The Legal Implications of Covenants Not to Compete in Veterinary Contracts

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I. INTRODUCTION

Covenants not to compete, or non-competition covenants, have engendered a multitude of cases and commentaries.\(^1\) Four decades ago, an often-quoted decision\(^2\) recognized the "vast and vacillating, overlapping and bewildering" sea of authority on the subject.\(^3\) Even more law exists now,\(^4\) and the issues are so diverse that a comprehensive analysis of restrictive covenants may serve little purpose. Recognizing this complexity, several commentators have addressed the subject in limited contexts where replicable rules can be identified more readily and suggestions for improvement carry greater weight.\(^5\)

This Article analyzes the relevance and validity of covenants not to


\(^3\) The often-quoted language follows:

This is not one of those questions on which the legal researcher cannot find enough to quench his thirst. To the contrary there is so much authority it drowns him. It is a sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long.

\(^4\) Id. at 687.

\(^5\) The authors collected over 300 such decisions in a routine computer search spanning the years 1980 to 1991.

\(^6\) See, e.g., Robert W. Hillman, Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving, 67 TEX. L. REV. 1 (1988); Stuart L. Pachman, Accountants and Restrictive Covenants: The Client Commodity, 13 SETON HALL L. REV. 312 (1983); Kevin M. Kelly, Comment, Drafting Enforceable Covenants Not to
compete among veterinarians. Because the subject has received significant analysis in the context of physician contracts, this Article will address only the particular justifications for, and limitations on, the use of covenants not to compete in veterinary medicine. Although veterinarians are a relatively small proportion of the various medical professionals, a significant number of veterinarians are affected by covenants not to compete.

This Article will first discuss the relevance of non-competition agreements in veterinary medicine and their pervasiveness in the profession. Next, it will discuss how the common law has approached covenants not to compete, with greater attention given to the aspects most relevant to veterinary covenants. Third, the Article will address the impact of state statutes and federal antitrust legislation on the validity of veterinary covenants. Finally, a brief conclusion will suggest some improvements for dealing with covenants in this area.

II. COVENANTS NOT TO COMPETE IN VETERINARY MEDICINE

Covenants not to compete reflect the importance of protecting one's proprietary interest in information or knowledge. The nature of this interest varies with the specific profession or trade. Among veterinary practitioners, the primary focus of protection is the interest in preserving client relationships, or "goodwill." Other protectable in-

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8. "Goodwill" may be defined as:

the favor or advantage in the way of custom that a business has acquired beyond the mere value of what it sells whether due to the personality of
Veterinary medicine is a client-oriented profession. Therefore, the success of a practice depends greatly on its ability to attract and retain clients. Much of a practice’s ability to attract clients initially depends on its reputation within the community. This reputation, along with the effects of location and staff, constitute what is commonly termed “practice goodwill.” Practice goodwill is often the initial impetus for many clients’ decisions to visit the practice. Practice goodwill also benefits the staff at the clinic by improving their reputation in the community through association with the practice. But although the individual members of a veterinary practice’s staff contribute to the formation of practice goodwill, the proprietary interest in this form of goodwill normally rests with the practice.

Although attracting new clients is important for the success of any veterinary practice, retaining existing clients is considered the most important factor in maintaining a successful practice. Client retention is important because clients in veterinary practice, as in all service fields, tend to be repeat customers. As illustrated in the Webster’s Third New International Dictionary, 979 (1961), the term "goodwill" is defined as "the capitalization of excess earnings." Owen E. McCafferty, How to Price Your Practice (Part 2), VETERINARY ECON., Sept. 1987, at 62, 69.

9. See infra notes 36-86 and accompanying text for a more thorough discussion of the various protectable interests.

10. The authors use the term “practice” for the entity providing veterinary services. The practice may be owned by a single veterinarian, a partnership, or a corporation. Distinctions based on the form of ownership are irrelevant for the purposes of this discussion.

11. See Stephan R. Leimberg, Putting a Price on the Practice, BEST'S REVIEW—LIFE-HEALTH INSURANCE EDITION, July 1987, at 62, 64 (“trust, respect and the likability of the practitioner are crucial to the success of the practice”). As a further example of the importance of reputation or goodwill in veterinary practice, a standard rule of thumb for calculating a veterinary practice's goodwill is to compute 60 to 90 percent of the practice’s annual revenue. Id. at 105. For other professions, such as medicine and dentistry, the figures are 20 to 40 percent and 30 to 40 percent, respectively. Id.

12. Id. at 64.

13. Other factors, such as proximity and cost, play an important role in client decisions as well.

14. See Owen E. McCafferty, How to Price Your Practice (Part 3), VETERINARY ECON., Oct. 1987, at 62, 68 (“An associate may cultivate clients, educate the staff, and provide medical expertise and management skills, but rarely do employment contracts credit doctors for their contribution to goodwill.”)

15. See e.g., Jack Antelyes, Rolling Out the Red Carpet, VETERINARY ECON., Feb. 1990, at 66, 66 (noting that obtaining new clients costs a practice six times more than retaining existing ones). See also John Lofflin, How to Reverse Fading Client Support, VETERINARY ECON., Feb. 1986, at 38 (offering ten suggestions for retaining clients and maintaining income despite a decline in client base); James McBride, Keep Your Clients Coming Back, VETERINARY ECON., July 1986, at 42
tion rests primarily with the practice's ability to satisfy client needs and develop loyalty among its clients. Thus a practice depends on the individual practitioner's ability to foster strong veterinarian-client relationships (that is, his or her "professional goodwill").

The veterinarian-client relationship is a one-to-one relationship, based on trust and open communication. Clients often prefer to have their animals examined by a particular veterinarian, a preference that stems largely from the client's perception of the individual veterinarian's competence. This perception, however, rarely correlates with the practitioner's true medical competence. A client rarely witnesses the indicators, such as surgical skill or ability to diagnose accurately and develop a successful therapeutic regimen, that reveal a practitioner's true medical competence. Moreover, clients often cannot appreciate the significance of given diagnostic or therapeutic regimes or the knowledge required to interpret them. Instead, clients base their decision on superficial, non-medical criteria, such as how the animals respond to the veterinarian and vice versa or the veterinarian's ability to perform minor, technical procedures like drawing blood or giving a dog a pill. Few, if any, of these activities really demonstrate the practitioner's medical or surgical competence. Because the activities performed in the client's presence provide the only basis on which the client can form an opinion, however, the veterinarian should perform them proficiently.

A veterinarian can affect client perceptions in other ways as well. For example, a veterinarian with a cordial, empathetic personality may be able to console a client in the face of tragedy or a bleak prognosis. A veterinarian may also enhance client relations with marketing strategies, such as follow-up calls, to demonstrate concern for clients and their animals. In addition, advanced or specialized training will enable the veterinarian to serve the needs of clients and patients more

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16. See generally Leimberg, supra note 11, at 62.
17. Most medical and surgical procedures take place out of the client's view for many reasons, but primarily to reduce animal and client stress.
18. In addition to the medical and clinical information provided to practicing veterinarians, a great deal of literature is dedicated to building and strengthening veterinarian-client relations. See, e.g., Jacob Antelyes, Difficult Clients in the Next Decade, 198 J. AM. VETERINARY MED. ASS'N 550 (1991) (concerning the need to accommodate demanding or otherwise difficult clients); Steve Beale, When Your Associate Loses a Client, VETERINARY ECON., July 1987, at 18; Lofflin, supra note 15; McBride, supra note 15.
effectively.20 In these ways, the veterinarian provides the client with an indication, albeit sometimes minor, of overall medical competence.

All of these personal attributes combine to form the individual practitioner's "professional goodwill."21 Unlike practice goodwill, professional goodwill develops mainly from the individual veterinarian's efforts, and it primarily benefits that veterinarian. Professional goodwill often leads to strong loyalty from clients. This loyalty also benefits the practice, because it helps to establish practice goodwill.

Thus, both practice goodwill and professional goodwill combine to create an overall "client goodwill" that constitutes one of the most important assets in a veterinary practice.22 When a veterinarian leaves a practice, clients may prefer to continue working with the departing doctor at a new practice or to find a new practice altogether, if their veterinarian has left the area. Thus, the risk exists that a veterinarian's departure will decrease client goodwill, not only by loss of the doctor's own professional goodwill, but also by reducing the value of the remaining practice goodwill. When a popular veterinarian leaves a practice, the remaining veterinarians will need to preserve client goodwill. This need increases in importance in light of recent evidence suggesting that more veterinarians will be competing for fewer client dollars.23

The primary mechanism for protecting client goodwill in veterinary medicine is the covenant not to compete. Though no studies document the prevalence of non-competition covenants in veterinary medicine, anecdotal as well as circumstantial evidence suggests that these covenants are common.24

20. Board-certified specialists are veterinarians who have received advanced training and education in a particular field of veterinary medicine. Currently 18 specialty boards exist, overseeing 23 specialties, including internal medicine, surgery, anesthesiology, and cardiology. AMERICAN VETERINARY MEDICAL ASSOCIATION DIRECTORY 657-93 (1990).

21. Leimberg, supra note 11, at 64.

22. See e.g., Harvey Sarner, Sale and Lease of a Small Animal Practice, 2 VETERINARY CLINICS OF NORTH AMERICA, Sept. 1972, at 503, 504-07 (discussing goodwill valuation for tax purposes and protection through the covenant not to compete).

23. Current studies indicate that the amount of discretionary income available to animal owners for their animal's health care has declined, and the number of veterinarians competing for this income has increased. Antelyes, supra note 18, at 550.

24. The anecdotal evidence is based on numerous conversations with veterinarians who planned to execute an employment contract with a restrictive covenant or draft a contract with such a provision. Further evidence of the widespread use of restrictive covenants can be found in literature devoted to the subject in veterinary journals and texts. See, e.g., JAMES F. WILSON, LAW AND ETHICS OF THE VETERINARY PROFESSION 205-13 (1988); Ellen Bleiler, Will a Restrictive Covenant Hold Up Today?, VETERINARY ECON., May 1986, at 31; Harold W. Hannah, Non-competition Agreements and the Veterinary Profession, 170 J. AM. VETERINARY MED. ASS'N 134 (1977), reprinted in LEGAL BRIEFS 177 (1986); Harold W. Hannah,
Covenants not to compete normally arise in one of three contexts: a contract for the sale of a practice, a partnership agreement, or an employment contract. In each situation, the primary motivation for the covenant is to protect practice goodwill. Secondary motivations, such as protecting trade secrets or unique skills, may exist and will be discussed below. Legal rules governing covenants not to compete vary from state to state and will be the subject of the remainder of this article. The common law; state statutes specifically regulating covenants not to compete, as well as other state antitrust legislation; and federal antitrust legislation all play some role in determining the validity of covenants not to compete.

III. THE COMMON-LAW APPROACH

Since the early fifteenth century, judges have been asked to decide about the enforceability of covenants not to compete. In ensuing centuries, courts have attempted to define the appropriate standard of


An ethical principle also supports covenants not to compete:

The records of a veterinary facility are the sole property of that facility, and when a veterinarian leaves salaried employment therein, the departing veterinarian shall not copy, remove, or make any subsequent use of those records.


26. See, e.g., Durio v. Johnson, 358 P.2d 703, 705 (N.M. 1961)(recognizing that “good will also exists in professional practice, or in business founded upon personal skill and reputation and is salable.”); Harold W. Hannah, Sale of a Veterinary Practice, 192 J. AM. VETERINARY MED. ASS'N 1496, 1496 (1988) (“If there is any doubt whatsoever about the future intentions of the seller with respect to practice in the locality, the buyer should insist that the contract include a covenant against competition . . . .”).

27. See infra notes 61-86 and accompanying text.

28. The English court of common pleas refused to enforce a six-month restraint on a dyer-apprentice in Dyer's Case, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414). Most courts and commentators have interpreted this decision to hold that all restraints were void without regard to whether the restraint was reasonable. See Harlan M. Blake, Employee Agreements not to Compete, 73 HARV. L. REV. 625, 636-37 (1960). This overly protective view eventually gave way to the “rule of reason” as stated in Mitchel v. Reynolds, 1 P. Wins. 181, 24 Eng. Rep. 347 (Q.B. 1711), where the Queen's Bench recognized the need for reasonable restraints in order to protect economic expectations. Id. at 182, 186, 24 Eng. Rep. at 348, 349. Mitchel formed the basis for the current common-law approach to non-competition covenants. Blake, supra, at 637. For a thorough discussion of the economic and social climates that shaped the English and American courts' views of covenants not to compete from the 1400s to the 1900s, see Blake, supra, at 629-46.
review for these covenants, but a consistent, workable standard has proven difficult to formulate. In general, courts do not favor re-
straints of trade and therefore review restrictive covenants rather rig-
orously. Though each case is normally analyzed on its facts, several
guidelines have evolved.

Courts in different jurisdictions have formulated the standard of
review in a variety of ways. Broadly speaking, however, the primary
issues raised by a covenant not to compete are whether the covenant is
reasonably necessary to protect a legitimate interest of the covenantee
and whether it reasonably protects that interest without unfairly bur-
dening the covenantor or the public. In addition, the covenant must
be ancillary to a valid contract and supported by consideration.

A. The Protectable Interest

When a court evaluates a covenant not to compete, the most impor-
tant issue may be whether the covenantee possesses an identifiable,
legitimate interest that justifies imposing a restraint. In the absence
of an interest deserving protection, no covenant, whether reasonably
drafted or not, should be enforced. Some courts, however, have fo-
cused on the reasonableness of the covenant's scope without first in-
quiring into the justification for the covenant itself. Others have
assumed that a legitimate interest supported the covenant merely be-
cause of the nature of the relationship between covenantor and

29. See, e.g., Ohio Valley Communications, Inc. v. Greenwell, 555 N.E.2d 525, 528 (Ind. Ct. App. 1990) ("covenant will be enforced if it is reasonable, is ancillary to the main purpose of a lawful contract, and is necessary to protect the covenantee in the enjoyment of the legitimate benefits of the contract or to protect the covenantee from the dangers of unjust use of those benefits by the covenantor"); Pollack v. Callmag, 458 N.W.2d 591, 598 (Wis. Ct. App. 1990), review denied, 461 N.W.2d 444 (Wis. 1990) (holding that a valid covenant must "(1) be necessary for the protection of the employer or principal; (2) provide a reasonable time restriction; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive to the employee; and (5) not be contrary to public policy") (citing Fields Found., Ltd. v. Christensen, 309 N.W.2d 125, 128 (Wis. Ct. App. 1981)).


33. Id. at 544. See also Nalle Clinic Co. v. Parker, 399 S.E.2d 363, 365 (N.C. Ct. App.), review denied, 407 S.E. 2d 538 (N.C. 1991) (requiring a valid covenant to be: "(1) in writing, (2) made part of a contract of employment, (3) based upon reasonable consideration, (4) reasonable both as to time and territory, and (5) not against public policy").
Over the years, courts have recognized three basic interests as protectable: customer (or client) relationships or "goodwill"; trade secrets or other confidential information; and, in the context of employment relationships, unique attributes or skills possessed by an employee.\(^\text{35}\)

1. **Client Relationships or "Goodwill"**

In veterinary contracts, the covenantee's interest in maintaining customer relationships or goodwill is the most important of the potential interests that justify imposing a covenant. This interest in customer goodwill depends more on the relationship between the covenantor and covenantee than do the remaining two interests. Relationships between the veterinarian parties to a covenant will normally be characterized as vendor-vendee, partnership, or employment.\(^\text{36}\) In each of these relationships, goodwill constitutes a protectable interest. Nonetheless, many courts distinguish between protecting goodwill in the context of sale of a practice or dissolution of a partnership and protecting goodwill in the context of an employment contract.

   a. **Sale of a Veterinary Practice**

In the sale of a veterinary practice, client goodwill constitutes an intangible capital asset capable of transfer for valuable consideration.\(^\text{37}\) Thus, for a covenant incident to the sale of a practice, the legitimate interest is "the buyer's need to protect the value of the good will that he has acquired."\(^\text{38}\) Otherwise, in a profession where client goodwill constitutes a major asset,\(^\text{39}\) nothing would prevent a selling veterinarian from establishing a new practice nearby and re-acquiring the goodwill that the veterinarian had already sold.\(^\text{40}\)

Because goodwill constitutes such an important component in the sale of a business, courts rarely inquire into whether a protectable interest exists, presuming its presence from the mere existence of the transaction.\(^\text{41}\) Not all sales actually involve goodwill, however, and an

\(^{34}\) Retina Services, Ltd. v. Garoon, 538 N.E.2d 651, 653 (Ill. App. Ct.), appeal denied, 545 N.E.2d 130 (Ill. 1989) ("The Illinois Supreme Court has repeatedly upheld covenants not-to-compete in medical practice cases without making a specific inquiry into whether the plaintiff has demonstrated a protectable business interest.").

\(^{35}\) RESTATEMENT (SECOND) OF CONTRACTS § 188 cmts. b, g (1979).

\(^{36}\) Closius & Schaffer, supra note 32, at 551 n.1. See also RESTATEMENT (SECOND) OF CONTRACTS § 188(2)(1979); Blake, supra note 28, at 626 n.3.

\(^{37}\) Sarner, supra note 22, at 504-05. See also Leimberg, supra note 11, at 64.

\(^{38}\) RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. f (1979).

\(^{39}\) See supra text accompanying notes 8-27.

\(^{40}\) See 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1393 (1962). See also RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. f (1979).

\(^{41}\) See, e.g., Western Media, Inc. v. Merrick, 727 P.2d 547, 549 (Mont. 1986) ("Where the seller of a business agrees in connection with the sale not to engage in the
appraisal of the interests in the disputed relationship should be part of every judicial analysis.

b. Partnership Agreement

Similarly, a partnership agreement providing that the goodwill of a practice will remain with one of the partners on dissolution or termination of the partnership also requires some form of protection for the acquiring partner. Open competition among former partners after the partnership has ended would make worthless any consideration paid for the practice goodwill. As a first step, however, it must be established that goodwill actually exists in a specific partnership agreement. Not every partnership involves goodwill, as the following Michigan case demonstrates.

In Boggs v. Couturier, a veterinarian employer entered a limited partnership with his employee. In exchange for capital contributions to the partnership, the employee received a 24 percent interest in the practice as limited partner; the employer became general partner. The partnership agreement contained a non-competition clause: on termination or dissolution of the partnership “neither of the parties shall engage in a like or similar business within fifteen (15) miles of the present location and for a period of three (3) years from the date of such termination or dissolution.” The clause provided, however, that the general partner (former employer) could continue his practice at the partnership premises and retain the clinic name and telephone number. After three years, the limited partner gave notice of withdrawal from the partnership, and the general partner sued to enforce the covenant not to compete. In the court of appeals, the only issue was the lawfulness of the covenant. Michigan law prohibited agreements and contracts in restraint of trade, but a statutory exception applied in the case of a sale of a business or its goodwill. Thus, the existence of goodwill was critical to validity of the covenant. On

same business in the same place, the obvious intent of the seller is to transfer the goodwill of the business.” See also South Bay Radiology Medical Assocs. v. Asher, 269 Cal. Rptr. 15 (Cal. Ct. App. 1990)(finding compensation for goodwill was not required in order to enforce a covenant not to compete against a withdrawing partner).

42. See, e.g., Durio v. Johnson, 358 P.2d 703 (N.M. 1961)(acknowledging that goodwill benefits the partners in a veterinary practice).
44. Id. at 795.
45. Id.
46. Id.
the facts of the case, the court held that the dissolution of the partnership did not involve a transfer of the defendant's goodwill. The defendant, a new veterinary graduate, had no goodwill to sell. Instead, the compensation paid to the defendant was a return of his original capital investment. In the absence of goodwill, the covenant not to compete could not be enforced.48

Although most partnership relationships, like sales of veterinary practices, would normally involve a legitimate interest in protecting client goodwill, Boggs indicates that not all transactions of this type present a justifiable basis for enforcing a covenant not to compete. Therefore, where the basis for a covenant not to compete rests on the protection of goodwill, the transaction must be analyzed to determine whether goodwill has actually been transferred.

c. Employment Contract

More difficult issues involving goodwill arise in employment relationships. In professional practices, client goodwill has two elements: practice goodwill and professional goodwill.49 In the employment relationship, the employee gains the benefit of the practice goodwill in developing his or her professional career, and the practice benefits from the professional goodwill that the employee creates while associated with the practice. Though conceptually distinguishable, these two elements are difficult to separate in practice. The distinction is important for employees, because employees do not normally intend to relinquish the right to gain from their own professional goodwill, as those who sell practices or terminate veterinary partnerships sometimes do.50

Simply stated, the issue in employment contracts with covenants not to compete is who actually owns the employee's professional goodwill. If employees own their professional goodwill, then they should be allowed to take that goodwill with them when they leave. On the other hand, if the employer owns both practice and professional good-

48. Specifically, the court stated:

Rather, all the good will in the clinic remained with plaintiff who began using the name Clay-Mar Veterinary Clinic when he commenced his practice in 1969; defendant did not become a partner in the clinic until 1976. The partnership agreement gave the plaintiff, upon dissolution of the partnership, the privilege of remaining in the present location of the partnership business under the name of Clay-Mar Veterinary Clinic and the use of the clinic's telephone number. There was, therefore, no good will linked to the defendant's participation in the partnership which he could transfer to the plaintiff upon dissolution.

Id. at 797. Moreover, the defendant's transfer of his partnership interest was not the sale of a business, but merely retrieval of his capital contribution. So the "sale of a business" exemption also failed to apply. Id. at 798.

49. See supra text accompanying notes 10-23.

50. See infra text accompanying notes 135-153 regarding consideration.
will, employees should be foreclosed from using either for their own benefit. The argument for employer ownership of goodwill asserts that "under traditional agency concepts, any new business or improvement in customer relations attributable to [the employee] during his employment is for the sole benefit of the principal."\(^{51}\) Some courts have found this argument convincing.\(^{52}\) The contrary argument is that to deprive an employee of the goodwill gained while working for the employer unfairly restricts the employee's freedom of employment.\(^{53}\) This debate is particularly significant in the context of professional employment, where it is extremely difficult to distinguish practice goodwill from professional goodwill.

Despite the conceptual distinction, courts have apparently recognized the practical difficulty of separating the two forms of goodwill. Thus, most courts do not make the distinction and instead hold that client goodwill, in whatever form, constitutes a protectable interest that supports a covenant not to compete.\(^{54}\) For example, in Cockerill \& Wilson,\(^{55}\) the Illinois Supreme Court held that a veterinarian employer had a legitimate interest in preventing his clients from being taken over by his former employee.\(^{56}\) The court focused on the employer's right to prevent the former employee from taking clients he had established over the years, and not on the employee's interest in the clientele by virtue of his own professional goodwill. The court stated clearly, "[t]he protection of this asset [client goodwill] is recognized as a legitimate interest of an employer."\(^{57}\) Based on this language and the court's approach in other cases involving physicians,\(^{58}\) an Illinois appellate court stated that "[t]he Illinois Supreme Court has repeatedly upheld covenants not-to-compete in medical practice cases without making a specific inquiry into whether the plaintiff has demonstrated a protectable business interest."\(^{59}\)

A more reasoned judicial approach would avoid presuming good-

\(^{51}\) Blake, supra note 28, at 654. Blake here discusses customer relationships in light of agency concepts.

\(^{52}\) See, e.g., United Labs. Inc. v. Kuykendall, 370 S.E.2d 375, 382 (N.C. 1988)("When an employee, during the course of his or her employment, develops or improves customer relationships, the employee is establishing business good will, which is a valuable asset of the employer . . . .").

\(^{53}\) Corisis, supra note 1, at 212. See also Blake, supra note 28, at 654-55.


\(^{55}\) 281 N.E.2d 648 (Ill. 1972).

\(^{56}\) Id. at 651.

\(^{57}\) Id.


The nature of the relationship is relevant for purposes of determining what constitutes the protectable interest. Nonetheless, a court should not assume that a legitimate interest exists merely because the parties belong to a class of individuals who traditionally require restrictive covenants in their transactions. Analyzing the nature of the relationship between covenantee and covenantor is significant both for covenants in partnerships or the sale of a business and for covenants in employment agreements.

2. Trade Secrets or Confidential Information

A second justification for seeking a covenant not to compete arises from the need to protect trade secrets or other confidential information. A trade secret is defined as "any formula, pattern, device, or compilation of information which is used in one's business, and which gives [its owner] an opportunity to obtain an advantage over competitors who do not know or use it." Confidential information, in contrast, often fails to reach the level of trade secrets but nonetheless deserves protection. Confidential information is often closely associated with customer goodwill. The key factor in determining whether a business matter is a trade secret or confidential information is the extent to which the holder of the information seeks to protect it from disclosure to the public.

In determining whether information is a trade secret, or even confidential information, the courts commonly rely on the six factors articulated in the Restatement of Torts:

1. the extent to which the information is known outside [the covenantee's] business; (2) the extent to which it is known by employees and others involved in [the covenantee's] business; (3) the extent of measures taken by [the covenantee] to guard the secrecy of the information; (4) the value of the information to [the covenantee] and to his competitors; (5) the amount of effort or money expended by [the covenantee] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

60. See supra notes 42-49 and accompanying text.
62. Id. at 322 (quoting Restatement of Torts § 757 cmt. b (1939)).
63. Hutter, supra note 30, at 325.
64. Restatement of Torts § 757 cmt. b (1939). The Restatement (Second) of Torts does not include a section on the misappropriation of trade secrets, but courts continue to use the rule as stated in the first RESTATEMENT. Closius & Schaffer, supra note 32, at 536 n.26. See, e.g., Network Telecommunications, Inc. v. Boor-Crepeau, 790 P.2d 901, 903 (Colo. Ct. App. 1990)(citing factors listed in Restatement of Torts).
65. Restatement of Torts § 757 cmt. b (1939). See also Closius & Schaffer, supra note 32, at 536. In addition to the common law treatment of trade secrets, legislatures in several states have adopted the Uniform Trade Secrets Act, 14 U.L.A. 433 (1990). How this legislation has affected the judicial analysis of covenants not to compete is beyond the scope of this article. The primary impact of this legislation
Factors as broad as these can encompass a number of types of information, ranging from technology to customer lists.\textsuperscript{66} They do not, however, seem to apply to information belonging to employees as a result of knowledge and skill acquired during employment. This omission becomes particularly important for employees in the medical professions.

Medical knowledge, per se, does not constitute a trade secret. Most veterinarians acquire their knowledge during their veterinary education or from advanced training. Even knowledge and skill acquired while in the covenantee's employ would belong to the employee.\textsuperscript{67} Moreover, treating medical knowledge as a trade secret would violate ethical rules relating to the dissemination of medical knowledge throughout the profession.\textsuperscript{68}

Another type of information that might qualify as a trade secret or confidential information is business information such as marketing strategies or client education programs, which may help a practice attract and maintain clients. Misappropriation of this information could inflict economic harm on the practice. The ethical rules that require dissemination of medical knowledge\textsuperscript{69} probably do not apply to business or marketing information. Moreover, the existence of significant literature on marketing strategies in veterinary medicine today\textsuperscript{70} makes it unlikely that ordinary business information of a practice would constitute confidential business information.

Customer lists may qualify as protectable information. Although customer lists have generally not been considered trade secrets,\textsuperscript{71}

\textsuperscript{66} See Closius & Schaffer, supra note 32, at 536; Hutter, supra note 30, at 322-23.

\textsuperscript{67} See, e.g., Isuani v. Manske-Sheffield Radiology Group, 798 S.W.2d 346, 351 (Tex. Ct. App. 1990)(advanced subspecialties acquired by radiologist not trade secrets in that no one else in practice group possessed this knowledge nor was the knowledge acquired by way of confidences expressed by any member of the practice), rev'd on other grounds, 802 S.W.2d 235 (Tex. 1991).

\textsuperscript{68} Veterinarians should strive continually to improve veterinary knowledge and skill, making available to their colleagues the benefit of their professional attainments, and seeking, through consultation, assistance of others when it appears that the quality of veterinary service may be enhanced thereby.


\textsuperscript{69} See supra note 68 and accompanying text.

\textsuperscript{70} For example, each monthly issue of Veterinary Economics (the "magazine of practice management and finance") has a department focusing on marketing. Feature articles, too, focus on marketing techniques. E.g., Jingle Davis, Casting for Clients, VETERINARY ECON., Nov. 1987, at 42.

courts have treated them as protectable interests if the lists cannot be compiled except by "extraordinary efforts." The treatment of veterinary customer lists as a protectable interest is probably appropriate. Veterinarians establish their clientele primarily through word of mouth and reputation, and these efforts are not easily duplicated. Arguably, one could identify pet owners or livestock breeders with relatively little effort by canvassing neighborhoods or attending animal shows and sales and identifying the relevant client population. Realistically, however, active client lists are closely connected with the practice's goodwill; in effect, they are evidence of the extent of the practice's goodwill. Thus, customer lists should be protected to the extent of the protectable interest in client goodwill.

3. Unique or Special Characteristics of an Employee

Some courts, primarily in New York, have held that an employer has a legitimate interest in preventing competition from former employees with unique or special skills that are not trade secrets or confidential information. This interest stems less from an employer's right to restrict the mobility of employees with unique skills than from the employer's expectation that a departing employee will not exercise these special skills for a competitor.

Courts that recognize this protectable interest take different approaches in determining what employee skills are unique enough to warrant enforcing a covenant not to compete. It is not generally enough that the employee "excels at his work" or that the employer values the employee's services. Instead, the employer must show that the employee's services "are of such character as to make his replacement impossible or that the loss of such services would cause the employer irreparable injury." Most reported decisions in this area have involved employees in the entertainment fields,

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74. Kniffen, supra note 73, at 55.
75. Id. at 53-54.
76. Purchasing Assocs. v. Weitz, 196 N.E.2d 245, 249 (N.Y. 1963); see also Kniffen, supra note 73, at 39.
sports, or who possess significant responsibility within a company. Covenants imputing unique skills to physicians have been treated inconsistently. No cases addressing this issue in veterinary contracts have been identified. Moreover, enforcing covenants not to compete against health professionals with unique skills raises a difficult issue. As one commentator has argued, when an employee possesses unique or special skills, a covenant burdens not only the potential competitor, but also the employee. In addition, if a productive professional must leave the community, the public may be burdened. This public burden is particularly significant in covenants not to compete entered by health professionals. Despite the employer's arguable interest, the public policy interest in ensuring the availability of unique health care services may outweigh the need to prevent unfair competition.

Perhaps recognizing this public burden, few recent decisions have found a protectable interest in unique employee skills. New York remains the primary jurisdiction that recognizes an employee's possession of unique skills, without more, as a protectable interest. Other jurisdictions recognize an interest in protecting unique employee skills only if the employer had a role in training or educating the employee.

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81. See, e.g., Weintraub v. Schwartz, 516 N.Y.S.2d 946, 948 (N.Y. App. Div. 1987) (recognizing that physician employee's practice of neurology may constitute a unique service but refusing to enforce covenant on grounds that territorial restriction was too broad); Karpinski v. Ingrasci, 268 N.E.2d 751 (N.Y. 1971). Karpinski did not address this issue specifically, but later courts have cited it as an example of applying the unique skills requirement to the learned professions; see Reed, Roberts Assocs. v. Strauman, 353 N.E.2d 590, 593 (N.Y. 1976).
82. Kniffen, supra note 73, at 55.
83. See infra text accompanying note 84.
84. See Dick v. Geist, 693 P.2d 1133 (Idaho Ct. App. 1985) (refusing to enforce covenant against pediatrician where only two pediatricians practiced within a 25-mile radius); Williams v. Hobb, 460 N.E.2d 287 (Ohio Ct. App. 1983) (refusing to enforce covenant against osteopath because osteopath's radiological skills were unique to the area). See also Kniffen, supra note 73, at 55; text accompanying infra note 94.
85. E.g., American Broadcasting Cos. v. Wolf, 420 N.E.2d 363 (N.Y. 1981); Reed, Roberts Assocs. v. Strauman, 353 N.E.2d 590 (N.Y. 1976) (recognizing a protectable interest in "unique or extraordinary" services, but holding that such a characterization did not apply to an accountant).
86. See, e.g., Torrence v. Hewitt Assocs., 493 N.E.2d 74 (Ill. App. Ct. 1986) (enforcing covenant against attorney who possessed special skills in flexible compensation plans developed while employed by plaintiff); Welcome Wagon, Inc. v. Haschert,
B. Reasonableness of the Covenant to Protect the Covenantee's Interest

When a court has determined that an employer or other covenantee has a protectable interest, the next assessment is whether the restraint imposed by the covenant not to compete is reasonably designed to protect that interest.87 This analysis is difficult, and courts have applied it inconsistently. Nevertheless, the courts look to a number of separate but interrelated factors, including the relationship among the parties, the geographical area of the restraint, the time limitation, and the scope of the activity restrained.88 Each factor must be analyzed in light of the interests of the covenantee, the covenantor, and the public.89 A court determines the reasonableness of a covenant not to compete by considering the factors and interests in the totality of the circumstances surrounding the particular covenant. For purposes of analysis, however, it is useful to consider each factor individually.

1. The Relationship among the Parties.

As in the analysis of protectable interests, the relationship among the parties weighs heavily in the courts' determination of whether a covenant not to compete is reasonable. When the relationship is the sale of a practice or formation of a partnership, courts generally consider the parties to be substantially equal in bargaining power.90 Thus, the covenant not to compete that is included in the contract of sale or partnership agreement can reflect more accurately the intent of the parties than a covenant in a situation of less equal bargaining power (for example, in an employment contract). This presumed equality means that courts are normally reluctant to overturn covenants in sale-of-business and partnership agreements.91

In contrast, courts recognize employment contracts as inherently suspect because of the employee's unequal position; therefore non-

87. Closius & Schaffer, supra note 32, at 542; Hutter, supra note 30, at 318. In determining the reasonableness of a covenant, some courts and commentators look to its effect on each of the following: the covenantee, the covenantor, and the public. See Getty, supra note 6, at 244 & n.71; Mayo, supra note 6, at 322. See also Karlin v. Weinberg, 390 A.2d 1161 (N.J. 1978); Booth v. Greer, 363 N.E.2d 6 (Ill. Ct. App. 1977). These considerations may serve more as underlying considerations than distinct and separate grounds for reviewing a covenant. See Milton Handler & Daniel E. Lazaroff, Restraint of Trade and the Restatement (Second) of Contracts, 57 N.Y.U. L. Rev. 669, 731-39 (1982). One commentator asserts that in physician covenants, the interests of the covenantor and the public may play a more distinct role than in other contexts. Getty, supra, at 244 n.71.
89. Getty, supra note 6, at 244.
90. Closius & Schaffer, supra note 32, at 531 n.1.
91. Id.
competition covenants in employment contracts receive stricter scrutiny. Some courts apply strict scrutiny even to non-competition covenants in employment contracts involving professionals, though professionals negotiating for employment may be slightly less vulnerable to overreaching than other types of employees. One possible explanation for this protection for professional employees is the public interest in the availability of professional services.

2. Geographic Limits

When evaluating whether the geographic scope of a covenant not to compete is reasonable, courts normally determine whether the restraint reasonably protects the covenantee's interest without causing undue harm to the covenantor or the public. The interrelated nature of the interests of the covenantee, covenantor, and the public means that the extent of a reasonable geographic restraint can vary significantly with the type of activity restrained. In a limited number of instances, broad geographic restraints may be appropriate. For example, when an employee has been involved in all aspects of a competitive national business, a nation-wide restriction on activity may be reasonable. Normally, however, much more limited geographic restraints will be appropriate.

In the veterinary context in particular, broad territorial limits are normally inappropriate. Generally, the courts ask whether the territorial restraint encompasses only the area required to protect the covenantee's interest—that is, usually the goodwill of the practice. The percentage of clients within the territory of the covenant is relevant, though courts have established no precise guidelines. In Brecher v. Brown, for example, a veterinarian-employer attempted to prevent his former employee from practicing within a twenty-five-mile radius of the employer's practice. The Iowa Supreme Court held this restraint to be unreasonable where only one of the employer's clients...

92. See, e.g., Harvest Ins. Agency v. Inter-Ocean Ins., 492 N.E.2d 666, 688 (Ind. 1986) (holding that employer-employee covenants not to compete are reviewed with stricter scrutiny than covenants not to compete ancillary to the sale of a business).
93. See, e.g., Jenkins v. Jenkins Irrigation, 259 S.E.2d 47 (Ga. 1979); Madison Bank & Trust v. First National Bank, 635 S.W.2d 268 (Ark. 1982).
94. See supra note 84 for decisions citing this public policy argument.
95. Hutter, supra note 30, at 329-32.
97. 17 N.W.2d 377 (Iowa 1945).
98. Id. at 378 ("The [employee] will not engage in the practice of veterinary medicine or surgery, or any competing business to that of [the employer], in Storm Lake, Iowa, or a territory within a radius of twenty-five miles of Storm Lake, Iowa... ").
lived at a distance greater than twenty-five miles. In *Cockerill v. Wilson*, an Illinois appellate court held that the twenty-mile radius sought in the plaintiff-veterinarian's amended complaint (reduced from the thirty-mile radius specified in the contract) was reasonable where ninety percent of the plaintiff's clients lived within this twenty-mile area.

What constitutes a reasonable geographic restraint depends greatly on the nature of the covenantee's veterinary practice. A veterinary practice that serves primarily small-animal clients will draw its clients from a significantly smaller area than a predominantly equine or large-animal practice. Moreover, within a practice specialty, the population density may affect the relevant area of service. Thus, in *Cukjati v. Burkett*, a Texas appellate court held that a twelve-mile radius from the plaintiff-veterinarian's hospital was "unreasonable and unnecessary." In reaching this conclusion, the court cited evidence that "demonstrates that most pet owners travel only a few miles to obtain pet care." A similar restraint for a large-animal or equine practitioner is less likely to be unreasonable. Indeed, a covenant at issue in one reported decision recognized the distinction between different types of practices. That covenant prohibited competition for

99. *Id.* at 379. The court also found the unlimited time restraint to be unreasonable. *Id.*


101. *Id.* at 517. *See also* Lassen v. Benton, 346 P.2d 137, 139 (Ariz. 1959) (although only 10-25 percent of the plaintiff's clients came from the area within 12 miles of the city limits of Mesa, Arizona, this restraint was not unreasonable).

102. "Small-animal clients" own small companion animals such as dogs, cats, or birds. Other types of veterinary practice are equine practice (the care and treatment of horses) and food-animal practice (the care and treatment of animals intended for human consumption, such as cattle, swine, and sheep).

103. For example, in 1988, equine practitioners served clients who lived a mean radius of 27 miles from the practice, whereas small-animal practitioners served clients who lived between 11 and 19 miles from the practice. J. Karl Wise, *Economic Note: Size and Practice Density of Local Veterinary Service Areas, 1988*, 195 *J. AM. VETERINARY MED. ASS'N* 251, 252 (1989) (table 3). Food-animal practitioners covered an average radius of 23 to 31 miles. *Id.*

104. Small-animal practices served areas that varied in mean radii from 17 miles in rural areas to 8 miles in small suburban areas (between 50,001 and 500,000) and large cities (greater that 500,000). *Id.* The areas served by equine practitioners varied less, *id.*, probably because most horses are stabled in the country, so most equine veterinarians practiced in the rural areas even if they were near a city. Population density affected competition from other equine practices. In rural areas (populations less than 2,500), an average of seven other practices provided equine medical care; in large cities (population greater than 500,000), an average of 17 equine practices competed for similar business. *Id.* (table 4). One can reach similar conclusions for food-animal practitioners. *Id.*


106. *Id.* at 218.

107. *Id.* *See* Texas statute cited at *infra* note 205.
five years within a five-mile radius of the former employer for small animal practice and within a twenty-five-mile radius for equine practice.\textsuperscript{108}

In addition to the type of animals a veterinary practice treats, other factors play a role in determining the reasonableness of a covenant's geographic restraint. For example, whether the practice is a hospital practice or an ambulatory practice\textsuperscript{109} relates to the area served, with ambulatory practices serving larger areas. The population density of the available client base affects not only the relevant area of service, but also the amount of competition among similar practices in the area.\textsuperscript{110}

In the evaluation of covenants, tension exists between two relatively private interests: the covenantee's right to protect goodwill and the covenantor's right to practice a profession. In addition, however, the prevention of disease is a compelling public interest. In human medical cases, courts look to the public's need for medical services as a factor in determining whether a geographic restraint is reasonable.\textsuperscript{111} Though reported veterinary cases seem to ignore this issue, the veterinarian's role in protecting public health from animal-borne disease suggests that the public health factor is also relevant in the context of veterinary covenants not to compete.

3. **Time Limits**

Time limits are more difficult to evaluate than geographic restraints. Courts can look to the area encompassed by a practice to de-

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\item \textsuperscript{108} Pacific Veterinary Hosp. v. White, 696 P.2d 570 (Or. Ct. App. 1985). The covenant was held unenforceable because the governing statute prohibited enforcement of any noncompetition agreement other than one formed at initial employment. The employee had entered a less onerous (2 years, 2 1/2-mile small animal, 20-mile equine) agreement at initial employment.
\item \textsuperscript{109} In a hospital practice, clients bring their animals to the veterinarian for treatment; this approach predominates in small-animal practice, though it occurs in other types of practice. In an ambulatory practice, usually an equine or large-animal practice, the veterinarian provides services on the client's premises.
\item \textsuperscript{110} An Arizona Court appeared to miss this fact in Lassen v. Benton, 346 P.2d 137 (Ariz. 1959). In Lassen, the Arizona Supreme court upheld the enforcement of a covenant not to compete in a veterinarian's employment contract. The covenant restricted the former employee from practicing within 12 miles of the city limits of Mesa, Arizona. \textit{Id.} at 138. Despite the fact that the restricted area encompassed Mesa, with a population of 20,000, and "approximately two-thirds of Phoenix, and all of the cities of Scottsdale, Tempe, Chandler, and Gilbert, as well as Williams Air Force Base," \textit{id.}, the court found the restraint reasonable. \textit{Id.} at 139-40.
\item \textsuperscript{111} See, e.g., Duffner v. Alberty, 718 S.W.2d 111, 113-14 (Ark. Ct. App. 1986)(prohibiting orthopedic surgeon from practicing within 30 miles of Fort Smith, Arkansas unduly interfered with public interest of having an orthopedic surgeon available); Gelder Medical Group v. Webber, 383 N.E.2d 573, 577 (N.Y. 1977)(if covenant were enforced, area would not be left with too few doctors).
\end{itemize}
termine if a geographic restraint is reasonable. No such method exists for time restraints. Courts have stated the rule that when the covenant is designed to protect client goodwill, the time limit will be considered reasonable "only if it is no longer than necessary for the employer to put a new [person] on the job and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to the customers." Determining what constitutes that "reasonable opportunity," however, presents the court with a difficult task, particularly in service professions where a former veterinarian's professional goodwill can survive for a number of years. In making this determination, as in assessing geographic restraints, courts consider the interests of the covenantor, the covenantee, and the public.

The nature of the relationship plays a significant role in determining whether a time limit is reasonable. If the covenant involves the sale of a business, a covenantor may be restrained from competing for an indefinite time period, provided the buyer remains in business. In contrast, a covenant between an employee and employer is likely to be invalid if it continues for an indefinite period of time.

Another relevant factor is the frequency with which the covenantor came in contact with the clients. At an extreme, when an employee only contacted clients once every three years, a five-year limitation would reasonably ensure that all of the employer's clients become aware that a new employee had been hired. More frequent client contact may suggest that a shorter period of restraint is adequate.

In veterinary cases, few trends can be identified. In Brecher v. Brown, the Iowa Supreme Court refused to enforce a broad covenant not to compete with an unlimited time restriction. In other decisions, the Supreme Court of Ohio seemed willing to accept a time restraint of three years, and the Supreme Court of New Hampshire found a five-year covenant not to compete reasonable. In upholding the five-year restraint, the New Hampshire court noted that the "relationship between a professional and his clients tends to be enduring.

112. Blake, supra note 28, at 677; see also Hutter, supra note 30 at 334.
114. Hutter, supra note 30, at 332.
117. See, e.g., Chapman & Drake v. Harrington, 545 A.2d 645, 648 (Me. 1988)(upholding five-year restraint on former insurance salesman where relevant policies had three-year renewal dates).
118. 17 N.W.2d 377 (Iowa 1945).
119. Id. at 380.
In the instant case, the business entity was closely identified with the veterinarians who staffed it, and this identification would not soon be extinguished upon a veterinarian's termination. Even in a rather transient population, the animal hospital's clientele was stable, and the five-year restraint was a reasonable means of protecting the goodwill of the hospital.

In some situations, a covenant not to compete could be structured with tiers of protection, through a variable time restraint that restricts individual types of veterinary activity for different lengths of time. The parties had taken this approach in Cukjati v. Burkett, which involved an employment relationship. The covenant not to compete imposed a three-year limit on practicing small animal medicine; in addition, the employee promised not to notify present or past clients of his former employer about his return to practice at a new location for a period of five years. Though the court refused to enforce the covenant, it did so on the grounds that the geographic restraint was unreasonable and the covenant was not supported by consideration. Despite the holding in this case, a time restraint with tiers of protection for different activities may be preferable to a flat restraint on all competitive activity. It would permit covenantors to protect their legitimate interests without oppressing covenantes.

4. Activity Restraints

A covenant not to compete must be limited with respect to the scope of the covenantor's activity, and it must reasonably protect the covenantee's interest while not unreasonably burdening the covenantor or the public. Thus the scope of the covenant's restraint must encompass only the activity or activities that threaten the covenantee's protectable interest. If the interest is the goodwill of clients, the restriction must prevent competition only for those clients. If the interest is a trade secret, the restraint should proscribe only the covenantor's use of that trade secret.

Protection of a veterinary employer's interest does not always mean that the covenantor must cease all local activities related to the practice of veterinary medicine. In Tench v. Weaver, a Wyoming veterinarian had signed an employment contract in which he agreed not to "engage in the practice of Veterinary Science or medicine, nor render any services as Veterinarian for compensation" in the county for five years. The veterinarian, Tench, subsequently accepted employment with the U. S. Department of Agriculture, Animal Disease

122. Id. at 1048.
124. Id. at 216.
125. Id. at 218.
Eradication Service, and worked in the same county in the government program for disease eradication. In a counterclaim to Tench's suit for fees due under the employment contract, Weaver argued that Tench's employment with U.S.D.A. violated the covenant not to compete. The court rejected Weaver's claim. Under the Wyoming veterinary practice act, Tench's work for U.S.D.A. was not the practice of veterinary medicine. Nor did Tench render service "for compensation"; he received a salary, but animal owners paid nothing for testing and vaccinating under the disease eradication program. Moreover, Weaver failed to prove that the contract restraint was fair and necessary, nor could he reasonably expect that Tench's government activity would compete with his business. Tench's U.S.D.A. employment, the court concluded, did not violate the covenant not to compete.

When an employee has worked in a specialized practice, a covenant not to compete may be unreasonable if it prevents that employee from post-employment work in a general practice, even in the same geographic area. A decision involving human dentistry illustrates. In Karpinski v. Ingrasci, the plaintiff, an oral surgeon, attempted to restrain a former employee from practicing "dentistry and/or Oral Surgery" within a five-county area. The New York Court of Appeals held that the restriction as to the defendant's practice of general dentistry was overly broad; therefore, the court denied enforcement of this part of the covenant.

The Karpinski decision helps to focus the issue, not often addressed by courts, of the appropriate extent of restraints on activities in a covenant. When the protection of goodwill is the goal, the restraint should be no broader than necessary. To enforce the covenant as to all forms of veterinary medicine when the covenantor practiced only a specialty fails to recognize the diversity that has developed within the veterinary profession.

An Arizona court faced this kind of issue in Lassen v. Benton. In an earlier decision in the same case, the Arizona Supreme Court had upheld a covenant that restrained a former small animal employee from practicing "Veterinary Medicine or establish[ing], or work[ing] in any small animal hospital." In a petition for rehearing, the former employee sought to compete with the former employer's large-animal practice. He argued that the only services that he had performed for the employer were in the small-animal practice. The

127. Id. at 28-29.
129. Id. at 752.
130. Id. at 754. See also Mayo, supra note 6, at 324-25.
131. 347 P.2d 1012 (Ariz. 1959)[hereinafter Lassen II].
133. Id. at 138.
court denied the former employee's request and refused to rewrite the contract. The court found the covenant controlling by its terms and not divisible.\textsuperscript{134} Perhaps the court could have reached a different result with a more artfully drafted covenant not to compete.

5. \textit{Additional Factors}

Courts have occasionally weighed other factors in determining whether a covenant not to compete should be enforced. Among these factors are the existence of consideration for the covenant and the applicability of any liquidated damages clause.

a. \textit{Consideration}

A court will enforce a covenant not to compete only if that covenant is supported by consideration. The focus of analysis depends on whether the covenant accompanies the sale of a business, a partnership agreement, or an employment contract.

Generally, courts do not question the existence of consideration in the context of a business transfer or partnership agreement, perhaps because of the clear importance of protecting goodwill in these contexts. In the sale of a business, consideration for the covenant not to compete is presumed when the sale price includes the firm's goodwill.\textsuperscript{135} In partnership contracts, too, courts recognize that goodwill can be transferred.\textsuperscript{136} Alternatively, courts analyzing partnership agreements have found consideration in the form of the partners' reciprocal promises not to compete.\textsuperscript{137} Normally, there is no inquiry about the adequacy of consideration so long as consideration is present.\textsuperscript{138} Because challenges on the basis of a lack of consideration rarely arise in the context of a sale of a business or termination of a partnership, the following discussion will focus primarily on the issue of consideration in employment contracts.\textsuperscript{139}

\textsuperscript{134} Lassen v. Benton, 347 P.2d 1012, 1013 (Ariz. 1959) (\textit{Lassen II}). Concurring justices would have found the covenant divisible; they believed the restraint from practicing general veterinary medicine to be unreasonable. See \textit{infra} notes 174-179 and accompanying text for a discussion of this case in the context of divisibility of covenant terms.

\textsuperscript{135} See Sarner, \textit{supra} note 32, at 504-05; Leimberg, \textit{supra} note 11, at 64.

\textsuperscript{136} See, e.g., Durio v. Johnson, 358 P.2d 703 (N.M. 1961) (recognizing goodwill as a transferable asset in a partnership dissolution between two veterinarians).

\textsuperscript{137} See, e.g., Rash v. Tocca Clinic Medical Assocs., 320 S.E.2d 170 (Ga. 1984) (differentiating covenants in partnership agreements from those in employment contracts on the grounds that the consideration received for the partner's promise is the other partner's promise not to compete).


\textsuperscript{139} The issue of whether the covenantor received consideration for the covenant not to compete does not commonly arise in the modern medical cases. Occasionally it does occur, however. See Newman v. Sablosky, 407 A.2d 448 (Pa. Supr. Ct. 1979) (sale of a medical practice containing a noncompetitive covenant held not to
When the covenant not to compete is part of an employment contract, the circumstances surrounding negotiation of the contract will affect the court’s analysis of the consideration issue. The timing of the covenant’s execution is especially significant because the covenant and the consideration must be contemporaneous. If an employee executes a covenant not to compete at the time of employment, the consideration and the covenant are contemporaneous. But if the employee signs a covenant not to compete after the employment relationship has commenced, the covenant may fail for lack of consideration. For these post-employment contracts, the issue is whether the employee received any consideration at the time of execution. In contracts that renew an employment relationship, a majority of courts hold that continued employment is sufficient consideration.

The issue of a post-employment covenant was raised in the 1989 case of Stevenson v. Parsons. Plaintiff had worked for defendant as a veterinarian; he signed a covenant not to compete a month after beginning his employment. After leaving defendant’s employ, plaintiff intended to open a veterinary practice (within the ten-mile, five-year proscription of the covenant) and had contracted to buy real estate for his clinic. Plaintiff sought a declaratory judgment that the post-employment covenant not to compete in his employment contract was void for lack of consideration. The North Carolina Court of Appeals reversed the trial court’s summary judgment for the plaintiff-employee. The summary judgment was improper because a factual issue existed as to whether the promise not to compete had been made at the time the veterinarian accepted employment. If so, the covenant was supported by consideration, and the mere fact that execution of the written covenant occurred later would not make it unenforceable.

A related problem exists when covenants are executed after com-

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141. Hutter, supra note 30, at 337.
143. Id.
145. Id. at 292. The declaratory judgment action was proper because an actual controversy existed as to the value of the covenant not to compete, and litigation was unavoidable. In fact, the defendant employer had already filed a complaint concerning plaintiff’s violation of the covenant.
146. Id. at 293.
147. Id.
mencement of an at-will employment contract. Courts have not agreed whether the prospect of indefinite employment in at-will relationships constitutes sufficient consideration. The majority rule provides that if a covenant is signed prior to, contemporaneous with, or at any time during the covenantor's employment, the covenant is considered ancillary to the employment and satisfies the requirement for consideration. In contrast, a minority of states require some form of additional consideration for the covenant, such as a promotion or special training. In states that do not follow the majority rule, one commentator recommends that employers who hire at-will employees establish a bilateral notice period for terminating the employment. This notice period will permit the employment to be considered one for a term, allowing a court to apply normal consideration requirements to the transaction.

b. Liquidated Damages Clauses

Liquidated damages provisions in covenants not to compete have not yet figured prominently in reported veterinary cases, though they are likely to become more important in the future. Nevertheless, they occur in other professional contracts, and they offer a practical alternative to broad occupational bans in covenants not to compete. In effect, liquidated damages clauses provide a substitute remedy for a covenant not to compete. Instead of granting the covenantee a cause of action for injunctive relief against the covenantor, a liquidated damages clause permits the covenantee to recover a pre-deter-

151. Id. at 1133-34.
152. Hutter, supra note 30, at 338.
153. Id.
154. Only one reported decision has addressed a veterinary covenant with a liquidated damages clause, Friddle v. Raymond, 575 So. 2d 1038 (Ala. 1991), but for statutory reasons neither the covenant nor that clause was enforceable. Anecdotal evidence suggests that the use of liquidated damages clauses is increasing.
156. Courts do not always consider liquidated damages clauses as "substitutes," however. See, e.g., Karpinski v. Ingrasci, 268 N.E.2d 751, 755-56 (N.Y. 1971)(holding that injunctive relief was not foreclosed simply because a contract containing covenant not to compete included a liquidated damages clause requiring repayment of $40,000 loan).
mined sum in the event the covenantor competes in violation of the terms of the clause.157

When a court is asked to enforce a liquidated damages provision in connection with a covenant not to compete, the court must perform two analyses. First, the court must determine whether the covenant not to compete is enforceable under the common-law requirements discussed above (for example, legitimate protectable interest, reasonable geographic and time limits) and whether the covenantor breached the covenant.158 This analysis is appropriate because the liquidated damages clause acts as a substitute for a covenant not to compete. If the terms of a covenant not to compete would be invalid for purposes of injunctive relief, a liquidated damages clause with similar terms should also be invalid.

Second, once the court determines that a valid purpose for the covenant and the associated liquidated damages clause exists, it must determine the validity of the damage provision specifically. Generally, courts require the covenantee to make three showings: the clause represents an intent to estimate damages rather than to impose a penalty; the harm caused by a future breach is difficult or impossible to estimate accurately; and the amount specified represents a reasonable estimation of anticipated damages.159 If these elements can be established, the court will enforce the provision.

Liquidated damages clauses allow efficient resolution of conflicts between covenantor and covenantee for two reasons. First, liquidated damages clauses enhance judicial efficiency by removing from the courts the difficult task of calculating damages as the result of unfair competition.160 Second, these clauses allow a covenantee to recover damages resulting from a covenantor's unfair competition, but they do not bar the covenantor from competing altogether.161 And in many situations, the covenantor's continued right to practice a profession serves the public interest.

The structure of liquidated damages provisions can be flexible.

157. See cases cited supra note 155.
161. For an example of a liquidated damages clause, see Dean Van Horn Consulting Assocs. v. Wold, 395 N.W.2d 405, 407 (Minn. Ct. App. 1986).
Some provisions impose a specific sum as a damage amount; others require payment of a percentages of fees the covenantor collects from former clients. The fairest approach to both parties may be to assess damages according to the covenantee's anticipated losses caused by losing clients to the covenantor-competitor. This creates an effective disincentive, without acting as a complete bar to competition. If the relevant client population is so small that the covenantor must compete directly with the covenantee, however, a calculation based on loss from direct competition would prevent the covenantor from competing entirely and thus have the same effect as injunctive relief. The disadvantage of using anticipated loss for liquidated damages stems from the difficulties of discovering the extent of direct competition to calculate the damages.

C. Unreasonable Covenants: The Issue of Divisibility

Over the years, courts have developed three methods for dealing with an unreasonable covenant not to compete. One of the earliest methods was simply to refuse to enforce a covenant that was unreasonable in any respect. This approach could be explained in part by judicial reluctance to rewrite the contract, a reluctance based on the notions that such rewriting was inappropriate and that the parties' intentions would be best carried out by not enforcing the covenant, rather than by enforcing it in a form not contemplated by either party. These notions, however, have gradually been replaced by the judicial view that partial enforcement of a covenant actually comports with the parties' expectations far better than invalidation. Thus, a large majority of jurisdictions now permit partial enforcement of non-competition covenants that are unreasonably broad. This partial enforcement comes in two forms: "blue-penciling" and judicial rewriting,


163. See, e.g., Dental East, P.C. v. Westercamp, 423 N.W.2d 553 (Iowa Ct. App. 1988)(40 percent liquidated damage charge on fees collected from former clients); Dean Van Horn Consulting Assocs. v. Wold, 395 N.W.2d 405, 407 (Minn. Ct. App. 1986)(staggered percentage tied to number of years covenantor no longer employed).

164. Jeffrey G. Grody, Note, Partial Enforcement of Post-Employment Restrictive Covenants, 15 COLUM. J.L. & SOC. PROBS. 181, 196 (1979). Some states provide for this result legislatively; e.g., WIS. STAT. ANN. § 103.465 (West 1988)(requiring courts either to enforce a covenant as written or to invalidate it).


166. Grody, supra note 164, at 202-03.
sometimes called the "reasonableness rule."\textsuperscript{167}

\section{1. The Blue-Pencil Rule}

The so-called blue-pencil rule was developed to alleviate concern about judicial authority to rewrite existing contracts.\textsuperscript{168} The term "blue-pencil" derives from the editorial manner in which the rule is applied.\textsuperscript{169} That is, the blue-pencil rule allows the court to strike out unreasonable terms that are grammatically divisible, if the excision will make the remaining terms reasonable.\textsuperscript{170} If an unreasonable covenant is not grammatically divisible, however, the court must invalidate the entire covenant.\textsuperscript{171}

Many have criticized the "purely mechanical" approach of the blue-pencil rule.\textsuperscript{172} The applicability of the rule rests solely on whether the unenforceable portions can be excised grammatically from the covenant without rewriting it altogether. Thus, for example, if a covenant unreasonably prevented a veterinarian from practicing in two adjoining cities, a court applying the blue pencil rule could modify the covenant by striking out one of the cities and enforce it as to the other city. In contrast, if the covenant unreasonably prevented a veterinarian from practicing in an entire county (and was thus grammatically indivisible), the court would be forced to invalidate the entire covenant. In either situation, modification is desirable to enable the covenantee to retain at least some of the bargained-for protection, and also to protect the covenantor from an overly restrictive bar. Because of the rule's inflexible requirement of divisibility, however,

\textsuperscript{167} Id. at 196-97.
\textsuperscript{168} Id. at 206.
\textsuperscript{169} 2 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.8, at 72-73 (1990)(a court can create a reasonable covenant "merely by excising some of the words, as it might do by editing the language with a blue pencil").
\textsuperscript{170} Id.; 6A CORBIN, supra note 40, § 1390, at 67-69; see also Karpinski v. Ingrasci, 268 N.E.2d 751 (N.Y. 1971)(enforcing covenant bar from oral surgery, but not from dentistry).
\textsuperscript{172} See, e.g., Data Management, Inc. v. Greene, 757 P.2d 62, 64 (Alaska 1988)(agreeing with criticism of "blue-pencil" rule as "too mechanical"); Raimonde v. Van Vlerah, 325 N.E.2d 544, 546 (Ohio 1975)("blue-pencil" rule has not worked well in practice); see also 6A CORBIN, supra note 40, § 1390, at 67 (referring to the rule as mechanical); Katz, supra note 165, at 1357-58; Grody, supra note 164, at 210.
blue-pencil courts can give effect (albeit partial) only to the grammatically divisible covenant.\textsuperscript{173}

Moreover, determining whether a covenant is divisible is not always an easy matter. In \textit{Lassen v. Benton},\textsuperscript{174} a veterinarian had signed an employment contract containing a covenant not to compete. The covenant prevented him from practicing “Veterinary Medicine or establish[ing], or work[ing] in any small animal hospital” within 12 miles of the city limits of Mesa, Arizona.\textsuperscript{175} The Arizona Supreme Court held that the time and territorial restrictions were reasonable.\textsuperscript{176} The defendant subsequently moved for a rehearing to modify the covenant by striking the term “Veterinary Medicine,” which would enable him to practice large-animal veterinary medicine in the proscribed area.\textsuperscript{177} He argued that the term “Veterinary Medicine” was too broad and should be stricken from the covenant as divisible. Striking this term, he asserted, would restrict him only in the practice of small-animal medicine, thus leaving him free to practice large-animal medicine.\textsuperscript{178}

In \textit{Lassen II}, the court stated:

\begin{quote}
we do not see how [enabling the veterinarian to practice large-animal veterinary medicine] can be done without the Court rewriting the contract for the parties, incorporating therein its notions as to what should be included. We hold this cannot properly be done as the provisions of the contract are controlling and by its terms it is not divisible.\textsuperscript{179}
\end{quote}

The court refused to blue pencil a covenant divisible (at least arguably) on its face. This refusal may reflect the court’s concern that merely striking the term “Veterinary Medicine,” without providing some additional qualifying language, would create confusion about the activity restrained. In 1959, when \textit{Lassen} was decided, the clearly-defined practice paradigms of today’s veterinary medicine had not been established. The current trend toward practices devoted to small-animal or food-animal medicine might make a court more willing to blue pencil a covenant like that in \textit{Lassen}, with confidence that the parties’ rights and responsibilities would be clear.

Nonetheless, \textit{Lassen} exemplifies the problems inherent in the blue-pencil approach. As a result, more and more courts have turned from blue penciling to a more workable method that offers judicial flexibility to fashion the proper relief in each case.\textsuperscript{180}

\textsuperscript{173} Grody, \textit{supra} note 164, at 210 (“That the construction of a covenant should turn on whether the parties chose the one or the other form of expression is, to say the least, a difficult proposition to defend.”).

\textsuperscript{174} \textit{Lassen v. Benton}, 346 P.2d 137 (Ariz. 1959)(\textit{Lassen I}).

\textsuperscript{175} \textit{id.} at 138.

\textsuperscript{176} \textit{id.} at 139.

\textsuperscript{177} \textit{Lassen v. Benton}, 347 P.2d 1012, 1013 (Ariz. 1959)(\textit{Lassen II}).

\textsuperscript{178} \textit{id.} at 1013.

\textsuperscript{179} \textit{id.}

\textsuperscript{180} Grody, \textit{supra} note 164, at 210 (“the blue-pencil rule stands as a curious anomaly, a form of mechanical jurisprudence which deserves no place in a rational system of
2. Rewriting the Covenant

In many recent decisions, the courts have rewritten overly broad covenants so that their terms are reasonable and thus enforceable. Some commentators term this approach the "reasonableness test." This approach is consistent with the courts' broad power in equity to fashion appropriate relief. The parties' intentions are not defeated, it is reasoned, because of the presumption that they have already assented to a restraint less severe than the (unreasonable) one imposed in the covenant.

The rule of reasonableness is subject to criticism, however. Most significant is its potential to encourage oppressively drafted covenants. Covenanteees (particularly employers) may draft, and hope to enforce, unreasonably broad covenants with the expectation that, if the covenant is challenged, the court will simply modify the covenant to make it reasonable, rather than strike it completely. Some assert that the rule of reasonableness will tend to restrict a covenantor's mobility. That is, covenantors who would prefer to compete contrary to the covenant will be reluctant to challenge the validity of the covenant when the covenant is likely to be rewritten rather than rejected. Moreover, the existence of a broad covenant, likely to be only modified by a reviewing court, may discourage other employers in the area from hiring the covenantor, for fear of legal challenges or less cordial relations with the competitor-covenantee.

Nonetheless, not all employment contracts are adhesion contracts; many covenants are drafted too broadly because of the difficulties in tailoring narrow, individualized provisions. For covenantees, too, overly broad covenants pose disadvantages. One major disadvantage is the cost of litigation. Though litigation may be a greater burden to the covenantor/employee, it still imposes significant costs on the covenantee.

Recognizing the risk that some employers will take advantage of the rule of reasonableness, some courts have conditioned modification on a showing that the covenant reflects good-faith bargaining on the part of both parties. At least one commentator has suggested, however, that a requirement of good faith alone is insufficient. Though a good-faith requirement may prevent malicious drafting, it does not encourage drafters to write covenants that are appropriately narrow. That is, without some legal incentive, drafters may attempt only to satisfy the good faith requirement, but not to draft covenants limited to the scope of protectable interests. To encourage more narrow covenants, courts should reject vague, broad covenants and require a showing that the covenant bears a reasonable relationship to that employer's legitimate protectable interest. Alternatively, the court could rewrite a covenant so that the judicially rewritten covenant exceeds the minimum standards of reasonableness (that is, gives the covenantee less protection than would be reasonable in the absence of the original, overbroad covenant). This approach may be a further incentive to drafters, provided the probability that an employee will malicious drafting by employers, judicial modification provides no deterrence for sloppy draftsmanship. Grody, supra note 164, at 192; Katz, supra note 165, at 1358.

187. Blake, supra note 28, at 683. Professor Blake contends that some employers must draft broad covenants because of the difficulty of anticipating the extent of an employee's exposure to protectable interests.

188. E.g., Data Management, Inc. v. Greene, 757 P.2d 62 (Alaska 1988)(courts can cure the concern for overreaching by imposing a good-faith requirement on covenantees); see also 2 FARNSWORTH, supra note 169, § 5.8, at 74. But cf. Raimonde v. Van Vlerah, 325 N.E.2d 544, 547 (Ohio 1975)(presumption that "[m]ost employers who enter contracts do so in good faith, and seek only to protect legitimate interests. In fact, relatively few employment contracts reach the courts.").

189. Grody, supra note 164, at 222.

190. Id.

191. Id. at 225. This approach has been used in two cases: Insurance Ctr. v. Taylor, 499 P.2d 1252 (Idaho 1972), and Reddy v. Community Health Found., 298 S.E.2d 906 (W. Va. 1982). In each case, the court looked to the inherent reasonableness of the terms initially before considering whether modification was appropriate. One of the relevant factors was whether the covenant, as written, protected only the covenantee's legitimate interest. Reddy v. Community Health Found., 298 S.E.2d 906, 915-16 (W. Va. 1982). If not, then the whole covenant fails. Id. at 915.

192. 6A CORBIN, supra note 40, § 1390, at 77.
Occasionally the parties to a covenant may fail to define a term, such as time or geographical area, of the covenant not to compete. In this situation, it would seem appropriate for a court to supply the missing term. But the extent of the restriction should be the smallest geographic area or the shortest time period that will protect the employer/covenantee's legitimate interest.

The above-described approach works best for quantifiable restraints such as area or time. It is not so simple to apply to restraints that are more qualitative in nature—for example, restraints on the covenantor's scope of activity. Nonetheless, similar principles should apply. In rewriting an unreasonable covenant, a court could restrict the covenant's coverage to the narrowest form of activity that would provide reasonable protection to the covenantee.

Despite criticisms of the rule of reasonableness, a majority of jurisdictions have adopted reasonable modification instead of the blue pencil approach or the refusal to enforce a defective covenant. In fact, a number of states have adopted the rule of reasonableness by statute.

IV. ALTERNATIVES TO THE COMMON-LAW APPROACH

Though most covenants not to compete are evaluated by the prevailing common law standard, a growing number of states have adopted legislation that alters the common law to some extent. Many state statutes have practical implications for the veterinarian who is drafting or negotiating a contract. In addition, covenants may be subject to scrutiny under federal antitrust law.

A. State Legislation

All states have some form of antitrust legislation. In a number of states, antitrust laws broadly condemn contracts in restraint of trade, but do not address specifically the issue of covenants not to com-

193. Using another approach, the court could modify the covenant to the same extent that the original covenant was unreasonable. For example, if a court were to determine that a covenant restricting a veterinarian from practicing veterinary medicine in a radius of ten miles for five years was unreasonable, but that a reasonable covenant would limit the covenantor to eight miles and three years, the court might rewrite the covenant so that it restricts the covenantor for six miles and for one year. This would impose a penalty for the unreasonably burdensome covenant.

194. See, e.g., cases cited supra note 181.


Courts in these jurisdictions therefore analyze non-competition covenants under the common-law standards the states have adopted. Legislation in a significant minority of states, however, directly addresses the covenant not to compete. The state statutes vary significantly both in terms of the parties subject to regulation and the form of regulation. Analysis of the legislation itself and interpretive case law determine whether and to what extent veterinary covenants are governed by this legislation. The following discussion identifies some of the states that regulate covenants not to compete by statute, discusses the various state models of legislation, and highlights the implications of the statutes for veterinary covenants. This discussion is intended to focus briefly on the effect of these statutes for veterinarians, rather than to provide an exhaustive analysis of the legislation.

Although the state statutes vary significantly, four general approaches can be identified: codification of the common law, prohibition of covenants restraining the exercise of a profession, prohibition of covenants in physician contracts, and regulation solely of employee covenants.

1. Codification of the Common Law

Statutes in four states (Georgia, Hawaii, North Carolina, and Texas) more or less adopt the common-law approach to non-competition covenants. The language of the statutes in Georgia, Hawaii, and Texas expressly restates that state’s respective version of the common-law rule. In Hawaii, for example, contracts in restraint of

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199. Recent legislative changes may be relevant. Compare, e.g., FLA. STAT. ANN. § 542.33(2)(a)(West 1988) with FLA. STAT. ANN. § 542.33(2)(a)(West Supp. 1992)(amendment requires courts not to enter injunctions that are “contrary to the public health, safety, or welfare,” but presumably permits injunctions where covenant is aimed at preventing the “use of specific trade secrets, customers lists, or direct solicitation of existing customers”). Compare also LA. REV. STAT. ANN. § 23:921 (West 1985) with LA. REV. STAT. ANN. § 23:921 (West Supp. 1992)(changes from an employee-only focus to a broader focus including the sale of good will and partnership dissolution). Legislative changes may affect the application of a specific covenant. See, e.g., Compton v. Joseph Lepak, 397 N.W.2d 311 (Mich. Ct. App. 1986)(prior statute that invalidated non-competition covenant controlled because it applied at execution of the covenant, despite current statute that would validate the same covenant).


201. GA. CODE ANN. § 13-8-2.1 (Michie 1992)(allowing reasonable non-competition covenants as partial restraints of trade and supplying examples of restraints in employment, partnership and sale-of-business contracts that are deemed reasonable). See HAW. REV. STAT. § 480-4(c)(1)-(3)(1989)(exempts reasonable
trade are generally illegal. Nonetheless, covenants in the transfer of a business or partnership are permitted, if they operate within a reasonable area and for a reasonable period of time. Covenants by an employee not to use trade secrets in unfair competition are permitted when reasonably necessary to protect the employer, without imposing undue hardship on the employee.\textsuperscript{202} In North Carolina, restraints in violation of the common law are unlawful.\textsuperscript{203} The statute, however, explicitly permits covenants made in conjunction with the sale of a business and its goodwill, if the covenant does not violate common-law principles.\textsuperscript{204}

It appears that these state statutes offer little or no protection to the covenantor beyond that already available at common law. In at least one state, Texas, the statute specifically authorizes reformation of covenants that, at common law, would have been void and unenforceable.\textsuperscript{205} Thus, it may actually reduce protection to the covenantor.

2. Restraints on Practicing a Profession

A number of state statutes refine the common law somewhat by declaring some types of covenants void per se, while retaining common-law analysis for other types. Each state statute of this type begins with language to the effect that: “Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind otherwise than is provided . . . is to that extent void.”\textsuperscript{206}

\textsuperscript{203} See N.C. Gen. Stat. § 75-2 (1988)(prohibits all restrictive covenants void at common law). \textit{See also} Robins & Weill, Inc. v. Mason, 320 S.E.2d 693, 696 (N.C. App.), \textit{appeal denied}, 322 S.E.2d 558 (N.C. 1984)(non-competition agreements between employers and employees that restrain trade are valid and enforceable if they are in writing, made a part of the employment contract, based on valuable consideration, designed to protect an employer’s legitimate interest, and reasonable with respect to both time and territory).

\textsuperscript{205} \textit{Compare} Tex. Bus. & Com. Code Ann. § 15.51(c)(West Supp. 1991)(permits a court to reform a covenant to the extent necessary to comply with § 15.50(2) concerning reasonable limits as to time, area, and activity restrained) \textit{with} Cukjati v. Burkett, 772 S.W.2d 215 (Tex. Ct. App. 1989)(declaring non-competition covenant that exceeded reasonable limits void and unenforceable). \textit{See also} DeSantis v. Wackenhurst Corp., 793 S.W.2d 670 (Tex. 1990)(suggesting \textit{Cukjati} has been superceded by statute).

From this general prohibition, the statutes list exceptions for certain types of non-competition covenants. Four states, Alabama, Florida, Louisiana, and South Dakota, permit covenants not to compete in the sale of a business, an employment contract, or a partnership dissolution provided the covenants are limited in the area or nature of the activity restrained. Florida, for example, permits restraints "within a reasonably limited time and area," when the covanantee is competing in that area.

The remaining five states—California, Montana, Nevada, North Dakota, and Oklahoma—permit covenants only for the sale of a business or the dissolution of a partnership. This limitation indicates that non-competition covenants associated with contracts for employment are void under the general prohibition of restrictive covenants. Some California courts, however, have made exceptions to this principle in the case of confidential information. The specific language in each statute affects its application to health professionals, including to veterinarians. The statutes generally prohibit contracts by which anyone "is restrained from exercising a lawful profession . . . ." Except for South Dakota, the provisions do not mention the term "profession" in sections that list exceptions to the basic rule. At least one state, Alabama, has held this distinc-

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207. ALA. CODE § 8-1-1(b)-(c)(1984)(excepts covenants that restrain parties "from soliciting old customers . . . within a specified county, city, or part thereof so long as the [buyer, partner, or employer] carries on a like business therein."); FLA. STAT. ch. 542.33(2)-(3)(1991)(allows restraints that are "within a reasonably limited time and area" so long as buyer, partner, or employer "carries on a like business therein"); LA. REV. STAT. ANN. § 23:921(b)-(c)(West Supp. 1990)(similar to Alabama); S.D. CODIFIED LAWS ANN. §§ 53-9-9 to -11 (1990)(similar to Alabama).


209. CALIF. BUSINESS & PROFESSIONAL CODE §§ 16601-16602 (West 1987); MONT. CODE ANN. §§ 28-2-704 to -705 (1989); NEV. REV. STAT. § 598A.040 (1989); N. D. CENT. CODE § 9-08-06(1)-(2)(1975); OKLA. STAT. tit. 15, §§ 218-219 (1991). Nevada's statute differs from the other four. It permits restrictive covenants "which are part of a contract of sale for a business and which bar the seller of a business from competing with the purchaser of the business sold within a reasonable market area for a reasonable period of time . . . ." NEV. REV. STAT. § 598A.040(5)(a)(1989). The statute addresses only the sale of a business. Moreover, the list of prohibited acts does not seem to include covenants for employment contracts or partnership agreements, and their status remains unclear under the statute.


211. See statutes cited, supra note 206.

212. For example, ALA. CODE § 8-1-1(b)(1984) states:
tion to be meaningful and intentional on the part of the legislature. In *Odess v. Taylor*, a physician attempted to enforce a non-competition covenant against a former associate who had left to join a nearby clinic. Citing the shortage of physicians in Alabama, the Alabama Supreme Court agreed with the lower court's finding that to give effect to the covenant "would be adverse to the public interest." Accordingly, the court held that the failure to include the term "profession" in the section permitting non-competition covenants in employment contracts prevented the plaintiff from using this section to validate the covenant. Instead, the court applied the more restrictive section that prohibits contracts restraining one's exercise of a profession. Thus, under the court's interpretation of the Alabama statute, physicians may not enforce covenants not to compete against other physicians.

In 1991, the Alabama Supreme Court extended this interpretation to a veterinary covenant. In *Friddle v. Raymond*, the plaintiff veterinarian sought to enforce a covenant imposed pursuant to the sale of the defendant veterinarian's practice. The covenant restricted the defendant from practicing within six miles of the plaintiff's practice for a period of three years. The court referred to its analysis of the term "profession" in *Odess*, as well as to the learned nature of veterinary science, to conclude that the practice of veterinary medicine is a profession. As professionals, veterinarians are not excluded from the general rule prohibiting covenants not to compete; therefore the Ala-

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One who sells the goodwill of a business may agree with the buyer and one who is employed as an agent, servant or employee may agree with his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer... so long as the buyer... or employer carries on a like business therein.

*But see S. D. CODIFIED LAWS ANN. § 53-9-9 to -11 (1990)(allowing an employee to agree not to compete "directly or indirectly in the same business or profession" (emphasis added); the sections on sale of goodwill and dissolution of a partnership do not include the term "profession").*

213. 211 So. 2d 805 (Ala. 1968).
214. Id. at 808.
215. ALA. CODE § 8-1-1(b)(1984), quoted supra note 212.
216. Odess v. Taylor, 211 So. 2d 805, 811 (Ala. 1968). Specifically, the court stated: Having included 'profession' in Section 22 [the predecessor to Section 8-1-1 providing a general prohibition against restraints of trade], and omitted this term in Section 23 [the predecessor to Section 8-1-1(b) providing an exception for the sale of a business or an employment contract], an affirmative inference is created that the legislature did not intend to include professions in Section 23.

Id.
218. 575 So. 2d 1038 (Ala. 1991).
219. *Id.* The covenant also contained a liquidated damages clause that required the defendant to forfeit receipt of any remaining payments for the sale as of the time he breached the covenant. *Id.* at 1039.
bama Supreme Court held that the covenant could not be enforced. The court stated, "Although the remaining subsections . . . provide for exceptions to the general rule [prohibiting contracts in restraint of trade], including an exception for the sale of good will of a business, this Court has stated on numerous occasions that a 'professional' cannot fall within these statutory exceptions."220

Decisions in states with statutes similar to Alabama's either have not addressed the issue of whether the variation in the language is significant or have not considered or adopted the Alabama court's interpretation.221 In South Dakota, the legislature has addressed the issue, apparently to permit covenants not to compete between professionals by inserting the term "profession" into the section providing an exception for employment contracts.222 The analogous sections pertaining to the sale of good will and the dissolution of a partnership refer only to a business and do not mention professions.223

Resolution of the issue of whether to construe the statutory language narrowly, as the Alabama Supreme Court has done, turns primarily on policy grounds. The Alabama court's restrictive interpretation disfavors restraints "because they tend not only to deprive the public of efficient service but also tend to impoverish the individual."224 This rationale is particularly compelling in the context of medical professions, because the public has an interest in the availability of efficient health care services. Thus, it is probably appropriate to interpret statutes narrowly when that interpretation will promote the availability of health care. Arguably, however, as the South Dakota legislature apparently realized, in the context of a sale of a business or dissolution of a partnership, the analysis may be somewhat different. The public policy interest in efficient service still exists, but protecting the transferee's investment in goodwill is also important. If the law does not permit purchasers or remaining partners to invest in goodwill and thereafter to protect it through covenants not to compete, incentives to invest in professional practices will decrease.225

On a somewhat related point, the Florida legislature has recently addressed the policy interest in the public's well-being by adopting an amendment to the statute governing covenants not to compete. The

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220. Id. at 1040.
225. E.g., "Plaintiff made it plain that he was not interested in acquiring the hospital and the facilities without having a binding covenant from the defendant . . . ." Griffin v. Hunt, 268 P.2d 874, 876 (Okla. 1954).
amended section permits reasonable covenants not to compete to be enforced by injunction. The amendment, however, adds that "the court shall not enter an injunction contrary to the public health, safety or welfare . . . ."226 The work of veterinarians, at least in some situations,227 affects the public directly. Thus, in Florida, certain veterinary covenants not to compete may be among those covenants that cannot be enforced without harm to public health, safety, and welfare.

3. Covenants among Physicians

Covenants not to compete involving medical professionals have received special treatment in some jurisdictions. For example, Colorado, Delaware, and Massachusetts expressly prohibit covenants not to compete in contracts among physicians.228 No reported decision in these states has expanded coverage of the statute to include veterinarians. Such expansion appears unlikely, at least in Colorado and Massachusetts. In Colorado, the statute defines the "practice of medicine" narrowly by reference to statutory provisions regulating the practice of human medicine.229 In Massachusetts, the covenant prohibition appears in the statutory chapter that governs registration and regulation of physicians and surgeons.230 Neither state law specifically addresses veterinary medicine in those sections.231

226. FLA. STAT. § 542.33(2)(a)(1991). The injunction may not enforce an unreasonable covenant or be used where there is no showing of irreparable injury; irreparable injury is presumed in certain situations.

227. For example, decreased veterinary service to livestock facilities or dairy parlors affects the public health, safety, and welfare when it increases the risk of foodborne illness or disease otherwise communicable to humans.

228. COLO. REV. STAT. ANN. § 8-2-113(3)(West 1990)(voids all contract provisions restraining a physician's right to practice medicine but permits liquidated damages, of which damages from competition may be a part); DEL. CODE ANN. tit. 6, § 2707 (1989)(same as Colorado); MASS. ANN. LAWS ch. 112, § 12x (Law. Co-op. 1991)(invalidates the offending portion of "[a]ny contract or agreement . . . which includes any restriction of the right of [a] physician to practice medicine in any geographic area for any period of time . . . ").

229. COLO. REV. STAT. ANN. § 8-2-113(3)(West 1990), referring to the right to practice medicine, as defined in COLO. REV. STAT. ANN. § 12-36-106. See Michael J. Katz, Drafting a Noncompetition Clause for the Colorado Contract, 20 COLO. LAW. 703 (1991).

In addition, the Colorado statute has a more general section that permits a covenant not to compete in "[a] contract for the purchase and sale of a business . . . " and for "executive and management personnel and officers and employees who constitute professional staff to executive and management personnel . . . " COLO. REV. STAT. ANN. § 8-2-113(2)(West 1990)(emphasis added). It is unclear whether veterinarians fit within these exceptions and therefore could be allowed to use restrictive covenants, subject to common-law rules.


4. Employee Covenant Legislation

Some jurisdictions—Michigan, Oregon, and Wisconsin—address the validity of non-competition agreements in employment contracts, but not in partnership dissolution agreements or the sale of a business. The latter involve parties with more equal bargaining positions and thus may require less legislative guidance than employment contracts. Statutory restrictions on employment covenants are generally no more restrictive than the common law.

The Oregon statute authorizes a non-competition covenant between employer and employee if the covenant is part of an initial employment contract or a subsequent good faith advancement of the employee. This statutory authorization "applies only to non-competition agreements made in the context of an employment relationship or contract and not otherwise." Presumably, the common law governs in other situations.

The Michigan and Wisconsin statutes permit covenants not to compete in employment contracts if restrictions on time, geographic area, and type of employment are reasonable. The statutes differ in approach, however, when a covenant is unreasonable. Michigan permits the court to limit an overbroad covenant to "render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited." Wisconsin, on the other hand, states that an unreasonable covenant is illegal and void; it cannot be enforced "even as to so much of the covenant or performance as would be a reasonable restraint." This approach is inconsistent with the modern trend of enforcing overbroad contracts to the extent they are

235. For Oregon approaches to covenants, see, e.g., North Pac. Lumber Co. v. Oliver, 596 P.2d 931, 938 (Or. 1979) ("courts will uphold [contracts in restraint of trade] where they are reasonably necessary to protect a legitimate interest of the person in whose favor they run, do not impose an unreasonable hardship upon the person against whom they are asserted, and are not injurious to the public interest."); McCallum v. Asbury, 393 P.2d 774 (Or. 1964) (enforcing 10-year, 30-mile covenant contained in medical partnership agreement); Ladd v. Hikes, 639 P.2d 1307 (Or. Ct. App. 1982) (relying on McCallum to enforce similar covenant in employment contract with the same medical clinic).
236. Mich. Comp. Laws Ann. § 445.774a (West 1989)(if the "covenant is reasonable as to its duration, geographical area, and the type of employment . . . " ); Wis. Stat. § 103.465 (1990)("if the restrictions imposed are reasonably necessary for the protection of the employer . . . ").
The Wisconsin statute raises the more general issue of how states with legislation addressing covenants not to compete deal with unreasonable covenants. With the exception of Wisconsin, states that have addressed the issue allow enforcement of the covenant to the extent it is considered reasonable. Some states have resolved the issue by statute; in others, courts have interpreted the statute to permit this result.

B. Federal Antitrust Laws

In addition to, or instead of, relying on state law to challenge a covenant not to compete, veterinarian covenantors may consider applicability of the federal antitrust laws—primarily Section One of the Sherman Act. The successful plaintiff in a federal antitrust action may be entitled to treble damages and attorneys' fees. It must be acknowledged at the outset, however, that federal courts have been reluctant so far to grant damage awards to this type of antitrust plaintiff.

In separate lines of cases, the federal courts have acknowledged the Sherman Act's application both to the learned professions, such as veterinary medicine, and to covenants not to compete. Questions remain, however, as to the extent of the Sherman Act's applicability to various types of veterinary covenants. Therefore, the purpose of the following discussion is to identify those questions and suggest possible answers. The discussion concludes that the prospects of relief under federal antitrust law are remote, but should not be discounted completely.

Two primary barriers face veterinary antitrust plaintiffs: the jurisdictional requirement that the anticompetitive activity be in or substantially affect interstate commerce and the required proof that the covenant not to compete be unreasonable.

239. See supra text accompanying notes 181-184.
242. 15 U.S.C. § 1 (1988). The authors express appreciation to Professor Stephen F. Ross for his review of an earlier draft of this section of the article.
244. See infra note 301 and accompanying text.
245. See infra notes 249-253, 276-302 and accompanying text.
1. Jurisdictional Requirements

The jurisdictional requirements of the Sherman Act pose a significant threshold for the antitrust plaintiff. For Sherman Act purposes, the plaintiff must establish, among other things,\(^\text{246}\) that the defendant's alleged antitrust activity occurs in "trade or commerce among the several States."\(^\text{247}\) As the courts have interpreted this requirement, two separate elements are relevant: whether the activity consti-

\(^{246}\) Another Sherman Act requirement is that at least two persons act in concert. See Mayo, \textit{supra} note 6, at 313. This requirement should be met easily in most instances because a non-competition covenant is an agreement between two potential competitors. \textit{Id.} at 314.

\(^{247}\) 15 U.S.C. § 1 (1988). The circuits disagree as to whether the defendant's anticompetitive activity itself, or only the defendant's general business activity, must be in or affect interstate commerce. \textit{See Mayo, supra} note 6, at 316 n.56. In particular, there is disagreement about whether the Supreme Court's decision in \textit{McLain} v. \textit{Real Estate Bd.}, 444 U.S. 232 (1980), overruled precedent that required the defendant's alleged illegal activity to affect interstate commerce. \textit{See, e.g.}, Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 744 (1976)(citing several alleged effects on interstate commerce as a result of defendant hospital's efforts to prevent expansion of local competing hospital). \textit{See also} \textit{Crane v. Intermountain Health Care, Inc.}, 637 F.2d 715, 721-24 (10th Cir. 1981)(en banc)(discussing the line of precedent prior to \textit{McLain} that required the alleged antitrust activity to affect interstate commerce); Mayo, \textit{supra} note 6, at 316 n.56. In \textit{McLain}, the Supreme Court stated,

To establish the jurisdictional element of the Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful.


A majority of circuits that have addressed the issue have held that \textit{McLain} fails to overturn precedent requiring the alleged illegal activity itself to have a substantial effect on interstate commerce. \textit{See Stone} v. \textit{William Beaumont Hosp.}, 782 F.2d 609, 614 (6th Cir. 1986)(agreed with Second Circuit's reading of \textit{McLain} (in \textit{Furlong v. Long Island College Hosp.}, 710 F.2d 922 (2nd Cir. 1983)) that anticompetitive conduct, if local in nature, must be shown to "infect" those general business activities of the defendant which do, or are likely to, affect [sic] interstate commerce"); \textit{Seglin v. Esau}, 769 F.2d 1274, 1280 (7th Cir. 1985)(court is to consider only those activities that tie defendant's illegal activity to interstate commerce); \textit{Hayden v. Bracy}, 744 F.2d 1338, 1343 n.2 (8th Cir. 1984)(defendant's allegedly illegal conduct must affect interstate commerce); \textit{Furlong v. Long Island College Hosp.}, 710 F.2d 922 (2nd Cir. 1983); \textit{Cordova & Simonpietri Ins. Agency v. Chase Manhattan Bank}, 649 F.2d 36, 45 (1st Cir. 1981); \textit{Crane v. Intermountain Health Care}, 637 F.2d 715 (10th Cir. 1981)(en banc).

Two circuits, however, have held that \textit{McLain} changed the focus from the defendant's illegal activity to the defendant's general business activity. \textit{See Shahawy v. Harrison}, 778 F.2d 636, 640 (11th Cir. 1985)(defendant's general business activities are the proper focus); \textit{Western Waste Serv. v. Universal Waste Control}, 816 F.2d 1094, 1097 (9th Cir.), \textit{cert. denied}, 489 U.S. 869 (1989)(\textit{McLain} does not require proof that defendant's alleged activity affects interstate com-
tutes trade or commerce, and whether that trade or commerce is "among the several States." 248

The first element, whether veterinary medicine constitutes trade or commerce, has been largely resolved by Goldfarb v. Virginia State Bar. 249 In Goldfarb, the United States Supreme Court held that the practice of law constitutes a trade for purposes of Sherman Act regulation, 250 thus refining the somewhat equivocal attitude to the learned professions reflected in prior cases. 251 Goldfarb has since been applied to the medical profession. 252 Thus, the practice of veterinary medicine, at least when it involves economic principles and not ethical ones, is apparently also subject to federal antitrust regulation. 253


The debate over this issue should have little impact on covenant cases. In a covenant not to compete, the anticompetitive activity is preventing someone from practicing veterinary medicine in a given area. Thus, if practicing veterinary medicine can be said to affect interstate commerce substantially, see infra text accompanying notes 255-275, it follows that the act of preventing it would also substantially affect interstate commerce. Hence, it matters little which test eventually wins approval.


250. Id. at 787-88.

251. Though dictum in Fed. Trade Comm’n v. Raladam Co., 283 U.S. 643 (1931), suggested that the medical profession might be distinguishable from a trade, id. at 653, the Supreme Court declined to decide the issue despite several opportunities in subsequent cases. See, e.g., United States v. Oregon Medical Soc’y, 343 U.S. 326, 338-39 (1952) (Supreme Court accepted district court’s finding that medical services provided by defendant physicians’ group did constitute interstate commerce without discussing the district court’s other finding that “the sale of medical services ... [was] not trade or commerce within the meaning of Section 1”); American Medical Ass’n v. United States, 317 U.S. 519, 528-29 (1943) (declined to hold whether practice of medicine was trade where focus was on plaintiff’s activities; a nonprofit organization designed to sell and provide medical services, of which doctors were employees, was clearly trade). See also Friends of Animals, Inc. v. American Veterinary Medical Ass’n, 310 F. Supp. 1016, 1017 (D.S.D. 1970) (unnecessary to decide issue of whether veterinary medical association was engaged in trade where focus was on plaintiffs who were “engaged in reducing the number of homeless and unwanted cats and dogs” and merely employed veterinarians to aid in accomplishing this objective). For further discussion, see Mayo, supra note 6, at 314 & nn.40-41.

252. See e.g. Arizona v. Maricopa County Medical Soc’y, 457 U.S. 332, 349 (1982) (rejecting defendant’s argument that the lack of experience in medical care industry justifies not applying Sherman Act’s per se rule to alleged price-fixing agreement); Williams v. St. Joseph Hosp., 629 F.2d 448, 453 (7th Cir. 1980) (“with regard to its economic aspects professional activity is subject to the policies of the antitrust laws”). See also National Soc’y of Prof. Eng’rs v. United States, 435 U.S. 679 (1978).

The second element, whether the alleged trade or commerce is "among the several States," presents a bigger hurdle for veterinarians seeking federal antitrust jurisdiction. The practice of human medicine ("per se and without more") is generally considered a local activity.\textsuperscript{254} By analogy, veterinary medicine might also be a local activity, though no federal case law seems to establish this principle.\textsuperscript{255} But federal regulatory authority can sometimes extend to activities that are essentially local in nature. The Supreme Court has held that the Commerce Clause of the United States Constitution applies to activities that have a "close and substantial relationship to interstate commerce."\textsuperscript{256} Similarly, the Supreme Court has noted that even local business restraints can violate the Sherman Act.\textsuperscript{257} The required link with interstate commerce for Sherman Act purposes exists when a restraint based on local activity "substantially and adversely affects interstate commerce."\textsuperscript{258}

Despite the requirement that a regulated activity substantially affect interstate commerce, the Supreme Court has interpreted the required interstate nexus rather liberally, both under the Commerce Clause and for the Sherman Act.\textsuperscript{259} Even a liberal approach to the interstate nexus, however, does not encompass every commercial activity. In fact, the medical professions have posed special difficulties because of the predominantly local nature of their activities.\textsuperscript{260} Thus courts have identified several factors that help to establish the appropriate nexus between the anticompetitive activity and interstate commerce: whether a plaintiff receives revenue from federally-funded

\textsuperscript{254} Williams v. St. Joseph Hosp., 629 F.2d 448, 454 (7th Cir. 1980).

\textsuperscript{255} An economic survey by the American Veterinary Medical Association in 1988 revealed that the larger veterinary practices encompass an area with a mean radius of 36 miles. Wise, supra note 103, at 252 (table 3).

\textsuperscript{256} JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW § IV, at 165 (2d ed. 1983).

\textsuperscript{257} See Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 743 n.2 (1975). See also Mayo, supra note 6, at 316; Sullivan, supra note 243, at 625 n.22.


\textsuperscript{259} See Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 745 (1975)("An effect can be 'substantial' under the Sherman Act even if its impact on interstate commerce falls far short of causing enterprises to fold or affecting market price."); Wickard v. Filburn, 317 U.S. 111, 127-28 (1942)("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation . . . .").

\textsuperscript{260} See Huelsman v. Civic Ctr. Corp., 873 F.2d 1171 (8th Cir. 1989); Furlong v. Long Island College Hosp., 710 F.2d 922 (2d Cir. 1983); see also Jonathan D. Gordon, Antitrust in the Health Care Field—Subject Matter Jurisdiction, COLO. LAW., June 1989, at 1113; Mayo, supra note 6, at 317.
programs or out-of-state insurers;\textsuperscript{261} whether the plaintiff receives supplies from out of state;\textsuperscript{262} and, in some circuits, whether patients travel from other states to receive treatment by the plaintiff.\textsuperscript{263} These factors have been most relevant in cases where the parties are large-scale medical care providers like hospitals. It is still unclear whether these factors can support an interstate commerce nexus in a case involving a small, private practice.\textsuperscript{264}

A further nexus, not available to physicians, may be relevant for some veterinary plaintiffs: the connection of the food-animal veterinarian with production agriculture. It has long been established that the shipment of livestock, as well as milk and other animal products,\textsuperscript{265} across state lines constitutes interstate commerce.\textsuperscript{266} Moreover, the Supreme Court has held that the United States Department of Agriculture’s authority to regulate under the Commerce Clause applies to agricultural activity that is essentially local in nature (that is, intrastate) but has a substantial effect on interstate commerce, when control over the intrastate transaction is necessary to make regulation of interstate commerce effective.\textsuperscript{267}

Reduction of the spread of infectious disease has justified federal regulation of interstate movement of livestock. In \textit{Thornton v. United States},\textsuperscript{268} decided in 1925, the Supreme Court upheld congressional authority to regulate the movement (even the ranging) of diseased livestock between states. The Court stated:

\begin{quote}
[The authority of Congress over interstate commerce extends to dealing with and preventing burdens to that commerce and the spread of disease from one state to another . . . would clearly be such a burden, if it were not to be regarded as commerce itself . . . .]
\end{quote}

It seems likely that, for purposes of federal antitrust law, veterinarians who provide veterinary service to animal production facilities sub-

\begin{itemize}
  \item \textsuperscript{261} Mayo, \textit{supra} note 6, at 317.
  \item \textsuperscript{262} Id. at 318.
  \item \textsuperscript{263} Id. at 318 & n.62. \textit{See also} Feminist Women’s Health Ctr. v. Mohammad, 586 F.2d 530, 540 (5th Cir. 1978)(“Although the mere fact of dealings with out-of-state customers, whether or not those customers cross state lines for the purpose of buying a firm’s goods or services, might not of itself establish a sufficient interstate nexus, it does not follow that those dealings are of no pertinence whatsoever.”).
  \item \textsuperscript{264} The American Veterinary Medical Association does not keep records on the average number of veterinarians in a given practice. Anecdotal evidence, however, suggests that this number rarely exceeds three to four veterinarians per practice.
  \item \textsuperscript{265} United States v. Wrightwood Dairy Co., 315 U.S. 110, 121 (1941)(milk).
  \item \textsuperscript{266} Thornton v. United States, 271 U.S. 414, 425 (1925).
  \item \textsuperscript{267} United States v. Wrightwood Dairy Co., 315 U.S. 110, 120-21 (1941)(Congressional power “includes authority to make like regulations for the marketing of intrastate milk whose sale and competition with the interstate milk affects its price structure so as in turn to adversely affect the Congressional regulation.” \textit{Id.} at 121).
  \item \textsuperscript{268} 271 U. S. 414 (1925).
  \item \textsuperscript{269} \textit{Id.} at 425.
\end{itemize}
stantially affect interstate commerce, at least where it can be shown that the animals or their products (meat, milk, hide) travel in interstate commerce. Further support for this proposition comes from other decisions involving activity arguably affecting interstate commerce for purposes of other federal legislation.

For example, in *Mitchell v. Bowman*, sup270 the defendant operated an auction market where he sold and shipped livestock. The defendant had several employees responsible for caring for and handling the livestock as well as keeping records of the auction’s business. A substantial number of the livestock sold at the auction were sold and shipped to out-of-state buyers. The Secretary of Labor brought suit alleging violations of minimum wage, overtime and other provisions of the Fair Labor Standards Act. sup271 Based on the facts, the district court concluded that all the employees were engaged in interstate commerce for purposes of the jurisdictional requirement of the Fair Labor Standards Act. sup272 Veterinarians serve a role similar to, or arguably more important than, the role of an auction market’s employee in *Mitchell*; thus, veterinary care provided to animals shipped interstate should satisfy the jurisdictional nexus for regulation under the Sherman Act.

The practical significance of any jurisdictional nexus depends on the number of veterinarians involved in production animal agriculture. Statistics of the American Veterinary Medical Association indicate that many veterinarians would qualify under this analysis. Most obvious are veterinarians who treat livestock intended for sale or slaughter (food-animal veterinarians) and those who treat horses (equine veterinarians). Clients of these veterinarians frequently ship their animals interstate directly or indirectly through auctions or sale barns. Approximately 23 percent of all veterinarians devote more than half of their practice to serving these clients. Other veterinarians, approximately 10 percent of the veterinary population, serve both large- and small-animal clients. sup273 Thus, one-third of all veterinarians are likely to affect interstate commerce and thus (at least arguably) come within the scope of antitrust regulation. Small-animal practitioners may also be included if a sufficient number of their clients breed or raise pets destined for interstate commerce. In each case, the nexus with interstate commerce will depend on the facts, such as the percent of revenue derived from serving clients in this category or the

271. Id. at 521.
272. Id. at 523. See also *Wickard v. Filburn*, 317 U.S. 111 (1942)(application of wheat quotas to farmers who grew wheat for own consumption).
number of animals treated.\textsuperscript{274}

Failure to establish the nexus between the veterinary service and interstate commerce forces the antitrust plaintiff to rely on the more general factors used in the health care delivery cases. Little case law indicates whether a court would consider those factors for small, private practices. Furthermore, one of the factors, whether the plaintiff receives federal subsidies (such as Medicare), is not relevant in the veterinary context.\textsuperscript{275}

Arguably, the best way to promote the goal of the Sherman Act as well as the other federal antitrust laws is to provide liberal access to their protections. To withhold jurisdiction from a group of professions for whom state law protection has proven inadequate would undermine the policy against unreasonable restraints of trade. Implementation of that policy is particularly important when public health is at issue.

2. \textit{The Rule of Reason}

Once antitrust plaintiffs have satisfied the jurisdictional requirements, they must prove that the restraint at issue is unreasonable. Section One of the Sherman Act states, "Every contract in restraint of trade . . . is declared to be illegal."\textsuperscript{276} Despite this broad language, the Supreme Court has repeatedly interpreted Section One to apply only to \textit{unreasonable} restraints of trade.\textsuperscript{277} Nevertheless, "there are certain agreements or practices which because of their pernicious effect

\textsuperscript{274} For instance, a veterinarian may provide medical service only to small herds of cattle, yet this service may still satisfy the interstate commerce nexus. If animals later are shipped from a small herd to a large feedlot or auction, the health status of that herd may affect the health of all cattle in the stockyard as well as those farther down the distribution chain. And if the stockyard ships animals in interstate commerce, the requisite nexus has been met.

\textsuperscript{275} Another consideration may be whether the plaintiff is "accredited" by the U.S. Department of Agriculture. Accreditation enables veterinarians to write and issue health certificates for animals travelling in interstate commerce, as well as to inspect the herds of origin. \textit{See} 9 C.F.R. §§ 160-162 (1991), on accreditation of veterinarians. One might argue that a covenant not to compete would limit the number of accredited veterinarians in an area. This reduction would impede the ability of the U.S.D.A. to detect and respond to disease outbreaks, thus adversely affecting interstate commerce. Serving as an accredited veterinarian, however, does not necessarily require private employment in a specific area, and a covenant restricting future veterinary practice in a given area need not always limit one's ability to serve as an accredited veterinarian. \textit{See}, e.g., \textit{Tench v. Weaver}, 374 P.2d 27 (Wyo. 1962)(covenant that prevented former employee from practicing veterinary medicine did not extend to his service with the U.S.D.A. in disease eradication program).


\textsuperscript{277} \textit{See} Standard Oil Co. v. United States, 221 U.S. 1, 69-70 (1911); \textit{National Soc'y of Prof. Eng'rs v. United States}, 435 U.S. 679, 688-89 (1978)("read literally, § 1 would outlaw the entire body of private contract law").
on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry." These agreements or practices are void per se. This classification exists because certain practices are always or almost always unreasonable, leaving little need to decide each case independently. The courts have held uniformly that covenants not to compete do not qualify for per se treatment.

The courts have held uniformly that covenants not to compete do not qualify for per se treatment. A per se rule for covenants not to compete is inappropriate because the federal courts have had too little experience in covenant cases to determine that they are "so pernicious as to lack any redeeming value," and because non-competition covenants serve a legitimate purpose by protecting an individual's commercial investment.

Because the per se rule does not apply, the test for a covenant not to compete is whether the covenant is "reasonably related to legitimate interests of one of the parties." This rule of reason is a fact-specific inquiry that ascertains whether a given practice "imposes an unreasonable restraint on competition." Though similar in language to the common-law standard for covenants not to compete, the rule of reason, like other federal antitrust law, emphasizes different values.


Historically, only four types of activity have qualified as unreasonable per se: price fixing, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210 (1940); division of markets, United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899); group boycotts, Fashion Originators Guild v. Federal Trade Comm'n, 312 U.S. 457 (1940); and tying arrangements, International Salt Co. v. United States, 332 U.S. 392 (1947).


285. See Sullivan, supra note 243, at 634. Professor Sullivan recognizes that such a distinction has not been readily accepted by the courts. Id. at 632-34. See also McDonald v. Johnson & Johnson, 722 F.2d 1370, 1378 (8th Cir. 1983)(a covenant
pressive effect of covenants not to compete on the covenantor and the public. The Sherman Act, on the other hand, focuses on the anticompetitive effects of activities and their resulting effect on the relevant market. This distinction has been blurred somewhat in the area of non-competition covenants. In the early decision of United States v. Addyston Pipe and Steel Co., Judge Taft adopted principles from the common law to address a Sherman Act antitrust issue; he noted that unreasonable contract restraints (including covenants not to compete) will be void because they oppress the covenantor and because they result in monopoly. Later cases have read Addyston Pipe to incorporate the rule of reason into Sherman Act analysis of restraints of trade. Though the focus of analysis has varied since Addyston Pipe, as one thoughtful commentator has indicated, the proper focus of antitrust analysis is the economic benefit or detriment of a given restraint.

Under standard Sherman Act analysis, the plaintiff must show that the challenged restraint has an anticompetitive effect in the relevant market. This requirement also applies to covenants not to compete. It is not sufficient, however, to show that the restraint hindered only the plaintiff's ability to compete. Instead, the plaintiff must show that the activity "resulted in damage to competition as a

in the sale of a business is reasonable if "limited in time, and geography, and . . . necessary to protect a buyer's interests").


"Contrary to its name, the Rule does not open the field of Antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 688 (1978).

Addyston Pipe rejected the argument that competitors could lawfully set prices as long as the agreed prices were reasonable. Id. at 282-83. After 1890 antitrust legislation, contracts in restraint of trade are no longer merely void; they may violate criminal law and lead to assessment of damages.

Id. at 282. See also Sullivan, supra note 243, at 632-34.

See, e.g., Standard Oil Co. v. United States, 221 U.S. 1 (1911).

Sullivan, supra note 243, at 633.

See Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 246 (5th Cir. 1978).


whole in the relevant market," a requirement that poses a significant obstacle to the plaintiff seeking invalidation of a covenant not to compete. A covenant, albeit anticompetitive as to the person restrained, can nevertheless promote competition by encouraging individuals to enter a field knowing they will be able to protect the fruits of their labor.

The key to establishing anticompetitive effect will be to show the amount of competition in the relevant market. Whether the inquiry focuses on the national market or the local market will affect the analysis. In veterinary medicine, the focus should be on the local area, where the veterinary practice has a direct economic impact. In a small market area, particularly with a small population, a covenant not to compete may have a significant effect on competition. Presumably a small area will have a relatively small number of veterinarians, and the covenant will therefore restrain a relatively high percentage of competition, even if only the plaintiff-covenantor is restrained.

Small market areas also have other impacts on market effect. For example, ease of market entry has been a factor in determining whether a competitive market exists. As the relevant market expands, the degree of open competition increases, making a restraint less unreasonable because the restrained individual can enter the market at a new location. Thus, the smaller the relevant market area, the harder it is to enter the market. Despite the effects of covenants not to compete on competition, however, most courts that have decided this issue have held that the pro-competitive benefits provided by non-competition covenants outweigh any anticompetitive effects.

Even if the plaintiff successfully proves an anticompetitive effect, the courts still look to the purposes behind the covenant to determine if those purposes fulfill some legitimate need. This analysis is similar to the common-law analysis of covenants, with evaluation of the legitimacy of the interest protected and whether the restraint imposed is reasonably tailored to protect that interest. If the covenant is over-

297. See GTE Data Servs. v. Electronic Data Sys. Corp., 717 F. Supp. 1487, 1492 (M.D. Fla. 1987)(market impact depends on "(1) size of relevant product and geographic markets; (2) the amount of competition foreclosed; and (3) how the acts of defendant affected competition.").
Based on the analysis currently undertaken by courts applying the Sherman Act, it would appear that a covenantor has little to gain from using federal antitrust law in defense of a covenant case. There may be instances, however, when just such a tactic may prove beneficial. For instance, the assertion of a colorable federal antitrust counterclaim will enable the covenantor to remove the original suit to federal court rather than remain in state court. Further, the threat of additional litigation costs, because of the additional discovery and time required, may bring the covenantee to settlement sooner than if only a state claim were involved. Finally, a covenantor might consider bringing a federal antitrust claim in conjunction with a state claim for declaratory relief. By anticipating a future conflict involving a covenant in this way, a covenantor may be able to place the covenantee into an uncomfortable position, thus creating a more favorable settlement environment.

In any event, one must consider the option of raising federal antitrust laws in litigation focused on a covenant not to compete. The appropriateness of such a strategy will depend on a variety of factors including the state court's approach to covenants, relevant state legislation, the nature of the veterinary practice (in light of the jurisdictional nexus for federal antitrust law), and the client's ability to afford the added costs of such a claim.

V. CONCLUSION

Covenants not to compete play a major role in the business of veterinary medicine, particularly by protecting a covenantee's valid interest in client goodwill. Nonetheless, covenants have disadvantages, too. They restrict veterinarians from practicing wherever they desire, and they undermine the public's interest in having their animals examined by the doctor of their choice. In a profession in which the respect and goodwill of clients plays such a significant role, these restrictions on the practice of veterinarians should be limited to the greatest extent possible.

common law rule cited in United States v. Addyston Pipe & Steel Co., 85 F. 271, 282-83 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899), to alleged price-fixing strategy (i.e., a ban on competitive bidding) in professional ethical rules); McDonald v. Johnson & Johnson, 722 F.2d 1370, 1378 (8th Cir. 1983)("when the goodwill of a business is sold along with its other assets, such a covenant, if reasonably limited in time and geography, is necessary to protect a buyer's interests"); United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976), cert. denied, 429 U.S. 1122 (1977).

Courts and legislatures have addressed the tensions between the interests of covenantors and covanantee with relatively inconsistent results. No predictable, uniform standard adequately accommodates the various interests in conflict. As a result, courts have relied on a case-by-case analysis to determine the enforceability of covenants not to compete. Though some states have relevant statutory provisions, these have added little to the solution.

In light of increasing competition in veterinary medicine, it may be important for courts to take a more active role in accommodating the rights of the parties. Covenants not to compete should be closely tailored to the protectable interest of the covanantee and the realities of the modern veterinary industry. The practice of veterinary medicine no longer means that a veterinarian performs all types of services on all types of animals. The covanantee's real protectable interest may be relatively narrow; therefore, a covenant should normally be limited to the type of practice—for example, small animal, food animal, equine—that the covenantor engaged in. As specialization increases in the future, the scope of many covenants could eventually be limited not only to a specific species, but also to a given specialty within that species, such as cardiology or neurology. Geographic areas and time periods should be no more extensive than actually required to protect the covanantee's interest. Closely-tailored covenants will be encouraged if courts exercise their powers, where appropriate, to modify excessive covenants to ensure only the narrowest reasonable protection for the covanantee. Only with adequate incentives will covanantees be discouraged from sloppy drafting and from negligent or intentional overreaching.

Moreover, the parties themselves must exercise more responsibility in drafting covenants that encompass only the restrictions that will protect the covanantee without oppressing the covenantor. In negotiating a covenant, the parties should also consider using covenant substitutes. In particular, the inclusion of a liquidated damages clause in a veterinary contract may minimize unnecessary restraints and also help reduce the need for litigation. Finally, drafting covenants that place different, graduated restraints on veterinary activities will help to tailor the covenant further to restrict only the activities that pose the greatest risk to a covanantee. For example, a workable non-competition agreement for an equine ambulatory practice might begin with a covenant not to compete within a fifteen-mile radius of the covanantee for a one-year period, during which the covenantor may not accept any former clients. This restraint could be followed by a two- or three-year period during which the covenantor may accept former clients, but may not take active steps to solicit their business.

302. See supra text accompanying notes 187-192, for discussion of judicial modification of overly broad covenants to promote careful drafting.
The importance of covenants not to compete in protecting significant business interests—in particular, client goodwill—means that these covenants will continue to play a major role in veterinary contracts. The present inconsistency in statutory and judicial approaches to analysis and enforcement of these covenants suggests that uniform standards are unlikely to be developed in the near future. Therefore, veterinarians who are parties to covenants not to compete will have the responsibility to draft covenants that adequately protect the covenantee, but do not unjustly interfere with the covenantor's right to practice veterinary medicine.