

# At the Breaking Point: Adapting Louisiana Employment Noncompete Law to the Information Age

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## **At the Breaking Point: Adapting Louisiana Employment Noncompete Law to the Information Age**

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#### INTRODUCTION

Imagine a graphic designer named Charlie who works at a design firm based in Baton Rouge, Louisiana.<sup>1</sup> On his first day of work, Charlie signs some paperwork, including an agreement not to compete. The noncompetition agreement (noncompete) provides that if Charlie separates from the firm, he must refrain from engaging in the business of graphic design within the parishes of East Baton Rouge, West Baton Rouge, Livingston, and Ascension for a period of two years. During the course of his employment, Charlie designs many graphics for the firm’s customers who submit online orders via the firm’s website. Two years later, however, the firm decides that it needs to lay off Charlie due to cutbacks.

Though he is devastated, Charlie makes every effort to stay on his feet. He launches his own solo graphic design business, which he operates from his home in East Baton Rouge. His business’s website allows customers to submit online orders in exchange for Charlie’s graphic design services. So far, Charlie’s only customers are located beyond the geographic scope of the noncompete in Calcasieu Parish, Louisiana; Houston, Texas; and Nashville, Tennessee. After learning of Charlie’s website, however, his former employer files suit in East Baton Rouge Parish seeking to enforce the noncompete. If the employer’s suit is successful, Charlie would not be able to design graphics for anyone from his home in Baton

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1. This hypothetical is entirely fictional.

Rouge, regardless of where his customers are located. Additionally, Charlie would be prohibited from doing so for two years.<sup>2</sup> As a result of the noncompete, to earn a living he would be forced to either leave the restricted area if he wants to continue working as a graphic designer or take a job in another field outside of his expertise.

Current Louisiana law in this area has two fundamental problems. First, there is very little clarity on whether Charlie ever actually breached the noncompete by taking on customers from outside of the restricted parishes. This problem is caused by the underdevelopment of the requisites for breaching an agreement by competing with the former employer for customers or other business. Essentially, the law focuses on geographic limitations to the exclusion of examining the actual competition involved in the case, even in situations where geographic boundaries are of little importance.<sup>3</sup> Additionally, reported appellate litigation has yet to squarely face a situation involving Internet competition. Second, assuming Charlie's conduct does constitute a breach of the noncompete, the agreement would enjoin Charlie for two full years, which is far longer than necessary today given the modern reformulation of "knowledge assets" and the rise of the Internet.<sup>4</sup>

These two problems—(1) ambiguity in the jurisprudence as to what activity constitutes competition, and (2) inequity resulting from enforcing restraints on ex-employees for two full years when provided by the agreement<sup>5</sup>—though they existed prior to the rise

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2. He may face the additional problem of losing currency in relevant software after returning to the market two years later. See *Creative Cloud/Common Questions*, ADOBE.COM, <https://helpx.adobe.com/creative-cloud/faq.html>, archived at <https://perma.cc/RKB5-D4BY> (last visited Feb. 11, 2015) (noting changes in design software). Many industries face similar continuous training requirements.

3. See Norman D. Bishara & David Orozco, *Using the Resource-Based Theory To Determine Covenant Not To Compete Legitimacy*, 87 IND. L.J. 979, 980, 982 (2012) (arguing that most states have failed to take into account "the new concepts of boundary-less commerce and knowledge assets" in formulating noncompete law).

4. See *id.* at 982; Richard R. Mann & Barry S. Roberts, *Cyberlaw: A Brave New World*, 106 DICK. L. REV. 305, 339 (2011). To the extent that the two-year restriction's usefulness is diminished, the concern for preventing a person from engaging in the trade that person has chosen to pursue becomes more problematic. See Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 686–87 (1960) (discussing the balancing of employer and employee interests to "maximiz[e] the social values").

5. This Comment does not argue that two years is inequitable in all cases. There are a growing number of situations, however, where a shorter time is justified given the fast-paced nature of many businesses today. See Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 732 (2002) (noting

of the Internet,<sup>6</sup> have been fueled by it.<sup>7</sup> Neither the Louisiana Legislature nor Louisiana courts have reevaluated noncompete law in light of the vast societal changes brought on by the Internet age and the rise of Internet-intensive businesses.<sup>8</sup>

This Comment proposes a multi-step approach to alleviate the current problems presented by Louisiana's noncompete law. Since the problem of ambiguity as to what constitutes competition is largely of jurisprudential origin,<sup>9</sup> Louisiana courts can solve the problem by focusing on the impact a former employee's new employment would have on the former employer and enforcing the noncompete only if there is actual or likely competitive impact.<sup>10</sup>

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the vast changes recently caused by decentralization in the workplace); Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 11 (2001); see also *infra* Part III.A.

6. These broader implications are part of the importance in having a solution that fits with both traditional and Internet-intensive companies. See *generally infra* Part IV.

7. The Louisiana noncompete statute, Louisiana Revised Statutes section 23:921, allows enforcement against an employee when he engages in a similar business to the employer "so long as the employer carries on a like business" in the areas listed in the noncompete. LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015). Another example of this problem exists in the context of personal jurisdiction when a defendant interacts with the forum solely over the Internet. The difficulty courts have had in figuring out what counts as minimum contacts for Due Process purposes illustrates the main disconnect between the Internet and prior doctrine, which is that a person's location is far less relevant to their activities in any given area. See, e.g., *Shrader v. Biddinger*, 633 F.3d 1235, 1240 (10th Cir. 2011) ("The basic problem with relating such activities directly to the general principles developed pre-internet is that, in a sense, the internet operates 'in' every state regardless of where the user is physically located, potentially rendering the territorial limits of personal jurisdiction meaningless.").

8. This Comment will use the term "Internet-intensive businesses" as short-hand for ventures that rely heavily on the Internet as a central part of their business models. Types of ventures that might fit into the category of Internet-intensive would include technology companies, website operations, online sales catalogs, the myriad of client services industries that operate over the Internet, and other similarly Internet-dependent companies.

9. See discussion *infra* Part III.B.

10. There is also ambiguity in the statutory language itself, which lends itself to jurisprudential gloss. See LA. CIV. CODE art. 10 (2015) ("When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law."). This type of analysis resembles a reasonableness test, in that in other jurisdictions it is the impact that an employee's conduct would have on a former employer that makes enforcement reasonable. See RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(a) (1981) (providing that a noncompete is unreasonable when "the restraint is greater than is needed to protect the promisee's legitimate interest").

With respect to the two-year restraint, legislative intervention is necessary. The Legislature should amend the employment noncompete statute to allow restraint of the former employee for a reasonable time up to two years, which would allow courts to consider the competing interests in each case and cut the enforcement period short where appropriate.

Part I of this Comment provides an overview of other states' and Louisiana's approaches to the enforceability of noncompete agreements, specifying the policies underlying their enforcement. Part II deals with specific facets of Louisiana noncompete law, explicating the elements of enforceability under the noncompete statute. The problems with the current law, as exemplified by the law's application to Internet-intensive businesses, are discussed in Part III. Finally, Part IV urges both Louisiana courts and the Legislature to respond to the inequities and inconsistencies created by the application of the current law to situations like that of Charlie the graphic designer, who would be forced to take a job outside of his specialty, forego work for two years, or move away to work as a graphic designer.

#### I. SAME POINT OF DEPARTURE, DIFFERENT END RESULT—THE MOVING TARGET OF LOUISIANA NONCOMPETE POLICY

Louisiana began many years ago with the same proposition as that of many other states: noncompetes are against public policy.<sup>11</sup> The development of this policy and its reflection in the basic rules of enforcement of noncompetes have shifted in almost every state over the years.<sup>12</sup> In Louisiana, this development has led to considerable judicial and legislative ambivalence as to the state's policy on noncompetes.

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11. See LA. REV. STAT. ANN. § 23:921 (1950); 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, 120 (2008) (“Traditionally, state restraint of trade statutes either prohibited employee agreements not to compete or severely restricted the circumstances under which such agreements could be enforced.”). Agreements not to compete arise in many different situations beyond employment, including, for example, in connection with the sale of a business. See, e.g., LA. REV. STAT. ANN. § 23:921(B) (Supp. 2015). This Comment focuses on agreements between employers and employees wherein the employee agrees not to engage in competition with a former employer after separating from that employer, which *Black's Law Dictionary* defines as “[a] promise, usu. in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer.” BLACK'S LAW DICTIONARY 420 (9th ed. 2009).

12. Garrison & Wendt, *supra* note 11, at 120.

*A. General Trends in Noncompete Enforceability and the Competing Interests of Enforceability*

Louisiana is in good company in allowing noncompetes under limited circumstances, provided that those agreements are subject to legislative and judicial oversight.<sup>13</sup> In the United States, only California rejects the enforcement of noncompetes altogether.<sup>14</sup> A general survey of the basic law and policies animating noncompete law in the rest of the country shows that Louisiana's law has increasingly diverged from the law in the rest of the country.<sup>15</sup>

The *Restatement (Second) of Contracts* classifies noncompetes as one type of ancillary restraint on competition that is subject to the "rule of reason."<sup>16</sup> Legislatures and courts have adopted this rule of reason in a large majority of jurisdictions.<sup>17</sup> Twenty states have enacted statutes on the enforceability of employment noncompetes, including Louisiana.<sup>18</sup> Many other states' statutes

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13. See *infra* note 18 (listing state statutes governing noncompete agreements).

14. CAL. BUS. & PROF. CODE §§ 16600–16602.5 (West 2008). See *Edwards v. Arthur Anderson, L.L.P.*, 189 P.3d 285, 292–93 (Cal. 2008) (noting the lack of any exception to the prohibition on the enforceability of noncompetes).

15. Though approximately 20 states have statutes governing noncompetes as Louisiana does, very few of these provide for enforcement for two years, and most incorporate a reasonableness standard. See *infra* note 18. This Section is not intended to explain the law of any one state. Rather, the goal is to provide a sense of the major trends in approaching noncompete enforceability, especially with regard to the various policies that courts and legislatures find important when determining the extent of enforceability of noncompetes.

16. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a (1981).

17. Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1173 (2001) (pointing out that the "vast majority of jurisdictions have taken the position that noncompete agreements are enforceable if reasonable"). See also FLA. STAT. ANN. § 542.335 (West 2013); *Moore v. Midwest Distribution, Inc.*, 65 S.W.3d 490, 493 (Ark. Ct. App. 2002) ("In order for such a covenant to be enforceable, three requirements must be met: (1) the covenantee must have a valid interest to protect; (2) the geographical restriction must not be overly broad; and (3) a reasonable time limit must be imposed." (quoting *Federated Mut. Ins. Co. v. Bennett*, 818 S.W.2d 596, 597–98 (Ark. Ct. App. 1991))).

18. ALA. CODE § 8-1-1 (2002); CAL. BUS. & PROF. CODE §§ 16600–16602.5 (West 2008); COLO. REV. STAT. ANN. § 8-2-113 (West 2013); FLA. STAT. ANN. § 542.33 (West 2013); GA. CODE ANN. § 13-8-53 (Supp. 2014); HAW. REV. STAT. § 480-4(C) (2008); IDAHO CODE ANN. § 44-2701 (West 2014); LA. REV. STAT. ANN. § 23:921 (Supp. 2015); MICH. COMP. LAWS ANN. § 445.774a (West 2011); MO. ANN. STAT. § 431.202 (West 2010); MONT. CODE ANN. § 28-2-704 (2013); NEV. REV. STAT. ANN. § 613.200 (2013); N.C. GEN. STAT. ANN. § 75-4 (West 2012); N.D. CENT. CODE § 9-08-06 (2006); OKLA. STAT. ANN. tit. 15, § 219A (West 2013); OR. REV. STAT. ANN. § 653.295 (West 2011); S.D. CODIFIED LAWS

explicitly require the courts to examine the reasonableness of temporal and geographic restrictions.<sup>19</sup> Some statutes cite directly to the rule of reason, legislatively incorporating the judicially created rule.<sup>20</sup> Other statutes direct courts to examine the reasonableness of the agreement in specific ways.<sup>21</sup> One type of specified reasonableness is the statutory requirement that noncompetes further the “employer’s legitimate business interests” in order to be enforced.<sup>22</sup> Whether by statute or common law, most states consider three major policy concerns when determining the reasonableness of a noncompete agreement: the interests of the employer, the employee, and the public.<sup>23</sup>

With respect to the competing interests at play in all noncompetes, employers might see noncompetes as “the only effective method of preventing unscrupulous competitors or employees from appropriating valuable trade information and customer relationships for their own benefit,” or as helpful to

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§§ 53-9-8 to 53-9-12 (2004 & Supp. 2014); TEX. BUS. & COM. CODE §§ 15.50–15.52 (West 2011); WIS. STAT. ANN. § 103.465 (West 2010). Although 20 states have statutes on the books that apparently govern, the courts of at least 1 of these states—Ohio—do not reference the statute in employment noncompete cases. *See* OHIO REV. CODE ANN. §§ 1331.01–1331.02, 1331.04 (West 2002); *Premier Assocs. v. Loper*, 778 N.E.2d 630 (Ohio Ct. App. 2002) (action to enforce noncompete, but court does not mention the statute). The other 30 states regulate noncompetes by common law.

19. *See, e.g.*, HAW. REV. STAT. § 480-4(C) (2008) (allowing noncompetes “within such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent”).

20. *See id.*

21. *See, e.g.*, MO. ANN. STAT. § 431.202 (West 2010). The Alabama statute reads similarly to Louisiana’s statute, but it has been interpreted to incorporate a reasonableness inquiry. ALA. CODE § 8-1-1(6) (West 2002). *See, e.g.*, *Cent. Bancshares of the S. v. Puckett*, 584 So. 2d 829, 831 (Ala. 1991); *see also* *Roberson v. C.P. Allen Constr. Co.*, 50 So. 3d 471, 474 (Ala. Civ. App. 2010) (“Alabama courts will enforce a non-compete agreement if it (1) falls within a statutory exception to the general prohibition, and (2) is reasonably limited as to territory, duration and subject matter.” (internal quotation marks omitted)). The current version of the Louisiana statute is based on the Florida and Alabama statutes. *See* Carey C. Lyon, Comment, *Oppress the Employee: Louisiana’s Approach to Noncompetition Agreements*, 61 LA. L. REV. 605, 607 (2001).

22. *See, e.g.*, IDAHO CODE ANN. § 44-2701 (2014).

23. Daniel R. Anderson, *Restricting Social Graces: The Implications of Social Media for Restrictive Covenants in Employment Contracts*, 72 OHIO ST. L.J. 881, 885–86 (2011); James M. Duncan, Comment, *Agreements Not to Compete*, 33 LA. L. REV. 94, 94 (1972) (discussing the idea that most jurisdictions will enforce agreements that “afford fair protection to the interests of the covenantee and [are] not so comprehensive as to impinge unreasonably upon the public interest or to place undue hardship on the party restricted”).



prevent loss associated with employees leaving after the employer has invested time and money in training the employee.<sup>24</sup> Employees, on the other hand, might view noncompetes as “reduc[ing] both [their] economic mobility . . . and their personal freedom to follow their own interests” and might also be concerned with bargaining power.<sup>25</sup> The public interest requires consideration of broad policy implications of noncompete enforcement. Though these policies can vary widely, one often-cited interest of the public is in “free mobility of labor, ensuring that skilled employees can gravitate toward their best usefulness.”<sup>26</sup> Another public policy is one that frowns upon the creation of unemployment and interference with labor markets generally.<sup>27</sup>

Striking a balance between the interests of the employer, employee, and public depends not only on policy choices, but also on who makes those choices, since the courts and the legislature have different institutional competencies.<sup>28</sup> At least one commentator has suggested that legislatures are better suited for formulating rules for the enforcement of noncompetes.<sup>29</sup> This argument stems from the view that legislatures are generally seen as better suited for “policy-based, interest balancing” issues, such as the reasonableness of noncompetes.<sup>30</sup> On the other side of the argument, however, is the idea that specific legislative rules might be too inflexible to deal with the “unforeseen inequities” that might

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24. Blake, *supra* note 4, at 627, 652.

25. *Id.* at 627. See *Nat'l Motor Club of La., Inc. v. Conque*, 173 So. 2d 238, 241 (La. Ct. App. 3d 1965) (noting a “disparity in bargaining power, under which an employee, fearful of losing his means of livelihood, cannot readily refuse to sign an agreement which, if enforceable, amounts to his contracting away his liberty to earn his livelihood in the field of his experience except by continuing in the employment of his present employer”).

26. Anderson, *supra* note 23, at 886. Some have argued that the public interest is simply in striking the proper balance between the employer and employee interests. See, e.g., Blake, *supra* note 4, at 686–87. This view does not conflict with a separate consideration of the public interest, because a proper balancing of those interests requires considering consequences of noncompetes that neither the employer nor the employee would concern themselves with, such as the economy as a whole. See Bishara & Orozco, *supra* note 3, at 993.

27. See Stone, *supra* note 5, at 740.

28. See James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative–Judicial Interaction*, 45 AM. J. POL. SCI. 84, 84 (2001) (discussing the forward-looking legislative and the backward-looking judicial approaches).

29. Emily J. Kuo, Comment, *The Enforceability Gap of Covenants Not to Compete in Telecommuting Employment Relationships*, 1996 U. CHI. LEGAL F. 565, 583–85 (1996) (arguing that legislatures are better suited for making noncompete policy for telecommuting employees).

30. *Id.* at 583.

result from creating rules in an area that is rapidly changing,<sup>31</sup> such as in Internet-intensive business.

*B. Louisiana's Legal Tennis Match Between the Courts and the Legislature on the Extent of Noncompete Enforceability*

Before 1934, employer–employee noncompetes were largely unenforceable in Louisiana.<sup>32</sup> Although some cases occasionally enforced noncompetes under a reasonableness standard,<sup>33</sup> the agreements were predominantly held to be unenforceable.<sup>34</sup> In 1934, the Louisiana Legislature passed Act No. 133, which provided that any contract whereby “the employee agrees and contracts not to engage in any competing business for themselves or as the employee of another upon the termination of their contracts with such employer . . . shall be null and void as to those provisions.”<sup>35</sup> This Act later appeared as Louisiana Revised Statutes section 23:921 upon compilation of the Louisiana Revised Statutes,<sup>36</sup> where it has remained, subject to amendment. Courts

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31. See *id.* at 585 (“[S]ince telecommuting is a rapidly growing practice, the inflexible legislatures may need to rely upon courts to respond to unforeseen inequities.”).

32. Often, the grounds for nonenforcement were lack of mutuality or “serious consideration.” Duncan, *supra* note 23, at 98–99; M. Nan Alessandra & Barry L. LaCour, *The Past, Present and Future of Noncompetition Agreements in Louisiana: A Drafter's Dilemma*, 49 LOY. L. REV. 809, 813 (2003); Pitcher v. United Oil & Gas Syndicate, 139 So. 760, 761–62 (La. 1932). Another line of cases, including *Moorman & Givens v. Parkerson*, found that reasonable agreements as to time and geography would be enforceable. *Moorman & Givens v. Parkerson*, 54 So. 47, 47–48 (La. 1911). One commentator cites this line of cases for the assertion that the general rule prior to the adoption of the statute was a reasonableness test. See, e.g., Albert O. Saulsbury, IV, *Devil Inside the Deal: An Examination of Louisiana Noncompete Agreements in Business Acquisitions*, 86 TUL. L. REV. 713, 719 (2012). Though there is some disagreement in the scholarship as to the primary basis for unenforceability, it seems clear that the majority of noncompetes were held to be unenforceable during this period. See Duncan, *supra* note 23, at 97–98.

33. See, e.g., *Parkerson*, 54 So. at 47–48 (making the overbroad statement that “contracts whereby men bind themselves never thereafter to pursue a particular calling, within certain, reasonable, geographical limits, or not to pursue such calling at all within a limited and reasonable time, are generally upheld”).

34. Duncan, *supra* note 23, at 98–99. See also *Shreveport Laundries v. Teagle*, 139 So. 563, 567–68 (La. Ct. App. 2d 1932) (finding a noncompete unenforceable for lack of serious consideration); *Blanchard v. Haber*, 118 So. 117, 119 (La. 1928) (refusing to enforce a noncompete for lack of mutuality).

35. Act No. 133, 1934 La. Acts 484–85.

36. *Id.* For a discussion of the compilation of the Revised Statutes, see Dale E. Bennett, *Louisiana Revised Statutes of 1950*, 11 LA. L. REV. 4, 5 (1950). Prior to this revision, the language of the noncompete statute read slightly differently,

interpreting and applying the statute articulated the policy as one of individual freedom and free enterprise combined with a concern for disparate bargaining power.<sup>37</sup> After almost 30 years of universal unenforceability of employer–employee noncompetes, however, the Legislature changed course in 1962 by providing exceptions to unenforceability.<sup>38</sup> This was the first move in a policy tennis match between the courts and the Louisiana Legislature over the extent and circumstances of enforcing employer–employee noncompetes.<sup>39</sup>

*1. The Legislature Serves the Ball<sup>40</sup>—The 1962 Amendment*

In 1962, the Legislature started the tennis match by adding two exceptions to the unenforceability of noncompetes.<sup>41</sup> The amendment provided for enforcement “in those cases where the employer [either] incur[red] an expense in the training of the employee or incur[red] an expense in the advertisement of the business that the employer [wa]s engaged in.”<sup>42</sup> Both of these exceptions required the agreement to be voluntary and were limited to “not enter[ing] into the same business that [the] employer [wa]s engaged in over the same route or in the same territory for a period of two (2) years.”<sup>43</sup>

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with the revision simply cleaning up and modernizing the language. Act No. 133, 1934 La. Acts 484–85; Bennett, *supra*, at 6, 14–15 (“[T]he provisions of the Revised Statutes are not to be treated as new laws.”).

37. See, e.g., Nat’l Motor Club of La., Inc. v. Conque, 173 So. 2d 238, 241 (La. Ct. App. 3d 1965).

38. Act No. 104, 1962 La. Acts 251–52.

39. This tennis match of policy provides possible clues as to legislative intent, which is of utmost importance when the language of the statute is ambiguous. See LA. CIV. CODE art. 10 (2013) (“When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.”). Watching the tennis match also proves instructive in attempting to resolve the problems created or exacerbated by the advent of Internet-intensive businesses.

40. For an overview of the types of shots in tennis, see *Tennis Shots*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Tennis\\_shots](http://en.wikipedia.org/wiki/Tennis_shots), archived at <http://perma.cc/AWA4-MHJH> (last visited Feb. 11, 2015). See also *Glossary of Tennis Terms*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Glossary\\_of\\_tennis\\_terms](http://en.wikipedia.org/wiki/Glossary_of_tennis_terms), archived at <http://perma.cc/647R-XMPU> (last visited Feb. 11, 2015).

41. Act No. 104, 1962 La. Acts 251–52.

42. *Id.*

43. *Id.*

2. *The Judiciary Returns the Ball*—Orkin Exterminating Co. v. Foti

The Louisiana Supreme Court responded in 1974 by narrowing the statute's application. In *Orkin Exterminating Co. v. Foti*, the Court held that the noncompete statute allowed enforcement only where the employer had “invested substantial sums” in either the employee's training or in the employer's advertisement of the business.<sup>44</sup> Furthermore, language in the *Foti* decision indicated that when these substantial expenses related to the advertisement of the business, the employer had to advertise “the employee's connection with his business” in order to fall within the 1962 exception.<sup>45</sup> The Court in *Foti*, therefore, significantly narrowed the enforceability of noncompetes under the statute.

3. *The Legislature Forehands to the Elbow*<sup>46</sup>—The 1989 Amendment

The next major shift came in 1989 when the Legislature completely reformulated section 23:921, broadening both its scope and the enforceability of employer–employee noncompetes, with the rules relevant to employer–employee noncompetes appearing in subsection C of the statute.<sup>47</sup> The Legislature removed the requirement that employers incur expenses and the requirement that enforcement hinge on spending money on “training of the employee” or “advertisement of the business,”<sup>48</sup> which arguably

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44. *Orkin Exterminating Co. v. Foti*, 302 So. 2d 593, 596 (La. 1974).

45. *Id.* at 597. Although this reading of the statute seems to rest on sound logic, there is an argument that the plain language of the statute only requires consideration of the *business* that the employer is engaged in, which, read broadly, might include advertisement not directly relating to the employee.

46. The elbow is the back corner of the court where the baseline, the back-most boundary line (where players stand to serve), meets the doubles alley. *Glossary of Tennis Terms*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Glossary\\_of\\_tennis\\_terms](http://en.wikipedia.org/wiki/Glossary_of_tennis_terms), archived at <http://perma.cc/WWA5-CWTP> (last visited Feb. 11, 2015).

47. See Act No. 639, 1989 La. Acts 1836–37. The Legislature broadened its scope such that Louisiana Revised Statutes section 23:921 applied to many other types of noncompetes, including those between business partners and those resulting from the sale of a business. *Id.* The amendment also drew a distinction between noncompetes and non-solicitation agreements, saying that the employee could “agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes.” *Id.*

48. See *id.* Subsection (C) of Act 639 states:

C. A person who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a

constituted Louisiana's legislative formulation of reasonableness.<sup>49</sup> In making these changes, the Legislature broadened enforcement of noncompetes, allowing them for up to two years as long as the former employee engaged in a similar business within the specified geography of the agreement.<sup>50</sup> Since the amendment seemed to have removed much of the discretion from the courts, it was a stark departure from most other states, which largely required judicial consideration of reasonableness or furtherance of legitimate business interests—a requirement that most states maintain today.<sup>51</sup>

4. *The Judiciary Lobs a Return*—SWAT 24 Shreveport Bossier, Inc. v. Bond

The next major change occurred by judicial interpretation in 2001 when the Louisiana Supreme Court decided *SWAT 24 Shreveport Bossier, Inc. v. Bond*.<sup>52</sup> The Court resolved a circuit split

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business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years.

*Id.*

49. In this way, the prior law was similar to other jurisdictions with statutory schemes governing enforceability of noncompetes, as well as to the common law regimes of the majority of states, since many states consider what interest the employer has at stake in determining whether to enforce noncompetes as reasonable. *See, e.g.*, HAW. REV. STAT. § 480-4(C) (2008); *Technicolor, Inc. v. Traeger*, 551 P.2d 163, 170 (1976) (using the Hawaii statute to analyze the reasonableness of the restriction).

50. Act No. 639, 1989 La. Acts 1836–37. Because the specific factual exceptions were no longer mentioned, in that certain types of expenses did not need to be made in order to enforce a noncompete, this amendment is a strong broadening of noncompete enforceability.

51. Prior to this amendment, Louisiana's statute was very similar to others. The 1989 amendment also drew from other states, namely Alabama and Florida. Lyon, *supra* note 21, at 607. However, the vast majority of states still followed the reasonableness test and provided specifically protected interests either by statute or by caselaw. *See supra* Part I.A. The amendment also broadened the scope of the statute, so that the courts could no longer simply apply the reasonableness test to, for example, agreements between partners. LA. REV. STAT. ANN. § 23:921(K) (Supp. 2015); Jeffrey D. Morgan, Comment, *If at First You Don't Succeed: Louisiana's Latest Statutory Enactment Governing Agreements Not to Compete*, 66 TUL. L. REV. 551, 561–62 (1991).

52. 808 So. 2d 294 (La. 2001). Some other developments in noncompete law in Louisiana transpired between 1989 and 2001, but these are not relevant to the overall back and forth between the courts and the Legislature illustrated here. The most important of these developments, one that significantly affected noncompete enforceability, was *AMCOM v. Battson*, 666 So. 2d 1227 (La. Ct. App. 2d ), *rev'd*, 670 So. 2d 1223 (La. 1996) (mem.). *See supra* Part II. Some of

by interpreting “the phrase [in 23:921] ‘carrying on or engaging in a business similar’ to mean that [an] employee may agree to refrain from carrying on or engaging in his *own* business,” but not to include situations in which the employee goes to work for an existing entity.<sup>53</sup> In support of its holding, the Court first noted that the language in Revised Statutes section 23:921 was subject to differing interpretations and that the Court must, therefore, “apply and interpret it in a manner that is logical and consistent with the presumed fair purpose and intention the legislature had in enacting it.”<sup>54</sup> The Court then pointed out that unlike the then-current version of the statute, the 1962 version “clearly provided that an employer could not require any employee to enter into any contract restricting the employee from engaging in any competing business *for himself or as the employee of another*.”<sup>55</sup> The Court found the absence of the formerly used language important because a change in language is “presumed to have intended to change the law.”<sup>56</sup>

Justice Traylor dissented in *SWAT 24*.<sup>57</sup> His dissent argued that the Court in both *Foti* and *SWAT 24* ignored the legislative intent behind section 23:921 as well as modern business realities.<sup>58</sup> After outlining the legislative history of the noncompete statute and engaging in a discussion of the plain meaning of the terms “carry on” and “engage,” Justice Traylor concluded that individuals should still fall under the exception when they work for an existing competitor rather than working for themselves.<sup>59</sup>

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the history, including Louisiana Supreme Court jurisprudence, is omitted here as irrelevant to the focus of this Comment. For a discussion of the statutory and related jurisprudential history between 1989 and 2001, see Alessandra & LaCour, *supra* note 32, at 817–26; Loretta G. Mince, Note, Louisiana Smoked Products, Inc. v. Savoie’s Sausage and Food Products, Inc.: “If You Like Laws and Sausages. . .”, 44 LOY. L. REV. 327 (1998).

53. *SWAT 24*, 808 So. 2d at 307.

54. *Id.* at 303.

55. *Id.* at 303–04.

56. *Id.* at 305 (internal quotation marks omitted).

57. *Id.* at 310. Although it did legislate contrary to the majority, the Legislature likely did not adopt the dissent’s position here since it was not discussed at all in the legislative history. Daniel S. Terrell, Note, *The Louisiana Legislature’s Response to Swat 24 Shreveport Bossier, Inc. v. Bond: The Noncompete Pendulum Swings Toward Debt Peonage. Will the Judiciary’s Answer Achieve the Fragile Employer–Employee Balance?*, 64 LA. L. REV. 699, 715 (2004) (“It would be pure conjecture to declare that the Amendment represents an adoption of Justice Traylor’s dissent, as the committee did not even recognize the dissenting opinion’s existence.”).

58. *SWAT 24*, 808 So. 2d at 310.

59. *Id.* at 318.

5. *The Legislature Rushes the Net and Slams the Ball—The 2003 Amendment*

Two years after the Louisiana Supreme Court's decision in *SWAT 24*, the Legislature again responded by amending section 23:921, this time adding a new subsection.<sup>60</sup> The new subsection, which remains unchanged as of the publication date of this Comment, provides that employer–employee noncompetes are enforceable even when the former employee is not an owner of the subsequent business.<sup>61</sup> Although the legislative history is equivocal at best, it appears from both the current language of the statute and the discussion of *SWAT 24* in committee that the Legislature intended this amendment to overrule *SWAT 24*.<sup>62</sup> Subsequent jurisprudence has also interpreted this amendment as rejecting *SWAT 24*.<sup>63</sup> One commentator pointed out that the discussion of the bill in committee, though ambiguous and sometimes erroneous, does at least suggest that the committee wanted to favor employer protection, overrule *SWAT 24*, and equitably enforce noncompetes.<sup>64</sup>

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60. Act No. 428, 2003 La. Acts 1791 (“For the purposes of Subsections B and C, a person who becomes employed by a competing business, regardless of whether or not that person is an owner or equity interest holder of that competing business, may be deemed to be carrying on or engaging in a business similar to that of the party having a contractual right to prevent that person from competing.”).

61. LA. REV. STAT. ANN. § 23:921(D) (Supp. 2015).

62. See *id.*; Apr. 30th Hearing Before the House Comm. on Labor and Indus. Relations, 2003 Leg., 104th Reg. Sess. (La. 2003) [hereinafter House Committee], available at [http://house.louisiana.gov/H\\_Video/2003/Apr2003.htm](http://house.louisiana.gov/H_Video/2003/Apr2003.htm), archived at <http://perma.cc/V9GY-ZKJQ?type=live> (pertinent discussion begins at 25:20). For a detailed discussion of the legislative history, specifically the Labor Committee meeting in which the bill received the most discussion, see Terrell, *supra* note 57, at 716.

63. *Green Clinic, L.L.C. v. Finley*, 30 So. 3d 1094, 1098 (La. Ct. App. 2d 2010) (“However, *SWAT 24*’s narrow interpretation of ‘carrying on and engaging in a business similar to that of the employer’ in La. R.S. 23:921(C) was legislatively overruled.”).

64. Terrell, *supra* note 57, at 712–16; House Committee, *supra* note 62. It seems from the record of the House Committee meeting that, as the commentator points out, Representative Smith, the bill’s sponsor, fundamentally “misunderstood his own bill, believing that his hypothetical employee’s choice to redeem the stock for cash precluded enforcement of the noncompete agreement.” Terrell, *supra* note 57, at 715. Representative Smith’s hypothetical, about an upper-level employee who receives stock options in exchange for his signing a noncompete agreement, and who opts for a cash buy-out of his stock on termination “for cause” and then subsequently competes with the first company, seems to contemplate only one narrow situation—stock options and a for cause termination—where the amendment would require enforcement when prior law had not. House Committee, *supra* note 62. See also Terrell, *supra* note 57, at 715. Thus, the legislative history might militate toward a more narrow

6. *The Judiciary Misses the Return—Possible Softening of Louisiana’s Public Policy Against Noncompetes*

Although several other amendments have been added to the statute over the years,<sup>65</sup> only one has possible import in employer–employee noncompetes. That amendment, in 2010, added that despite the general prohibition against “exercising a lawful profession, trade, or business of any kind, except as provided” in the statute, “every contract or agreement, or provision thereof, which meets the exceptions as provided in this Section, shall be enforceable.”<sup>66</sup> Although this statement on its face seems to be a mere positive restatement of the negative implication of the first sentence of the subsection,<sup>67</sup> one commentator posits that it might represent a shift in policy toward greater enforcement of noncompetes simply by virtue of being a positive statement of enforceability of the exceptions rather than a negative statement of the general rule of

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interpretation of the statute than the plain meaning. This possible legislative intent is relevant to the statute’s interpretation to the extent that the language is ambiguous. LA. CIV. CODE art. 9 (2015) (“When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.”); LA. CIV. CODE art. 10 (2015) (“When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.”).

65. Act No. 137, 1990 La. Acts 458–60 (relative to confidential computer programs and preliminary injunctions); Act No. 201, 1990 La. Acts 579–80 (reenacting certain sections with amendments); Act No. 891, 1991 La. Acts 2692–94 (enacting section controlling franchise agreements); Act No. 937, 1995 La. Acts 2516–17 (amending portion of subpart C relevant to corporations and shareholders); Act No. 58, 1999 La. Acts 778–79 (relative to choice of laws and forum selection clauses in employment relationships); Act No. 436, 2006 La. Acts 1752 (providing unenforceability of noncompetes with automobile salesmen); Act No. 399, 2008 La. Acts 1802–03 (amending subparts relevant agreements in corporation, shareholder, partnership, and limited liability company relationships); Act No. 711, 2008 La. Acts 2756–57 (amending franchise agreement provisions).

66. Act No. 164, 2010 La. Acts 1348–49.

67. Indeed, Jim Patterson, on behalf of the Louisiana Association of Business and Industry, acknowledged as much in conceding that it was a fair statement to say that “the new language basically say[s] what the old language said.” See *Hearing on S.B. 194 Before the Senate Comm. on Commerce, Consumer Protection and Int’l Affairs*, 2010 Leg., 111th Reg. Sess. (La. 2010) [hereinafter Senate Committee] (statement of Jim Patterson), available at <http://senate.la.gov/Commerce/Archives/2010/video.htm>, archived at <http://perma.cc/7E62-PY7Z>.



unenforceability.<sup>68</sup> This possibility is supported by the legislative history in which the lobbyist group that brought the bill stated that it did so in an effort to “clarify the intent of the law” on noncompetes’ enforceability.<sup>69</sup>

Though it is true that the policies underlying the enforceability of noncompetition agreements have shifted in Louisiana,<sup>70</sup> courts continue to point out that the general rule is that these types of agreements are “null and void” under the statute.<sup>71</sup> Since the provisions allowing enforceability under the statute are categorized as exceptions,<sup>72</sup> courts have consistently stated that part (C) of the statute, the employer–employee noncompete provision, should be interpreted narrowly.<sup>73</sup> Similarly, because these agreements are “in derogation of the common right” of unrestricted employment, the agreements themselves “must be strictly construed against the party seeking their enforcement.”<sup>74</sup> These recitations, rather than

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68. Saulsbury, *supra* note 32, at 747 (noting that the 2010 amendment might be seen as “an attempt to soften the ‘strong public policy’ against the enforcement of noncompetes”). This author is aware of no cases that cite this recent change for the proposal that it changed the policy behind the statute.

69. Mr. Patterson presented the bill to the Senate committee, stating that it was “intended to address a question that has developed within some of the courts as to the intent of the legislature with regard to contracts that govern corporations, franchises, and employer–employee relationships.” Senate Committee, *supra* note 67. Further, Mr. Patterson stated that, “[a]ll we’re trying to do is clarify the intent of the law as regards the section that it applies to.” *Id.*

70. See discussion *supra* Part I.B.6.

71. LA. REV. STAT. ANN. § 23:921(A)(1) (Supp. 2015). See, e.g., Action Revenue Recovery, L.L.C. v. eBusiness Grp., L.L.C., 17 So. 3d 999, 1002 (La. Ct. App. 2d 2009) (“Such agreements are in derogation of the common right and must be strictly construed against the party seeking their enforcement.”); Acadian Cypress & Hardwood Inc. v. Stewart, 121 So. 3d 667, 669 (La. Ct. App. 1st 2013) (“Such agreements are deemed to be against public policy, except under the limited circumstances delineated by statute.”).

72. Subsection (A) of the statute has, since 1989, stated the general rule that noncompetes are unenforceable with the exception of those fitting into one of the following subsections. Act No. 639, 1989 La. Acts 1836–37.

73. See, e.g., Vartech Sys., Inc. v. Hayden, 951 So. 2d 247, 255 (La. Ct. App. 1st 2006) (“LSA–R.S. 23:921(C) is an exception to Louisiana public policy against non-compete agreements and as such, must be strictly construed.”).

74. Green Clinic, L.L.C. v. Finley, 30 So. 3d 1094, 1097 (La. Ct. App. 2d 2010). Despite their exceptional status, these agreements do still fall under the general rules of contractual interpretation contained in Louisiana Civil Code articles 2045–2057. See SWAT 24 Shreveport Bossier, Inc. v. Bond, 808 So. 2d 294, 307 (La. 2001). It should be pointed out that the recent amendments to the statute in the context of employer–employee noncompetes do not apply retroactively, so that the law that governs an employment noncompete contract is the law at the time of the execution of that contract. Sola Commc’ns, Inc. v. Bailey, 861 So. 2d 822, 828 (La. Ct. App. 3d 2003). This is not true for every

revealing a continuing commitment to the original policy of the statute, show that there is some ambivalence on the part of the courts with respect to noncompete enforcement. The courts continue to recite the policy of narrowness while broadly applying the statutory requirements with seeming disregard to the overarching policy.<sup>75</sup>

## II. TIME, PLACE, AND MANNER—THE REQUIREMENTS FOR ENFORCING A NONCOMPETE IN LOUISIANA

Louisiana Revised Statutes section 23:921 provides three overarching requirements for employer–employee noncompetes: (1) a two-year maximum duration, (2) a list of the areas in which the former employee is restrained, and (3) competition between the former employee and employer.<sup>76</sup> The current Louisiana noncompete statute provides, in pertinent part:

A. (1) Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void. However, every contract or agreement, or provision thereof, which meets the exceptions as provided in this Section, shall be enforceable.

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amendment to this statute. For example, the 1999 amendments on forum selection clauses apply retroactively to agreements entered into prior to the amendment's effective date. *Sawicki v. K/S Stavanger Prince*, 802 So. 2d 598, 606 (La. 2001).

75. See LA. REV. STAT. ANN. § 23:921 (Supp. 2015). One example of the disregard courts have toward this policy against noncompetes is the doctrine of reformation, in which a court can enforce a noncompete even when it is unenforceable on its face for having overbroad geographical coverage, simply by reforming the agreement and enforcing it in the parishes in which the employer does business. See discussion *infra* Part II.B.2.

76. Although the last category, competition, is implied by the language “carrying on or engaging in a like business therein,” so that it looks more like a subcategory of the geographic restriction, competition should be considered independently of geography, as there can be no enforcement of a noncompetition agreement if it is not violated, and the violation only occurs when the prior employee competes. LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015).

Under the express language of the statute and the majority view of the Louisiana Courts of Appeal, the statutory requirement is two-fold: the geographic scope of non-compete/non-solicit clauses must 1) list the parishes (counties) or municipalities in which the clauses apply, and 2) must be areas in which the employer actually does business.

*Lobrano v. C. H. Robinson Worldwide Inc.*, No. 10-CV-1775, 2011 WL 52602, at \*7 (W.D. La. Jan. 7, 2011).

C. Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment. . . .<sup>77</sup>

*A. Time Limit—Two-Year Restraint*

Louisiana Revised Statutes section 23:921(C) provides that, to be enforceable, a noncompete is “not to exceed a period of two years from termination of employment.”<sup>78</sup> This requirement, unlike some of the others, is completely clear. The time limit originated with the first exceptions to unenforceability in 1962.<sup>79</sup> Unlike some of the other portions of the statute, which have repeatedly changed over time, the time limit has provided for enforceability for two years since its inception over 50 years ago.<sup>80</sup>

*B. Geographic Listing Requirement—Specifying Parishes, Municipalities, or Parts Thereof*

The statute also requires noncompete agreements to be limited by geography to some “specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein.”<sup>81</sup> This language can properly be characterized in two ways: (1) as a drafting requirement, in that it requires the parishes, municipalities, and parts to be “specified” within the agreement itself, and (2) as a substantive limit, requiring that noncompetes be limited in enforcement to parishes where the

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77. LA. REV. STAT. ANN. § 23:921 (Supp. 2015). Working as an employee in an existing business similar to the employer constitutes “carrying on or engaging in” that business as per Subpart D of the statute passed in 2003. *Id.* § 23:921(D). See discussion *supra* Part I.B.5.

78. LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015). The question of whether a court would nullify an entire agreement or simply shorten the enforceability to two years if an agreement provides for a longer period of time has not been answered in Louisiana.

79. Act No. 104, 1962 La. Acts 251–52.

80. *Id.*

81. LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015).

first employer actually “carries on a like business therein.”<sup>82</sup> Whereas the second requirement mandates an assessment of where an employer actually does business and the nature of that business,<sup>83</sup> the first requirement is amenable to mere careful drafting.

*1. Generally—Listing Political Subdivisions Where Business Is Carried On*

The requirement that a noncompete specify a parish or parishes in which the former employee cannot compete precludes agreements that contain no geographic restrictions whatsoever.<sup>84</sup> The statute has also been interpreted to preclude agreements with geographic limitations that courts view as being so broad that they constitute no practical geographic limitation at all.<sup>85</sup> It should be

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82. *Id.* This second meaning is addressed more fully in the discussion of competition below, which incorporates the phrases “like business therein” and “carrying on or engaging in a business similar,” the two phrases that ensure that the employer and employee are trying to engage in the same type of conduct within the specified geography, into a discussion of the conduct that constitutes competition. *See* discussion *infra* Part II.C.

83. In requiring employers to list the areas in which they do business, the substantive requirement of the geographic limit gets at the basis for enforcing noncompetes in these circumstances—potential unjustified harm to employers’ businesses. If the employer does not do business in a parish, it would make no sense to restrain the former employee from doing business there, because that business would do no direct harm to the employer’s business. *See* discussion *infra* Part III.B.

84. *See, e.g., Johnson Controls, Inc. v. Guidry*, 724 F. Supp. 2d 612, 622 (W.D. La. 2010) (“Not only does the clause fail to specifically list the parishes that it covers, it also fails to reference or list any other data from which its geographical scope could be determined.”); *Action Revenue Recovery, L.L.C. v. eBusiness Grp., L.L.C.*, 17 So. 3d 999, 1003 (La. Ct. App. 2d 2009) (“The absence of the required geographic limitation is fatal to a noncompetition agreement and renders it invalid.”); *Elite Coil Tubing Solutions, L.L.C. v. Guillory*, 93 So. 3d 861, 866 (La. Ct. App. 2d 2012) (“The lack of a geographical restriction in a noncompetition agreement is fatal to the agreement and renders it invalid and unenforceable.”). The Third Circuit view differs from the other circuits. Despite the statutory language saying “specified,” the Third Circuit has found that a listing is not necessarily required to avoid nullity. *Monumental Life Ins. Co. v. Landry*, 846 So. 2d 798, 800–01 (La. Ct. App. 3d 2003). In the context of a non-solicitation agreement, however, the Third Circuit invalidated an agreement that did not specify the Parishes. *H.B. Rentals, LC v. Bledsoe*, 24 So. 3d 260, 263 (La. Ct. App. 3d 2009). Thus, it appears that there may be a split within the Third Circuit itself.

85. *See, e.g., Comet Indus., Inc. v. Lawrence*, 600 So. 2d 85, 87 (La. Ct. App. 2d 1992) (noting that the “agreement at issue purports to prohibit Lawrence from competing against Comet ‘anywhere within the continental United States,’” which is unenforceable). This type of case shades into the substantive requirement, because it might be argued that the reason such broad

noted that courts allow agreements to span multiple states, as long as they list the parishes and counties where the employer does business.<sup>86</sup> Additionally, courts have upheld agreements listing all of the parishes in the state when the employer did business in each parish.<sup>87</sup> Thus, the cases make it clear that a certain level of specificity is required.

Given this specificity requirement, agreements whereby an employee agrees not to compete within “the area in which the employer does business” are invalid as not specific enough.<sup>88</sup> The policy behind this rule seems to be one of putting the employee on notice to “know on the front end what his potential restrictions might be.”<sup>89</sup>

## 2. Caveat—Reforming Facially Overbroad Agreements

Although the general rule is that specific parishes must be listed in a noncompete, one huge caveat exists: reformation. For almost 20 years, courts have reformed geographically overbroad noncompetes.<sup>90</sup> When there is a severability clause, courts are willing to modify an agreement by enforcing the parts determined to be enforceable, rather than annulling the entire agreement.<sup>91</sup> Nationally, courts often have the ability to reform or “blue pencil,” a power most frequently used in the geographic context.<sup>92</sup> In

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restrictions were held to be invalid is only because the employer did not actually do business there.

86. *Action Revenue*, 17 So. 3d 999.

87. *See, e.g., Vartech Sys., Inc. v. Hayden*, 951 So. 2d 247, 258 (La. Ct. App. 1st 2006).

88. *See, e.g., Aon Risk Servs. of La., Inc. v. Ryan*, 807 So. 2d 1058, 1062 (La. Ct. App. 4th 2002); *Lobrano v. C. H. Robinson Worldwide Inc.*, No. 10-CV-1775, 2011 WL 52602, at \*7 (W.D. La. Jan. 7, 2011).

89. *Aon Risk*, 807 So. 2d at 1062.

90. *See AMCOM of La., Inc. v. Battson*, 666 So. 2d 1227, 1229 (La. Ct. App. 2d), *rev'd*, 670 So. 2d 1223 (La. 1996) (mem.) (overruling the Second Circuit’s refusal to allow reformation).

91. Nationally, this practice is generally referred to as “blue penciling” the agreement. *See, e.g., Advance Tech. Consultants, Inc. v. Roadtrac*, 551 S.E.2d 735, 737 (Ga. Ct. App. 2001); Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 681–89 (2008) (discussing the three different approaches taken nationally to blue penciling).

92. Part of the reason more time limitations are not blue-penciled is the fact that if a time limit were removed it would make the agreement broader and many courts do not rewrite agreements. Instead, courts simply strike offending terms. Thus, even after removing the offending term—the time limit—the agreement is still unenforceable. *See Joy v. Hay Group, Inc.*, No. 02-C-4989,

Louisiana, all reported cases of reformation occurred in the context of noncompetes that contained overbroad geographic limits.<sup>93</sup> Although the permissibility of reforming agreements was once a contentious issue in Louisiana,<sup>94</sup> it seems that the idea of reformation is no longer controversial, and courts will engage in it when the agreement contains a severability clause, also known as a savings clause.<sup>95</sup>

The Louisiana Supreme Court first addressed the issue of reformation, albeit in a cursory fashion, in *AMCOM v. Battson*.<sup>96</sup> The trial court reformed a radio station's noncompete agreement with its former employee that specified a 75-mile radius within which the employee could not compete.<sup>97</sup> The trial court found that the geographic constraint was overbroad and reformed the agreement by only enforcing the restriction in parishes where the radio station actually competed.<sup>98</sup> On appeal, the Second Circuit reversed and rendered judgment for the former employee, holding that reformation of noncompete agreements is not permissible under the statute, declaring that the invalidity of one clause rendered the entire agreement unenforceable.<sup>99</sup> The Supreme Court

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2003 WL 22118930, at \*10 (N.D. Ill. Sept. 11, 2003) (“While many courts decide to apply the blue pencil doctrine and slightly modify agreements that are overly broad, courts generally try to stay away from rewriting agreements or make drastic modifications . . . .”); *see also* Garrison & Wendt, *supra* note 11, at 119.

93. This author's search for Louisiana cases on the subject revealed no broader use of reformation than on geographic restrictions. Perhaps part of the reason for this limit is that this type of reformation is the only type that has been specifically approved by the Louisiana Supreme Court. *See AMCOM*, 670 So. 2d at 1223; *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 808 So. 2d 294, 308 (La. 2001).

94. *See Lyon, supra* note 21, at 624–25.

95. *SWAT 24*, 808 So. 2d at 309 (noting that the court, because there was a severability clause, would sever the agreement from the unenforceable section). *But see* *L & B Transp., L.L.C. v. Beech*, 568 F. Supp. 2d 689, 698 (M.D. La. 2008) (stating that it would follow the “majority line of jurisprudence which does not support reformation of the non-compete provision in this case,” even though there was a savings clause).

96. *AMCOM*, 670 So. 2d at 1223.

97. *See id.*; *AMCOM of La., Inc. v. Battson*, 666 So. 2d 1227, 1227, 1229 (La. Ct. App. 2d), *rev'd*, 670 So. 2d 1223 (La. 1996) (mem.). Although this case took place before some of the changes to the law noted in Part I.B, the subsequent changes do not affect the analysis of reformation under *AMCOM*. *See J & S Res., L.L.C. v. R-4, L.L.C.*, 63 So. 3d 393, 395 (La. Ct. App. 3d 2011) (refusing to reform the agreement due to the absence of a severability clause therein).

98. *AMCOM*, 666 So. 2d at 1227, 1229.

99. *Id.* at 1229.

granted writs, reversed the Court of Appeal, and reinstated the judgment of the trial court in a two-sentence opinion.<sup>100</sup> Accordingly, reformation is permissible under the statute.

Since *AMCOM*, courts have continued to recite the rule that an invalid noncompete will be reformed if it contains a severability clause and it is enforceable without the violating term.<sup>101</sup> In *SWAT 24*, the 2001 opinion that still seems authoritative on issues not touched by the 2003 contrary legislation,<sup>102</sup> including reformation, the Court reiterated that reformation is indeed possible under *AMCOM*.<sup>103</sup> After deciding that the agreement in the case was overly broad, the *SWAT 24* Court discussed *AMCOM* and the principle of reformation.<sup>104</sup> The Court stated that it approved of the reformation in *AMCOM* because “the severability clause did not require a court to reform, redraft, or create a new agreement. It required only that the offending portion of the agreement be severed.”<sup>105</sup> The Court in *SWAT 24* emphasized that the agreement in *AMCOM* included a specific list of parishes along with the overbroad 75-mile radius term.<sup>106</sup> Thus, courts will not

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100. See *AMCOM*, 670 So. 2d at 1223 (“Judgment of the court of appeal is reversed. Judgment of the trial court is reinstated.”).

101. See *Vartech Sys., Inc. v. Hayden*, 951 So. 2d 247, 257 (La. Ct. App. 1st 2006) (a severability clause “makes it possible to excise the offending language from the non-compete clause without doing undue damage to the remainder of the provision”); *J & S Res., L.L.C.*, 63 So. 3d at 395 (refusing to reform the agreement due to a lack of clear intent of the parties to enforce anyway by way of a severability clause).

102. *Elite Coil Tubing Solutions, L.L.C. v. Guillory*, 93 So. 3d 861, 866 (La. Ct. App. 2d 2012) (citing *SWAT 24* for statements of rules of interpretation even though this case applied post-2003 amendment law); *W. Carroll Health Sys., L.L.C. v. Tilmmon*, 92 So. 3d 1131, 1136 (La. Ct. App. 2d 2012) (citing *SWAT 24* despite applying post-2003 amendment law). See discussion *supra* Part I.B.5.

103. *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 808 So. 2d 294, 308–09 (La. 2001) (citing *AMCOM*, 670 So. 2d at 1223).

104. See *id.* at 308.

105. *Id.* Even though the Court reformed the agreement, the employer still failed in its attempt to enforce the noncompete. The Court went on to find that after reformation, “there [was] nothing in the language of the Agreement that [would] be construed to prohibit the conduct of which SWAT complains.” *Id.* at 309. This was because of the Court’s interpretation that the statute did not allow restriction of employees going to existing competitors. *Id.* at 307. See discussion *supra* Part I.B.4. Because of its legal interpretation that the exceptions only allowed restraint of employees who left for their *own* business, rather than that of an existing competitor, the Court found that its reformation of the agreement did not render it enforceable against the employee. The reformed agreement did not cover the employee’s activity under the law as interpreted by *SWAT 24* because he had gone to work for an existing competitor.

106. *SWAT 24*, 808 So. 2d at 309. The idea of reformation discussed above is closely related to the listing of locales requirement discussed in Part II.B.1, *supra*, as the inclusion of a specific list along with a severability clause would likely save an agreement from annulment if it were found that an employer did

rewrite an agreement, but if the agreement contains, for example, one clause precluding competition throughout the entire state and a separate clause listing parishes in which the employer actually does business, courts will likely enforce the noncompete to the extent of the listed parishes, but not throughout the entire state.

*C. Competition—How Much Is Enough to Carry on a Like Business Therein?*

The third requirement of the statute is essentially that there be competition between the former employer and employee.<sup>107</sup> Although the statute does not use the word “competition,” it is necessarily required because of the nature of noncompetes, which can only be breached by actual conduct. In the language of the statute, an employee may agree to “refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer” for the specified period of time within the specified area “so long as the employer carries on a like business therein.”<sup>108</sup> The jurisprudence is by no means clear on the meaning of the phrases “carrying on or engaging in a business similar” and “a like business therein” as they relate to this competition requirement.<sup>109</sup> Some of this underdevelopment in the jurisprudence is due to the posture of many of the cases that reach the appellate level,<sup>110</sup> which are appealed at preliminary stages that do not lend themselves to in-depth factual analysis.<sup>111</sup>

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not carry on a like business therein or that there was also included an overbroad geographic term, such as a catch-all.

107. LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015). The competition requirement is based on two phrases in the statute: “carrying on or engaging in a business similar” and “employer carries on a like business therein.” *Id.*

108. *Id.* The statutory language has two terms under the employee prong—both “carrying on” and “engaging in”—but only one, “carry on,” under the employer prong. *See id.* This Comment does not draw a sharp distinction between these two prongs.

109. *See* discussion *infra* Part III.B.

110. *See, e.g.,* H2O Hair, Inc. v. Marquette, 960 So. 2d 250 (La. Ct. App. 5th 2007) (preliminary injunction); Elite Coil Tubing Solutions, L.L.C. v. Guillory, 93 So. 3d 861, 867 (La. Ct. App. 2d 2012) (summary judgment). Under the Louisiana Code of Civil Procedure, any judgment, either granting or denying, a preliminary injunction is appealable as of right immediately. LA. CODE CIV. PROC. art. 3612 (2015). The granting of a motion for summary judgment also qualifies for immediate appeal as of right, with denials reviewable by discretionary supervisory writ or after a final judgment. LA. CODE CIV. PROC. arts. 2083, 1915 (2015).

111. These procedural postures might mean that facts relevant to the determination of whether a company “carries on a like business therein” have



*Elite Coil Tubing Solutions, L.L.C v. Guillory*, a Louisiana Second Circuit Court of Appeal decision, provides some guidance on the possible requirements for finding that an employer carries on a like business therein.<sup>112</sup> The court affirmed the trial court's finding of unenforceability of a noncompete based on its failure to specify parishes and to "produce factual support in opposition to [the employer's] motion to establish that it could satisfy its evidentiary burden to enforce the clause."<sup>113</sup> Although the court ultimately found that the 200-mile-radius geographic restriction was unenforceable because it did not list specific parishes as required by the statute, the court noted in dicta that even if the geographic listing were permissible, "[t]here was no evidence presented demonstrating how [the employer] 'carrie[d] on' its business throughout the 200-mile area which is the essential statutory test for establishing a geographical limit in the first place."<sup>114</sup> This indication that the plaintiff did not meet its burden of proving its

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not been sufficiently developed by a fact-finder at the trial court level, have not yet been discovered, or are not discussed by the appellate court because the standard of review does not require such discussion. In one case, the Court of Appeal noted that "the record contain[ed] very little summary judgment evidence detailing the nature of [the employer's] business." *Elite Coil Tubing*, 93 So. 3d at 867.

Another problem with these differing procedural postures and their review is the differing burdens of proof. In reviewing a preliminary injunction, a court can rely on the employee's failure to present evidence to show that, for example, the 64-parish restriction was overly broad. *Vartech Sys., Inc. v. Hayden*, 951 So. 2d 247, 258–59 (La. Ct. App. 1st 2006) ("The defendants asserted this specification was overly broad, in that it included parishes in which VarTech did not do business, but they failed to offer any proof to show that the specification made by VarTech in its agreements was invalid."). On the other hand, when summary judgment has been granted to the employer and the plaintiff employer is "required to produce evidence sufficient to establish that it [would] be able to satisfy its evidentiary burden of proof at trial," a court might find, as the Second Circuit did in *Elite Coil Tubing*, that the employer "failed in its opposition to defendants' motion." *Elite Coil Tubing*, 93 So. 3d at 867. This holding was based on a finding that the plaintiff did not plead or present evidence of its competition within the restricted area. *Id.*

One factor that possibly contributes to the lack of jurisprudential development may be that employee defendants have not often contested this issue in the past, possibly because they actually were competing in the listed geography. However, one issue with the rise of the communication and the Internet-age is that some companies might contact an area once rather than repeatedly, raising the question of whether they are actually "carr[ying] on a like business therein." LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015). Thus, the issue of whether there was competition may be contested much more frequently.

112. *Elite Coil Tubing*, 93 So. 3d at 861.

113. *Id.* at 862.

114. *Id.* at 867.

activity in the listed area signals that an employer must provide some evidence of its activity in the geographic area specified in the agreement in order to enforce the noncompete.<sup>115</sup>

Although the *Elite Coil Tubing* case indicates that some facts are required to meet the statutory requirement that an employer carry on a like business in the places listed, it does not speak to what activities constitute such conduct. However, another case, *H2O Hair, Inc. v. Marquette*, does provide some guidance on the issue.<sup>116</sup> The Louisiana Fifth Circuit affirmed a lower court's "finding that [an employer] d[id] business in Orleans Parish for purposes of the non-competition agreement" because a "substantial portion of [the employer's] customers [we]re residents of Orleans Parish, and that [employer's] solicitation of customers in Orleans Parish via advertising and other means [wa]s integral to its business."<sup>117</sup> Though it does not establish a minimum threshold for "carrying on" under the statute, the fact that it was important in this case that a substantial portion of the employer's customers were residents of the parish at issue indicates that there is probably some lower threshold at which the number of customers in a parish is too few to constitute carrying on a like business therein.<sup>118</sup>

One recent Second Circuit case provides additional insight into several facets of the competition requirement and possibly gives rise to a split in authority. In *West Carroll Health Systems, L.L.C. v. Tilmon*, the court made three points in analyzing a trial court judgment that granted an injunction enforcing a noncompete between a hospital and its former employee who worked as a physician assistant.<sup>119</sup> The first of these points is that the language of the statute, "carrying on" a "business,"<sup>120</sup> "allows for the employer to demonstrate significant business activity which might be competitively impacted in a parish outside of the location where the employee worked."<sup>121</sup> The court stated that the reason the statute allows for enforcement of this nature is because of the "statutory history . . . and the nature of commercial business

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115. The employer had the burden to respond to the summary judgment motion by the employee. *Id.* This requirement of proof should apply equally to a trial on the merits, since the plaintiff employer would have the burden of proving its case.

116. *H2O Hair, Inc. v. Marquette*, 960 So. 2d 250 (La. Ct. App. 5th 2007).

117. *Id.* at 259–60.

118. *Id.*

119. *W. Carroll Health Sys., L.L.C. v. Tilmon*, 92 So. 3d 1131, 1132 (La. Ct. App. 2d 2012).

120. LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015).

121. *Tilmon*, 92 So. 3d at 1137–38. *See also* LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015).

activity that generally does not abruptly end at the parish line of the principal location of a business.”<sup>122</sup> Thus, “the lack of an actual business facility in [the town where the employee was engaging in a business similar to the employer] in this case [was] not the only measure for the geographic test of the Statute.”<sup>123</sup>

Though this first point seems to support broad enforceability of noncompetes, the court limited their enforceability in other ways.<sup>124</sup> Principally, the court found that the statute required an examination of the impact on the former employer.<sup>125</sup> This second point draws from the distinction made by some courts prior to the 2003 amendment to the statute, that of owning one’s own business or working for a competitor.<sup>126</sup> In making that distinction, the court stated that when analyzing a noncompete in which the former employee starts a business, the competition requirement is met by virtue of this fact alone.<sup>127</sup> Likewise, if the former employee “becomes employed in a competing business, a dual test for the restraint is more appropriate as suggested by the ‘and’ in the legislative use of the ‘and/or’ expression.”<sup>128</sup> In these factual situations, the court stated:

It is not enough that the employee is hired in a competing business. The impact of his hiring on the former employer’s revenue from customers must be considered. Otherwise, the broad measure of the first restraint, “engaging in business,” would make the legislative use of the second restraint against “solicitation” superfluous.<sup>129</sup>

Citing its precedent, *Summit*, which was arguably overruled on the issue as a predecessor to *SWAT 24* by the 2003 amendment,<sup>130</sup>

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122. *Tilmon*, 92 So. 3d at 1137–38. See also LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015).

123. *Tilmon*, 92 So. 3d at 1137–38. Though the court speaks in terms of a “geographic test,” it is actually considering the geography in relation to the “engaging in” requirement.

124. Despite finding that the listing of that parish was allowed, the court eventually found that the facts did not support enforcing the agreement here. *Id.* at 1141.

125. *Id.* at 1139.

126. This case does not represent a complete reversion to the prior rule whereby noncompetes could only be enforced when ex-employees started their own businesses. It does, however, rely on a distinction that was probably erased from the statute by the 2003 amendment. See discussion *supra* Part I.B.4.

127. *Tilmon*, 92 So. 3d at 1139.

128. *Id.*

129. *Id.*

130. *Summit Inst. for Pulmonary Med. & Rehab., Inc. v. Prouty*, 691 So. 2d 1384 (La. Ct. App. 2d 1997). This case was one that agreed with the later Supreme Court case *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 808 So. 2d 294

the Second Circuit found that when dealing with an ex-employee who goes to work for an existing competitor rather than starting a business of his or her own, a dual test applies, which is essentially a test that also considers the impact on the employer.<sup>131</sup> The court acknowledged the 2003 amendment, seeming to read the amendment narrowly by calling it a “clarification after the *SWAT 24* ruling.”<sup>132</sup> The court stated that this “clarification” by the Legislature did not alter its concern stated in *Summit* “that the employer’s restraint over its former employee should be shown to

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(La. 2001), which was legislatively overruled. *See supra* Part I.B.3–5. The Second Circuit in *Summit* found that section 23:921(C) covered only instances in which the former employee opened his own business or, if he joined an existing competitor, solicited the former employer’s customers. *See Summit*, 691 So. 2d at 1387. Thus, just like *SWAT 24*, the court found that the statute could not be invoked to prevent an employee from joining another firm and simply competing for business. *Id.* And just as it did in *SWAT 24*, the 2003 amendment adding subpart (D) to the statute overruled that holding. *See Act No. 428, 2003 La. Acts 1791* (“For the purposes of Subsections B and C, a person who becomes employed by a competing business, regardless of whether or not that person is an owner or equity interest holder of that competing business, may be deemed to be carrying on or engaging in a business similar to that of the party having a contractual right to prevent that person from competing.”); *see also supra* Part I.B.3–5 and accompanying notes. For an in-depth analysis of the jurisprudence leading up to *SWAT 24*, see Terrell, *supra* note 57, at 716.

131. *Tilmon*, 92 So. 3d at 1139. The court supported its bifurcation with the following:

The two categories of the employee’s re-employment, now express in Subsection D, have significant differences in their impacts on the former employer’s business. If the employee commences a similar business as owner, that “like” business is a competitive force regardless of the employee’s actual role in the business. Whether or not the employee is actively participating in his new venture in a manner similar to his services in his former employment, the new business itself can competitively harm his prior employer. The same is not necessarily true if the employee becomes employed in a competing business. The new employer may have long operated as a competitor business of the former employer. The measure of the employee’s impact in that competitor business upon the former employer’s customers, goodwill, revenues or other business interest, as suggested by the Statute’s specific customer solicitation concern, remains the employer’s burden in seeking injunctive relief. This is a reasonable interpretation of the allowance given the employer to temporarily restrain its employee under Subsection C in view of the strong general prohibition against restraints on a person’s livelihood.

*Id.* at 1140.

132. *Id.* Interestingly, a different panel of the same circuit court stated in 2010 that the amendment was in fact a legislative overruling of *SWAT 24*. *See Green Clinic, L.L.C. v. Finley*, 30 So. 3d 1094, 1098 (La. Ct. App. 2d 2010).

promote and protect a ‘reasonable economic goal’ or business interest of the employer.”<sup>133</sup>

Using this impact analysis,<sup>134</sup> the court made its third major point concerning the issue of what actually constitutes “carrying on” or “engaging in” competition by the former employee.<sup>135</sup> Applying its impact analysis to the facts of the case, the court first noted that “[the former employee’s] employment alone in the ‘specified’ parish . . . [wa]s not dispositive.”<sup>136</sup> The court then reversed the lower court’s injunction, finding that the hospital had not met its burden of proof because “the evidence of [the former employee’s] one-day employment at [another] clinic [wa]s not sufficient to demonstrate any injury or potential injury to [the hospital’s] client base.”<sup>137</sup> Because the employer had not shown “its need to secure a reasonable economic goal or business interest and prevent its injury by the injunction sought against [the former employee’s] limited action” in the listed parish, the noncompete did not bind the employee’s activity.<sup>138</sup> Thus it seems that, at least sometimes, short-term employment with a competitor does not constitute carrying on or engaging in a business similar to the former employer.

This case demonstrates a possible shift since 2003 in the courts’ interpretation of section 23:921. Much of the language used in the opinion reflects a level of nuance in the analysis of noncompetition agreements that is not often utilized in Louisiana noncompete cases.<sup>139</sup> This case adds to the confusion of the jurisprudence, with some cases finding the competition requirement met by virtue of being located in a listed area,<sup>140</sup> others examining the actions of the former employer to some extent,<sup>141</sup> and the *Tilmon* court using an impact analysis when a former employee goes to work for a

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133. *Tilmon*, 92 So. 3d at 1140.

134. Because the test the court used here is based on the employee’s impact on the former employer, this Comment will refer to the dual test as an impact analysis.

135. *Tilmon*, 92 So. 3d at 1140.

136. *Id.*

137. *Id.* at 1141.

138. *Id.*

139. See generally *Vartech Sys., Inc. v. Hayden*, 951 So. 2d 247 (La. Ct. App. 1st 2006).

140. See *id.* at 258 (“However, the statute contemplates that the parishes specified in the agreement must be parishes where the ex-employer actually has a location or customers. Employers are not permitted to lock former employees out of markets in which the employer does not operate.”).

141. See *Elite Coil Tubing Solutions, L.L.C. v. Guillory*, 93 So. 3d 861, 867 (La. Ct. App. 2d 2012).

competitor.<sup>142</sup> If the reasoning and rule from *Tilmon*,<sup>143</sup> or even the reasoning from *Elite Coil Tubing*,<sup>144</sup> spreads to other circuits, the Louisiana Supreme Court might step in to provide guidance as to the proper analysis of the competition requirement.

### III. SQUARE PEG IN A ROUND HOLE—FLAWS IN LOUISIANA’S APPROACH AS APPLIED TO INTERNET-INTENSIVE BUSINESSES

The problems of ambiguity in the judicial interpretation of the noncompete statute’s competition requirement along with the mechanical nature of the two-year time limit have been exacerbated by the advent of the Internet age.<sup>145</sup> In the context of Internet-intensive business, Louisiana’s noncompete statute fails to properly balance the interests of the employer, the employee, and the public in its enforcement of noncompete agreements.

#### *A. The Clock Stopped in 1962, But Time Does Not Stand Still on the Internet*

In 1962, the Louisiana Legislature attempted to make the fact-intensive judgment call of temporal reasonableness by a priori rule.<sup>146</sup> Though the time-limit rule is intended to increase predictability,<sup>147</sup> it has become arbitrary and detached from practical reality. When passed a half century ago, the two-year rule arguably reflected a world in which business changed at a slower pace due to its traditional brick-and-mortar form.<sup>148</sup> The two-year

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142. See *Tilmon*, 92 So. 3d at 1140. It should be noted that *Elite Coil Tubing* was decided by the same circuit, the Second, after the decision in *Tilmon*. See generally *Elite Coil Tubing*, 93 So. 3d at 867. In fact, Judge Caraway wrote the opinion in both cases, albeit while sitting on different panels. See generally *id.*; *Tilmon*, 92 So. 3d 1131.

143. See 92 So. 3d 1131. The Supreme Court denied writs in *Tilmon*. See 99 So. 3d 665 (mem.) (La. 2012).

144. See 93 So. 3d 861.

145. Changes to the modern business world both directly and indirectly caused by the rise of the Internet have greatly affected the equities involved in the enforcement of noncompetes in most areas of society. This is because of the Internet’s vast impact on all facets of society, and all workplaces. Cf. Stone, *supra* note 5, at 732.

146. Act No. 104, 1962 La. Acts 251–52.

147. Indeed, employers know exactly how long they can restrain employees and can be assured that their putting two years in a noncompete will not be a problem. See discussion *supra* Part II.A.

148. See Stone, *supra* note 5, at 725 (“Our labor and employment laws have been constructed on the basis of a view of the employment relationship that saw the employment relationship as a long-term relationship between a firm and an employee in which the employer gave the worker an implicit promise of lifetime

limit, however, no longer reflects the contemporary pace of business practices. Even when the statute was revised in 1989,<sup>149</sup> despite the existence of desktop computers and early versions of the Internet, circumstances were much different than they are today in terms of business realities.<sup>150</sup> This two-year rule, while providing a very bright line, creates unfair results, not only in the context of Internet-intensive business, but also for all business models today.<sup>151</sup>

In terms of business realities, employment markets have changed drastically because of connectivity and other factors related to technology.<sup>152</sup> For instance, lifetime employment with one company is less likely in the information age.<sup>153</sup> Also, employment models have shifted from vertical ladders to horizontal, or lateral, employee movement between and among employers.<sup>154</sup> These developments contribute to the onerous nature of a two-year ban from working in an area; unlike in the past where job security was much more commonplace and more fixed “ladders” of advancement were in place within companies,<sup>155</sup> today’s business environment requires flexibility on the part of employers.<sup>156</sup> When the two-year limit was first put in place, these fast-paced changes in employment were much less likely to occur, such that employers had a greater interest in protecting their investments in human capital made over time with the expectation that employees would be there to return on those investments for years to come.<sup>157</sup>

At least one court has found that the changing business realities of the Internet should have some effect on the length of time for which noncompetes are enforceable.<sup>158</sup> This New York case, where the employee was a company executive for a website operator,

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job security and opportunities for promotion along clearly-defined job ladders.”).

149. See discussion *supra* Part I.B.3–5.

150. See Stone, *supra* note 5, at 732 (pointing out the vast changes recently caused by decentralization in the workplace); Dau-Schmidt, *supra* note 5, at 11. This argument does not apply to the competition ambiguity problem with the current law, because that problem is not caused by so inflexible a rule as an arbitrary number that cannot adjust with changing times.

151. See Stone, *supra* note 5, at 732; Dau-Schmidt, *supra* note 5, at 11.

152. See Dau-Schmidt, *supra* note 5, at 11.

153. See *id.*

154. See Stone, *supra* note 5, at 732.

155. See *id.* at 725.

156. See *id.* at 732.

157. See *id.*

158. *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999).

found that “the one-year duration of [an Internet company’s] restrictive covenant [was] too long given the dynamic nature of this industry, its lack of geographical borders, and [the executive’s] former cutting-edge position with [the company] where his success depended on keeping abreast of daily changes in content on the Internet.”<sup>159</sup> Thus, even though at least one jurisdiction has recognized that Internet-intensive business requires a somewhat different calculus,<sup>160</sup> Louisiana courts have been hamstrung by the inflexibility of Revised Statutes section 23:921 as currently drafted. In the situation of the hypothetical graphic designer, Charlie, a Louisiana court would be required to enforce the agreement for the full two years despite the possibility that its utility might wane to such an extent over that time that it would no longer make sense to enforce it.<sup>161</sup>

*B. Carrying on and Engaging in Ambiguity—The Competition Requirement*

The most troubling issue presented by Louisiana noncompete law is the question of what constitutes competition within a listed geographical area. Revised Statutes section 23:921(C) requires both that the employee be “carrying on or engaging in a business similar” to the employer and that the employer “carr[y] on a like business” in the listed geographical area.<sup>162</sup> This issue creates complexities relating to both competition and the geographical specification requirements. One gap in current law and business practice is that Internet-intensive businesses naturally are more widely dispersed than traditional businesses.<sup>163</sup> Thus, because of the decentralizing effects of Internet advertising and other Internet-

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159. *Id.*

160. *See id.*; Stone, *supra* note 5, at 732; Mann & Roberts, *supra* note 4, at 339; Jason S. Wood, *A Comparison of the Enforceability of Covenants Not to Compete and Recent Economic Histories of Four High Technology Regions*, 5 VA. J.L. & TECH. 14 (2000); DoubleClick Inc. v. Henderson, No. 116914/97, 1997 WL 731413, at \*8 (N.Y. Sup. Ct. Nov. 7, 1997) (“Moreover, the one-year period sought by plaintiff is too long. Given the speed with which the Internet advertising industry apparently changes, defendants’ knowledge of DoubleClick’s operation will likely lose value to such a degree that the purpose of a preliminary injunction will have evaporated before the year is up. Accordingly, the preliminary injunction issued below shall expire after six months from the date of this opinion. Plaintiff may for good cause move to extend the life of the preliminary injunction.”).

161. This assertion assumes that the agreement meets the other requirements of the statute.

162. LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015).

163. Mann & Roberts, *supra* note 4, at 339 (discussing Nat’l Bus. Servs., Inc. v. Wright, 2 F.2d 701 (E.D. Pa. 1998)).



based communication networks, there is an argument that noncompetes are under-enforced with respect to breadth of permissible geography.<sup>164</sup>

Although some aspects of current Internet-intensive business practice might militate toward broader geographic restrictions, at other times the statute as currently applied can over-enforce noncompetes in light of modern considerations. For example, if Charlie had a single customer in one of the parishes listed in the noncompete, the entire noncompetition agreement may be enforceable solely based on that one customer, regardless of whether Charlie took the customer from his former employer and despite the fact that most of his business comes from outside of the restricted area.<sup>165</sup> Even worse, some courts may even go so far as to enforce the noncompete in the original hypothetical, where Charlie has no customers in the restricted parishes at all, but only works out of his home in that parish. Such stringent enforcement, without regard for whether the employee is trying to compete against the former employer, is inequitable, because the employee is not harming the former employer.<sup>166</sup> The problem is that there is simply no clarity as to how the law would deal with this situation.<sup>167</sup>

Another problem is that the current law, although setting out some basic rules, makes no allowances for Internet-intensive

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164. See discussion *supra* Part II.B.

165. See discussion *supra* Part II.C.

166. See *Competition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/competition>, archived at <http://perma.cc/G8B9-8SXT> (last visited Feb. 22, 2015) (defining competition as “the act or process of trying to get or win something (such as a prize or a higher level of success) that someone else is also trying to get or win : the act or process of competing”).

167. This lack of clarity is partly because cases have not come before appellate courts in the proper posture to easily consider the deeper factual issue of competition and partly because appellate courts are not sufficiently considering the facts of the cases. See discussion *supra* Part II.C. By the time a case has reached the summary judgment stage—the posture of many of these appeals—discovery has been completed and there is evidence in the record that each party points to in supporting his or her respective side. LA. CODE CIV. PROC. art. 966(B)(2) (2015) (discussing support for motions, taking form of “pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any”). With respect to the preliminary injunction hearing, certain facts are being found in the plaintiff’s *prima facie* case for a preliminary injunction, especially with regard to the likelihood of success on the merits. *VarTech Sys., Inc. v. Hayden*, 951 So. 2d 247, 261 (La. Ct. App. 1st 2006) (“Accordingly, based on the trial court’s finding, [employer] was entitled to a preliminary injunction prohibiting the defendants from carrying on or engaging in a business similar to that of VarTech in all 64 parishes of this state.”). It is problematic that more of these facts are not specifically addressed at the appellate level to provide guidance to litigants, contract drafters, and future courts on what constitutes competition in a listed geographical area.

companies and other businesses where geography is a secondary consideration or is altogether irrelevant. For example, take the idea that a “substantial portion” of customers in one area constituted competition in *H2O Hair*.<sup>168</sup> For an Internet-intensive business, even this seemingly simple inquiry is difficult to apply. In many online businesses, a substantial portion of customers might not live in any one area, but rather, the business might have one customer in every parish in the state. The interests of the ex-employer, much less the public or the employee, are not advanced by precluding someone from transacting business in areas that would not affect the employer, even if the person’s company is headquartered in the same location. The underlying problem is that the basic assumptions about the purposes of noncompetes and the policies behind them completely break down in this context.<sup>169</sup>

There are strong policies against allowing enforcement of noncompetes in areas where a company does very little business, which might be everywhere at once for an Internet-intensive business. The policy of personal freedom has long weighed against noncompete enforcement,<sup>170</sup> and it is more likely to override the business concerns at stake when there is a lower chance of impact on the former employer, which is the case when an entity does not conduct much business in an area. Relatedly, the person would be essentially jobless if it were found that a company did business everywhere such that a noncompete with that employer would be enforceable everywhere. Another policy is economic growth. One commentator, in comparing California’s Silicon Valley with technology areas in Massachusetts, points out that one key distinction between the areas is how each state treats the enforceability of noncompetes.<sup>171</sup> This distinction, the commentator argues, has contributed to a pro-mobility culture in Silicon Valley, where noncompetes are not enforceable at all, and a concomitant lack of such mobility in Massachusetts high-tech areas, where noncompetes are used “to prevent . . . employees from jumping ship.”<sup>172</sup> Some have argued that this difference in employee mobility is part of what

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168. *H2O Hair, Inc. v. Marquette*, 960 So. 2d 250, 259–60 (La. Ct. App. 5th 2007).

169. Cf. Xuan-Thao N. Nguyen, *Shifting the Paradigm in E-Commerce: Move Over Inherently Distinctive Trademarks—The E-Brand, I-Brand and Generic Domain Names Ascending To Power?*, 50 AM. U. L. REV. 937, 949–50 (2001).

170. Duncan, *supra* note 23, at 99 (noting the spirit of “free labor”).

171. Wood, *supra* note 160, at 14.

172. *Id.*

has made Silicon Valley so successful.<sup>173</sup> It makes sense that lack of employee mobility is dangerous for the economy in the area of Internet-intensive business because of the dynamic and creative nature of those businesses.<sup>174</sup>

These problems, though exacerbated by the explosion of Internet-based and Internet-reliant business, are not new. In fact, the Louisiana Supreme Court in *AMCOM* in 1996 arguably recognized that Louisiana's noncompete statute is a poor fit for some real-world business situations.<sup>175</sup> The Court may have realized that it made sense to enforce the agreement in terms other than parishes, since the employer was a radio station trying to protect its broadcast range.<sup>176</sup> This is analogous to the problem present with many Internet-intensive companies, where the statutory yardstick of competition does not match the realities of doing business, illustrating some of the reasons why fairness might dictate enforcement based on measures other than geography.<sup>177</sup> Additionally, the longstanding lack of clarity with respect to the factual issue of what constitutes competition under the statute is not new either.<sup>178</sup> However, it tends to create more problems in the area of Internet-intensive business because of the lack of clear geographic delineation when acting over the Internet.<sup>179</sup> Because

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173. See, e.g., *id.*; Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 578 (1999) (arguing that differences in the legal infrastructure of Silicon Valley in California and Route 128 in Massachusetts provide an explanation for the different levels of success of each of these areas).

174. See *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299 (S.D.N.Y. 1999).

175. See *AMCOM of La., Inc. v. Battson*, 670 So. 2d 1223 (La. 1996) (mem.). Although the Louisiana Supreme Court did not specifically make this statement, since it did not issue an opinion, it can be inferred from the fact that it reinstated the trial court's injunctive order enforcing the noncompete despite the appellate court's reversal. See *id.*

176. *AMCOM of La., Inc. v. Battson*, 666 So. 2d 1227, 1229 (La. Ct. App. 2d), *rev'd*, 670 So. 2d 1223 (La. 1996) (mem.) (noting the 75-mile restriction). Since there is no data on the type of broadcaster used here, it is impossible to determine the actual broadcast range.

177. This is not to say that noncompetes should generally be more broadly enforced. This simply provides an example of the court's recognition that the statute makes it difficult to properly balance the interests at stake in each individual case.

178. See discussion *supra* Part II.C.

179. See, e.g., *Shrader v. Biddinger*, 633 F.3d 1235, 1240 (10th Cir. 2011). In the context of a personal jurisdiction analysis, the court stated that "[t]he basic problem with relating such activities directly to the general principles developed pre-internet is that, in a sense, the internet operates 'in' every state regardless of where the user is physically located, potentially rendering the territorial limits of personal jurisdiction meaningless." *Id.*

of the inequity of the time requirement allowing noncompetes to restrain former employees for two years, the ambiguity of what constitutes competition, and the tacit acknowledgement by the Louisiana Supreme Court in *AMCOM* that the statute and jurisprudence does not always reach fair results, a more workable formulation of Louisiana's noncompete law is necessary.

#### IV. A COORDINATED EFFORT—LOUISIANA'S SOLUTION FOR THE NEW ECONOMY

Two paths to greater coherency in Louisiana noncompete law would ameliorate or completely eliminate the main problem areas highlighted in this Comment: action by the courts and by the Legislature. With respect to the ambiguity in the statute as to what constitutes competition, the courts should give full meaning to the phrases “carrying on or engaging in” and “carr[ying] on a like business therein” by inquiring into the impact of the former employee's conduct on the former employer to determine whether the former employee's conduct actually constituted competition. In explicating this definition, the appellate courts should provide fuller factual analysis of the conduct at issue in each case in order to guide future cases. With respect to the unfairness of restraining employees for two full years, the Legislature should amend the statute to allow enforcement of noncompetes for a reasonable time up to two years. Although these two proposals are both necessary for proper balancing of noncompete policy in Louisiana, either could be implemented independently of the other.<sup>180</sup>

##### *A. Judicial Solution to Ambiguity in the Competition Requirement—Adopting an Impact Analysis*

The courts should interpret the language of the statute “carries on a like business therein” and “carrying on or engaging in”<sup>181</sup> to require a fact-specific inquiry into the impact of the former employee's conduct on the business interests of the former employer. This impact analysis should “measure . . . [the] impact . . . upon the former employer's customers, goodwill, revenues or other business interest.”<sup>182</sup> Because the judiciary might be reluctant to

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180. Action on either of these would help to a great extent. If the Legislature does not act on the time-limitation proposal, the courts would still remain free to act on the judicial interpretation of the competition requirement.

181. LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015).

182. *W. Carroll Health Sys., L.L.C. v. Tilmon*, 92 So. 3d 1131, 1140 (La. Ct. App. 2d 2012).

interpret the statute in such a way given the tennis match between courts and the Legislature over the statute, this Comment also proposes a legislative change to the same effect, if the judiciary fails to act.

In the context of Internet-intensive business,<sup>183</sup> such a rule would provide more clarity in the long term because of the ability of courts to delineate what constitutes competition within a parish. In applying the proposed rule to Internet-intensive business, being “within the parish” requires more than just being located there and instead requires some material impact on a legitimate business interest in that location. After all, the true goal of the competition requirement is to protect businesses from unjustified negative impact on customer bases, return on investment in human capital, and the employers’ most valued information.<sup>184</sup> In the context of Internet-intensive business, the impact inquiry is the clearest standard that could be applied while still being couched in geographic terms so as to provide a workable standard for both modern and more traditional businesses.

Determining whether an employer carries on business in a certain parish or whether the employee carries on or engages in business there needs greater factual development. These are, or should be, highly fact-specific and fact-intensive inquiries.<sup>185</sup> The level of impact on the former employer by the former employee’s conduct should be inherent in this fact-intensive inquiry.<sup>186</sup> This

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183. To be clear, this proposed judicial interpretation would apply to all employer–employee noncompetes under section 23:921. Indeed, one court has examined the impact and made a fact-specific analysis similar to that proposed here, even though it was not an Internet business case. *See generally Tilmon*, 92 So. 3d 1131; *see also* discussion *supra* Part II.C. However, Internet-intensive business provides a fitting example for why the change is necessary. In the context of traditional business, this interpretation would not have precluded enforcement of any noncompetes actually breached under the terms of the statute.

184. *See supra* Part II.C; Stone, *supra* note 5, at 737.

185. *See* SWAT 24 Shreveport Bossier, Inc. v. Bond, 808 So. 2d 294, 314 (La. 2001) (Traylor, J., dissenting). Although part of the reason that factual inquiries are somewhat underdeveloped is the procedural posture for many appeals, the courts can do more with the facts that they do have, because there is often some development at these stages. *See supra* notes 111, 167 (discussing procedural postures on appeal).

186. *See* SWAT 24, 808 So. 2d at 314 (Traylor, J. dissenting). This interpretation also fits within the often-recited requirement that the exceptions to unenforceability be interpreted narrowly. *See, e.g.,* Vartech Sys., Inc. v. Hayden, 951 So. 2d 247, 255 (La. Ct. App. 1st 2006) (“LSA–R.S. 23:921(C) is an exception to Louisiana public policy against non-compete agreements and as such, must be strictly construed.”).

view is supported by the Second Circuit's *Tilmon* decision.<sup>187</sup> In its discussion of whether there was competition sufficient to meet the "carries on" requirement of the statute, the court considered the impact of the employee's activities on the former employer's business.<sup>188</sup>

The current statutory language supports an impact analysis as the method of determining whether employers and employees are carrying on business in a certain area. The statutory language is written in present tense, with the employee's prohibited actions characterized by "carrying on or engaging in a business similar" and the employer's interest being protected "so long as [it] carries on a like business therein."<sup>189</sup> The verb *carry* appears once in the present tense, "carries," and once in the present-continuous tense, "carrying."<sup>190</sup> Both of these tenses suggest that the term requires some sort of continuing activity, such that doing something irregularly is not "carrying on" and doing something in the past, even if regularly, does not "carry on."<sup>191</sup> The other operative word here, "engaging," only appears on the employee side of the statutory analysis.<sup>192</sup> It also is written in present-continuous tense, likewise suggesting that an employee must be currently competing in order to breach the noncompete.

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187. *Tilmon*, 92 So. 3d 1131.

188. *Id.* at 1140. The court said:

The two categories of the employee's re-employment, now express in Subsection D, have significant differences in their impacts on the former employer's business. If the employee commences a similar business as owner, that "like" business is a competitive force regardless of the employee's actual role in the business. Whether or not the employee is actively participating in his new venture in a manner similar to his services in his former employment, the new business itself can competitively harm his prior employer. The same is not necessarily true if the employee becomes employed in a competing business. The new employer may have long operated as a competitor business of the former employer. The measure of the employee's impact in that competitor business upon the former employer's customers, goodwill, revenues or other business interest, as suggested by the Statute's specific customer solicitation concern, remains the employer's burden in seeking injunctive relief. This is a reasonable interpretation of the allowance given the employer to temporarily restrain its employee under Subsection C in view of the strong general prohibition against restraints on a person's livelihood.

*Id.*

189. LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015).

190. *Id.*

191. *Id.* See *Tilmon*, 92 So. 3d 1131, 1137–38; see also discussion *supra* Part II.C.

192. LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015).

In addition to suggesting that the activities must be active rather than static, the statutory language suggests that activities need to happen more than once to qualify as competition under the statute. The term *engage* means “to begin and carry on an enterprise or activity.”<sup>193</sup> Similarly, *carry on* means “to continue doing, pursuing, or operating.”<sup>194</sup> These definitions suggest some type of continuous activity, which presupposes repeated conduct. The existence of this threshold suggests examining the harm caused to the former employer in order to determine whether the employee was “engaging in” or “carrying on” business in the parish.<sup>195</sup> The fact that the Alabama statute, which is the source of the Louisiana statute, has been interpreted by the courts of that state to incorporate a reasonableness analysis lends additional support to this more flexible interpretation.<sup>196</sup>

This interpretation of the statute as requiring an impact analysis draws support from Justice Traylor’s dissent in *SWAT 24*: “A better approach to achieve the legislative intent while preserving a balance between employers and employees in the commercial marketplace would consider the words of the contract, whether the employers are competitors, and the employee’s position and its impact on the former employer.”<sup>197</sup> Justice Traylor posited that giving effect to the legislative intent, the “key factor in evaluating a[] noncompetition clause’s enforceability is the impact on the

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193. *Engage*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/engaging?show=1&t=1384184869>, archived at <http://perma.cc/4HQ4-33XM> (last visited Feb. 23, 2015).

194. *Carry on*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/carry%20on>, archived at <http://perma.cc/WCU3-7GF3> (last visited Feb. 20, 2015). The dictionary, in connection with this definition, provides “carried on the business” as an example of its use. *Id.*

195. It would be difficult to provide a workable standard that did not examine the impact the employee’s activity had on the employer without just setting an arbitrary number of repeated competitive conduct that was per se competition under the statute. This solution would be as bad as the current formulation, since it would rid the interpretation of all nuance and fact-specific inquiry.

196. See *supra* note 21. The language of the Alabama statute is remarkably similar to the current language of 23:921.

(b) One who sells the good will of a business may agree with the buyer and one who is employed as an agent, servant or employee may agree with his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a specified county, city, or part thereof so long as the buyer, or any person deriving title to the good will from him, or employer carries on a like business therein.

ALA. CODE § 8-1-1 (2002).

197. *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 808 So. 2d 294, 314 (La. 2001) (Traylor, J., dissenting).

former employer's ability to compete with the new employer."<sup>198</sup> He then proceeded to examine the facts in an effort to determine whether the defendant, the ex-employee, was actually competing with his former employer.<sup>199</sup> Though this factual review dealt with the similarity of the employee's new job to his old job,<sup>200</sup> the analysis would just as easily apply to a factual examination of the extent of competition within a parish, asking whether there was an effect on the former employer. This type of analysis would be especially helpful in the Internet context, given the indeterminacy of geography as an accurate proxy for actual competition than it might be for more traditional business.<sup>201</sup>

Past versions of section 23:921 addressed two specific business interests, the elimination of which could suggest the Legislature intended to get rid of the specific consideration of identified business interests.<sup>202</sup> However, it is more likely that the Legislature did this to overrule the narrow interpretation given by the court in *Foti*<sup>203</sup> rather than to eliminate all consideration of competitive harm.<sup>204</sup> Courts focusing on the legitimate business interests of an employer with respect to a former employee's behavior would not be reading out words in the statute as *Foti* did. Instead, this interpretation gives full effect to the legislative intent of enforcing noncompetes where it is fair to do so.<sup>205</sup>

Another counterargument is that this judicial interpretation, as with the proposed statutory amendment to the temporal restriction,<sup>206</sup> creates more uncertainty. First, this argument is undercut by the fact that the jurisprudence is already very ambiguous. This proposal would inject more structure into the current analysis. Second, to the extent that this judicial interpretation does create uncertainty, the Legislature has already acquiesced to a certain level of uncertainty within the statute by not overruling *AMCOM v.*

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198. *Id.* at 316.

199. *Id.*

200. *Id.*

201. This is not to say that the impact analysis should not be adopted for non-Internet-intensive businesses, but simply that the argument in favor of the impact analysis is even stronger in the Internet context.

202. *See* Act No. 104, 1962 La. Acts 251–52 (providing for enforceability only “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”).

203. 302 So. 2d 593 (La. 1974).

204. *See* discussion *supra* Part I.B.

205. As discussed in Part I.B.5, *supra*, the legislative history indicates that the Legislature intended to enforce noncompetes equitably.

206. *See* discussion *infra* Part IV.B.



*Batson*,<sup>207</sup> though it has been very active in overruling the Supreme Court on other issues arising under section 23:921.<sup>208</sup> *AMCOM* stands for the proposition that courts may enforce noncompetes despite their being facially unenforceable.<sup>209</sup> Thus, predictability and certainty have already been lost to some extent.

Though it might be argued that moving away from geographic indicia altogether is warranted and that some other indicator should be used, such a drastic change is not necessary. For one, upsetting the developed jurisprudence in employer–employee noncompetes as a whole is unnecessary and would be far too disruptive, especially since a solution without some geographic nexus is not apparent.<sup>210</sup> Also, there still needs to be a uniform general standard that applies to all types of employer–employee noncompetes without regard to Internet versus non-Internet companies. One danger that would come from completely unhinging enforcement from geographical limits is the possibility of running afoul of a very basic principle of this area of law: that there must be limits on the extent to which an employee is bound.<sup>211</sup> Specifying a geographic area has the potential to be an effective limit on the scope of noncompetes in certain businesses. The impact analysis is flexible enough to encompass

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207. 670 So. 2d 1223 (La. 1996).

208. See Act No. 639, 1989 La. Acts 1836–37; Act No. 428, 2003 La. Acts 1791. The Legislature was presumably aware of the current state of the law in 2003 when it overruled *SWAT 24*, which already included the ability to reform at that time. See *AMCOM*, 670 So. 2d 1223. The Legislature has since acted with respect to the statute on multiple occasions, none of which speak to reformation. See *supra* note 65 (citing amendments to section 23:921).

209. See discussion *supra* Part II.B.2.

210. Thus, the impact solution suggests moving from complete reliance on geography to only a partial reliance on geography, with more of a focus on the competition within that geography.

211. LA. REV. STAT. ANN. § 23:921 (Supp. 2015) (where the allowance of noncompetes is an exception to the general prohibition). The entire reason for requiring listing of the parishes and other subdivisions is to put the employee on notice as to exactly where he or she cannot compete. *H.B. Rentals, LC v. Bledsoe*, 24 So. 3d 260, 262–63 (La. Ct. App. 3d 2009).

Here, H.B. not only fails specifying the parishes or municipalities in which Bledsoe is prohibited from soliciting customers, it also attempts to prohibit him from soliciting *potential* customers. We cannot discern whether this refers to customers of H.B. at the time of the agreement, at the time Bledsoe left H.B.'s employ, or at any time present or future. The inclusion of potential customers is particularly troubling, in that it can be assumed that any entity in the field is a potential customer. Unlike the situation in *Petroleum Helicopters*, this provision is simply so overly broad that any attempt to reform it would not be in keeping with either the letter or spirit of the statute.

*Id.* at 263.

both business models: those in which geography is important and those in which it is not.

Another counterargument is that courts might be reluctant to adopt this interpretation based on past experience with being legislatively overruled. This counterargument has some resonance because the Court's narrow interpretations in *Foti* and *SWAT 24*, as well as circuit precedent leading up to those cases, were overruled by the Legislature.<sup>212</sup> However, courts should not be hesitant because this approach does not narrow enforceability in the same way as *Foti* and *SWAT 24*.<sup>213</sup> Rather, it provides more legitimacy to the statutory regime by interpreting it in a way that properly balances the interests at stake, which was the goal of the statute,<sup>214</sup> and it does so without going too far. Because this change would make the enforcement of noncompetes more fair, the judicial over-narrowing that the Legislature has reacted to at least twice in the past would be less likely to occur,<sup>215</sup> as judges would not feel the need to engage in creative interpretation. This interpretation is unlikely to, as Justice Traylor predicted in his dissent in *SWAT 24*, "prompt[] the legislature to amend the statute . . . [by] constru[ing] the statute so narrowly that effectively no competitive agreements can be enforced."<sup>216</sup> Accordingly, courts should adopt the impact analysis in determining whether the employee is "carrying on or engaging in a business similar to that of the employer."<sup>217</sup>

Although a judicial gloss would be the optimal solution, considering that the problem is one of current judicial interpretation, it is possible that the judiciary might be hesitant to make such an interpretation.<sup>218</sup> The Legislature should act if the judiciary does not. The Legislature could change language like "carries on a like business therein," to simply "competes therein."<sup>219</sup> This linguistic modification

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212. See discussion *supra* Part I.B.2–5; *Orkin Exterminating Co. v. Foti*, 302 So. 2d 593 (La. 1974); *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 808 So. 2d 294 (La. 2001).

213. See cases cited *supra* note 212. These two decisions both took entire types of cases out of the consideration of the statute by reading that "substantial sums" had to be expended for the statutory exception to apply, or that the exceptions only applied to employees who open their own business rather than going to an existing competitor. See *supra* Part I.B.

214. See *supra* note 64 and accompanying text.

215. See discussion *supra* Part I.B.

216. *SWAT 24*, 808 So. 2d at 310 (Traylor, J., dissenting).

217. LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015).

218. It seems that the Second Circuit has moved rather firmly in this direction. See *W. Carroll Health Sys., L.L.C. v. Tilmon*, 92 So. 3d 1131, 1137–41 (La. Ct. App. 2d 2012).

219. For the full statute incorporating both revisions proposed by this Comment, see *infra* note 225.

would leave the courts no choice but to consider the impact of the subsequent activity on the former employer; competition, as a matter of plain language, requires an effect or threatened effect on the employer.<sup>220</sup> This change would, without restricting the flexibility of the jurisprudential standard, spur the courts to action in defining the specifics of what constitutes competition. Thus, the Legislature's change in language would require courts to engage in the fact-intensive impact analysis.<sup>221</sup>

### *B. Legislative Solution to Temporal Overreaching*

It is at least arguable that the two-year limitation was too lengthy even when it was enacted in 1962 given the state's business climate at that time.<sup>222</sup> However, even assuming that this two-year allowance made sense in 1962, it is untenable in today's fast-moving economy.<sup>223</sup> The rigidity of the current statutory language necessitates a legislative change to inject reasonableness into the time limit. The necessity of this change is reinforced by the fact that the statutory language has simply been carried over in each version of the statute since 1962.<sup>224</sup> There is no evidence that the Legislature ever adequately considered the time limit's discord with the policies behind noncompetes. Accordingly, it is time that the Legislature consider this problem and provide a solution to the problem created by its lack of attention.

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220. In the verb form, the word "compete" means "strive to gain or win something by defeating or establishing superiority over others who are trying to do the same." *Compete*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/compete](http://www.oxforddictionaries.com/us/definition/american_english/compete), archived at <http://perma.cc/5XYR-VW88> (last visited Feb. 23, 2015).

221. This Comment, though proposing an alternative legislative solution, does not suggest that the judicial solution is implausible. Rather, this alternative is provided in the event that the judiciary is overly hesitant in its adoption of the standard.

222. See William H. Horton & Michael R. Turco, *Some Observations on Restrictive Employment Agreements in the Information Age*, 79 MICH. B.J. 1520, 1520 (2000) ("Jobs were far less automated; many employees performed work now done by machines. Long-term employment and customer relationships were more common.").

223. Although the technology industry is only a portion of the Internet-intensive business that is the subject of this Comment, this amendment would still allow for the standard enforcement to be two-years for those industries to which the policy concerns of the tech industry do not apply. However, the fast-paced Internet world has had broader implications on business velocity in more areas than just the technology industry. It has also led to quicker turnover in employees in other types of Internet-intensive firms, as discussed *supra* Part III.A.

224. See amendments cited *supra* note 65.

The Legislature should amend Revised Statutes section 23:921(C) to allow for enforcement of noncompetes *for a reasonable time up to two years*.<sup>225</sup> Changing from a blanket allowance of two years to this more nuanced approach would better balance the competing interests in the widely varied factual situations that arise under the statute, giving courts the flexibility to create appropriate standards for specific types of business. By implementing this “reasonable time” standard, both traditional business operations and Internet-based companies can adequately be covered under the statute. For traditional businesses, courts might well find that two years is a proper protection. The point of the amendment, however, is to allow for a case-by-case analysis of whether the time listed in the noncompete is justified.<sup>226</sup>

In this way, the amendment would allow for the consideration of the type of business at issue and the particular circumstances of each case. Thus, rather than being required to enforce a noncompete for two years in a fast-paced technology industry, a court would have the ability, just as the New York court did, to find such a time restriction to be unreasonable.<sup>227</sup> One commentator has even called for only three to six months of restraint in light of online business realities.<sup>228</sup> Under the new standard, a court may agree that this time limitation is much more reasonable than a two-year restriction.

In addition to allowing the courts to account for business realities of the employer’s business as a whole, the standard would also allow for consideration of the particular role of the employee in that business. In a case governed by Virginia law, the United States Court of Appeals for the Fourth Circuit analyzed a one-year noncompete with specific reference to the job at issue.<sup>229</sup> The court

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225. Thus, the statute would read:

Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, *for a reasonable time up to two years from termination of employment*. . . .

226. Even for traditional businesses, the economy has changed so much in the past 50 years such that two years of enforcement might no longer be reasonable either. *See* discussion *supra* Part III.A.

227. *See* *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999).

228. Mann & Roberts, *supra* note 4, at 340.

229. *Comprehensive Techs. Int’l, Inc. v. Software Artisans, Inc.*, 3 F.3d 730, 738–39, *vacated and appeal dismissed* (4th Cir. 1993).

stated that the employee's position as vice president of the software company contributed to the reasonableness of the agreement, because he "necessarily came into contact with confidential information concerning both [the employer's] products and its customers."<sup>230</sup> Similarly, Louisiana courts could examine the extent to which the specific employee's role in the business warrants restraint.

This scheme would have a limited negative impact on employers, which is justified by the changing nature of the workplace. First, employers should not expect employees to remain as loyal in today's economy.<sup>231</sup> In fact, because today's economy moves at a faster pace than in the past, employers might benefit from shorter enforcement periods because they would be able to hire from other companies as well.<sup>232</sup> Additionally, other legal doctrines, such as trade-secret and industrial-espionage claims can protect important information that need not be bound in a noncompete for two years.<sup>233</sup> This more nuanced approach would also help employers, because the labor pool would not be restricted for nearly as long.

This amendment would also better provide for the interests of the public—greater employee mobility in Internet-intensive businesses would allow for a more efficient economy and prevent the burden on society imposed by unemployment.<sup>234</sup> There is also the possibility that a time-limit that more accurately reflects current business practices could spur economic growth by facilitating knowledge transfers that allow for maximization of resources.<sup>235</sup>

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230. *Id.* at 739. Although this case was vacated pursuant to a settlement, it provides a good example of the analysis that might be employed by Louisiana courts under the "reasonable time" standard. *See also* Capital One Fin. Corp. v. Kanas, 871 F. Supp. 2d 520, 534 (E.D. Va. 2012) (stating that access to confidential information because of employee's job made the agreement more reasonable).

231. *See supra* Part III.A.

232. *Id.* It is certainly true that employers may see this benefit and reduce the length of the restraint themselves. There is not reliable data on the extent to which this voluntary reduction is done. Regardless, court enforcement is probably necessary to ensure reasonableness and because the benefit to the employer contemplated by the reduced time period would also be beneficial to the economy as a whole, allowing for more productive use of human capital resources.

233. *See* Stone, *supra* note 5, at 738.

234. *See* Lyon, *supra* note 21, at 608–10 (explaining the theory of efficient breach impinged by noncompetes and the "connotation of involuntary servitude"). Some commentators have said that the enforcement of noncompetes is also important to the public because it results in better investment in the training and free communication of employees. Blake, *supra* note 4, at 627. This Comment does not advocate for the eradication of noncompete agreements, but rather that they be reasonable limits rather than overreaching ones.

235. *See* Gilson, *supra* note 173, at 578–79.

Although some may argue that the proposed amendment would create a greater level of uncertainty within the statute, it would not significantly diminish the current predictability.<sup>236</sup> There remains a clear two-year maximum, and to the extent that it would diminish predictability, it is justified by the more equitable results reached.<sup>237</sup> Jurisprudential holdings could potentially provide more clarity for specific factual situations in the long run, so any initial lack of clarity would eventually be lowered. Moreover, Louisiana courts could look to other states' case law for guidance in determining the reasonableness of a given time restriction, since many states require a reasonableness inquiry when evaluating noncompete enforceability.<sup>238</sup> To the extent that the change would increase litigation—which it might indeed—this uncertainty is necessary as a matter of fairness.<sup>239</sup> Additionally, the possible increase in litigation would probably be only a short-term effect.<sup>240</sup> If judicial standards become clearer as to what constitutes a reasonable time restraint in certain circumstances, then these more reasonable limitations might result in fewer ex-employees breaching the agreement since the restriction would not be as onerous.<sup>241</sup> With fewer employees breaching their agreements

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236. One might argue that creating uncertainty here is contrary to the legislative intent, an argument that is well taken. After all, in 1989, the Legislature seemed to favor rote application of bright-line rules in this context by excising the determination of the specified business interests required by the previous version of the statute. Act No. 639, 1989 La. Acts 1836–37. Additionally, it might be argued that this amendment would destroy a scheme in which it is possible to look at an agreement on its face and be able to determine its enforceability based on the clear requirements of the statute. *See* discussion *supra* Part II.B.1–2. The argument goes that such uncertainty may lead to an increase in litigation in the area.

237. This Comment assumes that courts would continue to reform agreements under this amendment when the agreement contains a severability clause. This amendment might raise an issue of whether reformation should be extended to time-limitation clauses in Louisiana. To the extent that courts would be willing to do so, this extension might ease the transition into the new rule, since courts would initially be applying post-hoc analysis to previously drafted agreements. Retroactivity, while not conceptually problematic for courts, could raise issues of fairness until the new rules become more settled.

238. *See* discussion *supra* Part I.A; *see also* statutes cited *supra* note 18.

239. A related and more incidental counterargument is that this amendment would also allow non-Internet-intensive employees to claim that the two-year restriction would be unreasonable in their cases as well. Some of this modification based on reasonableness might be warranted. Because of the flexibility of the rule, courts are free to balance the interests at stake in each individual case in determining how long a time limit is reasonable.

240. It is possible that the greater flexibility in the statute would actually lead to fewer enforcement suits by employers, who may be more hesitant to spend money on litigation that is less likely to be successful.

241. Lyon, *supra* note 21, at 651.

because they are more fair, litigation would decrease since employers would not need to sue to enforce them.

#### CONCLUSION

The Internet has greatly affected competition—and competition between employers and former employees is no exception. The rules governing employer–employee noncompetes have not kept pace with changing competitive interests. To bring Louisiana’s noncompete law in line with the twenty-first century, the Legislature and judiciary must recognize that Louisiana law is at a breaking point and, rather than act as opponents, work together to achieve better results. The judiciary should engage in an interpretation of the noncompete statute that, while still maintaining the integrity of its plain meaning, better adheres to the properly balanced policies underlying noncompete agreements in Louisiana. To spur judicial action, slight language changes may be necessary to clarify the legislative intent that competition, rather than geography, is paramount. Under this interpretation, courts would examine the impact of a former employee’s conduct on the former employer, as impact is a more accurate proxy to competition than relying on geography alone. Additionally, the Legislature must act to ameliorate the negative policy implications of the inflexible two-year restraint by modifying the standard to allow for enforcement to the extent reasonable for a time not to exceed two years. Under this new regime, Charlie, the graphic designer, would have the opportunity to operate his website as long as he does not actually compete by negatively affecting the business interests of his former employer in a material way. Additionally, if he does eventually breach this agreement, he would likely be bound for less than two years. The proposed changes to Louisiana’s employer–employee noncompete law would allow the market to function more efficiently to the benefit of employers, employees, and the public.

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