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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?

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1. 808 So. 2d 294 (La. 2001).
INTRODUCTION

The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.  

Noncompetition agreements, also referred to as covenants not to compete, are employer mechanisms that prevent or restrict employee competition upon termination or voluntary separation. Noncompetition agreements are widely used within a variety of industries and provide employers with an ability to protect valuable interests through injunctive remedies against competing former employees. The decision to enforce a noncompete agreement and, thus, to curtail individual freedom, is weighty. A valid noncompete agreement limits an individual’s right to pursue a livelihood. Thus, the standards by which noncompete agreements are enforced must carefully balance employer interests and individual autonomy.

Louisiana, like the majority of other states, has a strong public policy disfavoring covenants that restrain individuals from competing with their former employers. Louisiana Revised Statutes 23:921 (the


3. See, e.g., Katherine V.W. Stone, Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace, 34 Conn. L. Rev. 721, 723 (2002) (“In the past decade, there has been an exponential increase in the volume of lawsuits between employers and former employees involving covenants not to compete and the ownership of information and knowledge.”); Gillian Lester, Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis, 76 Ind. L.J. 49, 51 (2001) (“Restrictive covenants are an increasingly common feature of employment, used across a wide range of industries, occupations, and employees.”).


5. See, e.g., SWAT 24, 808 So. 2d at 298 (“[T]he longstanding public policy
"Statute") reflects this policy by providing that all noncompetition agreements are null and void except those that comply with the Statute. Section C of the Statute ("Section C") sanctions certain covenants not to compete between employers and employees. That section provides that an employee may agree with his employer to be restrained "from carrying on or engaging in a business similar to that 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."

In SWAT 24 Shreveport Bossier, Inc. v. Bond, the Louisiana Supreme Court resolved a split in the circuit courts of appeal by interpreting Section C's phrase, "carrying on or engaging in a business[,]" to denote that a former employee could be restrained only from opening a competing business. Thus, the court invalidated covenants not to compete that serve to restrict an individual from securing employment with a competitor of his former employer. Two years later, the Louisiana legislature responded to this portion of the supreme court's decision in SWAT 24 by enacting an amendment of Louisiana has been to prohibit or severely restrict such agreements.

7. La. R.S. 23:921(A)(1) (2002) provides: "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." Sections (B) through (C) and (E) through (G) of Louisiana Revised Statutes 23:921 are the exclusive exceptions to Louisiana's prohibition against covenants not to compete. See, e.g., Team Envt'l Servs., Inc. v. Addison, 2 F.3d 124, 126 (5th Cir. 1993) ("[T]he first subsection proclaims that every agreement not to compete shall be null and void, except for those explicitly sheltered.").
9. Id. (emphasis added).
10. 808 So. 2d 294.
11. See infra text accompanying notes 56-79, for a discussion of the SWAT 24 opinion.
12. SWAT 24, 808 So. 2d at 306.
to the Statute (the "Amendment"). The Amendment provides that a person who becomes employed by a competing business "may be deemed to be carrying on or engaging in a business" similar to that of his former employer.

The Amendment's application is uncertain and potentially troublesome. Without question, SWAT 24 severely restricted the ability of Louisiana employers to enforce noncompete agreements; the Amendment reflects the legislature's intention to correct the perceived imbalance effected by that decision. However, the Amendment, rather than achieving equilibrium, has simply reversed the imbalance. By its terms, the Amendment allows employers to prevent former employees from accepting all employment positions with competitors, although, in many situations, no legitimate business interest justifying such restraint can be identified. Thus, in the wake of the most recent addition to Louisiana's ongoing employer/employee power struggle, unfinished business remains.

This comment seeks to equip Louisiana courts with a framework for equalizing the competing tensions associated with former employee competition. The approach offered is currently followed by the majority of other jurisdictions, and provides a tried and true method for achieving the necessary balance. Because noncompetition agreements exist to shield employers from the disadvantages arising from the possibility that employees will appropriate valuable trade information and customer relationships upon termination or voluntary separation, enforcement should be conditioned on the presence of a legitimate business interest in need of protection. An overwhelming number of states subscribe to that qualification, and Louisiana courts should mandate the same when applying the Amendment. Such restrictive enforcement is consistent with the just legislative intent underlying its passage, and rectifies the Amendment's potential for inequitable application.

Part I provides a historical review of Louisiana law on noncompete agreements, presents the appellate decisions abrogated by the SWAT 24 court, and examines the SWAT 24 decision. This section traces the volatile evolution of the law concerning noncompetition agreements so that the Amendment may be understood in its proper context. Against this backdrop, the

14. Id.
15. See infra text accompanying notes 82-104, for a discussion of the Amendment's legislative history.
16. See infra text accompanying notes 141-58, for a discussion of the majority approach, which has been termed the legitimate business interest requirement.
17. Id.
Amendment and its implications are set forth in Part II. During this discussion, particular focus is devoted to the broad discretion that the Amendment vests in the judiciary, and the divergent applications that the Amendment may receive in light of the legislature's failure to provide clear standards for its application. Part III identifies two possible judicial responses to the challenges posed by the Amendment. Because the two approaches offered in this section are, for the most part, mutually exclusive, they are best understood as an either/or proposal: Either revive and reinvigorate the pre-SWAT 24 decisions that sought to balance the competing interests at stake, or integrate the legitimate business interest requirement as a means of avoiding an inequitable or absurd result. Although the pre-SWAT 24 appellate decisions interpreting "carrying on or engaging in a business" could be revived, unlike the legitimate business interest requirement, they fail to both satisfactorily protect employers' justifiable concerns and implement the legislature's equitable intentions underlying the Amendment. Hence, it is submitted that Louisiana courts should endeavor to balance the competing tensions produced by former employee competition with reference to the universally accepted latter approach. Where legitimate business interests that have historically been protected by a noncompete agreement are at stake, logic and equity demand enforcement. Yet where no such interest may be ascertained or justified, individual autonomy and considerations of sound public policy tip the scales in favor of employee freedom.

I. BACKGROUND: LOUISIANA'S EMPLOYMENT POWER STRUGGLES

The evolution of Louisiana's noncompetition law demonstrates not only a clash between the competing interests of individuals and businesses, but also a clash of public policies and interpretive philosophies. The following sections address the highlights in the development of the law regarding noncompete agreements in order to better understand the legislature's most recent addition to the power struggle.

A. Historical Summary of Louisiana Statutory Law on Noncompetition Agreements

In 1934 the Louisiana legislature first articulated the state's policy as it related to noncompete agreements. Act No. 133 of 1934

nullified "contracts [where employees agree] not to engage in any competing business for themselves or as the employee of another upon the termination of their contract with such employer."20 Yet in 1962, and again in 1989, the legislature significantly altered Louisiana law by amending the pertinent statute to permit noncompetition agreements under certain conditions. As one commentator has suggested, it is likely that these alterations resulted from market pressures and successful lobbying by businesses.21

1. The 1962 Amendment and Its Judicial Gloss

The 1962 amendment generally prohibited noncompetition agreements, providing that contracts where "the employee agrees not to engage in any competing business for himself, or as the employee of another" are null and void.22 However, as an exception to this rule, the law in 1962 also provided that a noncompete agreement prohibiting an employee from "enter[ing] into the same business that [the] employer is engaged over the same route or in the same territory for a period of two (2) years" was valid and enforceable if the employer had incurred advertising or employee training expenses.23 Thus, Louisiana law sought to protect employers who expended advertising and training dollars by enforcing noncompetition agreements for this limited purpose.24

Twelve years later the Louisiana Supreme Court abrogated the limited protections afforded to employers under the 1962 amendment. In Orkin Exterminating Company v. Foti,25 the court narrowly interpreted the statute to hold that advertising or employee training expenses must be substantial in order for noncompete agreements to be enforceable.26 Essentially, the Orkin court superimposed a flexible, subjective analysis on the face of the statute. As a result, Louisiana courts post-Orkin did not enforce noncompetition agreements under the plain language of the statute, relying instead on the supreme court's restrictive construction.27

605, 612-14 (2001), for an insightful discussion of the evolution of Louisiana law regarding noncompetition agreements.

20. SWAT 24, 808 So. 2d at 303 (quoting repealed Act No. 133 of 1934).
21. Lyon, supra note 19, at 607.
22. SWAT 24, 808 So. 2d at 303 (quoting repealed La. R.S. 23:921 (1962)).
23. Id. at 304.
24. Id. ("The purpose of this amendment was 'to protect an employer only where he has invested substantial sums in special training of the employee or in advertising the employee's connection with his business.'") (quoting Orkin Exterminating Co. v. Foti, 302 So. 2d 593, 597 (La. 1974)).
25. 302 So. 2d 593.
26. Id. at 597.
27. See, e.g., Lyon, supra note 19, at 613 ("[N]o court considering the
2. The 1989 Amendment: Predictability Becomes Paramount

In 1989 the legislature again revised Louisiana’s noncompetition law by repealing the 1962 amendment and rewriting the statute. The new Statute retains a general prohibition against noncompete agreements, with one major employer/employee exception:

Any ... 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.

This exception, found in Section C of the Statute, departs from the 1962 amendment’s focus on advertising and training expenses. Likewise, Section C does not empower courts with a flexible, subjective analysis for testing the validity of noncompetition agreements. Instead, Section C provides objective criteria that afford parties a degree of predictability. If an employer drafts its noncompete agreement in such a way that it “mechanically adheres” to Section C’s yardstick, then enforceability is virtually certain, and the employer should be able to obtain injunctive relief against a competing former employee. Yet as the following sections demonstrate, the extent to which an employer could restrict competition under Section C remained ambiguous long after its passage.

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enforceability of noncompetition agreements after Orkin found there to be substantial expense such that a noncompetition agreement could be enforced.”); Jeffery 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, 558 (1991) (“[N]o court found the requisite ‘substantial expenditures’ test to be satisfied sufficiently to uphold a noncompetition agreement between an employer and an employee. In effect, the Louisiana Supreme Court had emasculated the 1962 amendment, rendering its exceptions almost meaningless.”).


30. See, e.g., Sentilles Optical Servs. v. Phillips, 651 So. 2d 395, 399 (La. App. 2nd Cir. 1995) (stating that Louisiana law requires “mechanical adherence” to Section C); Gearheard v. De Puy Orthopaedics, Inc., No. 99-1091, 1999 WL 638582 (E.D. La. Aug. 19, 1999) (“Louisiana’s approach to non-competition agreements requires mechanical adherence to the requirements listed in the law (especially the geographical and time limitations).” (internal quotations omitted); Lyon, supra note 19, at 607 (“[C]ourts simply require mechanical adherence to the statute in order to effect an enforceable agreement.”)).
B. SWAT 24's Appellate Predecessors

Prior to the supreme court's decision in SWAT 24, Section C's phrase, "carrying on or engaging in a business[,]" received conflicting interpretations in the courts of appeal. The Louisiana Second Circuit Court of Appeal interpreted the phrase narrowly to mean restraints in the form of prohibiting a former employee from either engaging in a separate business venture for himself or accepting an employment position with a competitor when that position entailed soliciting his former employer's customers. By contrast, the Louisiana Third and Fourth Circuit Courts of Appeal refused to limit Section C in this fashion, finding that section satisfied not only in the circumstances outlined by the second circuit, but also when a former employee simply worked for his former employer's competitor without regard to whether his new position entailed solicitation of his former employer's customers.

1. The Second Circuit's Approach

In Summit Institute for Pulmonary Medicine & Rehabilitation, Inc. v. Prouty, the second circuit invalidated what it found to be an overbroad noncompetition agreement. The plaintiff, an operator of long-term, acute care, and physical rehabilitation hospitals, hired the defendant for a position in its marketing department to recruit patients. After signing a noncompetition agreement, the defendant left the plaintiff's employ and accepted a new marketing position with one of the plaintiff's competitors. Shortly thereafter, the plaintiff employer brought suit, seeking to enjoin the defendant from working in his new position.

The Summit plaintiff based its action on the covenant not to compete which prohibited the defendant from becoming an employee of any entity managing or providing long-term acute medical services or physical rehabilitation. In determining whether "carrying on or engaging in a business" encompassed all forms of employment with a competitor, the Summit court sensibly stated that the decision to either enforce or invalidate a noncompetition agreement "should promote a reasonable economic goal." The court reasoned that

31. See, e.g., Summit Inst. for Pulmonary Med. & Rehab., Inc. v. Prouty, 691 So. 2d 1384 (La. App. 2nd Cir. 1997), writ denied, 701 So. 2d 983 (La. 1997).
32. See, e.g., Moreno v. Assoc. v. Black, 741 So. 2d 91, 95 (La. App. 3d Cir. 1999); Scariano, 719 So. 2d at 135 (expressly refusing to follow Summit, 691 So. 2d 1384).
33. 691 So. 2d 1384.
34. Id. at 1386.
35. Id. at 1387.
precluding a former employee from accepting employment with his former employer's competitor was unreasonable when his new position would not have an impact on the former employer.36

Thus, the second circuit held that Section C only permitted the enforcement of noncompetition agreements that restrained an individual from either opening a similar competing business or accepting employment with a competitor of his former employer where he solicits his former employer's customers.37 Because the noncompetition agreement at issue precluded the defendant from accepting all employment positions with a competitor, it was held overbroad.38 In sum, the Summit court interpreted "carrying on or engaging in a business" to mean opening a separate, similar competing business or accepting a new position that entails the solicitation of a former employer's customers.39

2. The Third and Fourth Circuits' Approach

One year after Summit, the fourth circuit handed down its own opinion interpreting Section C. In Scariano Brothers, Inc. v. Sullivan,40 the plaintiff employer was engaged in the marketing, distributing, and processing of meat, poultry, and meat related products. It sought to enjoin the defendant, a former sales representative, from working for a competing business in the same position. The noncompetition agreement at issue prevented the "rendering [of] services to . . . any other person or entity" engaged in the employer's business.41 On appeal from the grant of an injunction at the trial court level, the defendant relied on the Summit decision to argue that the covenant not to compete was overbroad because it prevented him from working in any capacity with a competitor of his former employer.42

The Scariano court agreed with the defendant's contention that the phrase prohibiting employment in any position with a competitor was overbroad.43 But, it relied on the agreement's severability clause to enforce the remainder of the covenant not to compete, which effectively prevented the employee from working as a sales

36. Id.
37. Id.
38. Id. at 1388.
39. Id. at 1387.
40. 719 So. 2d 131 (La. App. 4th Cir. 1998).
41. Id. at 134.
42. Id.
43. Id. at 135.
representative with the plaintiff’s competitor. The fourth circuit in Scariano expressly refused to follow the Summit decision, characterizing that opinion as “illogical and nonsensical.” The Scariano court held that “carrying on or engaging in a business” encompassed agreements that restrained an employee from either owning a competing business or working for a competitor.

The third circuit followed the Scariano opinion in Moreno & Associates v. Black. The Moreno plaintiff sued to enforce a noncompetition agreement against the defendant, its former employee and safety consultant, who had accepted a position with a competing business. Like the covenants in Summit and Scariano, the Moreno noncompetition agreement prevented the defendant from holding any position with a competitor because it prohibited post-employment participation with a “[p]erson or business in direct or indirect competition” with the plaintiff.

Citing Scariano, the Moreno court reasoned that the agreement’s language could operate to prevent the defendant from engaging in actions that directly compete with the plaintiff’s business, but it could not prohibit the defendant from holding any position with a competitor. The court held that the noncompete’s language accomplished the former restraint only, and, thus, it complied with Section C and was enforceable.

The approach taken in Scariano and Moreno is markedly different from the Summit court’s interpretation of “carrying on or engaging in a business.” Neither Scariano nor Moreno adopted the second circuit’s examination of customer solicitation. The Scariano court failed to explain the reasoning in support of its interpretation of “carrying on or engaging in a business[.]” and the Moreno court cited Scariano in support of its conclusion that the former employee’s competing actions were determinative. In light of the confusing jurisprudence and obvious circuit split, the stage was set for supreme court intervention.

44. Id.
45. Id. at 134.
47. Scariano, 719 So. 2d at 135.
48. 741 So. 2d 91.
49. Id. at 94.
50. Id.
51. Id. at 95.
53. Scariano, 719 So. 2d at 134; Moreno & Assoc. v. Black, 741 So. 2d 91 (La. App. 3d Cir. 1999) (failing to recognize the Summit opinion’s existence).
55. Moreno, 741 So. 2d at 94.
C. SWAT 24 Shreveport Bossier, Inc. v. Bond

1. The Majority Opinion

The Supreme Court of Louisiana resolved the split among the circuit courts of appeal in the divided opinion of SWAT 24 Shreveport Bossier, Inc. v. Bond. In SWAT 24, a construction company sought to restrain its former production manager from securing employment with a competitor in the same position. The covenant not to compete in question prevented the defendant from serving as an employee in any capacity with a business that competed with the plaintiff. The trial court relied on the Summit decision and denied the employer an injunction against the defendant. In reviewing the second circuit's affirmation of the trial court's ruling, the supreme court based its decision on the legislative intent underlying the 1989 amendment.

The Court stated that the 1989 amendment (Section C), which allows agreements to restrain employees from "carrying on or engaging in a business[,]" changed "the type of business in which an employee may be allowed to agree not to compete." In addition, the Court interpreted the state's long-standing policy disfavoring covenants not to compete as an indication that the language of Section C should be strictly construed. The supreme court concluded that the legislature intended, with the passage of the 1989 amendment, to provide for the enforcement of only those covenants not to compete that restrained an employee from carrying on or engaging in his own similar competing business.

The Court reasoned that Section C's phrase, "and/or from soliciting customers of the employer[,]" would be rendered meaningless by an interpretation allowing employers to prohibit former employees from working for a competitor because "there would be no business for which to solicit customers." Noncompetition agreements that restrict a former employee from working for a competitor were deemed outside of the ambit of Section C and, thus, invalid under the Statute. Consequently, the Court nullified the SWAT 24 noncompetition agreement.

56. 808 So. 2d 294.
57. Id. at 297.
58. Id. at 305.
60. SWAT 24, 808 So. 2d at 306.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id. at 308 ("The statute does not allow a flat prohibition of employment by
Consistent with the decisions of its circuit courts of appeal, the supreme court refused to interpret Section C's "carrying on or engaging in a business" language to permit noncompetition agreements that restrain an individual from working in any capacity with his former employer's competitors. Yet the Court did not adopt either of the more balanced approaches of Summit or Scariano, which allowed limited competitive restraint. Instead, the Louisiana Supreme Court relied on legislative intent to completely negate the protection of employer interests through noncompetition agreements that prevented a former employee from securing employment with competitors.

2. Justice Traylor's Dissent

In a stinging dissent joined by two other justices, Justice Traylor wrote that "the [SWAT 24] majority's interpretation strangles the statute, and . . . renders noncompetition agreements effectively meaningless between an employer and his employee." Justice Traylor's dissent rested on three grounds. First, the dictionary definition of "engage" covers an employee engaged in the employ of another. Justice Traylor reasoned that an interpretation of Section C that allowed an employee to agree to refrain from engaging in the employ of a competitor would not render the phrase "and/or soliciting customers of the employer" meaningless because employees are not the only means an employer may use to solicit customers.

Second, Justice Traylor attacked the majority's conclusion that the legislative intent underlying the 1989 amendment was to restrict the enforceability of noncompetition agreements. He contended that the "carrying on or engaging in a business" phrase added by the 1989 amendment is broader than the 1962 amendment's language that nullified agreements restraining individuals from "engag[ing] in any competing business for himself, or as the

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a competitor, even if the employee's new job duties are exactly the same as those performed for the former employer.

66. Id. at 307.
67. See supra text accompanying notes 33-47, for a discussion of these decisions.
68. SWAT 24, 808 So. 2d at 312 (Traylor, J., dissenting).
69. Id. (quoting Webster's Third New International Dictionary 751 (4th ed. 1976)).
70. Id.
71. Id. at 312-13.
employee of another.\textsuperscript{73} Thus, the dissent concluded that the legislature actually intended, in 1989, to broaden the statutory exceptions to the general rule of nullity, a legislative judgment directly contravened by the \textit{SWAT 24} majority.\textsuperscript{74}

Finally, the dissent criticized the majority for failing to take into account the important employer interests served by noncompetition agreements. Justice Traylor wrote that noncompetition agreements serve to protect employers from the competitive disadvantages resulting from employee exploitation of acquired skills, knowledge, and information.\textsuperscript{75} He viewed noncompetition agreements as mechanisms for simultaneously preserving competitive advantages and protecting important employer interests.\textsuperscript{76}

The dissent characterized the majority's decision as an unnecessary paternalistic intervention to preserve the archaic principle of individual freedom and to protect the "downtrodden" employee at the expense of legitimate employer interests, common business practices, and legislative intent.\textsuperscript{77} Justice Traylor recommended an alternative approach, one which he maintained would further the intent of the legislature while balancing the interests of both employers and employees.\textsuperscript{78} He suggested that the contract language, the competitive status of the employers, and the employee's new position and its impact on his former employer should all be considered when determining whether to enforce the agreement in question.\textsuperscript{79} Justice Traylor's view of the legislature's intent proved prophetic just two years later when the Statute was, yet again, amended.

II. THE AMENDMENT: HONORABLE INTENTIONS WITH A GRIEVIOUS POTENTIALITY

A. The Well-Meaning Legislature

The most recent amendment to the noncompetition statute was signed by Governor Murphy James "Mike" Foster, Jr. on June 18, 2003 and took effect on August 15, 2003.\textsuperscript{80} The Amendment adds the following section to the Statute:

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73. \textit{SWAT 24}, 808 So. 2d at 313 (Traylor, J., dissenting).
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74. \textit{id.}
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75. \textit{id.} at 315.
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76. \textit{id.} at 314.
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77. \textit{id.}
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78. \textit{id.}
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79. \textit{id.}
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\end{table}
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.\(^8\)

After the Amendment’s enactment, Section C’s phrase, “carrying on or engaging in a business[,]” no longer has the meaning assigned to it by the supreme court in SWAT 24. That language may now be interpreted to enforce a covenant not to compete that prevents an individual from securing employment with competitors of his former employer. Thus, the Amendment overrules the restrictive statutory construction adopted by the Louisiana Supreme Court in SWAT 24. The sentiments underlying this legislative response are the subject of the following sections.

1. The Committee Meeting

Representative Jack D. Smith introduced the Amendment in its original form at an April 30, 2003 meeting of the Louisiana House of Representatives Committee on Labor and Industrial Relations.\(^8\) In his presentation, Representative Smith stressed that the Amendment was not a Louisiana Association of Business and Industry (“LABI”) bill, but rather it was conceived out of the unfairness experienced by a Louisiana computer company (hypothetically named “Audubon”).\(^8\)

Representative Smith explained that Audubon hired an individual as its Executive Vice President in charge of sales (hypothetically named “Joe”), and it agreed to pay him “a couple hundred grand a year” as well as an initial distribution of Audubon stock.\(^8\) Joe thereafter signed a noncompetition agreement. About one year later, Audubon had to terminate Joe because he had “a very serious problem” that the company board felt would trigger employee

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83. Id.  

84. Id.
lawsuits if he remained an Audubon employee. Upon discharge, the company gave Joe the option to either retain the stock or exchange it for cash. Joe chose the latter. After his termination, Joe told Audubon, "Hey, I got your cash and I’m out of this noncompete and I’m going down the street and I’m going to take my client list that you gave me and now I’m going to compete against you." Following this narrative, Representative Smith emphasized that the Amendment was aimed at correcting the inequity resulting from Audubon’s inability to enforce the noncompetition agreement against Joe under Louisiana law. He described the Amendment’s effect as follows: "We say No, No Joe. We’re not going to do that.

In the ensuing dialogue, Representatives Henry “Tank” Powell and A. G. Crowe communicated their concern over the Amendment’s effect on employees’ right to work. Representative Smith responded by stating, "I think what this bill tries to do is clarify in the law it should be fairness, not only to the employee, but also to the employer." Representative Smith continued, "When you bring in a guy and you pay him a lot of money and give him stock and for whatever reason he’s got to go and you think you’ve got a noncompete there and just because he takes the cash for the stock . . . ."

Representative Shirley Bowler addressed Representative Smith’s recurring emphasis on the fact that Joe elected to receive cash for his Audubon stock. She stated that the Amendment’s equity interest language refers to the former employee’s “position with the new employer not with the old employer.” Failing to understand her point, Representative Smith later stated that, had Joe remained an Audubon stockholder, “the noncompete would have been enforced.

Representative Bowler also astutely pointed out that in a recent supreme court decision, unmistakably the SWAT 24 case, the Court refused to enforce a noncompetition agreement that restrained an individual from accepting employment with a competitor of his

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85. Id.
86. Id.
87. Id.
88. Id. Representative Smith continued his remarks addressed to the hypothetical employee, “You sign[ed] a noncompete, especially when you take the cash for the stock.” Id. Representative Bowler ultimately, albeit unsuccessfully, attempted to address Representative Smith’s misplaced reliance on the employee’s choice to redeem the stock. See infra text accompanying notes 91-92. Yet these statements illustrate a general misunderstanding of Louisiana law regarding noncompetition agreements. See also, text accompanying note 107.
89. Audio-Video File, supra note 82.
90. Id.
91. Id.
92. Id.
former employer. She was troubled that the Amendment was in conflict with the Court’s decision and stated, “I’m afraid if we adopt this bill, all we’re doing is . . . basically kind of flailing about here.”

Representative Loulan J. Pitre, Jr. confirmed Representative Bowler’s observation regarding SWAT 24 and informed the committee that he thought the Amendment was narrowly attempting to correct the supreme court decision, but was not seeking to upset the balance between employer rights and employee freedom. He expressed a desire to have “a little more information and background on the supreme court decision we’re trying to correct,” but Representative Smith stated, “I’m not sure about the supreme court case.”

After all committee representatives were given an opportunity to speak, two witnesses testified before the committee. First, Mr. Jim Patterson of the LABI provided the committee details about the SWAT 24 decision. He argued that the authors of Section C did not intend the result reached by the supreme court in SWAT 24, and stated that “the fact of the matter is that this type of provision exists in states all over the south, all of them, either by jurisprudential precedent or doctrine or by actual statute.”

Second, Ms. Sibal Holt, of the Louisiana AFL-CIO, opposed the Amendment. She was concerned with the scope of the Amendment and its potential for broad and devastating effects on employees despite the fact that it was “well intended.” Ms. Holt articulated her concern by stating, “You just don’t own people when they work for you.”

Ultimately, the Committee on Labor and Industrial Relations reported the Amendment favorably with eight representatives in favor and four representatives opposed. Subsequently, the Louisiana House of Representatives passed the Amendment by a

93. Id.
94. Id.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
101. Audio-Video File, supra note 82.
102. Id.
vote of ninety to thirteen, and the Louisiana Senate passed it as well with only one opposing vote.\textsuperscript{104}

2. \textit{Sausage and Law}

The committee meeting gives credence to the quote, "If you like laws and sausages, you should never watch either one being made."\textsuperscript{105} The representatives favorably reported the Amendment despite their failure to examine a multitude of significant issues. Consequently, certain conclusions cannot be drawn. 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. Also, the committee did not discuss the pre-\textit{SWAT 24} appellate decisions interpreting the language, "carrying on or engaging in a business."\textsuperscript{106} Thus, the Amendment's legislative history does not support an argument that the Amendment adopts either of the approaches abrogated by \textit{SWAT 24}. But the committee's benightedness extends beyond its omissions.

The representatives' expressions fail to evidence an understanding of the progression of Louisiana law regarding noncompetition agreements. In fact, Representative Smith misunderstood his own bill, believing that his hypothetical employee's choice to redeem the stock for cash precluded enforcement of the noncompete agreement.\textsuperscript{107} Furthermore, it is disturbing that a party whose interests are clearly at issue would be the committee's sole source of information concerning the state of the law. It would seem that a more appropriate source of legal authority could have been found in any number of independent legal experts conveniently located at two state-funded law schools within twenty-five miles of the legislature. The Amendment represents a significant change to Louisiana's law governing noncompete agreements; thus, the committee decision of whether to report it favorably should have been based on the knowledgeable input of numerous authorities representing diverse and disinterested parties.


\textsuperscript{106} La. R.S. 23:921(C) (2002).

\textsuperscript{107} See \textit{supra} note 88 and text accompanying notes 90-92.
Despite the committee's unawareness, two observations can be made. First, the committee favorably reported the Amendment after noting its contradiction of SWAT 24. Second, the representatives reported the Amendment favorably after multiple statements were made that the Amendment provided fairness to both employers and employees. At the meeting's conclusion, Representative Smith summarized the intention behind the Amendment and stated that noncompetition agreements exist to protect employers' interests in confidential information, in customer lists, and in proprietary information. Thus, it appears likely that the committee intended to overrule the SWAT 24 decision to favor employer protection and the equitable enforcement of noncompete agreements. Nevertheless, the ambiguities inherent in the Amendment's language may thwart this equitable purpose by unnecessarily exposing employees to overly restrictive covenants not to compete. The particular dangers created by the new enactment are examined in the following section.

B. The Danger to Employee Liberty

The Amendment does not define the phrase “carrying on or engaging in a business.” Rather, the Amendment permits the judiciary to deem a person who is employed by his former employer's competitor to be “carrying on or engaging in a business.” The most obvious result of this change is that certain covenants not to compete that restrain an individual from accepting employment with competitors of his former employer may now be deemed enforceable. The Amendment expressly allows the judiciary to enforce covenants not to compete that restrain an individual from accepting employment with competitors of his former employer upon termination or voluntary separation.

Significantly, however, the Amendment does not require such enforcement because the permissive word “may” is used. According to its terms, simple mechanical adherence to the amended Statute's requirements does not automatically constitute enforcement against a former employee in a competitor's employ. Such a spurious

108. Audio-Video File, supra note 82.
109. See Sola Communications, Inc. v. Bailey, 861 So. 2d 822, 827-28 (La. App. 3d Cir. 2003) (“The subsequent amendment was clearly in the nature of a substantive change to the law as it existed after the supreme court's pronouncement in SWAT 24. This type of response to a supreme court determination cannot be said to be merely interpretive, but must be viewed as substantive insofar as it establishes a new rule.”).
112. Id. (“[A] person who becomes employed by a competing business ... may be deemed to be carrying on or engaging in a business ...”) (emphasis added).
interpretation would effectively rewrite the Amendment to read: "[A] person who becomes employed by a competing business ... [shall] be deemed to be carrying on or engaging in a business ... ." Automatic enforcement of noncompetition agreements misreads the plain language of the Amendment and ignores the broad discretion granted to the judiciary.

Discretionary terms notwithstanding, the danger of the Amendment lies in its failure to textually provide standards for its application. Given this uncertainty, the Amendment has the potential to subsume cases where the former employee does not even perform activities with a competing employer that overlap with the particular aspect of his prior employment. More importantly, because the Amendment lacks standards for application, courts may apply the Amendment without identifying any legitimate business interest in need of protection. Hence, the Amendment may be applied to unreasonably preclude an individual from exercising his trade or earning a living.

The appellate courts in the pre-SWAT 24 decisions refused to interpret the Statute as a wholesale prohibition against competitive employment. In addition, the supreme court in SWAT 24 denied the plaintiff employer’s contention that the Statute expansively allowed an employer to restrain a former employee from accepting all employment positions with a competitor. Thus, the Amendment’s potential application squarely contradicts all prior jurisprudential authority in Louisiana regarding the extent of permissible competitive restraints under these Statutes.

113. Such interpretation appears more likely considering the supreme court’s reasoning in SWAT 24 that "[t]he language of the original exceptions [to the Statute] themselves has not been expanded, thus solidifying the notion that the public policy disfavoring such agreements remain strong." SWAT 24, 808 So. 2d at 305. The Amendment is undoubtedly an expansion which may be interpreted to shift Louisiana's public policy. Thus, a post-Amendment noncompetition agreement might be held valid even though it precludes a former employee from accepting any employment position with a competitor.


115. SWAT 24, 808 So. 2d at 307:
If the statute were to allow an employer to enter into an agreement whereby an employee agrees to refrain from being employed by a competitor subject to certain geographical restrictions, then, for example, a doctor employed by a regional hospital who signs such an agreement could not practice medicine in any capacity in the region for two years. The same situation would result if a riverboat pilot, a plumber, or a bank manager signed a noncompetition agreement. Such results would curtail employees’ ability to earn a living and offend the basic premise of Louisiana’s doctrine of employment at will. These overbroad and expansive results could not have been intended by the legislature.
It is well documented that the legislature intended the Amendment "to provide fairness to the employee and the employer." Nevertheless, if an employer is successful in restraining a former employee from accepting all employment positions with a competitor despite the absence of a legitimate business interest, then the legislature's intent has been neglected in favor of indenturing that employee to his current post. Such an employment relationship resembles debt peonage, or compulsory service in payment of a debt. The employer is effectively saying, "We don't have to keep you, and you can't rely on us, but we can keep you from working at your chosen life work." The Amendment could, thus, produce overbroad and expansive results by permitting the enforcement of noncompete agreements that essentially function as devices *in terrorem.* The following fact pattern, taken from an actual case, illustrates the Amendment's potential for inequity.

Faces Boutique was a facial spa company that provided skin care services. Deborah Gibbs joined the business as an esthetician and thereafter provided facials to customers of Faces Boutique. She and her new employer entered into a written employment contract containing a provision that prevented Deborah Gibbs from securing employment in any capacity with any competing business providing facials. After approximately one year at Faces Boutique, Deborah Gibbs took an eight-day maternity leave. Deborah Gibbs did not return to Faces Boutique. Instead, she accepted a position as a

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116. Committee on Labor and Industrial Relations, La. House of Representatives, 2003 Reg. Sess., April 30, 2003, Minutes (on file with the Committee on Labor and Industrial Relations). See also, supra text accompanying notes 89 and 95.

117. See supra text accompanying notes 89 and 95.

118. Covenants not to compete are subject to "great abuses... from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come up to set up for themselves." Mitchel v. Reynolds, 1 P. Wms. 181, 190, 24 Eng. Rep. 347, 350 (Q.B. 1711). See also, Rachel S. Arnow-Richman, Bargaining For Loyalty In The Information Age, 80 Or. L. Rev. 1163, 1176 (2001) (arguing that when an employer has a legitimate protectable interest, it "is neither attempting to indenture the employee nor restrain legitimate competition, but rather is seeking to prevent the employee from departing with the customer base that the employer developed.").

119. Bailey v. State of Alabama, 219 U.S. 219, 242, 31 S. Ct. 145, 152 (1911) ("[Peonage] may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master.").


121. The Latin phrase *in terrorem* is defined as "[b]y way of threat" or "as a warning," Black's Law Dictionary 825 (7th ed. 1999).

manicurist with a nearby beauty salon that happened to also provide facials to its customers.

If Faces Boutique files suit, a Louisiana court applying the Amendment could deem Deborah Gibbs' employment with Faces Boutique's competitor to constitute "carrying on or engaging in a business" within the meaning of Section C. Assuming the covenant not to compete complies with Section C's remaining technical requirements, Faces Boutique would be able to obtain an injunction against Deborah Gibbs that would prevent her from either continuing in her new manicurist position or "working as... [the] competitor's janitor." By its express terms, the Statute does not require further analysis. Yet equity hinges on one unanswered issue: does Faces Boutique have a protectable legitimate business interest that outweighs Deborah Gibbs' individual freedom? In light of the discretionary wording of the Amendment, it would seem that the legislature has left the task of shaping Louisiana policy, as it relates to competitive restraints, largely to the courts. The following section outlines two potential judicial reactions to this broad grant of discretionary authority.

III. TENABLE JUDICIAL RESPONSES

In spite of the legislature's intention to provide fairness to both employers and employees, the Amendment could radically shift the anti-competition versus individual freedom balance in favor of employers. It therefore becomes necessary to develop an application of the Amendment that balances employer interests against employee freedom. This section analyzes two alternative courses the judiciary may take when applying the Amendment.

A. Reviving Pre-SWAT 24 Decisions

As noted previously, the SWAT 24 decision resolved a split among the decisions of the Louisiana circuit courts of appeal, each of which allowed limited restrictions on former employee competition under different rationales. The Amendment overrules the SWAT 24 decision. Consequently, the pre-SWAT 24 appellate decisions may guide the judiciary and provide a proper standard, the satisfaction of which would warrant the Amendment's permissive enforcement.

123. Telxon Corp. v. Hoffman, 720 F. Supp. 657, 664 (N.D. Ill. 1989). In Telxon, the court invalidated a covenant not to compete because it did "not preclude employment only in those capacities which might threaten [the employer's]... legitimate interests." Id.

124. See supra text accompanying notes 51-55, for a discussion of the major appellate court decisions leading up to SWAT 24.
The second circuit's analysis in *Summit Institute for Pulmonary Medicine & Rehabilitation, Inc. v. Prouty* implies that it is unjust and inequitable to restrain an employee with a covenant not to compete when his former employer does not have a legitimate business interest in need of protection. Unfortunately, the court held that customer solicitation is the only employer interest worthy of protection. The Amendment's history manifests a legislative recognition of multiple employer interests, including confidential information, customer lists, and proprietary information. And there are, in fact, multiple employer interests that should find refuge behind a noncompetition agreement's shield. The *Summit* approach is therefore too narrow, failing to both adequately protect employer interests and provide guidance consistent with the legislature's will.

In *Scariano Brothers, Incorporated v. Sullivan*, the fourth circuit found that the agreement at issue was overbroad because it prevented the individual from "rendering services" to a former employer's competitor. The court's reasoning is unclear. The fourth circuit merely stated that the competitive actions encompassed by the covenant did not constitute "carrying on or engaging in a business" similar to the plaintiff employer. Thus, the court recognized that working for a competitor of a former employer is, without more, not "carrying on or engaging in a business." According to the fourth circuit, the former employee's new position must constitute "carrying on or engaging in a business" similar to that of his former employer. By focusing solely on the former employee's new position, the *Scariano* court did not explicitly balance the employer's interests against the employee's freedom.

The *Scariano* court's approach could be interpreted in two ways. First, if the former employee's new position entails competing with any aspect of his former employer's business, then the employee is "carrying on or engaging in a business" similar to his former employer. This interpretation was adopted by the third circuit in *Moreno & Associates v. Black*. A comparable approach focusing on

125. 691 So. 2d 1384.
126. See supra text accompanying notes 37-39.
127. See supra text accompanying note 108.
128. See infra text accompany note 154.
129. 719 So. 2d 131.
130. Id. at 135.
132. *Scariano*, 719 So. 2d at 135.
134. Id.
135. *Scariano*, 719 So. 2d at 135.
137. 741 So. 2d 91.
the former employee's new position and its impact on the former employer was suggested by Justice Traylor in his SWAT 24 dissent.¹³⁸

By strictly focusing on competition, this first interpretation of the Scariano opinion forecloses an inquiry into the parties' respective interests. Fair competition is highly favored, and competitive restrictions cannot reasonably be based solely on the employer's desire to contractually eliminate competition.¹³⁹ Only a legitimate business interest in need of protection warrants a restraint on an individual's freedom.¹⁴⁰ Thus, this first interpretation of the Scariano opinion fails to resolve the Amendment's potential for unjust application.

Second, the Scariano court's intention may have been to formulate a rule that allows a noncompete agreement to prevent a former employee from assuming a new position where the activities he performs overlap with the particular aspect of business that he performed for his former employer. However, this view assumes that the employer has a legitimate business interest in need of protection. The fourth circuit did not explain the scope or application of its rule, and both interpretations of its rationale are problematic. Thus, the Scariano decision does not provide an appropriate formula for the Amendment's application.

In sum, the pre-SWAT 24 decisions of the Louisiana circuit courts of appeal do not provide an adequate analysis for determining the scope of the Amendment's application in a way that conforms with the legislature's equitable intentions. The second circuit too narrowly restricted the employer's legitimate business interests to include only customer solicitation, while the third and fourth

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¹³⁸ See supra text accompanying note 79.
¹³⁹ See, e.g., Davis v. Albany Area Primary Health Care, Inc., 503 S.E.2d 909, 912 (Ga. Ct. App. 1998) (holding that the "avoidance of competition is not a legitimate business interest sufficient to justify such an uncertain geographic limitation . . . ."); Am. Broad. Cos., Inc. v. Wolf, 420 N.E.2d 363, 368 (N.Y. 1987) ("Underlying the strict approach to enforcement of these covenants is the notion that, once the term of an employment agreement has expired, the general public policy favoring robust and uninhibited competition should not give way merely because a particular employer wishes to insulate himself from competition."); Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 473 (Tenn. 1984) ("[A]ny competition by a former employee may well injure the business of the employer. An employer, however, cannot by contract restrain ordinary competition."); Lester, supra note 3, at 54 (stating that noncompete agreements "interfere with market competition" and thus are only enforceable if they protect "a legitimate interest of the employer . . . ."); Arnow-Richman, supra note 118, at 1175 ("Employers have no right to enforce a noncompete merely for purposes of indenturing an employee to his or her current post, nor any right to prevent competition per se. To avoid unfair effects on employees and competitors, courts require the presence of special interests or circumstances that justify a restriction.").
¹⁴⁰ Id.
circuits completely failed to evaluate the employers' respective interests. Despite their potential reinstatement as good law, these decisions do not further the goals of equity. Consequently, Louisiana courts seeking to implement the legislature's equitable intentions should not look to these decisions when construing the Amendment. Nonetheless, the consensus of other states construing similar statutes may serve as a highly useful interpretive aid in this process.

B. The Legitimate Business Interest Requirement: A Proven Model

If the purpose of noncompetition agreements is to protect employers' justifiable interests, then it is logical to require the presence of a legitimate business interest in need of protection as a prerequisite to enforcement. The overwhelming majority of states employ this approach. In order for Louisiana to join its sister states, the legitimate business interest standard must first be adopted; and second, its scope must be defined.

1. The National Standard and Its Definition

Deborah Gibbs, the subject of the facial spa company employment example outlined in Part II(B) of this comment, was fortunate that her case was not adjudicated in a Louisiana court applying the Amendment without standards. In *Faces Boutique, Ltd. v. Gibbs*,141 a South Carolina appellate court upheld the trial court's ruling invalidating the noncompetition agreement. The appellate court focused on the legitimate business interest requirement and reasoned that the covenant, by restricting Gibbs from being associated in any capacity with a competing provider of facials, exceeded what was necessary to protect the plaintiff employer's goodwill or customer list.142

South Carolina is not the only state requiring a legitimate business interest. The Pennsylvania Supreme Court recently stated that "an overwhelming majority of jurisdictions . . . require, at a minimum, that . . . [noncompetition] contracts be reasonably related to the protection of a legitimate business interest."143 Specifically, the laws of forty-nine states and the District of Columbia demand that employers prove a legitimate business interest before a

142. Id. at 709.
covenant not to compete is enforced.\textsuperscript{144} Louisiana is, thus, alone in its failure to recognize the legitimate business interest standard.

Louisiana's current law does not recognize the legitimate business interest requirement. The repealed 1962 amendment\textsuperscript{145} and the overruled \textit{Summit Institute for Pulmonary Medicine \& Rehabilitation,}


\textsuperscript{145} See supra text accompanying notes 22-27, for a discussion of the 1962 amendment.
Inc. v. Prouty, decision protected certain employer interests, but both were considerably limited in scope. The legitimate business interest requirement broadly shelters employers and has never been entirely recognized under Louisiana law. This is despite the fact that the noncompetition Statute was based on the Alabama and Florida statutes, and the legitimate business interest requirement is central to the laws of both of those states. Louisiana is, thus, the only state in the United States whose law does not currently require that the employer prove a legitimate business interest.

2. Origin and Development of the Legitimate Business Interest Requirement

The 1831 English opinion of Horner v. Graves is likely the first legal decision articulating the business interest requirement. The Horner court analyzed the reasonableness of a covenant not to compete by examining facts relevant to "whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public." The Restatement (Second) of Contracts continues the Horner rule and provides that a noncompete agreement is reasonable and, thus, enforceable if it is necessary to protect an employer's legitimate business interest.

The majority of state courts and legislatures categorize the following business interests as legitimate and worthy of protection:

146. 691 So. 2d 1384. See also, supra text accompanying notes 33-39 (discussing the Summit decision).
147. See Lyon, supra note 19, at 642 (citing Jeffery 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, 552 (1991)).
148. See Chavers v. Copy Prods. Co., Inc. of Mobile, 519 So. 2d 942, 944 (Ala. 1988) (stating that a covenant not to compete must be reasonably related to an employer's "protectable interest."); Dyer v. Pioneer Concepts, Inc., 667 So. 2d 961, 964 (Fla. Dist. Ct. App. 1996) ("This court has held that the statute authorizes contracts in restraint of trade only to protect the employer's legitimate business interest."). It should be noted that the Florida statute upon which the Statute is based has been repealed. See Lyon, supra note 19, at 645.
149. In Sentilles Optical Servs. v. Phillips, 651 So. 2d 395 (La. App. 2nd Cir. 1995), the second circuit compared Louisiana and North Carolina policies governing noncompete agreements pursuant to a conflicts of laws analysis. The court stated that North Carolina law required a substantial interest of the employer before enforcing covenants not to compete, and Louisiana law required "mechanical adherence" to Section C. Id. at 399.
151. Harlan M. Blake, Employee Agreements Not to Compete, 73 Harv. L. Rev. 625, 639 (1960).
trade secrets, confidential customer information, and customer solicitation (goodwill).\textsuperscript{154} Obviously, if these interests are not protected, a former employee could take advantage of the access he had in the course of his former employment to appropriate valuable trade information and to sabotage customer relationships.\textsuperscript{155} Under the legitimate business interest analysis, a restrictive covenant should be enforced if it is designed to protect any of the employer’s trade secrets, the potential misappropriation of which would result in “a free competitive advantage.”\textsuperscript{156} The customer solicitation interest is

\begin{itemize}
  \item \textsuperscript{154} See generally, supra note 144. See also, Timothy J. Long and James H. McQuade, \textit{Practicing Law Institute, Emp. Law Y.B.} § 18:3.2, at 1044-54 (2003) (citing case law and detailing legitimate business interests); Arnow-Richman, \textit{supra}, note 118, at 1175-78 (same); Christine M. O’Malley, \textit{Covenants Not to Compete in the Massachusetts Hi-tech Industry: Assessing the Need for a Legislative Solution}, 79 B.U. L. Rev. 1215, 1222 (1999) (same).
  \item \textsuperscript{155} Kirstan Penasack, Note, \textit{Abandoning the Per Se Rule Against Law Firm Agreements Anticipating Competition: Comment on Haight, Brown & Bonesteel v. Superior Court of Los Angeles County}, 5 Geo. J. Legal Ethics 889, 899 (1992) (“Noncompetition agreements allow employers to entrust confidential, business development and client relation information efficiently to specific employees.”); Paul H. Rubin & Peter Shedd, \textit{Human Capital and Covenants Not to Compete}, 10 J. Legal Stud. 93, 96-97 (1981) (arguing that noncompetition agreements “are necessary in some circumstances to lead to efficient amounts of investment in human capital.”). See also, Restatement (Second) of Contracts § 188 cmt. c (1981):
    The employer’s interest in exacting from his employee a promise not to compete after termination of the employment is usually explained on the ground that the employee has acquired either confidential trade information relating to some process or method or the means to attract customers away from the employer . . . . A line must be drawn between the general skills and knowledge of the trade and information that is peculiar to the employer’s business. If the employer seeks to justify the restraint on the ground of the employee’s knowledge of a process or method, the confidentiality of that process or method and its technological life may be critical . . . . If the employer seeks to justify the restraint on the ground of the employee’s ability to attract customers, the nature, extent and locale of the employee’s contacts with customers are relevant. A restraint is easier to justify if it is limited to one field of activity among many that are available to the employee.
  \item \textsuperscript{156} Stork-Werkspoor Diesel V.V. v. Koek, 534 So. 2d 983, 985 (La. App. 5th Cir. 1988). Other Louisiana laws protect legitimate employer interests. See, e.g., Louisiana Uniform Trade Secrets Act (codified at La. R.S. 51:1431, et seq.); Louisiana Unfair Trade Practices and Consumer Protection Law (codified at La. R.S. 51:1401, et seq.). But a noncompete agreement prevents competition altogether and, thus, avoids the close questions of fact under alternate causes of action. See, e.g., SDT Indus., Inc. v. Leeper, 793 So. 2d 327 (La. App. 2nd Cir. 2001) (reversing a jury’s finding of fact and refusing to uphold a favorable ruling on the plaintiff’s trade secrets and unfair trade practices claims against its competitor and former employee). Nevertheless, recognition of the trade secret interest under the legitimate business interest analysis is consistent with Louisiana’s Uniform Trade Secret’s Act. In Koek, the fifth circuit explained the purpose of
present if the former employee had sufficient contact with customers such that he could lure them away from his former employer. Likewise, the confidential information interest exists when the information acquired by the former employee is useful to competitors and would unreasonably harm the former employer's business.

3. Integration with Louisiana Law

The legitimate business interest requirement provides the judiciary with a sensible and balanced solution to the Amendment's problematic potential application. Courts should not, due to a lack of support in the Amendment's text, be reluctant to implement the business interest requirement. The Amendment's permissive language grants the judiciary the authority to develop standards governing the enforceability of noncompete agreements. When the word "may" is used in the Louisiana Revised Statutes, it is "permissive." "Shall," in contrast, is "mandatory." The Statute is replete with the "shall" versus "may" distinction. The legislature did not use the word "shall" when writing the Amendment, but it did use the word "may." Thus, the Amendment's permissive language denotes that it is to be applied with discretion.

In light of this discretion, courts should deem "a person who becomes employed by a competing business... 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" only when the employer

Louisiana's Uniform Trade Secrets Act and stated that the prohibitions in the statute exist "to prevent one person or business from profiting from a trade secret developed by another, because it would thus be acquiring a free competitive advantage." 534 So. 2d at 985.

157. Restatement (Second) of Contracts § 188 illus. 6-8.
158. Restatement (Second) of Contracts § 188 illus. 9-10.
159. 2003 La. Acts No. 428, § 1 "[M]ay be deemed to be carrying on or engaging in a business..."
160. See La. R.S. 1:3 (2002) ("The word 'shall' is mandatory and the word 'may' is permissive.").
161. Id.
has demonstrated that the noncompetition agreement at issue protects a legitimate business interest. This would prevent the inequity that certainly results if, through the Amendment’s application, an employer is allowed to indenture its former employee without regard to whether the noncompete agreement protects a legitimate business interest. Furthermore, the legitimate business interest requirement ensures that the legislature’s equitable and balanced intent is respected.

The legitimate business interest requirement should operate as a threshold determination. An employer must first prove that it has a legitimate business interest in restraining a former employee from working for a competitor. If the employer proves the presence of a legitimate business interest, then the secondary issue of whether the noncompetition agreement complies with Section C’s remaining technical requirements must be resolved.

Integration of the legitimate business interest requirement is consistent with the legislative intent underlying the Amendment. The 1962 amendment protected advertising and employee training expenses, and thus its repeal may signal, to some, that the legislature implicitly rejected the legitimate business interest requirement. However, this would be an unwarranted reaction. The modern formulation of the legitimate business interest requirement protects multiple employer interests, none of which are advertising or employee training expenses. Moreover, in the Orkin Exterminating Company v. Foti decision, the supreme court’s judicial gloss severely inhibited employers’ use of noncompetition agreements. If the legislature wanted to negate those limited employer protections under the 1962 amendment, then inaction and acquiescence to the Court’s restrictive interpretation would have achieved that result. The Amendment’s history actually suggests that the current

164. This comment does not maintain that integration of the legitimate business interest requirement alone solves all current problems associated with Louisiana’s law on noncompetition agreements. For example, it is unfortunate that the legislature assumed that a two-year contract term is always reasonable. See La. R.S. 23:921(C) (2002). In contrast, the Restatement (Second) invalidates a noncompete agreement that restrains an employee for a period of time longer than needed to protect the employer’s legitimate interests. See Restatement (Second) of Contracts § 188(1)(a).
165. See supra text accompanying notes 22-27, for a discussion of the 1962 amendment.
166. See supra text accompanying notes 150-58, for a discussion of legitimate protectable business interests.
167. 302 So. 2d 593 (La. 1974).
168. See supra text accompanying notes 25-27, for a discussion of the Orkin court’s judicial gloss.
legislature favors employer protection, and this latest enactment may effectively reinstate the Summit Institute for Pulmonary Medicine & Rehabilitation, Inc. v. Prouty decision, which provided protection to employers by recognizing the customer solicitation interest. Thus, the question of whether the legislature rejected the legitimate business interest requirement fifteen years ago is more likely than not answered in the negative.

4. Predictability vs. Flexibility

It should be noted, however, that judicial adoption of the legitimate business interest requirement merits caution. Such a course of action would contribute to the historical theme of uncertainty that surrounds the enforceability of Louisiana noncompete agreements, and may awaken a legislative reaction similar to that which followed the Orkin decision in 1989. Endorsement of the legitimate business interest requirement, like the Orkin court’s superimposition, introduces a new hurdle that employers must overcome beyond Section C’s objective criteria. However, there is a significant difference between Orkin’s addition and the legitimate business interest requirement. Orkin’s standard of substantial expenses was unattainable. The legitimate business interest requirement is, by contrast, a proven equalizer in forty-nine states and the District of Columbia. Thus, adoption of the legitimate business interest requirement actually promotes predictability, thereby reconciling Louisiana law with that of the rest of the nation.

Satisfying the business interest requirement involves a subjective balancing of the parties’ respective interests, which lends itself to flexibility. Consequently, “mechanical adherence” to Section C

169. See supra text accompanying notes 82-104 and 108, for a discussion of the legislative intent underlying the Amendment.
170. 691 So. 2nd 1384 (La. App. 2d Cir. 1997).
171. See supra text accompanying notes 33-39, for a discussion of the Summit decision.
172. See supra text accompanying notes 25-30, for a discussion of the Orkin decision and the 1989 amendment.
173. From the national employer’s point of view, the legitimate business interest requirement is more favorable than any other standard for the Amendment’s application because the prevalence of a uniform legal standard produces efficiencies and predictability. Thus, adoption of the legitimate business interest requirement theoretically encourages business investment in Louisiana’s labor force. It should be noted that application of the Amendment without standards may also encourage business investment, but the burden imposed on an individual subject to a wholesale prohibition against competitive employment significantly outweighs the benefit to a national employer.
would no longer guarantee a noncompetition agreement's enforcement. This sacrifice of predictability does echo Orkin. Nevertheless, to require a legitimate business interest is to specifically carry out the discretionary authority and general equitable intent which lies at the heart of the legislature's most recent Amendment. Equity is a far nobler goal than predictability.

If the legislature truly desires predictability, it should enact a new statutory provision that requires employers to demonstrate one of a list of legitimate business interests as a prerequisite to the enforcement of noncompetition agreements. Florida's current statute governing noncompetition agreements is a stellar example. It requires employers to plead and prove the existence of a legitimate business interest, which is statutorily defined to include one of an illustrative list of specific interests. Louisiana's noncompetition statute was originally patterned after a now repealed Florida statute. The Louisiana legislature should, once again, follow Florida's model and supplement the Amendment appropriately if predictability remains the primary goal.

**CONCLUSION**

Striking an appropriate balance between employer interests and individual freedom should be of paramount concern in Louisiana. The Amendment was enacted with that goal, but its application may spawn considerable injustice. If courts deem individuals who become employed by competing businesses to be "carrying on or engaging in a business" similar to their former employers without regard to any legitimate business interest in need of protection, then a form of debt peonage has replaced individual autonomy in Louisiana.

There is an obvious reason why the laws of every state other than Louisiana require that an employer demonstrate a legitimate business interest as a precondition to the enforcement of a noncompete agreement. Only legitimate business interests, including trade secrets,
confidential customer information, and customer solicitation, justify limited competitive restraints on individual freedom. Restrictions without such justification unnecessarily tip the delicate balance. Hence, an application of the Amendment that fails to require a legitimate business interest is an inequitable encroachment on employee independence.

This comment submits that the Amendment presents the State of Louisiana with an opportunity to join the rest of the nation because it grants the judiciary authority to balance employer interests and employee freedom. An individual who becomes employed by a competing business should only be deemed to be "carrying on or engaging in a business" \(^{180}\) similar to his former employer if the employer establishes that the noncompetition agreement at issue protects a legitimate business interest. Although this proposal arguably reduces the predictability of the expected outcomes, its flexibility outweighs the risk of uncertainty that it involves, its equitable goal recognizes the legislature's intent underlying the Amendment, and its widespread use offers a proven approach to strike the delicate balance in Louisiana between employer protection and individual autonomy.

Daniel S. Terrell*
Appendix A

Louisiana Revised Statutes Title 23. Labor and Workers' Compensation Chapter 9. Miscellaneous Provisions Part II. Contracts

§ 921. Restraint of business prohibited; restraint on forum prohibited; competing business; contracts against engaging in; provisions for

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. (2) The provisions of every employment contract or agreement, or provisions thereof, by which any foreign or domestic employer or any other person or entity includes a choice of forum clause or choice of law clause in an employee's contract of employment or collective bargaining agreement, or attempts to enforce either a choice of forum clause or choice of law clause in any civil or administrative action involving an employee, shall be null and void except where the choice of forum clause or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action.

B. Any person, including a corporation and the individual shareholders of such corporation, who sells the goodwill of a business may agree with the buyer that the seller or other interested party in the transaction, will refrain from carrying on or engaging in a business similar to the business being sold or from soliciting customers of the business being sold within a specified parish or parishes, or municipality or municipalities, or parts thereof, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, not to exceed a period of two years from the date of sale.

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. An independent contractor, whose work is performed pursuant to a written contract, may enter into an agreement to refrain from carrying on or engaging in a business similar to the business of the person with whom the independent contractor has contracted, on the same basis as if the independent contractor were an employee, for a period not to exceed two years from the date of the last work performed under the written contract.

D. 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.

E. Upon or in anticipation of a dissolution of the partnership, the partnership and the individual partners, including a corporation and the individual shareholders if the corporation is a partner, may agree that none of the partners will carry on a similar business within the same parish or parishes, or municipality or municipalities, or within specified parts thereof, where the partnership business has been transacted, not to exceed a period of two years from the date of dissolution.

F. (1) Parties to a franchise may agree that: (a) The franchisor shall refrain from selling, distributing, or granting additional franchises to sell or distribute, within defined geographic territory, those products or services which are the subject of the franchise. (b) The franchisee shall: (i) During the term of the franchise, refrain from competing with the franchisor or other franchisees of the franchisor or engaging in any other business similar to that which is the subject of the franchise. (ii) For a period not to exceed two years following severance of the franchise relationship, refrain from engaging in any other business similar to that which is the subject of the franchise and from competing with or soliciting the customers of the franchisor or other franchisees of the franchisor.

(2) As used in this Subsection: (a) “Franchise” means any continuing commercial relationship created by any arrangement or arrangements as defined in 16 Code of Federal Regulations 436.2(a). (b) “Franchisee” means any person who participates in a franchise relationship as a franchisee, partner, shareholder with at least a ten percent interest in the franchisee, executive
officer of the franchisee, or a person to whom an interest in a franchise is sold, as defined in 16 Code of Federal Regulations 436.2(d), provided that no person shall be included in this definition unless he has signed an agreement expressly binding him to the provisions thereof. (c) "Franchisor" means any person who participates in a franchise relationship as a franchisor as defined in 16 Code of Federal Regulations 436.2(c).

G. (1) An employee may at any time enter into an agreement with his employer that, for a period not to exceed two years from the date of the termination of employment, he will refrain from engaging in any work or activity to design, write, modify, or implement any computer program that directly competes with any confidential computer program owned, licensed, or marketed by the employer, and to which the employee had direct access during the term of his employment or services. (2) As used in this Subsection, "confidential" means that which: (a) Is not generally known to and not readily ascertainable by other persons. (b) Is the subject of reasonable efforts under the circumstances to maintain its secrecy. (3) As used in this Subsection, "computer program" means a plan, routine, or set of statements or instructions, including any subset, subroutine, or portion of instructions, regardless of format or medium, which are capable, when incorporated into a machine-readable medium, of causing a computer to perform a particular task or function or achieve a particular result. (4) As used in this Subsection, "employee" shall mean any individual, corporation, partnership, or any other entity which contracts or agrees with an employer to perform, provide, or furnish any services to, for, or on behalf of such employer.

H. Any agreement covered by Subsections B, C, D, E, or F of this Section shall be considered an obligation not to do, and failure to perform may entitle the obligee to recover damages for the loss sustained and the profit of which he has been deprived. In addition, upon proof of the obligor's failure to perform, and without the necessity of proving irreparable injury, a court of competent jurisdiction shall order injunctive relief enforcing the terms of the agreement.