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## Private Law: Obligations

Alston Johnson

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## OBLIGATIONS

Alston Johnson\*

### SOLIDARITY: ONCE MORE WITH FEELING

Over the years, solidarity has occupied the greatest portion of this subject in the symposium.<sup>1</sup> Once again this year, solidarity is in the judicial news. Fortunately, both the general concept and the specific cases dealing with it during this term are treated in an extended student comment in this issue.<sup>2</sup> Accordingly, only a brief mention of the decisions will be made in this forum; the reader is urged to consult the student comment for a more detailed discussion.

During this term, the supreme court first deferred<sup>3</sup> and then resolved<sup>4</sup> the question of whether an employer is solidarily liable with its employee to the victim of the employee's fault. Since *Cox v. Shreveport Packing Company*<sup>5</sup> was decided in 1948, the rule has been that no solidary liability existed between the employer and the employee. As a consequence, a suit by the victim against one did not interrupt prescription as to the other.<sup>6</sup>

The first decision on the subject during this term was *Thomas v. W & W Clarklift, Inc.*<sup>7</sup> An employee brought suit against the corporation (and its insurer) which had sold to his employer the item that caused his work-related injury. More than a year after the incident, and more than six months after they had filed an answer, the defendants filed a third party demand against certain executive officers of the employer. The court of appeal affirmed the sustaining

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\*Professor of Law, Louisiana State University

1. *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Obligations*, 36 LA. L. REV. 375 (1976) [hereinafter cited as *1974-1975 Term*]; *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Obligations*, 35 LA. L. REV. 280, 291-98 (1975) [hereinafter cited as *1973-1974 Term*]; *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations*, 34 LA. L. REV. 231 (1974) [hereinafter cited as *1972-1973 Term*].

2. Comment, *Prescribing Solidarity: Contributing to the Indemnity Dilemma*, 41 LA. L. REV. 659 (1981).

3. *Thomas v. W & W Clarklift, Inc.*, 375 So. 2d 375 (La. 1979).

4. *Foster v. Hampton*, 381 So. 2d 789 (La. 1980).

5. 213 La. 53, 34 So. 2d 373 (1948).

6. See LA. CIV. CODE art. 2097: "A suit brought against one of the debtors in *solido* interrupts prescription with regard to all."

7. 375 So. 2d 375 (La. 1979) (Marcus, J., dissenting; Dennis, J., concurring in the result).

of exceptions based on prescription.<sup>8</sup> The supreme court, however, held that the potential liability of the selling corporation and of the executive officers of the employer was solidary. Solidarity between these parties would give to the seller a right of contribution against the executive officers which would only arise upon payment by the seller of the main demand. Thus the demand for contribution was timely and should not have been dismissed. The court distinguished *Cox* on the ground that it involved the relationship of an employer and its employee, not executive officers of the employer and a third person.<sup>9</sup>

But *Cox* was clearly moribund, and its execution was shortly to follow. In *Foster v. Hampton*,<sup>10</sup> the supreme court squarely held that an employer and an employee were solidarily liable to the victim of the employee's fault, and specifically overruled *Cox*. The issue was presented in a difficult factual situation, in which such an outcome could have been predicted. In an earlier decision in the same litigation, the supreme court held for the first time that the state rather than a sheriff was the employer of a deputy sheriff.<sup>11</sup> On remand, the victim then named the state as an additional party defendant and was met with the expected plea of prescription. Although the lower courts had upheld the plea,<sup>12</sup> the supreme court refused to do so, reasoning that the state as employer and the deputy sheriff as tortfeasor were solidarily liable to the victim. Thus, the original suit as to the deputy sheriff had interrupted prescription as to the state. Having sent the victim back to sue the state, the court was then hardly in a position to declare such a suit prescribed.

In its opinion, the supreme court noted doctrinal<sup>13</sup> and jurisprudential<sup>14</sup> comments critical of the absence of solidarity between employer and employee and critical of the "distinction" between imperfect and perfect solidarity when that distinction produced no difference in result. The only difference in result was supposed to be

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8. *Thomas v. W & W Clarklift, Inc.*, 365 So. 2d 913 (La. App. 4th Cir. 1979).

9. This distinction escaped Justice Marcus, whose brief dissent noted: "If employer's vicarious liability is not solidary with that of his employee, I am unable to see how the vicarious liability of the employer is solidary with the concurrent negligence of a third party . . ." 375 So. 2d at 379 (Marcus, J., dissenting). It also escaped Justice Dennis, who urged that *Cox v. Shreveport Packing Co.* should be overruled. 375 So. 2d at 379 (Dennis, J., concurring).

10. 381 So. 2d 789 (La. 1980) (Summers, C.J., concurring in the result; Marcus and Blanche, JJ., dissenting).

11. *Foster v. Hampton*, 352 So. 2d 197 (La. 1977).

12. *Foster v. Hampton*, 372 So. 2d 657 (La. App. 1st Cir. 1979).

13. 1972-1974 *Term*, *supra* note 1, at 291-98.

14. *Wooten v. Wimberly*, 272 So. 2d 303 (La. 1973) (Tate, J., concurring). *See also* 1972-1973 *Term*, *supra* note 1.

that suit against a person merely imperfectly solidarily bound to another would not interrupt prescription, while such a suit against one of perfectly solidarily bound obligors would be an interruption. For many years, this difference in result has not obtained in Louisiana. A suit against one of the solidary obligors interrupted prescription as to all, perfect or imperfect. In the absence of that difference, there was little reason to support the distinction.<sup>15</sup>

Noting that there was no legislative basis for the distinction in any event, the supreme court found that the "distinction drawn between perfect and imperfect solidarity" was "untenable" and "must be rejected."<sup>16</sup> While there may be academic interest in continuing to delineate perfect and imperfect solidarity at inception,<sup>17</sup> there is now a candid recognition at the highest judicial level of what has been the case for some time: No consequences arise from the distinction.

The overruling of *Cox* should produce the eventual overruling of *Wooten v. Wimberly*,<sup>18</sup> in which the court relied upon *Cox*. *Wooten* held that a parent and child are not solidarily liable to the victim of the child's fault.<sup>19</sup> Such a holding will now be inconsistent with the

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15. [A]s a practical matter, the law has not distinguished strangers who find themselves solidarily liable from parties who choose to so bind themselves and become mandataries for each other; and accordingly no distinction should be made between them. The doctrine of imperfect solidarity might be retained as a distinction in the manner in which solidary obligations may be created but there is no reason to decide that it should produce different effects thereafter.

1973-1974 Term, *supra* note 1, at 297-98.

16. *Foster v. Hampton*, 381 So. 2d 789, 791 (La. 1980).

17. It may be useful to continue to recognize that persons may be bound at different times, for different reasons, and in different ways for the same debt, and still be solidarily liable. See LA. CIV. CODE art. 2092. One person may be liable "in tort" and the other "in contract." See *Gremillion v. State Farm Mut. Auto. Ins. Co.*, 302 So. 2d 712 (La. App. 3d Cir.), *cert. denied*, 305 So. 2d 134 (La. 1974); 1974-1975 Term, *supra* note 1. Or one person may be bound by one contractual agreement, and the other by a different agreement. *Commercial Ins. Agency, Inc. v. Wilson*, 293 So. 2d 246 (La. App. 3d Cir. 1974); 1973-1974 Term, *supra* note 1. These are persons who do not act as mandataries of each other. Whatever name we give to their solidarity, we should recall that they can be solidarily liable to the creditor even though they are not, for example, business partners who sign a promissory note together and are thus "perfectly" solidary obligors.

18. 272 So. 2d 303 (La. 1973).

19. *Wooten* presented a difficult factual situation. The tort victim had first sued the parent and his liability insurer for the alleged negligence of the minor child. The victim lost on the merits. Before that judgment was final, the victim filed another suit against the insurer and the child himself, now relieved of the disabilities of minority. A plea of prescription was sustained in the second suit, and that ruling was before the court in *Wooten*. The victim argued that the suit against the parent had interrupted prescription, because the parent and the child were solidarily liable. There was no reason for the victim to have the opportunity to re-litigate the issue on the merits in

employer/employee relationship decreed by *Foster*, and there appears to be no basis for the inconsistency. In fact, solidarity between a vicariously liable<sup>20</sup> or financially responsible<sup>21</sup> party and the alleged wrongdoer, as to the victim, should be the general rule for all such relationships. This does *not* mean that contribution must necessarily be the rule as between the obligors themselves. The Civil Code provides for indemnity between them in some instances.<sup>22</sup> The jurisprudence also permits indemnity in some cases.<sup>23</sup> And the comparative negligence provisions now in force will theoretically permit a sharing on a basis which is neither equal contribution nor indemnity.<sup>24</sup>

#### ILLEGAL CAUSE: AGREEMENTS NOT TO COMPETE

Enforcement of an agreement by an employee not to compete with the employer after termination of their relationship has proved to be a troublesome issue for Louisiana courts. They are not alone in their quandary. Courts in many jurisdictions are currently grappling with the problem of weighing the conflicting interests of employer and employee in this context.<sup>25</sup> Employers are seeking legitimate

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the second suit, and the court could prevent that by sustaining the plea of prescription. To do so, it ruled that there was no solidarity between parent and child, and therefore no interruption of prescription. Even that ruling produced three dissents.

20. *I.e.*, an employer who responds for an employee or a parent for a negligent child. In this context, vicarious liability is the principle which requires a party innocent of wrongdoing to respond for a wrongdoer because of the relationship between the two.

21. *I.e.*, in Louisiana, a parent who responds for damage caused by a child under the age of discernment. *Turner v. Bucher*, 308 So. 2d 270 (La. 1975). Since a child under the age of discernment is not a "wrongdoer" in the ordinary sense of the word, one cannot accurately term this "vicarious liability." It is more in the order of "financial responsibility," in which one innocent person responds for damage caused by another innocent person, because of their relationship. *See* A. JOHNSON, R. LAMONICA & C. JOSEPH, 2 LOUISIANA JURY INSTRUCTIONS—CRIMINAL AND CIVIL, 246-86 (1980).

22. LA. CIV. CODE art. 2106.

23. *See, e.g.*, *Appalachian Corp. v. Brooklyn Cooperage Co.*, 151 La. 41, 91 So. 539 (1922).

24. 1979 La. Acts, No. 431 (effective August 1, 1980).

25. These struggles are reflected in numerous doctrinal commentaries. *See, e.g.*, Hughes, *Employee Non-Competition Agreements: A Review of Massachusetts Law*, 63 MASS. L. REV. 27 (1978); Kniffen, *Employee Noncompetition Covenants: The Perils of Performing Unique Services*, 10 RUT.-CAM. L.J. 25 (1978); Comment, *Enforcement of Employee Noncompetition Agreements in Oregon*, 58 ORE. L. REV. 336 (1979); Comment, *Contracts: Employee Covenants Not to Compete*, 17 WASHBURN L.J. 665 (1978). Louisiana writers have also been active. 1974-1975 Term, *supra* note 1, at 393-97; Comment, *Agreements Not to Compete*, 33 LA. L. REV. 94 (1972); Comment, *Obligations—Agreements in Restraint of Competition*, 11 LA. L. REV. 383 (1951); Note, *Contracts—Restrictive Covenants—Agreements Not to Compete*, 27 TUL. L. REV. 364 (1953).

ways of protecting their "investment" in employees with special training and skills without running afoul of the traditional judicial protection of the employee's freedom to follow his chosen avocation.<sup>26</sup>

A few years ago, the writer had occasion in this forum<sup>27</sup> to comment about *Orkin Exterminating Company v. Foti*,<sup>28</sup> a decision in which the Louisiana Supreme Court resolved a conflict between the various circuits by severely limiting the applicability of non-competition agreements. With appropriate professorial caution, the writer observed that the conflict "apparently is settled, at least for the moment . . ."<sup>29</sup> A more accurate statement would have been that a portion of the conflict was settled. Recent cases have brought to the fore a different, and more complex, aspect of the question.

Louisiana courts have usually understood an "agreement not to compete" as being a provision which forbids the employee in question from entering a competing business within a specified time period in a designated geographical area. Indeed, this has been the type of provision most employers want to enforce. The most direct form of protection for the employer who may have trained the employee, or advertised the employee's expertise in the particular field, is to prohibit any competition by him at all in that field. But, this is also the type of restriction that imposes the greatest burden on the employee, taking from him the skill by which he can best earn his living. It is not surprising that courts have traditionally reacted against such a harsh remedy. Some states, including Louisiana, have reacted legislatively to such provisions,<sup>30</sup> while others rely

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26. An excellent and thorough discussion of the important policy issues underlying this clash of interests is contained in Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960).

27. 1974-1975 Term, *supra* note 1, at 393-97.

28. 302 So. 2d 593 (La. 1974).

29. 1974-1975 Term, *supra* note 1, at 375-96.

30. It is reported that nine states have enacted statutes on the subject: Alabama, California, Florida, Louisiana, Michigan, Montana, North Dakota, Oklahoma and South Dakota. Kniffen, *supra* note 25, at 25 n.3. To these must be added Oregon, which enacted a statute in 1977. ORE. REV. STAT. § 653.295 (1977). See Comment, *Enforcement of Employee Noncompetition Agreements In Oregon*, 58 ORE. L. REV. 336 (1979). Its statute applies only to employees, and thus not to vendors, for example. The statute declares void non-competition agreements as defined, unless the agreement is entered into upon the initial employment of the employee with the employer.

The statutes of California, Montana, North Dakota, Oklahoma and South Dakota proscribe non-competition agreements except those ancillary either to sale of a business or to dissolution of a partnership. CAL. [BUS. & PROF.] CODE §§ 16600-02 (Deering); MONT. CODES ANN. §§ 28-2-703 to 705 (1979); N. D. CENT. CODE § 9-08-06 (1975); OKLA. STAT. ANN. tit. 15, §§ 217-19 (West 1966); S. D. COMPILED LAWS ANN. §§ 53-9-8 to 11 (1967). California also allows enforcement of a non-competition agreement ancillary

upon ordinary common law principles to reach similar results.<sup>31</sup>

Non-competition agreements may have other features as well. Often, the employee agrees not to solicit former customers or present employees. Or he may be forbidden to use customer lists, price lists, marketing strategies, or other "trade secrets" developed by the employer.

Louisiana's legislative reaction to non-competition agreements was a Depression-era statute invalidating any agreement by an employee "not to engage in any competing business" with the employer.<sup>32</sup> In a time when the supply of labor greatly exceeded the demand, it was not in the public interest for certain laborers to be excluded from those callings for which they might be best trained.

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to the sale by a shareholder of all his shares in a corporation. CAL. [BUS. & PROF.] CODE § 16601 (Deering). South Dakota provides an additional exception to nonenforcement of such a clause when the employee is in a profession and the agreement is for no more than ten years within a radius of twenty-five miles of the previous employment. S. D. COMPILED LAWS ANN. § 53-9-11 (1967). The effect of the statutes in these states, then, is to invalidate any non-competition agreement signed by an ordinary non-professional employee. Thus, their statutory scheme approaches the result of those states using precepts of the common law, which are less likely to restrict or annul a non-competition clause when the employee is a professional who probably did not enter a contract of adhesion.

However, the statutes in these states permit enforcement of non-competition clauses in instances in which the Louisiana courts have denied enforcement. Arguably, the Louisiana statute in using the word "employee" does not apply to shareholders, partners, and perhaps even professionals. But the Louisiana courts have invalidated non-competition agreements as to these persons as well, citing the "public policy" behind the statute even though it might not literally apply. *Marine Forwarding & Shipping Co. v. Barone*, 154 So. 2d 528 (La. App. 4th Cir. 1963) (shareholder, officer, and director); *Cust v. Item Co.*, 200 La. 515, 8 So. 2d 361 (1942) (partner); *Blanchard v. Haber*, 166 La. 1014, 118 So. 117 (1928) (dentist) (decided prior to Act 133 of 1934); *Nelson v. Associated Branch Pilots*, 63 So. 2d 437 (La. App. 1st Cir. 1953) (member of pilots' association). *But see Moorman & Givens v. Parkerson*, 131 La. 204, 59 So. 122 (1912) (enforcement of non-competition agreement against partner prior to enactment of Act 133 of 1934).

There are some Louisiana decisions enforcing non-competition agreements ancillary to the sale of a business. *Ballero v. Heslin*, 128 So. 2d 453 (La. App. 4th Cir. 1961); *J. Alfred Mouton, Inc. v. Hebert*, 199 So. 172 (La. App. 1st Cir. 1940). But even these clauses have been restricted in a more recent case. *Hirsh v. Miller*, 249 La. 489, 187 So. 2d 709 (1966).

The statutes in Alabama, Michigan and Florida—like the Louisiana statute—permit enforcement of non-competition clauses so long as they are limited in time and geography. ALA. CODE § 8-1-1 (1977) (same county); MICH. COMP. LAWS ANN. §§ 445.761 & 766 (1967) (ninety days, if employer has provided customer list); FLA. STAT. ANN. § 542.12 (West 1972) ("reasonably" limited in time and geography). Decisions in these states still reflect judicial dissatisfaction even with limited enforceability. *United Loan Corp. v. Weddle*, 77 So. 2d 629 (Fla. 1955).

31. See Blake, *supra* note 26, at 646-51.

32. 1934 La. Acts, No. 133 (now appearing as LA. R.S. 23:921 (1950 & Supp. 1962)).

Some years thereafter, the prohibition was softened by the proviso that an employer could enforce such an agreement, limited in time and geography, if he could show he had incurred "an expense in the training of the employee" or "an expense in the advertisement of the business that the employer is engaged in . . . ."<sup>33</sup>

Taken literally, the proviso could have undermined the basic prohibition of the statute. An employer could easily enforce a non-competition agreement for up to two years over the same geographical area as that in which the employee had worked simply by showing that he incurred "an expense" in training or advertisement. The statute placed no monetary or other requisite on that "expense."

The courts of appeal differed on the interpretation of the proviso. One circuit required that a substantial expenditure be shown,<sup>34</sup> while the others were more lenient on the point.<sup>35</sup> Finally, in *Foti*, the supreme court held that substantial expenses were necessary in order to support a non-competition agreement. Since that decision and as of this writing, there is no reported appellate decision in which a sufficient showing has been made to support a non-competition clause.<sup>36</sup>

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33. The amended statute presently reads:

No employer shall require or direct any employee to enter into any contract whereby the employee agrees not to engage in any competing business for himself, or as the employee of another, upon the termination of his contract of employment with such employer, and all such contracts, or provisions thereof containing such agreement shall be null and unenforceable in any court, provided that in those cases where the employer incurs an expense in the training of the employee or incurs an expense in the advertisement of the business that the employer is engaged in, then in that event it shall be permissible for the employer and employee to enter into a voluntary contract and agreement whereby the employee is permitted to agree and bind himself that at the termination of his or her employment that said employee will not enter into the same business that employer is engaged over the same route or in the same territory for a period of two years.

LA. R.S. 23:921 (1950 & Supp. 1962).

34. See, e.g., *National Motor Club of Louisiana, Inc. v. Conque*, 173 So. 2d 238 (La. App. 3d Cir.), *cert. denied*, 247 La. 875, 175 So. 2d 110 (1965). *Accord*, *Peltier v. Hebert*, 245 So. 2d 511 (La. App. 3d Cir. 1971).

35. See, e.g., *Aetna Fin. Co. v. Adams*, 170 So. 2d 740 (La. App. 1st Cir.), *cert. denied*, 247 La. 489, 172 So. 2d 294 (1965). *Accord*, *National School Studios, Inc. v. Barrios*, 236 So. 2d 309 (La. App. 4th Cir. 1970); *World Wide Health Studios, Inc. v. Desmond*, 222 So. 2d 517 (La. App. 2d Cir. 1969).

36. See *ADR v. Graves*, 374 So. 2d 699 (La. App. 1st Cir. 1979) (court refused to uphold non-competition agreement because employer showed only normal training and administrative expenses); *Target Rental Towel, Inc. v. Byrd*, 341 So. 2d 600 (La. App. 2d Cir. 1977) (court refused to uphold agreement when employer could show no training expenses at all and only \$25.00 for business cards for the employee and \$75.00 for an advertisement linking the employee and the business; court noted that during the



But in recent decisions, including one during this term, ancillary clauses prohibiting solicitation of customers or former fellow employees have also come under discussion. In *Orkin Exterminating Company, Inc. v. Broussard*,<sup>37</sup> the employer had both a non-competition clause and a non-solicitation clause. It conceded that it did not have the proof of expenditures sufficient to uphold the non-competition clause. But it argued that it could uphold the non-solicitation clause without proof of such expenditures, since the statute did not specifically govern such clauses. The supreme court held that there was no distinction "in legal principle" between the two,<sup>38</sup> and that even the non-solicitation clause could not be enforced without a showing of the necessary expenses. The same conclusion was reached last year in *Alexander & Alexander, Inc. v. Simpson*,<sup>39</sup> in which the court cited *Broussard* and added that the phrase in the statute "any competing business" was broad enough to reach agreements which would enjoin all components of a competing business operation, such as solicitation of customers. The court held that insufficient expenses were shown, and that since in its view of the statute they had to be shown in order to support a non-solicitation clause, the clause could not be enforced.

Finally, during this term in *John Jay Esthetic Salon, Inc. v. Woods*,<sup>40</sup> the court upheld a non-solicitation clause (pirating of fellow employees), concluding that R.S. 23:921 had no application. The court's reasoning was that while an employee could engage in a competing business, he could properly be enjoined from hiring away his former co-employees for that business. Thus, it again appears that the circuits are in conflict.

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four years that the employee was employed, this amounted to only \$25.00 per year); *Gulf Toy House, Inc. v. Bertrand*, 306 So. 2d 361 (La. App. 3d Cir. 1975) (court refused to uphold agreement even though considerable expenses were shown; expenses were characterized as for normal yearly supervision and administration, not special expenses with reference to three employees in question); *Glazer Steel Corp. v. Espenan*, 306 So. 2d 78 (La. App. 4th Cir. 1974) (court in circuit previously lenient in enforcing non-competition clauses refused to uphold one, noting that no extraordinary expenses had been demonstrated). See also *Fine v. Property Damage Appraisers, Inc.*, 393 F. Supp. 1304 (E.D. La. 1975) (applying Louisiana law; the court refused to uphold agreement when employer could show only advertising in the form of two single sheets containing employee's picture and resumé sent to insurance companies announcing opening of office, and only training in showing employee how to keep proper records as the employer wanted them kept).

37. 346 So. 2d 1274 (La. App. 3d Cir. 1977).

38. *Id.* at 1276.

39. 370 So. 2d 670 (La. App. 4th Cir.), *cert. denied*, 371 So. 2d 836 (La. 1979). See also *ADR v. Graves*, 374 So. 2d 699 (La. App. 1st Cir. 1979), in which the court refused to uphold an ordinary non-competition agreement and rejected a claim upon solicitation of customers while the employee was still in the service of the employer.

40. 377 So. 2d 1363 (La. App. 4th Cir. 1979).

Two reactions are possible at the supreme court level. The court could hold that that statute extends to all forms of non-competition agreements, including agreements not to solicit customers and employees, not to use customer lists, and not to use other trade secrets. In that event, such agreements would be virtually impossible to enforce, since proof of the necessary "expense" to justify them would be so difficult. On the other hand, the court could hold that the statute invalidates only agreements not to engage in a competing business and does not apply to agreements such as non-solicitation clauses. Such a ruling would permit an employee to engage in a competing business, but not to violate other restrictive clauses to which he might have agreed during his employment. If the court chooses the latter ruling, it should assure itself that the other restrictions are narrowly drawn, imposing only such limits on the employee's conduct in a new business as are reasonably necessary to protect an employer's interests.

The same policy reasons which militate against preventing an employee from entering a competing business at all are not present when other restrictive clauses are at issue. The court should consider distinguishing between treatment of general non-competition clauses and the validity of non-solicitation clauses, for example.<sup>41</sup> The interest of the employee (and coincidentally the interest of society as a whole) in engaging in work for which he is trained is so substantial that it is unlikely that the employer's interest in protecting his "investment" with a blanket non-competition clause will ever outweigh it.<sup>42</sup> Moreover, a total ban on competition (even if limited in time and geography) is in many instances more protection than the employer needs.

Permitting the employee to engage in competition, however, does not require society to sanction unfair methods of competition. If the employee sets about to lure away former fellow employees, or to solicit former customers by using customer lists, special informa-

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41. There is some indication of the willingness of some members of the supreme court to make this distinction; it is found in the three dissents to denial of the writ requested by the employer in *Alexander & Alexander, Inc. v. Simpson*, 370 So. 2d 670 (La. App. 4th Cir.), *cert. denied*, 371 So. 2d 836 (La. 1979) (Calogero, Marcus and Blanche, JJ., dissenting). The appellate court had held that the statute and its proof of expense requirement applied to a non-solicitation clause as well as a non-competition clause. *Dicta* in another recent decision also supports the distinction. *National Oil Service of Louisiana, Inc. v. Brown*, 381 So. 2d 1269, 1273 n.2 (La. App. 4th Cir. 1980) (agreement not to solicit customers and similar clauses not subject to R.S. 23:921, but no such agreement found in case at hand).

42. This is no doubt the underlying reason why the Louisiana courts have been so resistant to enforcing non-competition clauses, even those limited to fit the proviso in LA. R.S. 23:921.

tion about them or trade secrets he has gained while working for the old employer, the policy reasons in favor of his conduct are decidedly less compelling.

Even after the passage of Act 133 of 1934, and before passage of the proviso approving limited non-competition agreements under certain conditions, Louisiana courts had upheld or indicated approval of clauses prohibiting solicitation of employees or customers,<sup>43</sup> use of customer lists,<sup>44</sup> or use of trade secrets.<sup>45</sup> The passage of the proviso did not terminate such rulings.<sup>46</sup> Often, the court held that R.S. 23:921 applied only to agreements not to compete, not agreements not to solicit customers or employees.<sup>47</sup> Only recently has the statute been applied to both.<sup>48</sup>

If the court should rule that the statute does not apply to non-solicitation clauses and similar agreements short of agreements not to compete, it should still exercise caution that the restriction is limited to what is appropriate with reference to the particular employee. It should consider the time period of the restriction;<sup>49</sup> the

43. *Martin-Parry Corp. v. New Orleans Fire Detection Service*, 221 La. 677, 60 So. 2d 83 (1952) (agreement not to lure away fellow employees upheld).

44. *Baton Rouge Cigarette Service, Inc. v. Bloomenstiel*, 88 So. 2d 742 (La. App. 1st Cir. 1956) (court indicated it might have upheld a prohibition against use of customer lists, but held such use was not established).

45. See generally Comment, *Agreements Not to Compete*, 33 LA. L. REV. 94 (1972).

46. See *Bookkeepers Business Service, Inc. v. Davis*, 208 So. 2d 1 (La. App. 4th Cir. 1968) (agreement not to solicit customers upheld); *Delta Fin. Co. v. Graves*, 180 So. 2d 85 (La. App. 2d Cir. 1965) (agreement not to solicit customers upheld). See also *Buckeye Garment Rental Co. v. Jones*, 276 F. Supp. 560 (E.D. La. 1967) (applying Louisiana law; court severed prohibition against use of customers list from remainder of contract and enforced it); *Standard Brands, Inc. v. Zumpe*, 264 F. Supp. 254 (E.D. La. 1967) (applying Louisiana law; court recognized the prohibition against revelation of trade secrets could be enforced, but refused to grant an injunction absent proof that such revelation was imminent or inevitable). Cf. *Gulf Toy House, Inc. v. Bertrand*, 306 So. 2d 361 (La. App. 3d Cir. 1975) (court would not enjoin use of customer list from memory; other cases distinguished on ground that employer's contract did not contain specific prohibition against solicitation of customers from list).

47. *Bookkeepers Business Service, Inc. v. Davis*, 208 So. 2d 1 (La. App. 4th Cir. 1968); *Delta Fin. Co. v. Graves*, 180 So. 2d 85 (La. App. 2d Cir. 1965).

48. *Orkin Exterminating Co., Inc. v. Broussard*, 346 So. 2d 1247 (La. App. 3d Cir. 1977); *Alexander & Alexander, Inc. v. Simpson*, 370 So. 2d 670 (La. App. 4th Cir.), cert. denied, 371 So. 2d 836 (La. 1979) (Calogero, Marcus and Blanche, JJ., dissenting).

49. Professor Blake suggests in his article that the primary factor in this context is the determination of how much time is needed for the risk of injury to be reasonably reduced. If the principal purpose of a non-solicitation clause is to protect customer/employer relationships, the duration of the restraining period is reasonable only if it is no longer than necessary for the employer to put a new person on the job and to permit that person to demonstrate to customers that he is an adequate replacement for the former employee. If that demonstration is relatively simple, perhaps only

geographical or "activity" limitation;<sup>50</sup> the nature of the employee's relationships with customers;<sup>51</sup> the importance of confidential business information, if any;<sup>52</sup> personal circumstances of the employee, including the uniqueness of his talent;<sup>53</sup> and any other factors reflect-

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a few months would be reasonable. If development of such a relationship can be shown to be more complex and gradual, then a restraint of longer duration might be reasonable. If protection of a trade secret is the purpose of the restraint, it is conceivable that the duration could extend for the length of time in which the secret retains considerable economic value to the former employer. See Blake, *supra* note 26, at 677-78.

50. Restraints which are solely geographic in nature, without reference to "activity" within that area, appear to be losing popularity (if they ever had any) with the courts. Blake, *supra* note 26, at 681. If the employee was one who dealt with customers primarily at the employer's place of business, his link with the customers is likely to be tenuous at best. A restraint prohibiting any solicitation of customers, present or potential, within the entire geographical area in which the business operates is probably too broad to be reasonable. On the other hand, if the employee traveled extensively to serve customers within a region, loyalty to that employee might be substantial, and there is a greater risk of loss to the employer by solicitation. But a restraint that purported to reach potential customers as well as those actually serviced by the employee might still be too broad. *Id.* at 679-81.

51. This is perhaps the most important factor. If the business is fairly large and is one in which the product or service being sold varies little from company to company, the customer's primary contact with the business and the source of his trust in the business may be the employee who services his account. To the extent that the employer has fostered this relationship, or that his service or product in some way enhances this effect, upholding a restraint might be proper. A court should inquire into the frequency of the employee's contact with the customers, the locale of that contact, and the nature of the services performed. Professor Blake terms this the "customer contact" basis for examining a restraint. *Id.* at 653-67. It is not surprising that many of the litigated cases in Louisiana involve businesses in which the services provided are virtually interchangeable with those offered by other businesses, (often served by an employee traveling a "route"), or are businesses in which frequent customer contact with a particular employee plays a prominent part in the financial success of the business. See *Orkin Exterminating Co. v. Foti*, 302 So. 2d 593 (La. 1974) (pest control; employee followed designated route); *Hirsh v. Miller*, 249 La. 489, 187 So. 2d 709 (1966) (same); *John Jay Esthetic Salon, Inc. v. Woods*, 377 So. 2d 1363 (La. App. 4th Cir. 1979) (beauty salons; frequent customer contact and substantial relationship with individual employee likely); *Orkin Exterminating Co. v. Broussard*, 346 So. 2d 1274 (La. App. 3d Cir. 1977) (pest control); *National School Studios, Inc. v. Barrios*, 236 So. 2d 309 (La. App. 4th Cir. 1970) (photographing school children); *World Wide Health Studios, Inc. v. Desmond*, 222 So. 2d 517 (La. App. 2d Cir. 1969) (weight reduction and exercise; frequent contact with individual employees).

52. It would be appropriate for the court to inquire into whether the information is genuinely unique or substantially different from that used by others in the trade. It might also examine whether the employer voluntarily provided it to the employee when he was not under an obligation of secrecy. See Blake, *supra* note 26, at 667-74.

53. The interest of society as a whole becomes a factor here. If the employee is highly trained and specialized when he joins the employer, and receives little additional expertise from the employer and makes little contribution to the business, upholding of a restraint should be unusual. The loss to such an individual and to soci-

ing upon the reasonableness of the restraint placed upon the employee when measured against the interest of the employer sought to be protected.<sup>54</sup>

Legislative clarification of whether R.S. 23:921 should apply to clauses other than general non-competition clauses would be helpful. In the interim, employers should carefully review restrictive clauses in employment contracts. They should decide what specific interest they seek to protect by the restriction, and whether the restriction is only as broad as it need be to achieve that protection. Restrictions appropriate for some employees, or in some portions of the business, may not be appropriate for others.

If it is determined that some restrictive clauses are necessary, then the employer should segregate those expenses incurred for the training of each individual subject to the restrictions and for the advertisement that this individual is the person to whom the public should turn for services. Careful records of such expenses should be kept. Certainly this should be the case if a general non-competition clause within the statutory proviso is included in the employment contract. And if the supreme court should hold that other restrictive clauses are subject to the same proof of expenses, the records will be vital.

The recent decisions indicate at the very least that Louisiana courts will not accept the various types of restrictive clauses without close scrutiny. Employers should engage in their own self-scrutiny first, so as not to be found wanting when judicial examination of an employment contract occurs.

#### AUTHENTIC ACT: PRE-MARITAL AGREEMENT

Prior to the recent amendments of matrimonial regime law,<sup>55</sup> article 2328 of the Civil Code required that "every matrimonial agree-

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ety is great when he is restrained from employing these special abilities. *Id.* at 684-86. In some jurisdictions, this analysis takes the form of a discussion of the unique nature of the employee's talent. It has been suggested that the employee with unique talents should not be restrained from contributing those to society under the aegis of another employer. Kniffin, *supra* note 25.

54. A court might be more willing to uphold a restraint if it believed it possessed the power to sever the unacceptable portions of it and "whittle down" the restriction to the point at which it is reasonable. See *Eastern Distrib. Co. v. Flynn*, 222 Kan. 666, 567 P.2d 1371 (1977); Comment, *Contracts: Employee Covenants Not To Compete*, 17 WASHBURN L.J. 665 (1978). The Louisiana courts have not exhibited any proclivity toward engaging in such handiwork.

55. Act 627 of 1978 repealed Civil Code article 2328 and replaced it with R.S. 9:2834, which required that any contract establishing a matrimonial regime or modifying it be made "only by an act passed before a notary public and two witnesses." This

ment must be made by an act before a notary and two witnesses." In *Rittiner v. Sinclair*,<sup>56</sup> the meaning of that requirement was a collateral issue. The husband brought suit against his wife for divorce, and also for recognition of the validity of a pre-marital agreement providing for separate property. There was a slight discrepancy at trial between the husband's version and the wife's version of the sequence of events surrounding confection of the agreement. But, there was little doubt that on the day of confection of the instrument, the wife-to-be appeared before a notary and two witnesses and signed the agreement.<sup>57</sup> The husband-to-be appeared on the same day before the same notary and the same witnesses and signed the agreement, but not at the same time that his prospective spouse signed the agreement.<sup>58</sup> The notary and witnesses also signed the agreement, but the record does not reflect the precise time that they did so.

On original hearing, the court of appeal invalidated the agreement on the ground that the Civil Code required that the parties to the contract appear and sign simultaneously before the notary and witnesses. On rehearing, the court reversed itself on that point, and held that there had been no showing that the marriage contract in question was not an authentic act. The case was remanded for resolution of the claim by the husband that no community existed between the spouses.

The result is correct under the peculiar facts presented. The act in question was not irregular on its face, and no claim of forgery was made. A strict interpretation of the Civil Code would require exclusion of extrinsic evidence.<sup>59</sup> The act recited that the parties

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provision, before it became effective, was repealed by Act 709 of 1979. It was replaced by a new article (effective January 1, 1980), Civil Code article 2331, which provides that a matrimonial agreement "shall be made by authentic act or by an act under private signature duly acknowledged by the spouses."

56. 374 So. 2d 680 (La. App. 4th Cir. 1979).

57. Appellate Record at 14-15.

58. *Id.* at 103-04.

59. LA. CIV. CODE art. 2236: "The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved a forgery."

LA. CIV. CODE art. 2276: "Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since."

See Succession of Tete, 7 La. Ann. 95 (1852) (evidence that party may not have signed before witnesses, as document stated, should not be admitted unless forgery alleged; on rehearing, judgment of supreme court set aside without reasons and new trial granted). See generally *Writing Requirements and the Parol Evidence Rule*, 35 LA. L. REV. 745, 775-78 (1975).

"personally came and appeared" before the notary and "in the presence of the witnesses hereinafter undersigned." It also recited that the act was "passed . . . in the presence of" the two competent witnesses, "who hereunto sign their names with the said appearers and me, Notary, after reading of the whole."<sup>60</sup> The act does not recite that the parties appeared simultaneously, but the remainder of the act permits the implication that they did.<sup>61</sup> The simplest and most direct way for the appellate court to uphold the validity of the agreement was to refuse to consider extrinsic evidence to contradict it, in the absence of an allegation of forgery.

But, even with consideration of the evidence tending to show that the parties appeared separately before the same notary and the same witnesses, the result can still be approved. One of the primary functions of the requirement that certain types of agreements be in authentic form is a cautionary one. The occasion has been called "an invitation to reflect on what one is doing."<sup>62</sup> Execution of the agreement before a notary and witnesses adds an air of solemnity and formality which may induce final reflection of whether the act is wise or not. Ideally, the notary should also undertake to assure himself or herself that the party who is about to sign the document understands what the document has, and what basic legal consequences it entails. If satisfied that the person before him is the person described in the instrument, and understands its consequences, the notary can proceed to execute the instrument.

This function of the notary was, and is, better understood and more rigorously carried out in France and other civil law countries

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60. Appellate Record, attachment to plaintiff's original petition; plaintiff's Exhibit No. 1 under the proffer, Appellate Record at 19. The trial judge required that the testimonial evidence be admitted only within a proffer, but not because of its nature as attacking the authentic act. Both the act and the testimony were admitted within a proffer because the trial judge was of the opinion that the issue of partition of the property was not before the court.

61. The implication is weak, but nonetheless available. The parties were said to have appeared and "severally" declared their intentions. If they appeared separately, there would be no need to state that they "severally" declared their intentions. The act declared that the witnesses signed their names "with the said appearers and me, Notary, . . ." Since the witnesses apparently signed only once, this is a declaration that both parties were present when they did so. And finally, the act refers to a "reading of the whole" in the singular, and not to multiple readings at two different times in the day.

It may cogently be argued on the other side that the act does not specifically state that the parties appeared simultaneously, and that therefore any evidence on the simultaneity of their appearance is *not* contrary to the "full proof" contained in the act.

62. S. LITVINOFF & W. TETE, LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS 128 (1969).

than in Louisiana.<sup>63</sup> But the fact that the cautionary and advisory function of the notary is sometimes ignored should in no way detract from its importance. Our courts should be careful to assure that interpretation of the articles concerning authentic acts not only leaves room for this function, but encourages it.

A procedure which does not respect this function should not be approved. Thus, if one prospective spouse arrives at the notary's office with the agreement in hand, already signed by the other prospective spouse, the completion of the document at that stage would not achieve an authentic act. The signature of the absent spouse might have been obtained by duress, or may be a forgery. But even if it is a valid, voluntary signature, there has been no occasion for the exercise of the cautionary function of the authentic act.

In the case at hand, there was no evidence as to when the notary and witnesses signed. They apparently signed only once, most probably at the time that one spouse or the other also signed. One can probably conclude, then, that they did not sign at the time the other spouse signed. But, the uncontradicted testimony at trial by each spouse was that he or she came to the notary's office and signed the document. The document recited that the spouses "appeared" before the notary and the two witnesses, and there was no contrary proof. From these facts, it must be concluded that the possibility of the cautionary function was available. The notary could have, and should have, informed each spouse upon appearance of the nature of the act and its consequences. The presence of the witnesses on each occasion added the desired formality to the reflection of the spouse. The court was correct in concluding that the article does not require simultaneous appearance by the two spouses. And in this unusual instance, their simultaneous appearance would have added little to the cautionary function.<sup>64</sup>

However, the court's opinion should not be interpreted too broadly. The court observes that "[n]owhere does the law expressly require that the notary and the witnesses sign the act in the presence of the parties, and we now conclude that we erred in imposing such a requirement."<sup>65</sup> For the cautionary purpose of the act,

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63. *Writing Requirements and the Parol Evidence Rule*, 35 LA. L. REV. 745, 773-75 (1975).

64. Perhaps the simultaneous presence of the parties would have assured that the notary would have made only a single explanation of the consequences of the act. This in turn would have assured that his comments did not favor one party or the other, and left the contracting parties in exactly the same posture as to the decision each had to make. As a practical matter, if the notary said anything at all to either of the parties, it probably was very similar in nature.

65. *Rittiner v. Sinclair*, 374 So. 2d 680, 685 (La. App. 4th Cir. 1979).



it is the witnesses' *presence*, not their signature, which is important. For the evidentiary purpose of the act, it is their *signature*, as well as their presence, which is important.<sup>66</sup> The opinion could be taken to mean that the witnesses could sign at some later hour or date, and that practice could easily deteriorate into one in which the witnesses are not actually present at the moment of execution by the parties and notary.

This is not a desirable result. The French text of Article 2328 states that the act should be "*passé par devant un notaire et deux témoins*"<sup>67</sup> which is best translated as "executed in front of a notary and two witnesses." The advisable method is that at the moment of execution, all signing parties, the witnesses and the notary should be present and should each sign in turn: parties,<sup>68</sup> then witnesses,<sup>69</sup> then notary.<sup>70</sup> In the present instance, it would have been better for

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66. They should be present so that they can faithfully assert that they have seen the parties sign the agreement. They should sign so that they can be identified, and their assertion then becomes final and binding, lending credibility and security to the authentic act.

67. 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA art. 2328 (J. DAINOW ed.) (article 2308 of the Civil Code of 1825). A literal translation of the French text would not include the specific requirement that the parties, the witnesses, and the notary appear and sign simultaneously. However, there appears to be an implication that they will do so. Civil Code articles 1536 and 2328, as they appeared in the French text of 1825, contain the word *passé* (executed) before a notary and two witnesses; Civil Code article 2234 contains the word *reçu* (received) by a notary and two witnesses. If the witnesses and notary might just as well sign at another time, one could not say that the complete authentic act was "executed" or "received." One would have to say that it was partially "executed" or "received," to be completed at a later time.

When one party could execute the act at a later time, the redactors explicitly so provided. LA. CIV. CODE art. 1540. The fact that the redactors specifically provided in Civil Code article 1578 that the public nuncupative testament requires execution in the simultaneous presence of all the required persons may be explained by the provision that there must be a public dictation and reading of the whole testament.

68. The parties should sign first because this is evidence of their agreement. LA. CIV. CODE art. 1762. If they do not sign, there is nothing to which the witnesses and notary may attest.

69. The witnesses should next sign, having observed the signing by the parties. They thus assert that individuals claiming to be those named in the instrument signed in the witnesses' presence. The signatures of the witnesses affirm that the formalities recited in the act have been observed.

70. Finally, the notary signs in his capacity as a neutral public officer charged with receiving and certifying instruments of this type. His signature makes the instrument an authentic act, entitled to the protections outlined in the Civil Code. His signature affirms that the required course of action by parties and witnesses has been followed. It should also affirm that he has discharged the cautionary function which is traditionally required of him, and is implicit in the importance given to the authentic act in the Civil Code of Louisiana.

the prospective spouses to appear together before the notary and the witnesses. Fortunately, the court's careful thought produced the correct result on the facts presented. Unfortunately, lawyers and notaries might be encouraged to be more careless after reading the opinion. They should not. They should understand the cautionary as well as the evidentiary function of the authentic act, and discharge their responsibilities accordingly.