sells fire extinguishers, fire hoses, fire suppression systems, fire alarms, security systems, or other products which have been sold by the Corporation while Employee

has been employed with the Corporation, to or for any person or entity who or which was a customer of the Company as of the date of the Employee's termination (or within twelve (12) months prior to such termination date), or obtain or acquire any interest (whether as debt or equity), or provide services (whether as an employee, consultant or otherwise), in or to any such business.

(b) Solicit (or assist others in soliciting) sales from any person or entity who or which was a customer of the Corporation as of the date of Employee's termination (or within twelve (12) months prior to such termination date).

(c) Solicit (or assist others in soliciting), referrals from any person or entity who or which referred business to the Corporation as of the date of Employee's termination (or within twelve (12) months prior to such termination date).

(d) Solicit (or assist others in soliciting), interfere with or cause any employee of the Corporation to leave his other employment with the Corporation or to breach any agreement with or duty to the Corporation.

Id.

On August 17, 2004, Arrendondo and his co-worker, business partner, and co-defendant, Rene Garcia, executed an operating agreement that established defendant High Rise Security Systems, LLC to compete with Reliable's business as a supplier of engineered fire equipment throughout the Chicagoland area. *Id*. at 711. As a result, Reliable sued Arrendondo, Garcia, and High Rise for damages arising out of Arrendondo's alleged breach of the covenant not to compete contained in his employment agreement. *Id.* The defendants filed a counterclaim that sought, among other things, a declaratory judgment that the restrictive covenants in the employment agreement were unenforceable. *Id.* at 712. After a bench trial on defendants' counterclaim, the trial court invalidated the restrictive covenants. *Id*. at 713. Specifically, the court concluded that Reliable failed to prove the existence of a legitimate business interest that justified enforcement of the covenants. *Id.*

The appellate court in *Arrendondo* affirmed the trial court, but in a decision comprised of three very divergent opinions of how restrictive covenants should be analyzed under Illinois law. The court's lead opinion, written by Justice Kathryn Zenoff, rejected *Sunbelt* and upheld the trial court's conclusion that Reliable could not enforce the covenant because it could not demonstrate a legitimate business interest worthy of protection. *Id*. at 723-24.

A special concurrence authored by Justice Donald Hudson agreed that with the result, and particularly, that *Sunbelt* did not represent the law of Illinois. *Id*. at 748-53 (Hudson, J., concurring). Justice Hudson, however, disagreed with the "inflexible manner" in which the lead opinion had applied the legitimate business interest test. *Id*. at 751. Specifically, he disagreed with the lead opinion's application of a two-pronged test to determine the existence of a legitimate business interest that only considers whether the restrictive covenant was designed to protect: (1) trade secrets or confidential information or (2) "near permanent" customer relationships. *Id.* In lieu of application of this rather rigid two-pronged test, Justice Hudson advocated that the existence of a legitimate business interest should be "determined with regard to the totality of the facts and circumstances of a given case." *Id.* at 753-70.

The dissent, authored by Justice John O'Malley, agreed with the special concurrence. Based thereon, however, he would have reversed and remanded the case for further proceedings, rather than affirm. *Id.* at 753 (O'Malley, J., dissenting).

The appellate court in *Arrendondo* specifically addressed the issue it had passed upon in *Steam Sales*—whether *Sunbelt* correctly held that Illinois law does not recognize the legitimate business interest test. In rejecting the holding in *Sunbelt* and reaffirming the legitimate business interest test as part of the employer's burden of proof in enforcing a non-compete clause against its employees, the appellate court had now set the table for the Illinois Supreme Court to resolve the split on this issue between the appellate districts. The supreme court accepted the appeal in *Arrendondo* and issued what should prove to be a landmark decision on the subject of noncompetition agreements.

III. The Illinois Supreme Court Weighs In

The Illinois Supreme Court in *Arrendondo* reversed the appellate court and remanded the case for further proceedings. It first considered the proper test to apply when analyzing restrictive covenants. *Reliable Fire Equip. Co. v. Arrendondo*, 2011 IL 111871, ¶¶ 14-30. The court held that the modern standard of reasonableness for employee agreements not to compete applies a three-pronged test. It explained that assuming it is ancillary to a valid employment relationship, a restrictive covenant is reasonable if it: (1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public. *Id.* ¶ 17 (citing *BSO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1223 (N.Y. 1999); Restatement (Second) of Contracts 187 cmt. b, § 188(1) & cmts. a, b, c (1981)). The court further recognized that the scope of the noncompetition agreement's prohibitions may be limited by activity, geographic area, and time. *Id.* (citing Restatement (Second) of Contracts 188 cmt. d). The court found support for the three-prong rule of reason test in a long line Illinois of decisions dating back to 1896. *See id.* ¶¶ 18-19, 22 (discussing the decisions in *Hursen v. Gavin*, 162 Ill. 377, 44 N.E. 735 (1896); *Bauer v. Sawyer*, 8 Ill. 2d 351, 134 N.E.2d 329 (1956); *House of Vision v. Hiyane*, 37 Ill. 2d 32, 225 N.E.2d 21 (1967); *Cockerill v. Wilson*, 51 Ill. 2d 179, 281 N.E.2d 648 (1972); and *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 866 N.E.2d 85 (2006)).

The court then turned its attention to *Sunbelt* and overruled *Sunbelt*'s rejection of the legitimate business interest test. *Arrendondo*, 2011 IL 111871, ¶ 29. The court found that the legitimate business interest test had long been part of the three-prong rule of reason test that has always been the law in Illinois. *Id.* ¶¶ 16-30. It criticized *Sunbelt* on the grounds that it "'disallows inquiry into whether the employer has an interest other than suppression of ordinary competition.'" *Id.* ¶ 27 (quoting *Reliable Fire Equip. Co. v. Arrendondo*, 405 Ill. App. 3d 708, 723, 940 N.E.2d 153 (2d Dist. 2010)). The Illinois Supreme Court also disagreed with *Sunbelt*'s conclusion that the supreme court's decision in *Mohanty* should be read to stand for the proposition that the legitimate business interest component of the three-prong rule of reason test was no longer valid in Illinois. *Id.* ¶¶ 28-29. The court explained that it did not conduct an analysis of the existence of a legitimate business interest in that case because its existence in that case was not disputed. *Id.* ¶ 29. It further noted it had expressly endorsed—not rejected— the legitimate business interest test in *Mohanty* by citing the test as a component of the three-prong rule of reason test employed in its analysis. *Id.* ¶ 42.

The Illinois Supreme Court also overturned *Steam Sales* "[t]o the extent that *Steam Sales* characterizes *Mohanty* as deviating from the . . . general three-prong rule of reason [test]." *Id.* ¶ 30. The court sharply criticized *Steam Sales* as having "propagated *Sunbelt*'s error" by discussing "'*Mohanty*'s reasonableness test versus the legitimate-business-interest test.'" *Id.* (quoting *Steam Sales Corp. v. Summers*, 405 Ill. App. 3d 442, 457 (2d Dist. 2010)). The court made it clear that *Steam Sales* was clearly wrong in characterizing the legitimate business interest test as something different than the three-prong rule of reason test. *Id.* Importantly, it held that, "[b]ased on this court's extensive precedent, we continue to recognize the legitimate business interest of the promisee as a long-established component in the three-prong rule of reason [test]." *Id.*

The Illinois Supreme Court did not limit its analysis to a simple rejection of *Sunbelt* and a reaffirmance of the validity of the legitimate business interest test. After holding that a legitimate business interest is a factor courts must consider in assessing the reasonableness of restrictive covenants, the court proceeded to address the proper method for evaluating the legitimacy of the claimed interest. *Id.* ¶¶ 31-43 (analyzing competing approaches for assessing the reasonableness of a restrictive covenant). The court first considered the validity of the two-factor test the appellate court in Illinois had been applying for the past 36 years. *Id.* ¶ 38. Under this test, an employer possesses a legitimate business interest worthy of protection through a non-compete agreement *only* if it is able to demonstrate: (1) the employee acquired confidential information through employment with the employer seeking to enforce the agreement and then subsequently attempted to use it for his or her own benefit; or (2) by the nature of the business, the employer's customer relationship was near permanent and but for the employee's association with the employer, he never would have had contact with the

clients in question. *See Nationwide Adver. Serv., Inc. v. Kolar*, 28 Ill. App. 3d 671, 673, 329 N.E.2d 300, 302 (1st Dist. 1975); *see also, e.g., Hanchett Paper Co. v. Melchiorre*, 341 Ill. App. 3d 345, 351, 792 N.E.2d 395, 400 (2d Dist. 2003); *Dam, Snell & Taveirne, Ltd. v. Verchota*, 324 Ill. App. 3d 146, 151-52, 754 N.E.2d 464, 468-69 (2d Dist. 2001); *Carter-Shields v. Alton Health Inst.*, 317 Ill. App. 3d 260, 268, 739 N.E.2d 569, 575-76 (5th Dist. 2000); *Springfield Rare Coin Galleries, Inc. v. Mileham*, 250 Ill. App. 3d 922, 929-30, 620 N.E.2d 479, 485 (4th Dist. 1993); *A.B. Dick Co. v. Am. Pro-Tech*, 159 Ill. App. 3d 786, 792-93, 514 N.E.2d 45, 49 (1st Dist. 1987); *Reinhardt Printing Co. v. Feld*, 142 Ill. App. 3d 9, 15-16, 490 N.E.2d 1302, 1307 (1st Dist. 1986). The court rejected this test as "conclusive" or outcome determinative, and instead, held that "such factors are only nonconclusive aids in determining the [employer's] legitimate business interest, which in turn, is but one component in the three-prong rule of reason [test], grounded in the totality of the circumstances" of each case. *Arrendondo*, 2011 IL 111871, ¶ 42. The court summarized its ruling as follows:

> In sum, the legitimate business interest test is still a viable test to be employed as part of the three-prong rule of reason [test] to determine the enforceability of a restrictive covenant not to compete. However, the two-factor test created in *Kolar*, in which a near-permanent customer relationship and the employee's acquisition of confidential information through his employment are determinative, is no longer valid. Rather, we adopt the position of Justice Hudson's special concurrence [in the appellate court decision], which is: whether a legitimate business interest exists is based upon the totality of the circumstances of each individual case. Factors to be considered in this analysis include, but are not limited to, the near-permanence of customer relationships, the employee's acquisition of confidential information through his employment, and time and place restrictions. No factor carries any more weight than the other, but rather its importance will depend on the specific facts and circumstances of the individual case.

Id. ¶ 43.

Finally, because the trial court and the appellate court had applied the more rigid two-factor test for determining the existence of a legitimate business interest instead of examining the "totality of the circumstances," the Illinois Supreme Court remanded the case to the trial court for further proceedings. *Id*. ¶¶ 44-46.

IV. Analysis

Two major points are to be gleaned from the *Arrendondo* decision. First, the legitimate business interest test is alive and well in Illinois. Second, and perhaps more importantly, the *application* of this test in future cases will be different than it was in the past. No longer are trade secrets, confidential information, or near-permanent customer relationships the only business interests that a court will consider to be "legitimate" and, thus, deserving of protection through a non-compete agreement. The Illinois Supreme Court has made it clear that such factors "are only nonconclusive aids in determining the promissee's legitimate business interest," which now must be determined on the "totality of the circumstances of each case." Stated differently, the Illinois Supreme Court has thus made it very clear that non-compete agreements shall be evaluated no longer by rigid formulae and tests, but rather by the particular facts of each individual case. To emphasize this point, the court even noted that such an analysis "may result in an identical contract being found enforceable under one set of circumstances, and unenforceable under another."

The decision in *Arrendondo* allows courts a much greater level of flexibility in analyzing restrictive covenants that perhaps the supreme court feels is necessary in today's modern labor market. The decision brings Illinois within the modern approach to restrictive covenants where courts have relaxed the permissible scope of restrictive covenants in employment agreements. *See* Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 Am. Bus. L.J. 107, 122-23 (2008) (explaining the modern trend regarding the permissible scope of employment agreements). The modern trend has allowed for a more relaxed approach that allows for

noncompetition restrictions that protect more than just the customers with whom the employee had contact or the trade-secret information the employee obtained during his employment. *Id.* at 123.

The court's decision very well might be a reaction to the growth of technology-related jobs in the employment sector. Historically, broad-based shifts in labor markets have resulted in changes in the way in which employers have dealt with their employees and the manner in which courts scrutinize these relationships. For instance, the proliferation of restrictive covenants in England can be traced to the shift from a feudal to a capitalist economy. Mark. A. Glick, Darren Bush & Jonathan Q. Haffen, *The Law and Economics of Post-Employment Covenants: A United Framework*, 11 Geo. Mason L. Rev. 357, 365 (2002). During that shift, the enforcement of employment contracts replaced the stability lost from the apprenticeship system. *Id.* (citing Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 637 (1960)).

More recently, the economy of the United States has been experiencing another shift—from goods-producing employment to service-providing employment. *See* Norma D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 Berkeley J. Emp. & Lab. L. 287, 290 (2006). In fact, the December 2005 Bureau of Labor Statistics estimates that service-producing industries are expected to account for 14.5 million of the 15.3 million new jobs expected to be added from 2008 to 2018. *See* United States Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, Tomorrow's Jobs, *available at* http://www.bls.gov/oco/oco2003.htm (last modified Dec. 3, 2010) (last visited December 30, 2011). The shift to service-providing employment or the "knowledge economy" has brought with it a shift "away from manufacturing activities, which require interchangeable basic skills, and toward service activities, which require problem-solving skills based in formal education and training." Bishara, *supra*, at 291 (describing knowledge-based industries as both industries that thrive on creating new information such as high-tech software firms, and management consulting companies that use information and expertise to generate wealth by providing financial services, such as brokerage firms and investment banks). The Illinois Supreme Court's decision in *Arrendondo* might be an effort to better equip the courts to deal with issues arising out of the modern service-based economy, because it allows additional flexibility to recognize protectable interests.

Where does *Arrendondo* leave us? If there is one criticism of the Illinois Supreme Court's decision, it could be that it has provided more questions than answers. The court most certainly has opened the door to a much broader scope of employers' business interests worthy of protection through restrictive covenants not to compete, whereas the type of interests previously deemed protectable had been quite narrow, and often difficult to prove. *Arrendondo*, however, does not provide any indication of what types of business interests other than trade secrets, confidential information, and near-permanent customer relationships would be worthy of protection, and the trial courts are certain to struggle with the issue of what is and is not protectable in the future.

At least initially, Illinois courts might look to decisions of other jurisdictions for guidance as to what has and has not been deemed protectable under the modern three-prong rule of reason test. Other states' courts, however, have varied in their holdings of what constitutes a legitimate business interest. Some states, such as Utah, New York, and Maryland, include unique services among recognized legitimate business interests. *See* Kenneth J. Vanko, *"You're Fired! And Don't Forget Your Non-Compete..." The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DePaul Bus. & Comm. L.J. 1, 5 (2002) (citing *System Concepts v. Dixon*, 669 P.2d 421 (Utah 1983) (finding that an employee's unique services are a protectable business interest); *Reed, Roberts Associates, Inc. v. Strauman*, 40 N.Y.2d 303 (1976) (same); *Becker v. Bailey*, 268 Md. 93 (1973) (same)). Kentucky, Pennsylvania, and Georgia hold that employee training falls within the rubric of legitimate business interests. *See* Vanko, *supra*, at 5 (citing *Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc.*, 946 F. Supp. 495 (E.D. Ky. 1996) (applying Kentucky law and protecting an employer's interest in training and development costs of its employees); *Thermo-Guard, Inc. v. Cochran*, 596 A.2d 188, 192 (Pa. Super. Ct. 1991) (holding that an employer's interest in training and development costs of its employees should be protected); *Wesley-Jessen, Inc. v. Armento*, 519 F. Supp. 1352, 1357 (N.D. Ga. 1981) (same) (applying Georgia law)). New Hampshire and Washington, on the other hand, reject that theory and

hold that an employer's interest in recouping the costs associated with "recruiting and hiring employees" is not protectable through a non-compete clause. *See* Vanko, *supra*, at 5 (citing *Nat'l Empl. Serv. Corp. v. Olsten Staffing Serv.*, 761 A.2d 401, 405 (N.H. 2000) (holding that the costs associated with recruiting and hiring employees is not a legitimate interest that is protectable by a restrictive covenant in an employment contract); *Copier Specialists v. Gillen*, 887 P.2d 919, 920 (Wash. Ct. App. 1995) ("The training he acquired during his employment, without more, does not warrant enforcement of the covenant not to compete.")). Florida and Tennessee recognize this interest, but with a distinction. Those states mandate that an employer must show "extraordinary or specialized training" before a restrictive covenant may be enforced. *See* Vanko, *supra*, at 5 (citing *Hapney v. Cent. Garage*, 579 So. 2d 127, 131 (Fla. Dist. Ct. App. 2d Dist. 1991), *overruled by Gupton v. Vill. Key & Saw Shop*, 656, So. 2d 475 (Fla. 1995); *Vantage Tech., LLC v. Cross*, 17 S.W.3d 637 (Tenn. Ct. App. 1999)). Lastly, in Texas and Massachusetts, as well as in many other states, goodwill is a protected employer interest. *See* Vanko, *supra*, at 5 (citing Tex. Bus. & Com. Code § 15.50(a) (Vernon 2002) (listing an employer's goodwill as a protectable interest); *IKON Office Solutions, Inc. v. Belanger*, 59 F. Supp. 2d 125, 128 (D. Mass. 1999) (holding that an employer's goodwill with a client is a protectable interest, where an employee cultivated a relationship with a client during employment with the employer)).).

Arrendondo also could make it easier for courts to enforce other types of restrictive covenants designed to promote stability in the workforce. For example, previously, courts had disagreed as to whether agreements not to solicit or recruit a former employer's employees were enforceable. *Compare Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 589 N.E.2d 640 (1st Dist. 1992) (enforcing a covenant prohibiting the employer's former vice president of marketing and sales from "inducing any employees, agents, or sales personnel of Arpac to terminate relationship with Arpac," because the employer had an interest in protecting the stability of its workforce), *with, e.g., Unisource Worldwide, Inc. v. Carrara*, 244 F. Supp. 2d 977 (C.D. Ill. 2003) (finding that "*Arpac Corp.* represents a misapplication of Illinois law," because "the only two 'legitimate business interests' that may give rise to a covenant not to compete in Illinois are 'near permanent' relationships with customers, and confidential information or trade secrets"). In light of *Arrendondo*, however, it is probable that courts will enforce non-solicitation covenants if they are reasonable in light of the totality of the circumstances.

V. Conclusion

Arrendondo provides significant advantages to employers by considerably expanding the permissible scope of enforceable non-compete agreements in Illinois. In abandoning rigid tests in favor of a totality of the circumstances test for evaluating the enforceability of such agreements, the Illinois Supreme Court has promoted a more fact-intensive inquiry that will also make it tougher for employees to quickly invalidate non-compete agreements through motions to dismiss or even summary judgment.

Now that *Arrendondo* has broadened the recognition of legitimate business interests beyond near-permanent customer-relationships and trade secrets, the uncertainty surrounding what other business interests will be considered "legitimate" and worthy of protection through non-compete clauses provides employers with an opportunity to define those interests in their employment agreement. In doing so, the employer should be sure to include its basis for the legitimate business interest in the terms of the employment agreement, and then conduct its business consistent with that purported interest. Considerations such as these will be paramount as courts begin to struggle with application of the totality of the circumstances analysis in a post-*Arrendondo* legal climate.

About the Authors

James J. Sipchen concentrates his practice in general commercial and civil litigation. He has extensive trial and appellate experience in complex business litigation matters in state and federal courts. He has represented many plaintiffs and defendants in commercial disputes involving breach of contract, fraud, business torts, civil rights violations, retaliatory discharge, whistle-blower claims, wage disputes, challenges to noncompete agreements, trade secrets, civil Racketeer Influenced and Corrupt Organizations (RICO) Act disputes, unfair competition, antitrust, wrongful discharge, and shareholder and partnership disputes.

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The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation.
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