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# Equalizing the Threat of Noncompete Agreements: Solutions Beyond Louisiana's Tangled Web of Nullity

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# Equalizing the Threat of Noncompete Agreements: Solutions Beyond Louisiana’s Tangled Web of Nullity

## TABLE OF CONTENTS

Introduction .....	1236
I. Noncompete Agreements Throughout the United States and Louisiana.....	1241
A. Noncompete Agreements Throughout the United States.....	1242
B. Noncompete Agreements in Louisiana .....	1243
1. Louisiana’s Oscillating History of Noncompete Agreements.....	1244
2. Requirements of an Enforceable Noncompete Agreement Under Section 23:921 .....	1248
II. The Doctrine of Nullity as Applied to Noncompete Agreements.....	1249
A. Dissolution and Damages: Louisiana Civil Code Article 2033 and Its Application to Noncompete Agreements .....	1250
1. Application of Article 2033: Restoring a Party through Damages.....	1251
2. Restoring the Employee Through Article 2033: <i>Kimball v. HEALTHCAREfirst, Inc.</i> .....	1252
B. Reformation of Contractual Instruments.....	1254
1. Reformation of Noncompete Agreements Throughout the United States.....	1254
2. Reforming Noncompete Agreements in Louisiana: <i>AMCOM of Louisiana v. Battson</i> .....	1256
C. Lost in the Nebulous Web of Nullity .....	1258
III. Legal Problems Leading to Overused and Overly Broad Noncompete Agreements .....	1259
A. Overly Broad Noncompete Agreements .....	1259
B. Overuse of Noncompete Agreements .....	1260
1. Protectable Interest Requirement in Other Jurisdictions.....	1260
2. Louisiana’s Battle with Certainty and Fairness.....	1262
IV. Alternative Solutions to the Overly Broad and Overused Noncompete Agreements .....	1263
A. A Legislative Solution: Overhaul Louisiana’s Noncompete Law .....	1263

1. Disincentivize Overbreadth of Noncompete Agreements: Eliminate Reformation .....	1264
2. Curtail the Overuse of Noncompete Agreements: Require a Protectable Interest.....	1264
B. A Judicial Solution: Arming Employees and Employers with the Counterweight of Intentional Interference with Contractual Relations .....	1265
1. Intentional Interference with Contractual Relations in Other Jurisdictions.....	1266
2. Intentional Interference with Contractual Relations in Louisiana .....	1267
3. Adopting Tortious Interference in the Employment Context in Louisiana.....	1269
C. The Not-So-Magic Formula.....	1273
Conclusion.....	1274

## INTRODUCTION

Noncompete agreements, once used infrequently and limited to highly specialized industries, are becoming ubiquitous in employment contracts.<sup>1</sup> These agreements are frequently overly broad and often restrict employees who have no specialized knowledge or training and who pose no threat to an employer's competitive advantage. One such case is that of Catherine Kimball. HEALTHCAREfirst ("HCF") offered Catherine Kimball employment as a consultant and salesperson in charge of providing technology services to healthcare agencies.<sup>2</sup> Before Kimball accepted the

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1. See Greg T. Lembrich, Note, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291, 2297 (2002) ("Given the degree of protection that restrictive covenants can offer, some commentators have suggested that employers should routinely include them in their employees' contracts, even if they may not be necessary.").

2. HEALTHCAREfirst is a national company that provides web-based home health and hospice services to caregivers. *About Us*, HEALTHCAREFIRST, <http://w2.healthcarefirst.com/who-we-are/> (last visited Mar. 9, 2016). The company is based in Missouri, but has an office in Baton Rouge, Louisiana. *Contact HEALTHCAREfirst*, HEALTHCAREFIRST, <http://w2.healthcarefirst.com/contact-us/> (last visited Mar. 9, 2016). Catherine Kimball's attorney, Amy Newsom, provided all of the information on Kimball's journey through litigation. Interview with Amy Newsom, Newsom Law Firm, in Baton Rouge, La. (Sept. 18, 2014). Litigation arose in the Middle District of Louisiana. *Kimball v.*

position, but after she had resigned from her previous employment, HCF informed her that she would be required to sign a noncompete agreement.<sup>3</sup> Because Kimball had already resigned from her previous employment, she felt that she had no option but to sign the noncompete agreement.

HCF, a national company that used both telephone and web-based technology, allowed Kimball to work from her home in Baton Rouge, Louisiana. Kimball's service territory changed 13 times during her three years of employment, allowing Kimball to service agencies in all 50 states during her employment with HCF.<sup>4</sup> Despite working for HCF for years, the company laid off Kimball, forcing her to seek new employment.<sup>5</sup>

Kimball applied to work at a California company that did nearly identical work to HCF and would allow her to work from her home in Louisiana. The California employer was ready to offer Kimball a job when she told the company that she had signed a noncompete agreement with HCF. The company refused to hire Kimball unless HCF released her from the noncompete agreement or a court invalidated the agreement. HCF refused to release Kimball from the agreement, and as a result, the California employer declined to offer Kimball employment.

Because of the restrictive noncompete agreement, Kimball was left unemployed, and she had few options for future employment. The noncompete agreement restricted employees from working in every state in the United States, Guam, and Puerto Rico<sup>6</sup> and thus was geographically overbroad under Louisiana law.<sup>7</sup> Only after Kimball filed suit, did HCF concede that the noncompete agreement was overly broad and seek reformation of the agreement to make it enforceable.<sup>8</sup>

HCF's concession, however, arrived too late. By the time the court declared Kimball's noncompete agreement invalid, the California company had rescinded the job offer.<sup>9</sup> Throughout the litigation

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HEALTHCAREfirst, Inc., No. 12-395, 2013 WL 4782139 (M.D. La. Sept. 5, 2013).

3. Interview with Amy Newsom, *supra* note 2.

4. Because Kimball worked in each state, HCF's noncompete agreement, which forbade ex-employees from working in any place where they did work for HCF, effectively prohibited her from competing in any state in the nation.

5. Interview with Amy Newsom, *supra* note 2.

6. Memorandum in Support of Motion for Summary Judgment at 5, Kimball v. HEALTHCAREfirst, Inc., No. 12-395 (E.D. La. Sept. 4, 2012), 2012 WL 6197360.

7. The agreement violated Louisiana law because it did not restrict competition to the parishes or municipalities in which the employer did business. LA. REV. STAT. ANN. § 23:921 (Supp. 2015).

8. Kimball v. HEALTHCAREfirst, Inc., No. 12-395, 2013 WL 4782139, at \*2 (M.D. La. Sept. 5, 2013).

9. Interview with Amy Newsom, *supra* note 2.

concerning the validity of the noncompete agreement, Kimball hoped that the California company would hold her job offer, so she did not seek other employment. Even if she had, the noncompete agreement would have likely prevented her from being hired because there had been no judicial declaration that the agreement was overly broad. Because Kimball could not work, she was unable to pay her bills and almost lost her home due to foreclosure.

Although Kimball's situation is an extreme example of the damage caused by an overly broad noncompete agreement, other problems arise from Louisiana's current noncompete law. This law causes problems for two reasons: noncompete agreements are often overly broad and are overused. Kimball's situation demonstrates the negative consequences of overly broad noncompete agreements.

Overly broad noncompete agreements are contrary to Louisiana's public policy in favor of competition, and therefore are absolutely null.<sup>10</sup> Aggrieved employees, however, find no recompense in the three remedies provided by Louisiana's nullity doctrine—dissolution, reformation, and damages.<sup>11</sup> As such, Louisiana's noncompete landscape should provide employees with avenues for recovery if they suffer economic harm due an illegally restrictive agreement.

Current Louisiana law incentivizes employers to draft overly broad noncompete agreements because Louisiana courts are willing to sever overly broad provisions if the agreement contains a severability clause,<sup>12</sup> which renders the remainder of the agreement enforceable.<sup>13</sup> Between the termination of employment and the initiation of litigation to reform a noncompete agreement, the overly broad agreement remains in place. During this time, the employer benefits from the employee's uncertainty as to the enforceability of the noncompete agreement, and the employee is unlawfully restricted from competing.<sup>14</sup> The court's discretion to determine what portions, if any, of a noncompete agreement can be

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10. See *infra* Part II.

11. See *infra* Part II.

12. See *AMCOM of La., Inc. v. Battson*, 670 So. 2d 1223, 1223 (La. 1996) (mem.); *Vartech Sys., Inc. v. Hayden*, 951 So. 2d 247, 257 (La. Ct. App. 2006) (using a severability clause to “excise the offending language from the non-compete clause without doing undue damage to the remainder of the provision”).

13. See, e.g., *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 808 So. 2d 294, 309 (La. 2001) (allowing for the use of a severability clause to strike an unenforceable provision, while leaving the remainder of the contract intact).

14. Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 690 (2008).

severed or reformed makes it impossible for an employee to determine whether the agreement is valid and enforceable on its face.<sup>15</sup>

The Louisiana Legislature or the Louisiana Supreme Court could cure the uncertainty of enforceability that plagues noncompete agreements and deter employers from drafting overly broad agreements by terminating a court's ability to reform these agreements. Compared to other states' noncompetition statutes, Louisiana's statute is detailed and provides concrete requirements and restrictions on drafting noncompete agreements. Nowhere in the statute, however, did the legislature include the possibility for reformation or severability.<sup>16</sup> This suggests that the legislature did not intend for the courts to reform these unenforceable agreements. Indeed, reformation of noncompete agreements is relatively new, as Louisiana courts of appeal did not reform overly broad noncompete agreements until 1996.<sup>17</sup>

The defects in Louisiana's noncompete law also produce the secondary effect of employers' overuse of noncompete agreements. Louisiana Revised Statutes section 23:921 enables employers to easily draft noncompete agreements for any employee without justifying the need for restricting the employee. Employers—at little to no present or future cost—arm themselves with the threat of enforcing the agreements against employees and applicants whose only choices are to sign them or not accept a job.<sup>18</sup>

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15. *See id.*

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

17. *Compare* Comet Indus., Inc., v. Lawrence, 600 So. 2d 85 (La. Ct. App. 1992) (refusing to reform a noncompete agreement), *with* *AMCOM*, 670 So. 2d 1223 (reinstating trial court's ruling that allowed reformation of a noncompete agreement). In *AMCOM v. Battson*, the Louisiana Supreme Court infused uncertainty into Louisiana's approach to noncompete agreements by allowing for reformation without any statutory support or explanation. *See generally id.*; *see also* Carey C. Lyon, Comment, *Oppress the Employee: Louisiana's Approach to Noncompetition Agreements*, 61 LA. L. REV. 605, 628 (2001).

18. For instance, low-wage employees of Jimmy John's Gourmet Sandwiches who make and deliver sandwiches have recently filed lawsuits against their employer regarding its restrictive noncompete agreements. *See* Class and Collective Action Complaint, *Kubelskas v. Jimmy John's Enters., Inc.*, No. 1:14-CV-06134 (N.D. Ill. Aug. 8, 2014); Memorandum Opinion, *Brunner v. Jimmy John's Enters., Inc.*, No. 1:14-CV-05509 (N.D. Ill. Apr. 8, 2015) (declining to grant declaratory or injunctive relief that would prevent Jimmy John's franchisees from enforcing noncompete agreements of Jimmy John's employees because the plaintiffs alleged insufficient facts to confer standing). Jimmy John's requires its employees, regardless of position or salary, to sign noncompete

To rectify the overuse of noncompete agreements in Louisiana, the legislature should amend section 23:921 to require businesses to identify a justifiable reason—a protectable interest—to restrain an employee.<sup>19</sup> If the law required employers to draft noncompete agreements with purpose, instead of formulaic ease, many employers would draft noncompete agreements only when necessary—when an employee legitimately threatens the employer’s competitive advantage. The pervasive misuse of noncompete agreements needs to be curbed because these agreements infringe on an employee’s liberty interest in obtaining employment. Solving the problems that cause overly broad noncompete agreements and their overuse may require a joint effort from the Louisiana Legislature and the Louisiana Supreme Court.

If the Louisiana Legislature is unwilling to amend the state’s noncompete law by eliminating the courts’ ability to reform noncompete agreements or by requiring employers to prove a protectable interest, the Louisiana Supreme Court must take action. If the legislature refuses to act, the Court should mimic the courts of other states and adopt the tort of tortious interference with contractual relations to address abuse of noncompete agreements.<sup>20</sup> Tortious interference with contractual relations is not currently recognized in Louisiana as a cause of action for overly broad noncompete agreements.<sup>21</sup> A cause of action for tortious interference with contractual relations empowers both employees and employers to enforce their rights. The tort provides an employee with a countervailing remedy if she suffers damage due to an overly broad noncompete agreement. Further, the tort aids employers by allowing them to sue a competitor who hires a former employee in violation of a valid noncompete agreement. The tort will also stifle the overuse of noncompete agreements because employers will face the possibility of a lawsuit and damages if they do not draft a noncompete agreement in compliance with

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agreements. Class and Collective Action Complaint, *supra*; Memorandum Opinion, *supra*.

19. See *infra* Part III.A.

20. See *infra* Part IV.B.

21. See *9 to 5 Fashions, Inc. v. Spurney*, 538 So. 2d 228, 234 (La. 1989). In *Spurney*, the Louisiana Supreme Court expressly refused to adopt the common law doctrine of tortious interference, recognizing “only a corporate officer’s duty to refrain from intentional and unjustified interference with the contractual relation between his employer and a third person.” *Id.* Other courts have not expanded the tortious interference doctrine. See, e.g., *Great Sw. Fire Ins. Co. v. CNA Ins. Cos.*, 557 So. 2d 966, 969 (La. 1990); *Petrohawk Props., L.P. v. Chesapeake La., L.P.*, 689 F.3d 380, 394–95 (5th Cir. 2012); *Technical Control Sys., Inc. v. Green*, 809 So. 2d 1204 (La. Ct. App. 2002).

Louisiana's law. The legislative and judicial solutions to the overused and overly broad noncompete agreements in Louisiana are not mutually exclusive. Ideally, all of these changes would be implemented to provide employers with damages when an employee breaches a valid noncompete agreement and to give employees a remedy for damages when an employer drafts an overly broad noncompete agreement.

Part I of this Comment discusses both the use of noncompete agreements throughout the United States and the history and enforceability of noncompete agreements in Louisiana. Part II explores the doctrine of nullity and three remedies for null agreements under current Louisiana law. Specifically, this Part analyzes an action for damages under Louisiana Civil Code article 2033 as a remedy for absolutely null noncompete agreements and examines the appropriateness of reformation of overly broad noncompete agreements. Part III discusses how reformation leads to drafting overly broad agreements, which leaves both employers and employees uncertain about the enforceability of the agreement. This Part also addresses the problems of overuse of noncompete agreements in Louisiana caused by the lack of a requirement that employers demonstrate a protectable interest. Part IV offers both legislative and judicial solutions to address the pervasive problems in Louisiana's noncompete statute and to stifle the overuse and overbreadth of noncompete agreements.

## I. NONCOMPETE AGREEMENTS THROUGHOUT THE UNITED STATES AND LOUISIANA

Almost every state in the United States limits restrictions on employment competition within legislatively or judicially imposed means.<sup>22</sup> Many states view noncompete agreements as violating public policy because the agreements improperly restrain employees from competition and hinder efficiency of the employment market.<sup>23</sup> Certain agreements, however, are enforceable to protect businesses. Noncompete agreements are litigated throughout the country, where courts must balance the employer's interests in retaining customers and protecting trade secrets with the

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22. *Covenants Not to Compete*, LEXIS ADVANCE (Jan. 2015), <https://advance.lexis.com> (access "LexisNexis® 50-State Surveys, Statutes & Regulations," follow "Contract Law" hyperlink, then follow "Types of Contracts" hyperlink, then follow "Covenants Not to Compete" hyperlink).

23. See 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, 700 (2004).

employee's interest in having the personal freedom to work and maintaining his or her livelihood.<sup>24</sup>

### A. Noncompete Agreements Throughout the United States

Employers and employees have competing interests in enforcing noncompete agreements,<sup>25</sup> demonstrating that although these agreements are necessary, courts must reasonably enforce them.<sup>26</sup> Employers view noncompete agreements as necessary to prevent competitors from gaining information about customers or trade secrets.<sup>27</sup> Without noncompete agreements, employers would have to exhaust further resources and money to protect valuable information.<sup>28</sup> Noncompete agreements also insulate employers from the risk of losing investment in employee training.<sup>29</sup> For instance, once an employer trains an employee, that employee may have an incentive to use the newly acquired knowledge or skill to advance his or her own business or to benefit a competitor.<sup>30</sup> Therefore, businesses need noncompete agreements to protect sensitive information and their legitimate financial investment in the training of employees.<sup>31</sup>

Employees, however, view noncompete agreements as restricting their right to utilize the free market in search of employment.<sup>32</sup> Commentators have noted the lack of mutuality of performance for noncompete agreements signed by an at-will employee—an employer can fire an at-will employee, but the employee has no freedom to find a similar job.<sup>33</sup>

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24. See Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 178–85 (2008).

25. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 626–27 (1960).

26. *Id.* at 648–49.

27. *Id.* at 627.

28. See Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 97 (1981).

29. Blake, *supra* note 25, at 627 (“Without the protection afforded by such covenants, it is argued, businessmen could not afford to stimulate research and improvement of business methods to a desirably high level, nor could they achieve the degree of freedom of communication within a company that is necessary for efficient operation.”).

30. Rubin & Shedd, *supra* note 28, at 97.

31. *Id.* at 99.

32. See Blake, *supra* note 25, at 650.

33. Lyon, *supra* note 17, at 610–11. Enforcing a noncompete agreement against an at-will employee indicates that the employer does not have to keep the employee,

This imbalance is particularly problematic for employees who practice a specific trade or have expertise in a field.<sup>34</sup> Further, society has an interest in a free market with fair competition to foster innovation, which noncompete agreements inhibit when employers unnecessarily use them.<sup>35</sup>

Considering these interests, the traditional common law approach to determine the validity of noncompete agreements is based on both demonstrating a protectable interest and reasonableness. An employer first “must demonstrate a legitimate commercial reason for any agreement not to compete to ensure that the agreement is not a naked attempt to restrict free competition.”<sup>36</sup> If an employer prevails on that matter, the next question is whether the scope of the noncompete agreement is reasonable, which is limited by the type of activity, geographic area, and time.<sup>37</sup>

### *B. Noncompete Agreements in Louisiana*

Like other states, Louisiana has generally disfavored noncompete agreements because they are contrary to public policy.<sup>38</sup> Nonetheless, Louisiana courts and the Louisiana Legislature provide exceptions within which noncompete agreements are enforceable.<sup>39</sup> Over the past 80 years, the Louisiana Legislature has continuously amended noncompete law to adhere to the changing pace and structure of the employment market.

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even though the employer can prevent the employee from working in his chosen field. Hendrik Hartog, *Stone's Transitions*, 34 CONN. L. REV. 821, 823 (2002).

34. See generally Tracy L. Staidl, *The Enforceability of Noncompetition Agreements When Employment is At-Will: Reformulating the Analysis*, 2 EMP. RTS. & EMP. POL'Y J. 95 (1998).

35. Garrison & Wendt, *supra* note 24, at 114–15.

36. *Id.* at 115.

37. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. c (1981); see also Garrison & Wendt, *supra* note 24, at 114.

38. See *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 808 So. 2d 294, 298 (La. 2001) (“Louisiana has long had a strong public policy disfavoring noncompetition agreements between employers and employees.”).

39. LA. REV. STAT. ANN. § 23:921(C) (Supp. 2015) (“Any person . . . 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.”).

### 1. Louisiana's Oscillating History of Noncompete Agreements

Louisiana's current law governing noncompete agreements is a product of the vacillating influences of the Louisiana Legislature and the Louisiana courts. Generally, the courts have restricted noncompete agreements, citing Louisiana's public policy in favor of competition.<sup>40</sup> The legislature, however, has often reacted to the jurisprudence by broadening the enforceability of noncompete agreements.

Before 1934, the rules governing noncompete agreements in Louisiana were entirely judge-made, and the courts had a nearly per se rule against noncompete agreements.<sup>41</sup> In 1934, the Louisiana Legislature endorsed the judiciary's view of noncompete agreements and enacted the first noncompete statute, which declared any provision that restricted employment competition null.<sup>42</sup> The statute expressly provided that the public policy of Louisiana is "that employers shall not require or direct their employees . . . to enter into any contract . . . [where] the employee agrees and contracts not to engage in any competing business for themselves or as the employee of another" after they are no longer employed with the employer.<sup>43</sup> Following the statute, Louisiana courts consistently stated that the legislature's intent was to provide a broad policy against all noncompete agreements.<sup>44</sup>

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40. See, e.g., *SWAT 24*, 808 So. 2d at 298. The exception to Louisiana courts' negative attitude toward restriction of competition is *AMCOM of Louisiana v. Battson*, 670 So. 2d 1223 (La. 1996) (mem.), where the Louisiana Supreme Court reinstated the trial court's allowance of reformation of overly broad noncompete agreements. See *infra* Part II.B.2.

41. 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, 812 (2003).

42. Act No. 133, 1934 La. Acts 484 (current version codified at LA. REV. STAT. ANN. § 23:921); see also Alessandra & LaCour, *supra* note 41, at 813.

43. Act No. 133, 1934 La. Acts 484. The Louisiana Legislature enacted Act 133 during the Great Depression and did not want to exclude individuals from employment at a time of economic turmoil. *La. Smoked Prods., Inc. v. Savoie's Sausage & Food Prods., Inc.*, 696 So. 2d 1373, 1379 (La. 1997); see also Albert O. "Chip" Saulsbury, IV, *Devil Inside the Deal: An Examination of Louisiana Noncompete Agreements in Business Acquisitions*, 86 TUL. L. REV. 713, 718–19 (2012) ("The prohibition in the original statute was absolute, meaning *any* agreement by an employee not to compete with his employer was unreasonable per se." (emphasis in original)).

44. See, e.g., *Nelson v. Associated Branch Pilots of Port of Lake Charles*, 63 So. 2d 437, 439 (La. Ct. App. 1953); *Baton Rouge Cigarette Serv., Inc. v.*

In 1962, while still articulating the state's public policy against noncompete agreements, the Louisiana Legislature amended the noncompete statute to include two exceptions to the general prohibition against those agreements.<sup>45</sup> Section 23:921, as amended, allowed enforcement of noncompete agreements if an employer could show that it incurred a training expense or an expense in advertising.<sup>46</sup> In *Orkin Exterminating Co. v. Foti*, the Louisiana Supreme Court imposed a judicial gloss on these two exceptions by requiring an employer to "invest[] substantial sums" in training employees to meet the exception.<sup>47</sup> After *Foti*, lower courts adhered to the restrictive interpretation of the 1962 amendment and disallowed many noncompete agreements, citing the public policy against noncompete agreements and in favor of competition.<sup>48</sup> Thus, the *Foti* decision effectively rendered the 1962 amendment meaningless.

In reaction to the *Foti* Court's narrow interpretation of section 23:921, the Louisiana Legislature again amended the statute in 1989.<sup>49</sup> The legislature replaced the noncompete statute that the Court had narrowly interpreted with one that imposed concrete criteria for noncompete contracts. This was likely done to reduce the need to litigate noncompete agreements and to prevent the judiciary from overlying additional requirements. The amendment eliminated the requirement that the employer incur expenses for training employees or advertising the business for the agreement to be enforced and instead simply stated that "every" noncompete agreement was "null and void" unless it fell within limited statutory exceptions.<sup>50</sup> The amendment allowed courts to enforce

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Bloomenstiel, 88 So. 2d 742, 744–45 (La. Ct. App. 1956); *Marine Forwarding & Shipping Co. v. Barone*, 154 So. 2d 528, 530 (La. Ct. App. 1963).

45. Act No. 104, 1962 La. Acts 251, 251–52, §§ 1, 2; *see also* *Orkin Exterminating Co. v. Foti*, 302 So. 2d 593, 596 (La. 1974) (stating that the purpose of the 1962 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 *Nat'l Motor Club of La., Inc. v. Conque*, 173 So. 2d 238 (La. Ct. App. 1965)) (internal quotations omitted)).

46. LA. REV. STAT. ANN. § 23:921 (West, Westlaw 1962).

47. *Foti*, 302 So. 2d at 597; *Alessandra & LaCour*, *supra* note 41, at 815–16.

48. *Alessandra & LaCour*, *supra* note 41, at 815–16.

49. Act No. 639, 1989 La. Acts 1836, 1836–37.

50. *Id.* Subsection C of the 1989 amendment states:

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 business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or

noncompete agreements if the employee was engaged in a business similar to that of the employer, if the agreement specified a geographic restriction, and if the agreement restricted competition for no more than two years.<sup>51</sup> The legislature opted for specific exceptions to the per se rule of invalidity and sought to create certainty by specifying what constituted a valid noncompete agreement.<sup>52</sup>

Although the legislature likely expected the specificity of the 1989 amendment to decrease judicial discretion, two landmark Louisiana Supreme Court cases again changed the landscape of the enforceability of noncompete agreements in Louisiana. Traditionally, Louisiana courts did not permit reformation of overly broad noncompete agreements, adhering to a restrictive reading of section 23:921.<sup>53</sup> In *AMCOM*, however, the Louisiana Supreme Court reinstated the trial court's reformation of an overly broad noncompete agreement, which was a major shift from the Court's previous restrictive reading of the statute.<sup>54</sup> The ability to reform overly broad noncompete agreements gave courts wide discretion to decide whether a noncompete agreement is enforceable, notwithstanding the legislature's express language that an overbroad noncompete agreement be struck down as invalid.

Despite the Louisiana Supreme Court's apparent shift away from a restrictive interpretation of section 23:921 in *AMCOM*, the Court returned to its prior practice of narrowly construing the statute in *SWAT 24 Shreveport Bossier, Inc. v. Bond*.<sup>55</sup> In *SWAT 24*, the Court interpreted the requirement of "carrying on or engaging in a business similar to that of the employer" in section 23:921 to mean that an employee could not engage in his own similar business, but was free to engage with an existing competitor.<sup>56</sup> The Court reasoned that section 23:921(C), which requires the employee to be engaged in a business similar to that of the employer, is an exception to an otherwise prohibitive statute.<sup>57</sup> Thus, noncompete agreements must be narrowly construed in favor of the employee.<sup>58</sup> The Court also held that

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municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years.

*Id.*

51. *Id.*

52. See Alessandra & LaCour, *supra* note 41, at 816–17.

53. See, e.g., *Comet Indus., Inc. v. Lawrence*, 600 So. 2d 85 (La. Ct. App. 1992).

54. 670 So. 2d 1223 (La. 1996) (mem.); see also *infra* Part II.B.2.

55. 808 So. 2d 294 (La. 2001).

56. *Id.* at 296.

57. *Id.* at 298.

58. *Id.* The Court cited the public policy in section 23:921(A)(1), which stated that: "Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind,

Louisiana's public policy disfavors noncompete agreements.<sup>59</sup> Thus, *SWAT 24* applied a strict construction of the statute, which resulted in courts refusing to enforce noncompete agreements that did not fit into one of the exceptions.<sup>60</sup>

In response to *SWAT 24*, the Louisiana Legislature again amended section 23:921 in 2003 to include a new subsection, which states that a noncompete agreement is enforceable even when the employee is engaged in a similar, competing business.<sup>61</sup> This amendment effectively overruled *SWAT 24*'s ruling that a person is only "carrying on or engaging in a business similar to that of the employer" if that person is working at his *own* business.<sup>62</sup> Thus, although courts continue to articulate Louisiana's strong public policy against noncompete agreements, statutory amendments to section 23:921 have actually increased the courts' ability to enforce noncompete agreements.<sup>63</sup>

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except as provided in this Section, shall *be* null and void." LA. REV. STAT. ANN. § 23:921(A)(1) (West, Westlaw 2001) (emphasis added).

59. *SWAT 24*, 808 So. 2d at 298. The holding of *SWAT 24* seemed to clarify that noncompete agreements are usually enforced only when "the facts of the case [make] it very clear that the former employee who had executed a noncompete agreement had engaged in some type of unfair conduct that should be redressed by the courts." *Alessandra & LaCour, supra* note 41, at 833.

60. *See, e.g.,* *Kimball v. Anesthesia Specialists of Baton Rouge, Inc.*, 809 So. 2d 405 (La. Ct. App. 2001); *Aon Risk Servs. of La., Inc. v. Ryan*, 807 So. 2d 1058 (La. Ct. App. 2002).

61. 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."). The new subsection is Louisiana Revised Statutes section 23:921(D).

62. Terrell, *supra* note 23, at 715. Justice Traylor's dissent in *SWAT 24* essentially invited the legislature to legislatively overrule the majority opinion. He stated that the ruling "construe[d] the statute so narrowly that effectively no competitive agreements [could] be enforced, and [the majority's opinion] completely ignore[d] the competitive realities of today's commercial world." *SWAT 24*, 808 So. 2d at 310 (Traylor, J., dissenting).

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

2. *Requirements of an Enforceable Noncompete Agreement Under Section 23:921*

The current version of 23:921 provides that a noncompete agreement shall be null and void unless it meets three requirements.<sup>64</sup> First, the agreement can only restrict competition for two years.<sup>65</sup> Second, the agreement must specify the parishes or municipalities in which the employee is restricted from competing.<sup>66</sup> With respect to this requirement, Louisiana's courts of appeal agree that noncompete agreements must specify the parishes or municipalities in which the employer does business,<sup>67</sup> although some circuits disagree about what "specify" means.<sup>68</sup> Third, the agreement must restrict an employee only from working in a competing business.<sup>69</sup> The relevant part of the statute reads: "[An employee] may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer."<sup>70</sup> Louisiana courts are uncertain about whether a valid noncompete agreement must define the business in which the employee is restricted from competing, despite the fact that the statute does not explicitly require a definition of the business.<sup>71</sup>

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64. *Id.* at § 23:921(C).

65. *Id.*

66. *Id.*

67. *See, e.g.,* Action Revenue Recovery, L.L.C. v. eBusiness Grp., L.L.C., 17 So. 3d 999, 1003–04 (La. Ct. App. 2009); Vartech Sys., Inc. v. Hayden, 951 So. 2d 247, 257–58 (La. Ct. App. 2006); Aon Risk Servs. of La., Inc. v. Ryan, 807 So. 2d 1058, 1060–61 (La. Ct. App. 2002); Kimball v. Anesthesia Specialists of Baton Rouge, Inc., 809 So. 2d 405, 411–12 (La. Ct. App. 2001); Turner Prof'l Servs., Ltd. v. Broussard, 762 So. 2d 184, 185 (La. Ct. App. 2000); Cellular One, Inc. v. Boyd, 653 So. 2d 30, 33 (La. Ct. App. 1995); Water Processing Techs., Inc. v. Ridgeway, 618 So. 2d 533, 536 (La. Ct. App. 1993).

68. *Compare* Aon Risk Servs. of La., Inc., 807 So. 2d 1058 (reasoning that the legislature did not intend for the word "specify" to be a general, catch-all phrase, but instead intended "specify" to mean that the agreement had to name the parishes in which the employer does business), *with* Petroleum Helicopters, Inc. v. Untereker, 731 So. 2d 965 (La. Ct. App. 1999) (holding that the agreement was enforceable if the parishes could be inferred from where the employer conducted business).

69. LA. REV. STAT. ANN. § 23:921(C).

70. *Id.*

71. *Compare* LaFourche Speech & Language Servs., Inc. v. Juckett, 652 So. 2d 679 (La. Ct. App. 1995) (declaring a noncompete agreement that tracked the language of the statute unenforceable because it did not adequately define the business of the employer), *with* Baton Rouge Computer Sales, Inc. v. Miller-

Thus, Louisiana provides employers and employees with distinct requirements in a detailed statute. Even though the concrete nature of the statute seems to provide clear guidance to employers drafting noncompete agreements, there are still gaps in the statute that cause these agreements to be over broad and over used. Louisiana's doctrine of nullity is one remedy for the harms that invalid noncompete agreements cause, although whether the doctrine provides effective relief is uncertain.

## II. THE DOCTRINE OF NULLITY AS APPLIED TO NONCOMPETE AGREEMENTS

Louisiana adopted the modern French theory of nullity in the 1984 revision of the Louisiana Civil Code, recognizing the difference between absolute and relative nullities.<sup>72</sup> Absolute nullities are nullities of public order,<sup>73</sup> such as a juridical act that is against the state's public policy.<sup>74</sup>

Louisiana Revised Statutes section 23:921 declares overly broad noncompete agreements to be "null and void."<sup>75</sup> Overly broad noncompete agreements are absolute nullities because they are contrary to Louisiana's public policy in favor of competition and a person's freedom of employment.<sup>76</sup> An employer who drafts an overly broad noncompete agreement derogates from this public policy, so the agreement is absolutely null.<sup>77</sup> Because overly broad noncompete agreements are absolutely null, the remedies afforded for a violation of section 23:921 are also derived from the law of nullity. Louisiana's nullity doctrine recognizes three remedies: refusing to enforce the null agreement via

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Conrad, 767 So. 2d 763 (La. Ct. App. 2000) (holding that the law does not require a specific definition of the business). *See also* Jacob Ecker, *At the Breaking Point: Adapting Louisiana Employment Noncompete Law to the Information Age*, 75 LA. L. REV. 1317 (2015).

72. Ronald J. Scalise, Jr., *Rethinking the Doctrine of Nullity*, 74 LA. L. REV. 663, 671–72 (2014).

73. *Id.*; LA. CIV. CODE arts. 2030–2032 (2016). Absolute nullities are those that affect all members of society, cannot be confirmed, and can be invoked by any person. *Id.* art. 2033 (“An absolutely null contract, or a relatively null contract that has been declared null by the court, is deemed never to have existed.”).

74. LA. CIV. CODE art. 7. An act that is contrary to public policy is also bilaterally null, meaning it affects both parties to the contract. *Id.* art. 1968.

75. LA. REV. STAT. ANN. § 23:921.

76. *See* SWAT 24 Shreveport Bossier, Inc. v. Bond, 808 So. 2d 294 (La. 2001).

77. LA. CIV. CODE art. 7 (“Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.”).

dissolution, issuing damages caused by the null agreement when dissolution is impracticable, or reforming the null agreement.<sup>78</sup>

*A. Dissolution and Damages: Louisiana Civil Code Article 2033 and Its Application to Noncompete Agreements*

The traditional remedy for a null agreement is dissolution of the contract.<sup>79</sup> Louisiana Civil Code article 2018 provides the effects of dissolution of a null agreement, which mirror the effects of nullity in article 2033. Article 2018 states that upon dissolution, the court should restore the parties to their pre-contractual state.<sup>80</sup> Dissolution of an overly broad noncompete agreement by itself is not a sufficient remedy for an employee because the employee's pre-contractual state was unemployment. Simply declaring that the agreement is invalid does not provide full recourse for an employee who has already lost a job opportunity because of an overly broad noncompete agreement or a current employee who signs an updated noncompete agreement in fear of losing his or her job. Fortunately, Louisiana Civil Code article 2033 provides for restitution when simple dissolution of the agreement is insufficient.<sup>81</sup>

Although dissolution of the contract is the favored remedy for absolutely null contracts,<sup>82</sup> in situations like overly broad noncompete agreements—where dissolution of the contract does not adequately remedy the harm suffered by one of the parties—the court may order damages.<sup>83</sup> The former employee, however, will not be able to recover damages if that employee had actual or constructive knowledge that the noncompete agreement was overly broad.<sup>84</sup> In the absence of such knowledge, the former employee may be able to recover damages in addition to having the agreement dissolved.<sup>85</sup>

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78. *See id.* art. 2033. Because the remedies of dissolution and damages are interrelated, this Comment will discuss them together.

79. *See* SAÚL LITVINOFF, *THE LAW OF OBLIGATIONS*, § 16.77, *in* 5 *LOUISIANA CIVIL LAW TREATISE* 532–33 (2d ed. 2001).

80. LA. CIV. CODE art. 2018 (“Upon dissolution of a contract, the parties shall be restored to the situation that existed before the contract was made. If restoration in kind is impossible or impracticable, the court may award damages.”).

81. *Id.* art. 2033.

82. *Davis v. Parker*, 58 F.3d 183, 190 (5th Cir. 1995).

83. LA. CIV. CODE art. 2033.

84. *Id.*

85. *Id.* at art. 2033 cmt. d.

*1. Application of Article 2033: Restoring a Party through Damages*

In the case of overly broad noncompete agreements, dissolution alone will likely not provide complete restitution. Courts, however, have wide discretion as to how damages are to be allocated to restore the parties to the position they were in before the agreement. Very few cases have awarded damages to victims of overly broad noncompete agreements. Thus, examining similar scenarios in which courts have awarded damages when dissolution was impracticable could be helpful to understand how a court may allocate damages to a victim of an absolutely null noncompete agreement.

Louisiana courts have awarded damages under Louisiana Civil Code article 2033 when restoring a party in kind is impossible or impracticable.<sup>86</sup> Courts have applied article 2033 when they have deemed a contract to be an absolute nullity because a professional involved in the construction of a building was improperly licensed.<sup>87</sup> Upon deeming the contracts null, the courts found that restoring the parties in kind<sup>88</sup> was impracticable because the buildings had already been built.<sup>89</sup> Therefore, courts have instead awarded damages to the aggrieved parties for the amount of the cost of repair or the amount that the contractor was paid to do the work.

Courts have also applied article 2033 when the object of a contract is illicit or immoral,<sup>90</sup> finding that a person who acts in bad faith should not be restored to his pre-contractual state.<sup>91</sup> Further, courts will not award damages if the parties knew or should have known of the defect that caused

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86. *See, e.g., Touro Infirmary v. Travelers Prop. Cas. Co. of Am.*, No. 06-3535, 2008 WL 3975605 (E.D. La. Aug. 22, 2008) (restoration in kind was not practicable for a building built pursuant to a null contract, so the court awarded monetary damages).

87. These cases often involve buildings that were constructed pursuant to an invalid construction contract because the contractor lacked requisite licensure. *See, e.g., id.* at \*8; *First Hartford Realty Corp. v. Omega Contractors, Inc.*, No. 11-2294, 2014 WL 1329899, at \*4-5 (E.D. La. Apr. 2, 2014).

88. Restoration “in kind” is restoration “[i]n goods or services rather than money.” BLACK’S LAW DICTIONARY 857 (9th ed. 2009).

89. *See, e.g., Touro Infirmary*, 2008 WL 3975605, at \*8; *First Hartford Realty Corp.*, 2014 WL 1329899, at \*2-3.

90. *See, e.g., Dugas v. Dugas*, 804 So. 2d 878 (La. Ct. App. 2001) (where father transferred property to his daughter in an effort to escape collection from his creditors); *Moore v. Smith*, 521 So. 2d 742, 743 (La. Ct. App. 1988) (where children renounced their future interest in their still-living mother’s succession, understanding that their father would leave the property to them in his will).

91. *See Dugas*, 804 So. 2d at 882.

the nullity. For example, in *Pique Severn Avenue Partnership v. Ballen*,<sup>92</sup> the court did not grant damages to a lessor who made a claim against a real estate broker for the return of commissions paid because the lessor should have known that the broker did not have a license.<sup>93</sup>

Although courts have awarded damages due to an absolutely null contract in other areas of Louisiana law, the doctrine's application in the employment context remains uncertain. The *Kimball* case explored the applicability of article 2033 damages to overly broad noncompete agreements.

*2. Restoring the Employee Through Article 2033: Kimball v. HEALTHCAREfirst, Inc.*

The United States District Court for the Middle District of Louisiana used article 2033 to recognize the possibility of damages for Catherine Kimball for the harm that her employer's overly broad noncompete agreement caused.<sup>94</sup> Originally, the court granted HCF's motion for summary judgment, holding that article 2033 did not apply to the employment contract because the overly broad noncompete agreement was not an absolute nullity.<sup>95</sup> In the ruling on Kimball's motion to alter or amend the judgment, the court found its own ruling manifestly erroneous and held that the noncompete agreement at issue was an absolute nullity.<sup>96</sup> The court further held that damages under article 2033 were available to Kimball.<sup>97</sup>

HCF conceded that the noncompete agreement in Kimball's employment contract was overly broad and in contravention of section 23:921,<sup>98</sup> but HCF contended that severing and dissolving only the violative portions of the agreement was the proper remedy.<sup>99</sup> The court, however, reasoned that because the noncompete agreement did not comply with the requirements

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92. 773 So. 2d 179 (La. Ct. App. 2000).

93. *Id.* at 181.

94. *See Kimball v. HEALTHCAREfirst, Inc.*, No. 12-395, 2013 WL 4782139 (M.D. La. Sept. 5, 2013).

95. *Id.* at \*1.

96. *Id.* at \*2. In the initial ruling that granted HEALTHCAREfirst's Motion for Summary Judgment, the court reasoned that Kimball's reliance on Louisiana Civil Code articles 2030 and 2033 was misplaced because she could not prove that the contract could be invalidated in its entirety. Ruling on Defendant's Motion for Summary Judgment, *Kimball v. HEALTHCAREfirst, Inc.*, No. 12-395 (M.D. La. Sept. 5, 2013), 2013 WL 4782139.

97. *Kimball*, 2013 WL 4782139, at \*3.

98. *Id.* at \*2.

99. *Id.*

of section 23:921, the obligation suffered from an unlawful cause.<sup>100</sup> The court further found that the overly broad noncompete agreement was a “juridical act in derogation of a law enacted to protect a strong Louisiana public policy” and was therefore absolutely null.<sup>101</sup> Despite HCF’s argument to the contrary, the court found that nullity of one clause in the contract was enough to trigger an article 2033 analysis.<sup>102</sup>

After finding that article 2033 applied because of the severed provision’s absolute nullity, the court held that Kimball could seek damages and “be restored to the situation that existed before the contract was made.”<sup>103</sup> To obtain damages under article 2033, Kimball would have had to “establish that the absolutely null clause actually caused her some form of damages, such as causing her to lose a job opportunity.”<sup>104</sup> The court denied the HCF’s motion for summary judgment because Kimball “establish[ed] a genuine issue of material fact as to whether the absolutely null provisions caused her to lose a job opportunity, and thus, sustain damages.”<sup>105</sup> Soon after the ruling, Kimball and HCF settled for the amount of wages lost during litigation.<sup>106</sup> Because *Kimball* was not decided on the merits, the grounds on which a court will award damages under article 2033 for an overly broad noncompete agreement remains undetermined.

Although article 2033 may technically apply, damages under article 2033 are difficult to prove. Even if an employee could prove causation, the damages caused by an overly broad noncompete agreement are speculative because the employee has lost the continuing benefit of employment instead of some specific value gained in the past. Like dissolution of the agreement, restitution through article 2033 damages also proves to be an insufficient remedy. The third remedy to an absolutely null agreement—reformation—also provides little relief.

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100. *See id.*; *see also* LA. CIV. CODE art. 1968 (2016) (“The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.”).

101. *Kimball*, 2013 WL 4782139, at \*2. The court held that only the noncompete clause, which could be severed, was null, rather than the entire employment agreement. *Id.*; *see also* LA. CIV. CODE art. 7.

102. *Kimball*, 2013 WL 4782139, at \*3.

103. *Id.* (quoting LA. CIV. CODE art. 2033 (Supp. 2013)) (internal quotations omitted).

104. *Id.* at \*4.

105. *Id.*

106. Interview with Amy Newsom, *supra* note 2. The case settled minutes after Judge Brady’s ruling. *Id.* HCF paid Kimball an amount that reflected her lost earnings from the time she was terminated until she was denied employment due to the noncompete agreement. *Id.*

### *B. Reformation of Contractual Instruments*

Like dissolution and restitution, reformation is a remedy to nullity that Louisiana courts employ.<sup>107</sup> The reformation of a contract allows the contract to remain in existence, but not by its original terms.<sup>108</sup> Courts have historically utilized this remedy to reform deeds, but in recent years have used reformation to preserve otherwise invalid noncompete agreements.<sup>109</sup>

Louisiana Civil Code article 2034 limits the scope of nullity, stating that “[n]ullity of a provision does not [necessarily] render the whole contract null.”<sup>110</sup> Thus, severing the null provision while leaving the remainder of the agreement intact may be possible.<sup>111</sup> A court may only sever a null provision if, after looking at the totality of the circumstances, it determines that the parties still would have made the contract without the null provision.<sup>112</sup> Historically, courts used the reformation of a contract to correct an error made in the drafting of a contract.<sup>113</sup> In the context of noncompete agreements, however, Louisiana courts adopted the use of reformation from other states’ use of common law doctrine instead of applying traditional civilian principles.

#### *1. Reformation of Noncompete Agreements Throughout the United States*

Many states reform overly broad noncompete agreements based on different approaches.<sup>114</sup> Some states employ a “blue pencil” approach,

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107. See LITVINOFF, *supra* note 79, § 16.77, at 532–33.

108. *Id.*

109. Jaime E. Diaz, *Reformation of Instruments in Louisiana*, 30 TUL. L. REV. 486, 489–90 (1956).

110. LA. CIV. CODE art. 2034 (2016).

111. *See id.*

112. *Id.* The provision can be severed if “from the nature of the provision or the intention of the parties, it can be presumed that the contract would not have been made without the null provision.” *Id.* The comment to article 2034 directs courts to “consider the totality of the parties’ intentions before annulling the agreement when only a portion of [the agreement] is null.” *Id.* at cmt. a.

113. See Saül Litvinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 LA. L. REV. 1, 45 (1989); see *Peironnet v. Matador Res. Co.*, 144 So. 3d 791, 816–17 (La. 2013); *Wilson v. Levy*, 101 So. 2d 214, 215 (La. 1958); see also Diaz, *supra* note 109, at 487 (“The English and American courts reform only written instruments, but the French courts allow the correction of an error of computation in an oral contract. The Louisiana courts have applied the English and American theory of reformation.” (footnotes omitted)).

114. Lyon, *supra* note 17, at 628.

according to which courts strike the overly broad portion of an agreement, but do not rewrite any other part of the agreement.<sup>115</sup> In Indiana, courts remove unreasonable restrictions if they are divisible, meaning the court can only remove the offending language if doing so does not change the meaning of the remainder of the agreement.<sup>116</sup> Similarly, Arizona courts will strike unreasonable provisions of an agreement that can be grammatically severed.<sup>117</sup> In these states, if the offending portion of the agreement cannot be severed, the court will render the entire agreement void.<sup>118</sup>

Some states employ a more liberal reformation approach, reforming the agreement by making “reasonable alteration[s]” that reflect the intent of the parties.<sup>119</sup> These courts effectively rewrite overly broad agreements to the extent reasonably necessary to protect the employer.<sup>120</sup> In New Jersey, courts enforce noncompete agreements to the extent that they are reasonable as long as enforcement does not cause injury to the public or injustice to the parties.<sup>121</sup> Pennsylvania, Massachusetts, and New Hampshire similarly enforce overly broad noncompete agreements by modifying the agreement to be reasonable.<sup>122</sup> Courts in these states are not limited to grammatical or surgical severing of overly broad portions of an agreement, but can instead make substantial modifications to make the agreement fit within statutory or judicial requirements.<sup>123</sup>

Other states, notably Georgia, Virginia, and Wisconsin, do not permit any reformation of overly broad noncompete agreements.<sup>124</sup> For example, Wisconsin’s noncompete statute states: “Any covenant [not to compete] . . . imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.”<sup>125</sup> In Georgia, noncompete agreements are unenforceable if any

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115. *Id.* The “blue-pencil test” is defined as a “judicial standard for deciding whether to invalidate the whole contract or only the offending words.” BLACK’S LAW DICTIONARY, *supra* note 88, at 196. One Georgia court stated that “the ‘blue pencil’ marks, but it does not write.” *Hamrick v. Kelley*, 392 S.E.2d 518, 519 (Ga. 1990).

116. *Pivateau*, *supra* note 14, at 683–84.

117. *Id.* at 684.

118. *Id.* at 684–85.

119. *Lyon*, *supra* note 17, at 628.

120. *See Garrison & Wendt*, *supra* note 24, at 111.

121. *Pivateau*, *supra* note 14, at 687.

122. *Id.* at 687–88.

123. *Id.*

124. *Id.* at 682.

125. WIS. STAT. § 103.465 (2014).

provision of the agreement is “unreasonable either in time, territory, or prohibited business activity.”<sup>126</sup> Similarly, courts in Virginia have refused to modify overly broad noncompete agreements and have tended to render these agreements unenforceable when they contain any ambiguous language.<sup>127</sup> Louisiana once prohibited reformation of noncompete agreements, but currently reforms agreements that contain a severability clause.

2. *Reforming Noncompete Agreements in Louisiana: AMCOM of Louisiana v. Battson*<sup>128</sup>

Prior to 1996, Louisiana courts narrowly read section 23:921 and were generally unwilling to reform overly broad noncompete agreements. In *Comet Industries, Inc. v. Lawrence*,<sup>129</sup> the Louisiana Second Circuit Court of Appeal refused to reform an overly broad noncompete agreement that prohibited the employee from competing with the employer anywhere in the continental United States.<sup>130</sup> The *Comet* court reasoned that the statute “plainly says [noncompete agreements] are against public policy” and therefore “must strictly comply with the requirements contained in the statute.”<sup>131</sup> The United States Fifth Circuit and other Louisiana courts have come to similar conclusions.<sup>132</sup>

In 1996, however, the *AMCOM* Court deviated from the strict application of 23:921 by allowing for reformation of an overly broad noncompete agreement.<sup>133</sup> The agreement restricted Battson, the former employee of the radio station, from competing “in Shreveport or Bossier City, Louisiana, or in Caddo or Bossier Parishes, Louisiana, or within a seventy-five (75) mile radius of Shreveport or Bossier City, Louisiana.”<sup>134</sup>

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126. *Ward v. Process Control Corp.*, 277 S.E.2d 671, 673 (Ga. 1981).

127. *See, e.g., Lanmark Tech., Inc. v. Canales*, 454 F. Supp. 2d 524, 529 (E.D. Va. 2006).

128. *AMCOM of La., Inc. v. Battson*, 670 So. 2d 1223 (La. 1996) (mem.).

129. 600 So. 2d 85 (La. Ct. App. 1992).

130. *Id.* at 87.

131. *Id.* at 87–88.

132. *See, e.g., Team Env'tl. Servs., Inc. v. Addison*, 2 F.3d 124, 126–27 (5th Cir. 1993); *see also Maritech Commercial, Inc. v. Quddus*, No. 13-0613, 2014 WL 2624944 (E.D. La. Jun. 12, 2014); *Plunk v. LKQ Birmingham, Inc.*, No. 12-2680, 2013 WL 5913755 (W.D. La. Oct. 31, 2013); *Ferrellgas, L.P. v. McConathy*, No. 1:10-cv-00178, 2010 WL 1010831 (W.D. La. Mar. 15, 2010); *Kimball v. Anesthesia Specialists of Baton Rouge, Inc.*, 809 So. 2d 405 (La. Ct. App. 2001).

133. *See AMCOM*, 670 So. 2d at 1223.

134. *AMCOM of La., Inc. v. Battson*, 666 So. 2d 1227, 1229 (La. Ct. App. 1996).

The trial court found AMCOM's noncompete agreement geographically overly broad and in violation of section 23:921.<sup>135</sup> The court deemed the language "or within a seventy-five (75) mile radius of Shreveport or Bossier City, Louisiana" overly broad, and used the severability clause to strike the offending language and leave the remainder of the agreement enforceable.<sup>136</sup>

The court of appeal agreed that the agreement was geographically overly broad,<sup>137</sup> but also found that the existence of a severability clause did not automatically allow a court to reform a noncompete agreement.<sup>138</sup> The court reasoned that reformation of an unenforceable noncompete agreement is contrary to Louisiana's public policy in favor of competition.<sup>139</sup> Further, the court found that reformation of noncompete agreements "run[s] counter to the requirement of strict and narrow construction of the statute," and would ultimately lead to "uncertainty as to the validity and scope of what an employee has agreed to."<sup>140</sup> The dissent pointed out, however, that although Louisiana law does not favor reformation that requires judicial rewriting of a contract, courts are not prohibited from severing invalid portions of a noncompete agreement if the remaining text results in an enforceable contract.<sup>141</sup>

In a two-sentence ruling, the Louisiana Supreme Court reversed the judgment of the court of appeal and reinstated the trial court's ruling without further explanation.<sup>142</sup> After *AMCOM*, Louisiana courts took varied approaches to reformation.

Five years later, the *SWAT 24* Court held that a severability clause "did not require a court to reform, redraft, or create a new agreement," but instead "required only that the offending portion of the agreement be severed."<sup>143</sup> Since *SWAT 24*, most Louisiana courts have employed this

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135. *Id.* at 1228.

136. *Id.*

137. *Id.* at 1229.

138. *Id.* ("[A] 'savings clause' stating that any provision in an employment agreement found excessively broad would be limited [or reduced] to what was permitted by applicable law does not allow a court to reform a noncompetition provision to the geographical area permitted by [Louisiana Revised Statutes section] 23:921.").

139. *See id.*

140. *Id.*

141. *Id.* at 1230–31 (Hightower, J., dissenting).

142. *AMCOM of La., Inc. v. Battson*, 670 So. 2d 1223 (La. 1996) (mem.) ("Judgment of the court of appeal is reversed. Judgment of the trial court is reinstated.").

143. *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 808 So. 2d 294, 309 (La. 2001).

“blue pencil” approach to reformation, severing overly broad geographic restrictions and leaving the remainder of the agreement enforceable.<sup>144</sup> Other courts have refused to reform noncompete contracts because doing so would either rewrite the contract or leave no remaining agreement.<sup>145</sup>

The current practice of Louisiana courts is to sever overly broad portions of a noncompete agreement only if the agreement contains a severability clause.<sup>146</sup> Even then, the courts will only sever the overly broad portion if they can do so without having to rewrite any part of the agreement.<sup>147</sup> According to most Louisiana courts, extending the reformation of noncompete agreements to rewriting the contract would disrespect the intent of the parties.<sup>148</sup> The overuse of the practice of reformation, however, may incentivize employers to write overly broad noncompete agreements in the hope that courts will remedy such agreements without consequence to the employer.<sup>149</sup> Unfortunately, until a court rules these overly broad restrictions invalid, employees will likely abide by them<sup>150</sup> because employees may be ignorant that these agreements are invalid or may lack the ability to sue. Therefore, reformation of noncompete agreements is an insufficient and inequitable remedy for an employee harmed by an overly broad noncompete agreement.

### *C. Lost in the Nebulous Web of Nullity*

Resorting to nullity law to remedy the harms caused by an overly broad noncompete agreement produces unsatisfactory results. Dissolution of noncompete agreements is an inadequate solution because it does not

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

145. See, e.g., *Maritech Commercial, Inc. v. Quddus*, No. 13-0613, 2014 WL 2624944 (E.D. La. Jun. 12, 2014); *Plunk v. LKQ Birmingham, Inc.*, No. 12-2680, 2013 WL 5913755 (W.D. La. Oct. 31, 2013); *Ferrellgas, L.P. v. McConathy*, No. 1:10-cv-00178, 2010 WL 1010831 (W.D. La. Mar. 15, 2010); *Kimball v. Anesthesia Specialists of Baton Rouge, Inc.*, 809 So. 2d 405, 413 (La. Ct. App. 2001).

146. *SWAT 24*, 808 So. 2d at 309.

147. See, e.g., *id.*; *L & B Transp., LLC v. Beech*, 568 F. Supp. 2d 689, 698 (M.D. La. 2009); *Kimball*, 809 So. 2d at 413.

148. See, e.g., *Gearheard v. De Puy Orthopaedics, Inc.*, No. CIV.A.99-1091, 1999 WL 638582, at \*6 (E.D. La. Aug. 19, 1999) (refusing to reform a noncompete agreement beyond the blue pencil approach because to do so would “delve into the parties’ actions and minds for interpretation”).

149. *Team Envtl. Servs., Inc. v. Addison*, 2 F.3d 124, 127 (5th Cir. 1993).

150. *Id.*; *Maritech*, 2014 WL 2624944, at \*2.

completely restore the employee to his or her pre-contractual state. Restitution via damages under article 2033 for a lost benefit, as discussed in *Kimball*, are an inadequate remedy because the damages will be speculative and difficult to prove. Likewise, judicial reformation of overly broad noncompete agreements is an unsuitable remedy for the employee, because the court's reformation of the overly broad noncompete agreement often occurs after the employee has suffered a harm, such as the loss of a job. Reformation also leaves the employee uncertain as to whether the agreement can be enforced at all.

### III. LEGAL PROBLEMS LEADING TO OVERUSED AND OVERLY BROAD NONCOMPETE AGREEMENTS

Not only does Louisiana's law fail to remedy harms caused by invalid noncompete agreements, current law also contributes to the problems that plague them. Reformation causes uncertainty regarding a noncompete agreement's enforceability. This reality may even incentivize employers to intentionally draft overly broad agreements.<sup>151</sup> Also, the lack of a protectable interest requirement in the statute leads to the overuse of noncompete agreements by restricting employees from competing even where the employer has no interest in protecting its customer base, trade secrets, or expertise.<sup>152</sup>

#### *A. Overly Broad Noncompete Agreements*

The judicial reformation of overly broad noncompete agreements leads to uncertainty about the enforceability of these agreements and incentivizes employers to draft illegal agreements without fearing any consequences.<sup>153</sup> Reformation is not without merit, however, as the doctrine allows businesses to remain protected when they expand into new

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151. See *Team Envtl. Servs.*, 2 F.3d at 127.

152. For an example of a sandwich shop requiring their sandwich makers and delivery drivers to sign noncompete agreements, see Class and Collective Action Complaint, *supra* note 18, and Memorandum Opinion, *supra* note 18. A Louisiana daiquiri shop also required its employees to sign noncompete agreements. *Daiquiri's III on Bourbon, Ltd. v. Wandfluh*, 608 So. 2d 222 (La. Ct. App. 1992). The agreement prohibited employees from working in any place that sold "frozen drinks for consumption by the general public." *Id.* at 223. Even though the court in *Daiquiri's* ultimately deemed the noncompete agreement invalid, it is possible that the employees were restricted, de facto, from competing during the time that their employment ceased from the time the court ruled the agreement invalid.

153. See Pivateau, *supra* note 14, at 674.

areas. If the location of a business's operation changes from the time of the signing of a noncompete agreement, a court can reform the agreement to reflect the scope of the restriction at the time of the employee's termination. Reformation may also allow courts to maintain the intention of the parties to the agreement by severing overly broad language.<sup>154</sup>

Unfortunately, reformation also strips the detailed noncompete statute of predictability and creates uncertainty for employees who should be aware of the restrictions placed on them at the time they sign the agreement. Further, because noncompete agreements are contrary to Louisiana's public policy, reformation of noncompete agreements "place[s] courts in the business of either saving or writing a contract that is not generally favored by law."<sup>155</sup> To remedy the problem of uncertainty that overly broad noncompete agreements cause, Louisiana should either alter the current reformation doctrine or eliminate it altogether.<sup>156</sup>

### *B. Overuse of Noncompete Agreements*

Under current noncompete law, employers pervasively use noncompete agreements because there is no downside—the employer faces no harm in drafting these agreements even if competition does not jeopardize its interests. In Louisiana, any business can draft an enforceable noncompete agreement as long as the agreement complies with the requirements of section 23:921.<sup>157</sup> Because the statute does not require the employer to articulate a reason to restrain the employee from competition—often called a protectable or legitimate interest—employers are drafting noncompete agreements to restrict any employee, regardless of the employee's specialized skill or ability to advantage competitors.<sup>158</sup>

#### *1. Protectable Interest Requirement in Other Jurisdictions*

Most states apply a two-part test to determine whether a noncompete agreement is enforceable.<sup>159</sup> First, courts require an employer to show why restricting an employee from competition is necessary, meaning the employer must demonstrate a protectable interest.<sup>160</sup> States consider a

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154. See Garrison & Wendt, *supra* note 24, at 130.

155. Gearheard v. De Puy Orthopaedics, Inc., No. CIV.A.99-1091, 1999 WL 638582, at \*6 (E.D. La. Aug. 19, 1999).

156. See *infra* Part IV.A.1.

157. LA. REV. STAT. ANN. § 23:921 (Supp. 2015); see also *supra* Part I.B.2.

158. See *supra* note 152.

159. Lembrich, *supra* note 1, at 2301.

160. *Id.*

variety of factors when determining what constitutes a protectable interest, such as the protection of trade secrets, customer bases, and expertise gained during employment.<sup>161</sup> Second, courts require a noncompete agreement to be reasonable in its duration and area of restriction.<sup>162</sup>

Regardless of whether a states' noncompete statute or jurisprudential rule is broad or whether it provides detailed requirements for restricting competition, most states require some form of a protectable interest.<sup>163</sup> Like Louisiana, Florida has a detailed noncompete statute, but the Florida statute also contains a non-exhaustive list of acceptable protectable interests.<sup>164</sup> Once an employer demonstrates a legitimate business interest in restraining the employee, the employee then has the burden of showing that the restriction is not reasonably necessary.<sup>165</sup> Using a different approach, Wisconsin has a broad statute, which states that a noncompete agreement is enforceable "only if the restrictions imposed are reasonably necessary for the protection of the employer or principal."<sup>166</sup> Wisconsin courts have interpreted the statute to require both that an employer must

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161. Kyle B. Sill, *Drafting Effective Noncompete Clauses and Other Restrictive Covenants: Considerations Across the United States*, 14 FLA. COASTAL L. REV. 365, 384–85 (2013).

162. Lembrich, *supra* note 1, at 2301.

163. Sill, *supra* note 161, at 384–89.

164. FLA. STAT. § 542.335(1)(b) (1996). The relevant part of the statute reads:

The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. The term "legitimate business interest" includes, but is not limited to:

1. Trade secrets . . . .
2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.
3. Substantial relationships with specific prospective or existing customers, patients, or clients.
4. Customer, patient, or client goodwill associated with:
  - a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress";
  - b. A specific geographic location; or
  - c. A specific marketing or trade area.
5. Extraordinary or specialized training.

Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.

*Id.*

165. Frank J. Cavico, "Extraordinary or Specialized Training" as a "Legitimate Business Interest" in *Restrictive Covenant Employment Law: Florida and National Perspectives*, 14 ST. THOMAS L. REV. 53, 64 (2001).

166. WIS. STAT. § 103.465 (2014).

demonstrate a protectable interest—usually the protection of its customer base, trade secrets, employee expertise, or confidential information—and that the protectable interest is reasonable.<sup>167</sup> The courts determine the reasonableness of the protectable interest in light of the duration and geographic restrictions of the noncompete agreement.<sup>168</sup> The protectable interest requirement deters employers from using noncompete agreements because they must justify a legitimate reason for restricting the employee.

## 2. *Louisiana's Battle with Certainty and Fairness*

The conflict between certainty in enforceability and individual fairness in noncompete law drives the back-and-forth between Louisiana courts and the legislature on how to apply Louisiana's noncompete law. A statute without specific requirements for demonstrating a protectable interest leads to an increased chance of inequitable results because the parties must rely on the courts to determine the enforceability of agreements on a case-by-case basis.<sup>169</sup> The courts, however, would be more likely to reach fair results if the employer were required to demonstrate a legitimate reason for the restraint.<sup>170</sup>

On the other hand, a detailed statute with specific requirements, like the current version of section 23:921, provides employers with certainty of how to draft a noncompete agreement. An employer knows exactly what to include in a noncompete agreement to make it enforceable, and employees should be able to determine if an agreement is valid on its face. A detailed statute should also decrease the need for litigation to determine whether an agreement is enforceable. This specific statute trades certainty for inflexibility—and therefore potential unfairness—however, because employers are not required to prove to the court *why* an employee should be restrained from competition.

Before the legislature drafted the noncompete statute, Louisiana's stance on noncompete law favored equity, as courts would decide the enforceability of a noncompete agreement on a case-by-case basis and would determine enforceability based on reasonableness, which often included an inquiry into the justification of the employer's restriction.<sup>171</sup> Forcing employers to justify enforcing a noncompete agreement by

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167. See, e.g., *Runzheimer Int'l, Ltd. v. Friedlen*, 862 N.W.2d 879 (Wis. 2015).

168. Ralph Anzivino, *Drafting Restrictive Covenants in Employment Contracts*, 94 MARQ. L. REV. 499, 544 (2010).

169. See generally 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 (2001).

170. See *id.* at 1181.

171. See Alessandra & LaCour, *supra* note 41, at 812–13.

proving training or advertising expenses, the 1962 amendment to section 23:921 is the closest that the Louisiana Legislature has come to requiring a protectable interest.<sup>172</sup> In the current version of Louisiana's noncompete statute, however, the legislature settled on certainty, eliminating the need for an employer to demonstrate an interest in restraining the employee from competition.<sup>173</sup> This use of a bright line rule for drafting noncompete agreements has led to their enforcement against employees of hair salons and daiquiri shops, for which the employer did not—and likely could not—provide a good reason to restrict competition.<sup>174</sup>

Louisiana's current noncompete law is inequitable to employees despite the supposedly strong public policy against noncompete agreements. The law's defects are causing problems of overuse and overbreadth of these agreements, and the law therefore should be amended to provide employees with an avenue for recovery for harms suffered. This is especially necessary because employees find little recourse in Louisiana's nullity doctrine. As such, providing employees with a sufficient and equitable remedy will require a joint effort from the Louisiana Legislature and the Louisiana Supreme Court.

#### IV. ALTERNATIVE SOLUTIONS TO THE OVERLY BROAD AND OVERUSED NONCOMPETE AGREEMENTS

Because the remedies that the nullity doctrine affords do not provide relief from the deficiencies in Louisiana's noncompete statute, both the Louisiana Legislature and the Louisiana Supreme Court must act. An array of solutions to equalize the threat of noncompete agreements exist for both employers and employees. While all of these proposed solutions should be adopted, implementing any one of the solutions will provide a more equitable balance to the parties of a noncompete agreement.

##### *A. A Legislative Solution: Overhaul Louisiana's Noncompete Law*

The legislature should amend section 23:921 to prohibit the reformation of noncompete agreements. This would remove the employers' incentives to draft overly broad noncompete agreements and infuse certainty to noncompete law. Further, to remedy the overuse of noncompete

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172. Act No. 104, 1962 La. Acts 251, 251–52 (codified at LA. REV. STAT. ANN. § 23:921 (West, Westlaw 1962)).

173. See LA. REV. STAT. ANN. § 23:921 (Supp. 2015).

174. See, e.g., *H2O Hair, Inc. v. Marquette*, 960 So. 2d 250 (La. Ct. App. 2007); *John Jay Esthetic Salon, Inc. v. Preskitt*, 898 So. 2d 538 (La. Ct. App. 2005); *Daiquiri's III on Bourbon, Ltd. v. Wandfluh*, 608 So. 2d 222 (La. Ct. App. 1992).

agreements, the legislature should amend the statute and require employers to demonstrate a protectable interest in restricting the employee.

*1. Disincentivize Overbreadth of Noncompete Agreements: Eliminate Reformation*

To best remedy the uncertainty surrounding the enforceability of noncompete agreements, Louisiana should completely eliminate the reformation doctrine's application to noncompete agreements. The Louisiana Legislature's goal in adopting section 23:921(C) was to give clarity and certainty to noncompete law. The reformation doctrine, however, thwarts this purpose.<sup>175</sup> When looking at a noncompete agreement, whether the agreement is enforceable should be immediately clear based on whether it complies with the requirements of 23:921. With the current doctrine of reformation, however, whether a noncompete agreement is enforceable on its face remains uncertain.<sup>176</sup> Many issues frequently arise, such as whether the court will reform the agreement at all, what part or parts of the agreement the court will reform, and whether the court will infer any changes to the agreement. Therefore, the legislature should amend section 23:921 to expressly prohibit the reformation of overly broad noncompete agreements so that both employers and employees are clearly aware of the restrictions on competition.

*2. Curtail the Overuse of Noncompete Agreements: Require a Protectable Interest*

Another way to curtail the overuse of noncompete agreements in Louisiana would be for the Louisiana Legislature to amend the statute to require the employer to prove a protectable interest. This rationale reverts back to the purpose of the 1962 amendment,<sup>177</sup> but under this new

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175. Lembrich, *supra* note 1, at 2294.

176. Even Louisiana courts have noted that reformation runs counter to an employee's interest and Louisiana's requirement of strict construction of section 23:921. *See, e.g., Aon Risk Servs. of La., Inc. v. Ryan*, 807 So. 2d 1058, 1062 (La. Ct. App. 2002) (stating that the employee should know the extent of his restriction at the time of signing and "exactly what price he was being called upon to pay in exchange for employment"); *Heart's Desire, LLC v. Edwards*, No. 46,222-CA, 2011 WL 1630175, at \*4 (La. Ct. App. Apr. 27, 2011) (noting that reformation "allow[s] ambiguous noncompetition agreements"); *Kimball v. Anesthesia Specialists of Baton Rouge, Inc.*, 809 So. 2d 405, 413 (La. Ct. App. 2001) (refusing to reform because a "non-compete clause must stand on its own").

177. Act. No. 104, 1962 La. Acts 251, 251-52. The 1962 amendment provided for enforcement of a noncompete agreement where the employer would show that

amendment, the legislature should require that the employer prove a protectable interest instead of only requiring the showing of training or advertising expenses. This requirement will likely reduce the use of noncompete agreements in Louisiana because requiring a protectable interest may give employers with dubious interests in restricting competition pause about using noncompete agreements.

Admittedly, amending the statute to require an employer to state a protectable interest may initially increase the amount of litigation surrounding noncompete agreements, as courts must define and articulate what protectable interests are. Increased litigation, however, will not be a permanent problem because the courts will create jurisprudential definitions of what is deemed a valid protectable interest, and employers will begin drafting noncompete agreements in compliance with judicial standards. Although a period of increased litigation is not ideal, the protectable interest requirement is necessary to provide fairness to employees and to prevent the overuse of noncompete agreements in Louisiana. Providing distinct examples of protectable interests, such as those in the Florida noncompete statute, could help remedy this problem.<sup>178</sup>

The legislature, however, may not be willing to amend section 23:921 to disallow reformation and to include a protectable interest provision. After all, the legislature enacted such a provision in the 1962 amendment, but later removed it.<sup>179</sup> Further, the legislature has not amended the statute since the 2003 amendment, despite extensive litigation involving noncompete agreements. The legislature may also be unwilling to amend Louisiana's noncompete statute by prohibiting reformation of overly broad noncompete agreements. Thus, another avenue to remedy the problems of overuse and uncertainty of enforceability of noncompete agreements must be available.

*B. A Judicial Solution: Arming Employees and Employers with the Counterweight of Intentional Interference with Contractual Relations*

Whether or not the Louisiana Legislature changes Louisiana's noncompete law to control the overuse of noncompete agreements and the damage that overly broad noncompete agreements cause to employees, Louisiana should also adopt the tort of intentional interference with contractual relations in the employment context. Although Louisiana

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it incurred expenses in the training of the employee or expenses in the advertising of the business. *Id.*

178. See *supra* note 164 and accompanying text.

179. See *supra* Part I.B.1.

currently utilizes a unique application of this tort,<sup>180</sup> the Louisiana Supreme Court could expand the tort to overly broad noncompete agreements. Employees armed with a cause of action in tort will be better able to combat the threat of restricted employment even though the noncompete agreement is unenforceable. Additionally, employers will be able to use the tort to bring an action when a former employee or a competitor interferes with their legitimate business interests.

### *1. Intentional Interference with Contractual Relations in Other Jurisdictions*

Every state in the United States recognizes the common law tort of intentional interference with contractual relations, although the elements of the tort vary from state to state.<sup>181</sup> Most states use the *Restatement (Second) of Torts* as the basis for their laws.<sup>182</sup> The *Restatement* defines the tort as:

One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.<sup>183</sup>

Most cases involving intentional interference with contractual relations in the realm of noncompete agreements arise when a new

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180. See *infra* Part IV.B.2.

181. Gary D. Wexler, *Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations*, 27 CONN. L. REV. 279, 292 (1994) (“Since the 1989 Louisiana decision of *9 to 5 Fashions, Inc. v. Spurney*, all fifty states now recognize some form of tortious interference with contract.”).

182. The *Restatement* also recognizes variations of intentional interference with contractual relations. The *Restatement* states that a tortfeasor may be liable for interference with a prospective contractual relation, which may be relevant in situations where a job applicant is turned down for a job because of the prospective employer’s belief that the applicant is bound by an enforceable noncompete agreement, like in *Kimball*. RESTATEMENT (SECOND) OF TORTS § 766B (1979) (“One who intentionally and improperly interferes with another’s prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of: (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.”).

183. *Id.* § 766.

employer attempts to hire an employee who is bound by a noncompete agreement.<sup>184</sup> In these cases, most states require that the plaintiff have a valid noncompete agreement and that the competitor know of the agreement and hire the employee anyway.<sup>185</sup> States define the intent element differently, but most states follow the *Restatement's* rule that the actor does not necessarily have to “act for the purpose of interfering with the contract . . . but [the actor] knows that the interference is certain or substantially certain to occur as a result of his action.”<sup>186</sup> An interfering party may be subject to pecuniary loss resulting from the interference in addition to any consequential harms that the interference caused.<sup>187</sup>

A lesser-known application of intentional interference with contractual relations occurs when a former employer interferes with an employee's new employment by trying to apply an overly broad noncompete agreement. For example, in *SCI Funeral Services of Florida, Inc. v. Henry*,<sup>188</sup> the Florida Third Circuit Court of Appeal upheld an employee's claim for intentional interference after the employee was terminated from his new job because his previous employer attempted to enforce an expired noncompete agreement.<sup>189</sup> The court held that if a company attempts to enforce an invalid noncompete agreement that causes the employee to lose his job, a judicial remedy for damages is available for the employee.<sup>190</sup> Although intentional interference with contractual relations has been used in the employment context in other jurisdictions, Louisiana has yet to expand the tort to this arena.

## 2. *Intentional Interference with Contractual Relations in Louisiana*

Although Louisiana does not recognize the tort of intentional interference with contractual relations in the employment context, the courts have adopted the tort in a very narrow circumstance. Louisiana, however, was the last state in the nation to recognize any form of

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184. Peter R. Ulanowicz, *Taking the Fight to the Bullies: Tortious Interference Liability for Both Employer and Attorney on Baseless Restrictive Covenants, Part I*, FLA. B.J., Jan. 2011, at 28.

185. Henry F. Luepke, *Tortious Interference with Covenants Not to Compete*, J. MO. B., Mar.–Apr. 2010, at 88, 90.

186. RESTATEMENT (SECOND) OF TORTS § 766, cmt. j.

187. *Id.*

188. 839 So. 2d 702 (Fla. Dist. Ct. App. 2002).

189. *Id.* at 706.

190. *Id.*

intentional interference with contractual relations.<sup>191</sup> The Louisiana Supreme Court refused to recognize the action in *Kline v. Eubanks*.<sup>192</sup> In *Sanborn v. Oceanic Contractors, Inc.*,<sup>193</sup> however, the Court provided a glimpse of its shifting away from its long-time resistance to the action.<sup>194</sup> In a footnote, the court suggested that even though the *Sanborn* case did not present the issue, the plaintiff would have a cause of action for intentional interference if the plaintiff could prove that the defendant “intentionally and willfully interfered with plaintiff’s contract” and that the interference was the “proximate cause of the failure of the contract.”<sup>195</sup> Although the Court’s statement was dicta, that footnote opened the door for the Court to adopt the tort of intentional interference with contractual relations.

The Louisiana Supreme Court, in *9 to 5 Fashions, Inc. v. Spurney*,<sup>196</sup> followed the suggestion in *Sanborn* when it removed the bar on the application of intentional interference with contractual relations and recognized a narrow and fact-specific application of the tort.<sup>197</sup> Recognizing Louisiana’s longstanding refusal to utilize intentional interference with contractual relations, the Court stated that its intent was not to “adopt whole and undigested the fully expanded common law doctrine of interference with contract.”<sup>198</sup> Instead, the Court limited Louisiana’s application of intentional interference with contractual relations to “only a corporate officer’s duty to refrain from intentional and unjustified interference with the contractual relation between his employer and a third person.”<sup>199</sup>

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191. Bruce V. Schewe, *Developments in the Law, 1983–1984: Obligations*, 45 LA. L. REV. 447, 465–66 (1984); Wex S. Malone, *Torts*, 25 LA. L. REV. 334, 341 (1965) (“Unfortunately, Louisiana is the only remaining American jurisdiction where the malicious inducement of a breach of contract is not regarded as an actionable wrong.”).

192. 33 So. 211 (La. 1902).

193. 448 So. 2d 91 (La. 1984).

194. *Id.* at 95 n.5. In 1981, the Louisiana First Circuit Court of Appeal suggested that the Louisiana Supreme Court’s “unflinching adherence” to *Kline* needed to be reexamined in light of the changing social and economic conditions of the times. *Moss v. Guarisco*, 409 So. 2d 323, 330 (La. Ct. App. 1981).

195. *Sanborn*, 448 So. 2d at 95 n.5.

196. 538 So. 2d 228 (La. 1989).

197. *Id.*

198. *Id.* at 234.

199. *Id.* The elements of a claim of intentional interference with contractual relations against a corporate officer are as follows:

- (1) The existence of a contract or a legally protected interest between the plaintiff and the corporation;
- (2) The corporate officer’s knowledge of the contract;

The *Spurney* Court rationalized this holding in “light of modern empirical considerations and the objectives of delictual law.”<sup>200</sup> The Court used common law authorities, finding that these authorities were consistent with civilian delictual principles reflected in Louisiana Civil Code article 2315 that “obliges a person to repair damage caused [to] another by his fault.”<sup>201</sup> *Spurney* recognized the need to limit the tort’s application in Louisiana, however, and stated that open questions about the tort still persisted, such as what kind of contract is protected and what kind of interference is actionable.<sup>202</sup>

*Spurney*’s fact-specific application of intentional interference with contractual relations leaves the state of the tort in flux.<sup>203</sup> Because Louisiana’s version of the tort is different from that of any other state, employers and employees have little guidance as to the scope of the tort’s applicability. Thus, the Louisiana Supreme Court should expand the tort to be applicable in the employment context. This would allow the tort to serve as a remedy to employees harmed by overly broad noncompete agreements and employers harmed by breaches of valid noncompete agreements.

### *3. Adopting Tortious Interference in the Employment Context in Louisiana*

As compared to damages under article 2033 or other contractual or quasi-contractual damages, a tort remedy might provide more recovery for the aggrieved party. An employee could seek a declaratory judgment to

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(3) The officer’s intentional inducement or causation of the corporation to breach the contract or his intentional rendition of its performance impossible or more burdensome;

(4) Absence of justification on the part of the officer; and

(5) Causation of damages to the plaintiff by the breach of contract or difficulty of its performance brought about by the officer.

*See id.*

200. *Id.* at 231. The court applied the principles of Louisiana Civil Code article 2315.

201. *Id.* at 233–34.

202. *Id.* at 234.

203. Less than a year after *Spurney* was decided, the Louisiana Third Circuit Court of Appeal expressly stated that “Louisiana law does not recognize the tort of intentional interference with contracts.” *Compadres, Inc. v. Johnson Oil & Gas Corp.*, 547 So. 2d 382, 390 (La. Ct. App. 1989). Justice Dennis later clarified that “[t]his court recently recognized for the first time in some 87 years the possibility of a narrowly drawn action for *intentional* interference with contractual rights and indicated that it would proceed with caution in expanding that cause of action.” *Great Sw. Fire Ins. Co. v. CNA Ins. Cos.*, 557 So. 2d 966, 969 (La. 1990).

have the noncompete agreement declared invalid, but expecting every employee to go to court every time they sign a noncompete agreement to determine its validity is unreasonable. Under that flawed expectation, every time an employee changed jobs and signed a noncompete agreement, that employee would have to sue the employer to have a court declare an overly broad noncompete agreement invalid. Instead, a tort remedy would deter employers from drafting overly broad noncompete agreements for fear of being held liable under a tort theory, thus decreasing the need for employees to have those agreements ruled invalid.

If an employee does not leave his or her current employment because the employer threatens to enforce an overly broad noncompete agreement, the tort could provide *in terrorem*<sup>204</sup> effects to the employer, equalizing the threat of the overly broad noncompete agreement.<sup>205</sup> Further, an employer who threatens to enforce an overly broad noncompete agreement against an employee who has obtained other employment is interfering with the contractual relation between the employee and the new employer.<sup>206</sup> In this situation, the employee can answer the previous employer's threat with a reconventional demand for damages in tort.<sup>207</sup>

Adopting intentional interference with contractual relations does not just benefit employees, however. Implementation of the tort would allow former employers to sue current employers for intentional interference when a valid noncompete agreement restricts the employee.<sup>208</sup> Arguably, this action could threaten employees if prospective employers, fearful of incurring litigation costs, are hesitant to hire people bound by a noncompete agreement. In addition to litigation costs, prospective employers may be cautious about investing money to train an employee who is bound by a noncompete agreement because of the chance that the former employer will bring an action to enforce the noncompete agreement and enjoin the employee from working for the competitor.<sup>209</sup> Despite these potentially negative effects to employees by adopting the tort, the benefits outweigh the dangers to employees because a former

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204. *In terrorem* effects are those that act “by way of threat” or “as a warning.” BLACK’S LAW DICTIONARY, *supra* note 88, at 896.

205. *See generally* Ulanowicz, *supra* note 184.

206. *Id.* at 28.

207. LA. CODE CIV. PROC. § 1061 (2015) (“The defendant in the principal action may assert in a reconventional demand any causes of action which he may have against the plaintiff in the principal action . . .”). A reconventional demand is the equivalent of a counter claim in common law jurisdictions.

208. *See, e.g.,* DePuy Synthes Sales, Inc. v. Jones, No. 2:13-CV-392, 2013 WL 8118533 (E.D. Va. Nov. 5, 2013).

209. *See* Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1295, 1298–1302 (2005).

employer would only be able to use the tort if it first drafted a valid noncompete agreement.

Variations of tortious interference with contractual relations claims exist that the Louisiana Supreme Court could adopt, namely the distinction between negligent and intentional interference. Louisiana could adopt one or both variations with different requirements of intent. The first option is to adopt both negligent and intentional interference and apply a narrow definition of intent to the intentional interference tort. The second option is to only adopt intentional interference but apply a more broad definition of intent.

The tort of interference with contractual relations, whether negligent or intentional, first requires the interference to be the cause of the damage.<sup>210</sup> Under a negligent interference with contractual relations cause of action, any employer who drafts an overly broad noncompete agreement that causes an employee damage will be liable.<sup>211</sup> In cases where the prospective employer never learns of the overly broad noncompete agreement or where the prospective employer is made aware of the noncompete agreement but does not make hiring decisions based on the agreement, neither intentional nor negligent interference is applicable. The reason for the inapplicability of the tort is because the overly broad noncompete agreement is not the cause of damage.

Next, some degree of intent must exist.<sup>212</sup> The degree of intent varies with respect to the tort. For negligent interference, intent is irrelevant.<sup>213</sup> For intentional interference, the court may choose what degree of intent is sufficient—whether the employer must only intend to draft a noncompete agreement, intend to knowingly draft an overly broad noncompete agreement, or intend that the overly broad noncompete agreement cause

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210. See RESTATEMENT (SECOND) OF TORTS § 766 (1979) (intentional interference with contractual relation); *id.* § 766B (intentional interference with prospective contractual relation).

211. For an argument of why Louisiana should not reject the application of negligent interference with contractual relations, see Rebecca L. Lear, Comment, *Negligent Interference with Contract—An Argument Against Categorical Rejection: Applying a Duty/Risk Analysis to Negligent Drug Testing*, 60 LA. L. REV. 855 (2000).

212. See RESTATEMENT (SECOND) OF TORTS § 766 (intentional interference with contractual relation); *id.* § 766B (1979) (intentional interference with prospective contractual relation).

213. See *id.* § 766C (“One is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor’s negligently (a) causing a third person not to perform a contract with the other, or (b) interfering with the other’s performance of his contract or making the performance more expensive or burdensome, or (c) interfering with the other’s acquiring a contractual relation with a third person.”).

harm to the employee. Depending on how intent is defined, intentional interference with contractual relations may not give a remedy to an employee who suffers harm. Negligent interference with contractual relations, however, may provide a remedy.

The first option is to adopt negligent interference and intentional interference with a narrow definition of intent. A narrow definition of intent could be that an employer intended not only to draft an overly broad noncompete agreement, but also intended that the invalid agreement cause harm to the employee. For instance, if an employer drafts a geographically overly broad noncompete agreement and the employee loses a prospective job as a result of the invalid agreement, the employee may have a cause of action against the former employer for negligent interference, but would not have a cause of action for intentional interference. Louisiana courts, however, are reluctant to adopt both intentional and negligent interference with contractual relations.<sup>214</sup>

Given this reluctance, the second and preferable option is for Louisiana to adopt only intentional interference with contractual relations, and apply a broad definition to the requisite intent to provide some remedy to aggrieved employees. The definition of intent must be broad enough to impose liability on an employer who knowingly drafts an overly broad noncompete agreement or drafts an agreement with the substantial certainty that it is overly broad. Although an employer may not have malicious intent to harm an employee, the employer will likely know with substantial certainty that future employers will become aware of the noncompete agreement and may make adverse employment decisions based on the invalid agreement.<sup>215</sup> This broad definition would also include an employer's intent to interfere with the employee's future job prospects if it knew that the noncompete agreement were invalid. The very purpose of a noncompete agreement is to prevent current employees from being employed elsewhere, so intentionally drafting an overly broad noncompete agreement that causes the employee to sustain damage would qualify as intent. Similarly, when the tort is used by a former employer against a current employer, sufficient intent would require that the current

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214. See *Great Sw. Fire Ins. Co. v. CNA Ins. Cos.*, 557 So. 2d 966, 969 (La. 1990); see generally *Lear*, *supra* note 211. Although the Louisiana Supreme Court has not officially adopted the tort of negligent interference with contractual relations, the Court has acknowledged the cause of action in cases involving negligent drug testing that prevents a person from obtaining employment. *Id.*

215. *Blake*, *supra* note 25, at 627 (stating that noncompete agreements "diminish competition by intimidating potential competitors and slowing down the dissemination of ideas, processes, and methods").

employer intended to hire the employee when it knew that a valid noncompete agreement was in place.

Recognizing claims of intentional interference with contractual relations would be a substantial move in Louisiana that would broaden the current doctrine despite past resistance. The tort would allow employees like Catherine Kimball to sue previous employers because of a lost job opportunity that the overly broad noncompete agreement caused. Additionally, the tort would equalize the threat of noncompete agreements for employees who stay in a job because of the threat of a noncompete agreement. Finally, the tort allows an employee who is sued by a previous employer to answer the suit with a reconventional demand.<sup>216</sup> In addition to the benefits that employees enjoy from the tort, employers can also use intentional interference with contractual relations against a former employee or a competitor when the competitor hires a former employee when there is a valid noncompete agreement.<sup>217</sup> The tort would provide the former employer with a remedy of tort damages for any business expenses lost or costs incurred due to the breach.

### *C. The Not-So-Magic Formula*

The best option to solve the legal problems in Louisiana's noncompete law that cause noncompete agreements to be overused and overly broad is for the legislature to amend Louisiana's noncompete law. Amending section 23:921 to require employers to prove a protectable interest in restraining the employee would reduce the number of noncompete agreements issued.<sup>218</sup> Louisiana should also amend section 23:921 to expressly prohibit reformation of overly broad noncompete agreements, which would force employers to be more diligent in drafting enforceable agreements.<sup>219</sup> Eliminating reformation would reinstitute the certainty of Louisiana's noncompete law that the legislature sought to achieve by requiring that noncompete agreements strictly comply with section 23:921 to be enforceable.

If the Louisiana Legislature is unwilling to make these changes to the noncompete law, the Louisiana Supreme Court should expand the tort of intentional interference with contractual relations to apply to overly broad noncompete agreements. This expansion would create a cause of action for employees harmed by overly broad noncompete agreements or employers harmed by breach of a valid agreement. Due to the overuse of

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216. LA. CODE CIV. PROC. § 1061 (2015).

217. See Luepke, *supra* note 185, at 89–90.

218. See *supra* Part IV.A.2.

219. See *supra* Part IV.A.1.

noncompete agreements and the incentive for employers to draft overly broad agreements, employees are either remaining in jobs they would otherwise leave or losing prospective jobs because of seemingly valid noncompete agreements. The tort would allow employees to stand on equal footing against an employer that is threatening to enforce an overly broad noncompete agreement. Using the tort will not benefit only aggrieved employees, but it will also provide employers with an additional tool for protecting their business interests by allowing them to sue a new employer that hires an employee who is bound by a valid noncompete agreement.

No magic formula exists to solve the legal deficiencies that cause the problems of overly broad and overused noncompete agreements. If the legislature agrees to amend the statute, it is less necessary for the Louisiana Supreme Court to adopt the tort. The adoption of both the legislative reforms and intentional interference is ideal, however, as the tort provides additional protections for employers and employees even after the problems in the statute are solved.

#### CONCLUSION

The current state of Louisiana's noncompete law leads to overuse of noncompete agreements and uncertainty about when an agreement is enforceable. Employees like Catherine Kimball, who lost a job due to an overly broad noncompete agreement, do not currently have an adequate remedy for damages. Further, employees who stay in a job due to the threat of enforcement of a noncompete agreement need to be armed with something to balance the power vis-à-vis the employer. Finally, employees who are subject to suit by a former employer that is attempting to enforce an overly broad noncompete agreement need a mechanism to hold employers accountable and deter them from intentionally drafting and enforcing overly broad noncompete agreements.

Although the *Kimball* court found remedies for breach of a noncompete agreement rooted in Louisiana's nullity law, those remedies are insufficient.<sup>220</sup> The Louisiana Legislature and judiciary must remove noncompete agreements from the tangled web of nullity. Instead, Louisiana noncompete law should require employers to demonstrate a protectable interest in restricting an employee and should foreclose on the ability to reform overly broad noncompete agreements. These two solutions will solve the problems of these agreements being overused and overly broad. With these solutions, adopting intentional interference with

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220. See *supra* Part II.A.2.

contractual relations in the context of overly broad noncompete agreements will stifle the overuse and uncertainty of enforceability of noncompete agreements by arming employers and employees with a countervailing weight against the enforcement of the agreements. Either solution, or both solutions used together, will equalize the threat of noncompete agreements and bring equity to Louisiana's noncompete law.

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