ENFORCING RESTRICTIVE COVENANTS IN ILLINOIS: IS THE LEGITIMATE-BUSINESS-INTEREST TEST NECESSARY?

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I. INTRODUCTION

In a seemingly simple decision to accept a job with a different company, Neil Ehlers III incited what is sure to be a hotly contested battle throughout the state of Illinois.[1] This controversy began brewing in early January 2009, when Ehlers accepted a sales position with Midwest Aerials & Equipment, Inc. ("Midwest").[2] In February 2009, Ehlers' former employer, Sunbelt Rentals, Inc. ("Sunbelt"), sued Ehlers and Midwest, seeking preliminary and permanent injunctive relief.[3] Specifically, Sunbelt claimed that Ehlers violated the restrictive covenants of his employment agreement with Sunbelt when he accepted Midwest's employment offer.[4] The trial court granted Sunbelt's motion for a preliminary injunction, enjoining Ehlers and Midwest from violating the restrictive covenants of Ehlers' employment agreement with Sunbelt.[5] On appeal, the Fourth District of the Illinois Appellate Court enlivened this otherwise mundane case by rejecting over thirty years of Illinois precedent and holding that the "legitimate-business-interest" test[6] was no longer valid for evaluating the enforcement of restrictive covenants.[7]

Restrictive covenants in employment contracts are habitually used by employers in an attempt to control an employee's post-employment

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1. *See* Sunbelt Rentals, Inc. v. Ehlers, 915 N.E.2d 862 (Ill. App. Ct. 2009). *See also* Peter Steinmeyer & Jake Schmidt, *So Far, The "Legitimate Business Interest Test" Still Stands in Illinois*, EBG TRADE SECRETS & NONCOMPETE BLOG (Dec. 22, 2009), http://www.tradesecretsnoncompetelaw.com (search "Search" for "So Far, The Legitimate Business Interest Test Still Stands in Illinois"; then follow hyperlink under "Search Results") ("[W]e expect that the reasoning of *Sunbelt* will be at issue in virtually every lawsuit seeking to enforce or invalidate an Illinois restrictive covenant . . . .").
2. *Sunbelt Rentals*, 915 N.E.2d at 864. *See* discussion *infra* Part II.B.2.
3. *Sunbelt Rentals*, 915 N.E.2d at 865.
4. *Id.*
5. *Id.* at 863.
6. *See* discussion *infra* Part II.B.1.b.
7. *See Sunbelt Rentals*, 915 N.E.2d at 870.

actions.[8] Employers use restrictive covenants to protect their perceived goodwill, client relationships, intellectual property, trade secrets, and confidential information.[9] Post-employment restrictive covenants, however, also infringe upon an employee's economic mobility and freedom to follow personal interests.[10] Due to the infringements placed on employees, courts regard post-employment restrictive covenants as a restraint of trade and carefully scrutinize their use.[11] In Illinois, courts traditionally enforce restrictive covenants only if they are supported by adequate consideration, are ancillary to a valid employment contract or relationship, protect a legitimate business interest, and impose reasonable restrictions on the employee's subsequent employment.[12] Rejecting the legitimate-business-interest test, the Fourth District broke from this precedent. Illinois courts should not endorse the Fourth District's abandonment of the legitimate-business-interest test because doing so would deviate from fundamental public policy concerns and leave employees subject to the whims of employers.

To put this in context, Section II of this Comment provides an overview of restrictive covenants, particularly covenants not to compete in employment contracts. More specifically, Part A explores restrictive covenants generally and the policy considerations governing their use; Part B examines Illinois's approach to enforcing restrictive covenants and the Fourth District's recent decision in *Sunbelt Rentals, Inc. v. Ehlers*.[13] Section III discusses why the legitimate-business-interest test is consistent with Illinois precedent and promotes good public policy, and the section proposes a resolution to the division among the Illinois Appellate Court.

II. OVERVIEW OF RESTRICTIVE COVENANTS

This section explores restrictive covenants generally, the policy considerations governing their use, the traditional enforcement of restrictive covenants in Illinois, and the Fourth District's recent decision in *Sunbelt Rentals, Inc. v. Ehlers*.[14]

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8. John F. Kennedy & Suzanne L. Sias, *Employment Contracts Involving Restrictive Covenants and Trade Secrets*, *in* ILL. INST. FOR CONTINUING LEGAL EDUC., 3 BUSINESS LAW SERIES 7–5 (2008).
9. *Id.* at 7–4.
10. Wessel Co. v. Busa, 329 N.E.2d 414, 417 (Ill. App. Ct. 1975); C.G. Caster Co. v. Regan, 357 N.E.2d 162, 165 (Ill. App. Ct. 1976); Emery-Drexel Livery v. Cook-Du Page Transp. Co., 353 N.E.2d 182, 184 (Ill. App. Ct. 1976).
11. *Wessel Co.*, 329 N.E.2d at 417; *C.G. Caster Co.*, 357 N.E.2d at 165.
12. Lawrence & Allen, Inc. v. Cambridge Human Res. Grp., Inc., 685 N.E.2d 434, 440 (Ill. App. Ct. 1997).
13. Sunbelt Rentals, Inc. v. Ehlers, 915 N.E.2d 862 (Ill. App. Ct. 2009).
14. *Id.*

A. Restrictive Covenants and the Policy Governing Their Use

A restrictive covenant which prohibits a person from competing against another is a covenant in restraint of trade.[15] The rules governing agreements in restraint of trade have traditionally been left to judicial development.[16] The common law's policy against restraint of trade is one of its oldest and best established;[17] in fact, this policy dates back to English common law, under which contracts restricting a person's right to pursue his trade or occupation were void as against public policy.[18]

Essentially, every promise regarding business dealings is a promise operating in restraint of trade because it restricts the promisor's[19] future activity.[20] A promise of this sort is enforceable, however, unless the restraint imposed is unreasonably detrimental to the smooth operation of a freely competitive private economy.[21] This rule of reason[22] is necessarily vague in order to leave cases to be resolved on their particular facts and in light of the circumstances of the transaction.[23] Courts, therefore, scrutinize

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15. *See* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 19 (3d ed. 2004).
16. *Id.*
17. RESTATEMENT (SECOND) OF CONTRACTS § 186, introductory note (1981).
18. Hapney v. Cent. Garage, Inc., 579 So. 2d 127, 129 (Fla. Dist. Ct. App. 1991).
19. The *Restatement (Second) of Contracts* provides definitions for useful terms in this discussion:
> (1) A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made. (2) The person manifesting the intention is the promisor. (3) The person to whom the manifestation is addressed is the promisee. (4) Where performance will benefit a person other than the promisee, that person is a beneficiary.

RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981).
20. 2 FARNSWORTH, *supra* note 15, at 20. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 186 cmt. a (1981).
21. 2 FARNSWORTH, *supra* note 15, at 20. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 186 cmt. a (1981); RICHARD A. LORD, 6 WILLISTON ON CONTRACTS § 13:5 (4th ed. 2009).
22. The Sherman Antitrust Act prohibits "every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several states." M. Scott LeBlanc, *American Needle, Inc. v. NFL: Professional Sports Leagues and "Single Entity" Antitrust Exemption*, 5 Duke J. Const. L. & Pub. Pol'y 148, 151 (2010) (*quoting* 15 U.S.C.A. § 1 (West 2008)). In 1918, the Supreme Court held that the "true test of legality" under the Sherman Act is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." LeBlanc, *supra*, at 151 (quoting Chi. Bd. of Trade v. United States, 246 U.S. 231, 244 (1918)). This standard became known as the "rule of reason" and established a two-tiered system of antitrust liability. LeBlanc, *supra*, at 151. The rule of reason applies to situations in which the agreement is not plainly anticompetitive. *Id.* In such situations, an antitrust plaintiff is required to establish two elements: First, that a contract, combination, or conspiracy restraining trade exists, and second, that the agreement in question is in fact unreasonable. *Id.*
23. 2 FARNSWORTH, *supra* note 15, at 20. *See also* Restatement (Second) of Contracts § 186 cmt. a.

a promise in restraint of trade in terms of its potential and actual effects, taking into account such factors as the protection it affords for the promisee's legitimate interests,[24] the hardship that it imposes on the promisor,[25] and the likely injury to the public.[26]

In applying this rule of reason, courts have generally stated that to be valid, a restrictive covenant in restraint of trade must (1) be ancillary to an appropriate transaction or relationship, (2) protect some legitimate interest of the promisee, (3) be reasonable in the light of that interest, and (4) must not cause unreasonable hardship to the promisor or injury to the public.[27]

Courts first impose a requirement of ancillarity in order to ensure that the interest of the promisee is worth protecting and outweighs the hardship to the promisor and any injury to the public.[28] In its explanation of this requirement, the Seventh Circuit stated:

> Presumably when a covenant is merely part of a larger employment agreement, its relatively diminished stature reduces the likelihood of abuse where it simply eliminates a competitor. The larger agreement establishes consideration and mutual benefit; the covenant, then, becomes the employer's benefit in exchange for an employee benefit set out in other parts of the agreement.[29]

This idea is mirrored in the *Restatement (Second) of Contracts*, which expressly states that a non-ancillary promise not to compete is unreasonable.[30] A non-ancillary restraint of trade is unreasonable because it is not related to an otherwise valid transaction or relationship and, thus, leaves the promisee without an interest worthy of protection.[31] A promisee's interest may arise, however, out of his purchase from the promisor of a business, from an employer-employee relationship, principal-agent relationship, or a partnership.[32]

Secondly, once it has been established that the restraint is ancillary to an otherwise valid transaction or relationship, the necessary inquiry is

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24. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. b.
25. *See id.* cmt. c.
26. *Id.*
27. 2 FARNSWORTH, *supra* note 15, at 28.
28. *Id.* at 20–21. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 187 cmt. b.
29. JAK Prod., Inc. v. Wiza, 986 F.2d 1080, 1085 (7th Cir. 1993) (applying Indiana law). *See also* United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899); Nat'l Emp't Serv. Corp. v. Olsten Staffing Serv., 761 A.2d 401, 405 (N.H. 2000).
30. "A promise to refrain from competition that imposes a restraint that is not ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade." RESTATEMENT (SECOND) OF Contracts § 187.
31. *Id.* cmt b.
32. *Id.*

whether the restraint is necessary to protect a legitimate interest of the promisee.[33] This inquiry depends upon the nature of the transaction.[34] If the restraint is ancillary to the sale of a business and its good will, for example, the buyer's interest cannot be effectively realized until the seller promises not to act in such a way that would diminish the value of what the seller has sold.[35] If, however, the restraint is ancillary to an employment contract, "the central inquiry must always be the extent to which the employee may unjustly enrich himself by appropriating an asset of the employer for which the employee has not paid and using it against that very employer."[36]

Thirdly, a restrictive covenant's scope must be reasonable in the light of the promisee's legitimate interest.[37] The scope of the restraint may be limited in three ways: by type of activity, geographical area, and time.[38] The scope is unreasonable if the promise: (1) proscribes types of activity more extensively than necessary to protect those engaged in by the promisee, (2) covers a geographical area more extensively than necessary to protect the promisee's interests, or (3) if the restraint is to last longer than is required in light of those interests.[39] Of course, what is considered a reasonably limited activity, geographical area, or time in a particular case depends on all of the circumstances.[40]

Lastly, a valid restrictive covenant must not cause unreasonable hardship to the promisor or injury to the public.[41] Thus, even if the restraint is no greater than is needed to protect the promisee's interest, the promisee's need may be outweighed by the harm to the promisor and the likely injury to the public.[42] For example, in the case of a sale of a business, the harm caused to the seller may be excessive if the restraint forces the seller's complete withdrawal from business.[43] In addition, the injury to the public may be too great if it removes a former competitor from competition.[44] A post-employment restraint may be excessive if the restraint inhibits the employee's personal freedom by preventing him from

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33. 2 FARNSWORTH, *supra* note 15, at 29.
34. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. b.
35. *Id.*
36. 2 FARNSWORTH, *supra* note 15, at 29 (quoting Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 916 (W. Va. 1982)).
37. 2 FARNSWORTH, *supra* note 15, at 28.
38. *Id. See also* 2 FARNSWORTH, *supra* note 15, at 29–30.
39. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. d. *See also* 2 FARNSWORTH, *supra* note 15, at 30.
40. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. d.
41. 2 FARNSWORTH, *supra* note 15, at 28.
42. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. c.
43. *Id.*
44. *Id.*

earning his livelihood.[45] In this situation, the public may be seriously harmed by the impairment of the employee's economic mobility or by the unavailability of the skills developed in his employment.[46]

B. Enforcing Restrictive Covenants in Illinois

Traditionally under Illinois law, restrictive covenants are enforceable only if they are supported by adequate consideration, are ancillary to a valid employment contract or relationship, protect a legitimate business interest, and impose reasonable restrictions.[47] In a recent decision, however, the Fourth District declared the legitimate-business-interest test invalid, threatening the sustainability of this traditional test.[48]

1. Traditional Enforcement of Restrictive Covenants in Illinois

The Illinois Supreme Court has addressed restrictive covenants in restraint of trade for over one-hundred years and, yet, has never mentioned the legitimate-business-interest test by name.[49] Subpart "a" examines the history of Illinois Supreme Court precedent regarding restrictive covenants in restraint of trade. Subpart "b" looks at the history of the legitimate-business-interest test throughout the Illinois Appellate Court.

a) Illinois Supreme Court Precedent

The Illinois Supreme Court first addressed restrictive covenants in 1896 in a case in which the plaintiff, who had been engaged in the livery and undertaking business in Chicago, sued to enforce a restrictive covenant restraining his former partner from engaging in the same business in Chicago for five years.[50] The restrictive covenant arose ancillary to the plaintiff's purchase of defendant's one-half interest in the business.[51] Addressing whether the restriction was valid, the court stated that contracts in total restraint of trade are void upon two grounds: (1) depriving society of the restrained party's industry injures the public, and (2) it injures the

45. *Id.*
46. *Id.*
47. Lawrence & Allen, Inc. v. Cambridge Human Res. Grp., Inc., 685 N.E.2d 434 (Ill. App. Ct. 1997). *See also* Kennedy & Sias, *supra* note 8, at 7–7.
48. Sunbelt Rentals, Inc. v. Ehlers, 915 N.E.2d 862 (Ill. App. Ct. 2009).
49. *See* discussion *infra* Part II.B.1.a.
50. Hursen v. Gavin, 44 N.E. 735, 735 (Ill. 1896). *See also Sunbelt Rentals*, 915 N.E.2d at 867 (discussing Illinois Supreme Court doctrine regarding the enforceability of restrictive covenants).
51. *Hursen*, 44 N.E. at 735.

party himself by being deprived of the opportunity to pursue his occupation.[52]

The *Hursen* court found, however, that a contract in partial restraint of trade is valid, provided it is reasonable and is supported by consideration.[53] In defining a "reasonable" restraint, the court stated:

> The restraint is reasonable when it is such only as to afford a fair protection to the interests of the party in whose favor it is imposed. If the restraint goes beyond such fair protection, it is oppressive to the other party, and injurious to the interests of the public, and consequently void upon the grounds of public policy. A contract in restraint of trade, to be valid, must show that the restraint imposed is partial, reasonable, and founded upon a consideration capable of enforcing the agreement.[54]

Finding the restrictive covenant in the case at bar to be valid, the court stated: "The limitation here did not go beyond what was necessary for the protection of appellee in the prosecution of the business purchased by him, and was therefore reasonable."[55]

The supreme court again addressed the issue of restrictive covenants in 1903.[56] In *Ryan v. Hamilton*, the plaintiff sought an injunction to restrain the defendant from practicing general medicine in or within eight miles of the village of Viola, in Mercer County, Illinois.[57] Upholding the trial court's grant of an injunction, the supreme court found that an injunction is "customary and proper where the limitation as to territory is reasonable and there exists a legal consideration for the restraint."[58]

These foundational legal principles were affirmed by the supreme court in 1956.[59] In *Bauer v. Sawyer*, the supreme court upheld the enforcement of a restrictive covenant arising out of a partnership agreement, which prohibited a former partner from practicing medicine, surgery, or radiology "within a radius of 25 miles of Kankakee for a period of five years."[60] Relying on *Ryan*[61] and *Hursen*,[62] the court stated: "In

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52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 736.
56. Ryan v. Hamilton, 68 N.E. 781 (Ill. 1903). *See also* Sunbelt Rentals, Inc. v. Ehlers, 915 N.E.2d 862, 868 (Ill. App. Ct. 2009) (discussing Illinois Supreme Court doctrine regarding the enforceability of restrictive covenants).
57. *Ryan*, 68 N.E. at 782.
58. *Id.* at 783.
59. Bauer v. Sawyer, 134 N.E.2d 329 (Ill. 1956). *See also Sunbelt Rentals*, 915 N.E.2d at 868 (discussing Illinois Supreme Court doctrine regarding the enforceability of restrictive covenants).
60. *Bauer*, 134 N.E.2d at 331.
61. *Ryan*, 68 N.E. 781. *See supra* text accompanying notes 56–58.
62. Hursen v. Gavin, 44 N.E. 735 (Ill. 1896). *See supra* text accompanying notes 50–55.

determining whether a restraint is reasonable it is necessary to consider whether enforcement will be injurious to the public or cause undue hardship to the promisor, and whether the restraint imposed is greater than is necessary to protect the promisee."[63]

In 1969, the Illinois Supreme Court expanded on the foundational principles governing restrictive covenants and addressed the validity of a restriction by contract upon the right to practice medicine.[64] In *Canfield v. Spear*, a group of physicians associated in a Rockford, Illinois clinic brought suit to enjoin a former associate from practicing medicine in Rockford, or within a 25-mile radius thereof, in violation of his agreement.[65] The former associate had never lived in the Rockford area and brought no clients with him.[66] The supreme court noted:

> He was a newcomer to the community, and it was doubtless through the opportunities provided by this association that he became known in the city. The defendant's promise to temporarily refrain from practicing in the Rockford area if he left the clinic was one of the considerations upon which the plaintiffs accepted him and guaranteed him a substantial income.[67]

With this in mind, the court concluded that the terms of the agreement were not unreasonable and enforced the restrictive covenants in the defendant's contract.[68]

The Illinois Supreme Court further refined the *Canfield* principles in 1972, with its decision in *Cockerill v. Wilson*.[69] The case involved a suit for an injunction to enforce a restrictive covenant in a contract whereby two veterinarians agreed to form an association in Rushville, Illinois.[70] The plaintiff, Dr. Cockerill, practiced as a sole practitioner in Rushville, Illinois from 1958-1965.[71] In 1966, Dr. Cockerill entered into an agreement with Dr. Wilson, the defendant, for the formation of a veterinary medicine association.[72] At the time, Dr. Wilson had been licensed to practice veterinary medicine for a little more than a year and was a "total stranger to the Rushville area."[73] The agreement contained a restrictive covenant

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63. *Bauer*, 134 N.E.2d at 331.
64. Canfield v. Spear, 254 N.E.2d 433, 433 (Ill. 1969).
65. *Id.*
66. *Id.* at 434.
67. *Id.*
68. *Id.* at 435.
69. Cockerill v. Wilson, 281 N.E.2d 648 (Ill. 1972).
70. *Id.* at 649.
71. *Id.*
72. *Id.* The effective date of the agreement was January 1, 1967. *Id.*
73. *Id.*

restricting Dr. Wilson from practicing veterinary medicine, operating an animal health supply store, or operating a small animal clinic within a radius of thirty miles[74] from Rushville, Illinois in the event that Dr. Wilson left the association, whether voluntarily or involuntarily.[75]

In January 1968, Dr. Cockerill terminated the agreement and subsequently sued Dr. Wilson for violating the terms of the restrictive covenant.[76] The supreme court affirmed the trial court's grant of injunction and enjoined the defendant from practicing his profession and engaging in certain business activities in violation of the agreement.[77] In reaching this conclusion, the supreme court stated:

> In considering this issue we must consider that the interest plaintiff sought to protect by the covenant was his interest in his clients. In bringing the defendant into the association plaintiff was thereby bringing him in contact with a clientele which plaintiff had established over a period of years. Plaintiff was naturally interested in protecting his clients from being taken over by defendant as a result of these contacts. The protection of this asset is recognized as a legitimate interest of an employer.[78]

The Illinois Supreme Court has also addressed restrictive covenants regarding secret or confidential information acquired by an employee.[79] As early as 1921, the supreme court stated that a process commonly known in a trade would not be protected by injunction.[80] In 1965, the Illinois Supreme Court greatly expanded this idea by stating: "[An] employee may not take with him confidential particularized plans or processes developed by his employer and disclosed to him while the employer-employee relationship exists, which are unknown to others in the industry and which give the employer advantage over his competitors."[81] Relying on *Iliff*[82] and *Schulenburg*,[83] the supreme court again affirmed this rule of law in 1967.[84]

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74. "The plaintiff later amended the prayer of his complaint reducing the radius of the area affected from 30 miles as provided in the covenant to 20 miles." *Id.*
75. *Id.*
76. *Id.* The trial court granted the injunction and enjoined the defendant from practicing his profession and engaging in certain business activities in violation of the agreement. *Id.* The appellate court, however, modified the decree and permitted the defendant to practice veterinary medicine within the proscribed area but held that the defendant's office had to be located outside of the restricted area. *Id.* As support for its position, the appellate court stated that it was not indicated that the need for the protection of the plaintiff required that the defendant be prohibited from practicing within the twenty-mile radius. *Id.* at 650.
77. *Id.*
78. *Id.* at 651 (citations omitted).
79. *See* Victor Chem. Works v. Iliff, 132 N.E. 806 (Ill. 1921); Schulenburg v. Signatrol, Inc., 212 N.E.2d 865, 869 (Ill. 1965); House of Vision, Inc. v. Hiyane, 225 N.E.2d 21, 24 (Ill. 1967).
80. *Iliff*, 132 N.E. at 811.
81. *Schulenburg*, 212 N.E.2d at 869.

The most recent Illinois Supreme Court decision regarding restrictive covenants was decided in 2007.[85] In *Mohanty v. St. John Heart Clinic*, the supreme court addressed whether the restrictive covenants contained in the contracts of a group of physicians were valid.[86] The physicians made two arguments[87] challenging the enforceability of the restrictive covenants.[88] First, the physicians contended that all restrictive covenants in physician employment contracts should be held void and unenforceable because they are against Illinois public policy.[89] Second, the physicians argued that the restrictive covenants in their employment contracts may not be enforced because they were overly broad in their temporal and activity restrictions and, thus, unreasonable.[90]

The supreme court rejected the physicians' first argument, explaining that a private contract, or provision therein, will not be declared void as contrary to public policy unless it is "clearly contrary to what the constitution, the statutes or the decisions of the courts have declared to be the public policy" or it is clearly shown that the contract is "manifestly injurious to the public welfare."[91] The court also recognized that covenants restricting the performance of medical professional services had been held valid and enforceable in Illinois where their durational and geographic scope were reasonable, taking into account the effect on the public and any undue hardship on the parties to the agreement.[92] Rebutting the physicians' reasons for finding that restrictive covenants should be disfavored in physician employment contracts,[93] the supreme court stated that "restrictive

82. *Iliff*, 132 N.E. 806.
83. *Schulenburg*, 212 N.E.2d 865.
84. House of Vision, Inc. v. Hiyane, 225 N.E.2d 21, 24 (Ill. 1967) ("[W]here specialized knowledge, such as secret processes or the like are involved, restraints may protect against the competition resulting from disclosure or appropriation.").
85. Mohanty v. St. John Heart Clinic, 866 N.E.2d 85 (Ill. 2007). *See also* Sunbelt Rentals, Inc. v. Ehlers, 915 N.E.2d 862, 868 (Ill. App. Ct. 2009) (discussing Illinois Supreme Court doctrine regarding the enforceability of restrictive covenants).
86. *Mohanty*, 866 N.E.2d at 92.
87. The physicians actually advanced three separate theories challenging the enforceability of the restrictive covenants. *Id.* The third theory was that defendants materially breached the employment contracts, thereby relieving plaintiffs of their obligations under the restrictive covenants. *Id.* This theory is not relevant to this Comment.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* (quoting Vine St. Clinic v. HealthLink, Inc., 856 N.E.2d 422, 438 (Ill. 2006)).
92. *Mohanty*, 866 N.E.2d at 94. *See* Cockerill v. Wilson, 281 N.E.2d 648 (Ill. 1972); Canfield v. Spear, 254 N.E.2d 433 (Ill. 1969).
93. The *Mohanty* court stated:

> Plaintiffs provide a laundry list of the possible adverse effects of allowing restrictive covenants in physician employment contracts, namely, that restrictive covenants in physician employment contracts interfere with the doctor-patient relationship, deny patients the freedom to choose their own doctor, create barriers

covenants protect the business interests of established physicians and, in this way, encourage them to take on younger, inexperienced doctors."[94]

The supreme court also rejected the physicians' second argument that the restrictive covenants in their employment contracts were unenforceable "because they [were] unreasonably overbroad in their temporal and activity restrictions."[95] Relying on *Bauer*,[96] the court stated that the restraint on the practice of medicine was not greater than necessary to protect the defendants' interests.[97] In particular, the court noted that the restriction on plaintiffs was in effect only within a narrowly circumscribed area of a large metropolitan region and that this narrow restriction would not cause plaintiffs any undue hardship.[98]

b) History of the Legitimate-Business-Interest Test in Illinois

The First District of Illinois is credited with establishing the legitimate-business-interest test with its decision in *Nationwide Advertising Services, Inc. v. Kolar*.[99] In that case, an advertising agency sought to enforce a restrictive covenant against its former employee.[100] On interlocutory appeal from an order denying enforcement, the agency argued that "under Illinois law an employer such as it had a *legitimate business interest* in its customers which was subject to protection through enforcement of an employee's covenant not to compete."[101] Upon reviewing the cases relied on by the agency,[102] the *Kolar* court wrote:

> [A]n employer's business interest in customers is not always subject to protection through enforcement of an employee's covenant not to compete. Such interest is deemed proprietary and protectable only if certain factors are shown. A covenant not to compete will be enforced if [(1)] the employee acquired confidential information through his

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> to the delivery of quality medical care, hinder competition, and often force patients to incur the additional expense of duplicative testing.

Mohanty, 866 N.E.2d at 93.

94. *Id.* at 95.
95. *Id.* at 98.
96. *See supra* text accompanying note 63.
97. *Mohanty*, 866 N.E.2d at 99.
98. *Id.*
99. Nationwide Adver. Serv., Inc. v. Kolar, 329 N.E.2d 300 (Ill. App. Ct. 1975). *See also* Sunbelt Rentals, Inc. v. Ehlers, 915 N.E.2d 862, 866 (Ill. App. Ct. 2009) (discussing the origins of the legitimate-business-interest test).
100. *Kolar*, 329 N.E.2d at 301.
101. *Id.* (emphasis added).
102. *See* Nationwide Adver. Serv., Inc. v. Kolar, 302 N.E.2d 734, 736–38 (Ill. App. Ct. 1973) (agency relied on Smithereen Co. v. Renfroe, 59 N.E.2d 545 (Ill. App. Ct. 1945); House of Vision, Inc. v. Hiyane, 225 N.E.2d 21 (Ill. 1967); Cockerill v. Wilson, 281 N.E.2d 648 (Ill. 1972); Canfield v. Spear, 254 N.E.2d 433 (Ill. 1969)).

> employment and subsequently attempted to use it for his own benefit. An employer's interest in its customers also is deemed proprietary if, [(2)] by the nature of the business, the customer relationship is near-permanent and but for his association with plaintiff, defendant would never have had contact with the clients in question. Conversely, a protectable interest in customers is not recognized where the customer list is not secret, or where the customer relationship is short-term and no specialized knowledge or trade secrets are involved. Under these circumstances the restrictive covenant is deemed an attempt to prevent competition per se and will not be enforced.[103]

In the thirty years following *Kolar*,[104] each district of the Illinois Appellate Court has applied the legitimate-business-interest test when deciding restrictive covenant cases.[105] In doing so, the Illinois Appellate Court has further defined when an employee will be deemed to have acquired confidential information and when an employer will be deemed to have near-permanent customer relationships.

i. Acquiring Confidential Information

Illinois courts will enforce a covenant not to compete if the employee acquires confidential information through his employment and later attempts to use it for his own benefit.[106] To be considered "confidential," the information must have been developed by the employer "over a number of years at great expense and kept under tight security."[107] Information will not be considered "confidential" where it has not been treated as confidential and secret by the employer, was generally available to other employees and known by persons in the trade, could easily be duplicated by reference to telephone directories or industry publications, and when the customers on such lists did business with more than one company or

103. *Kolar*, 329 N.E.2d at 301–02 (citations omitted).

104. *Kolar*, 329 N.E.2d 300.

105. Sunbelt Rentals, Inc. v. Ehlers, 915 N.E.2d 862, 867 (Ill. App. Ct. 2009). *See* Office Mates 5, N. Shore, Inc. v. Hazen, 599 N.E.2d 1072, 1080 (Ill. App. Ct. 1992) (First District); Dam, Snell & Taveirne, Ltd. v. Verchota, 754 N.E.2d 464, 468–69 (Ill. App. Ct. 2001) (Second District); Hanchett Paper Co. v. Melchiorre, 792 N.E.2d 395, 400 (Ill. App. Ct. 2003) (Third District); Springfield Rare Coin Galleries, Inc. v. Mileham, 620 N.E.2d 479, 485 (Ill. App. Ct. 1993) (Fourth District); Carter-Shields v. Alton Health Inst., 739 N.E.2d 569, 575–76 (Ill. App. Ct. 2000) (Fifth District).

106. *Kolar*, 329 N.E.2d at 301–02.

107. A.J. Dralle, Inc. v. Air Tech., Inc., 627 N.E.2d 690, 697 (Ill. App. Ct. 1994). *See also Mileham*, 620 N.E.2d at 485; Lifetec, Inc. v. Edwards, 880 N.E.2d 188, 196 (Ill. App. Ct. 2007).

otherwise changed business frequently so that their identities were known to the employer's competitors.[108]

In *Lifetec, Inc. v. Edwards*, the Fourth District addressed whether Lifetec, the plaintiff, had protectable confidential information that Edwards, the defendant, gained through his employment with the plaintiff and later attempted to use to his own advantage.[109] The Fourth District stated that the general rule in Illinois is that an employee can take with him general skills and knowledge acquired during the course of his employment but may not take "confidential particularized information disclosed to him during the time the employer-employee relationship existed which are unknown to others in the industry and which give the employer advantage over his competitors."[110] Finding that the defendant's knowledge of "open quotes" pending at the time of his termination could be very damaging to Lifetec, the court upheld the trial court's grant of a preliminary injunction.[111]

In a dissenting opinion, however, Justice Steigmann laid the groundwork for his decision in *Sunbelt Rentals*[112] by stating the legitimate-business-interest test was not valid.[113] Justice Steigmann argued that the majority's analysis should have ended when it recognized that the reasonableness of the terms of the covenants as to time and territory were not in dispute.[114] According to Justice Steigmann, the employer did not need to prove a "protectable" or "legitimate" business interest to support enforcement.[115] Noting the Illinois Supreme Court's decision in *Mohanty*,[116] Justice Steigmann argued that the *Mohanty* court "enforced a restrictive covenant that undermined the physician/patient relationship without even acknowledging the existence of the legitimate-business-interest test."[117]

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108. *Mileham*, 620 N.E.2d at 485; *see also A.J. Dralle, Inc.*, 627 N.E.2d at 697; *Lifetec, Inc.*, 880 N.E.2d at 196.
109. *Lifetec, Inc.*, 880 N.E.2d at 196.
110. *Id.* (quoting Burt Dickens & Co. v. Bodi, 494 N.E.2d 817, 819 (Ill. App. Ct. 1986)).
111. *Lifetec, Inc.*, 880 N.E.2d at 197.
112. Sunbelt Rentals, Inc. v. Ehlers, 915 N.E.2d 862 (Ill. App. Ct. 2009). *See infra* Part II.B.2.
113. *Lifetec, Inc.*, 880 N.E.2d at 200 (Steigmann, P.J., dissenting). Justice Schmidt, sitting in the Illinois Appellate Court for the Third District, has agreed with Justice Steigmann that the legitimate-business-interest test "is no longer valid, if it ever was." Brown & Brown, Inc. v. Mudron, 887 N.E.2d 437, 442–43 (Ill. App. Ct. 2008) (Schmidt, J., dissenting).
114. *Lifetec, Inc.*, 880 N.E.2d at 204 (Steigmann, P.J., dissenting).
115. *Id.*
116. Mohanty v. St. John Heart Clinic, 866 N.E.2d 85 (Ill. 2007). *See supra* Part II.B.1.a.
117. *Lifetec, Inc.*, 880 N.E.2d at 204 (Steigmann, P.J., dissenting).

ii. Establishing a Near-Permanent Relationship

Illinois courts use two tests for evaluating whether an employer has a near-permanent relationship with its customers or clients: the "seven factor" test and the "nature of the business" test.[118]

The "seven factor" test was initially set out by the First District in *McRand, Inc. v. van Beelen*.[119] Courts using the "seven factor" test first analyze objective factors in determining whether a near-permanent relationship exists between an employer and its customers.[120] The factors are:

> (1) the number of years the employer required to develop the clientele, (2) the amount of money the employer invested in developing the clientele, (3) the degree of difficulty in developing the clientele, (4) the amount of personal customer contact by the employee, (5) the extent of the employer's knowledge of its clientele, (6) the length of time the customers have been associated with the employer, and (7) the continuity of the employer-customer relationship.[121]

After evaluating these factors, the second part of the test asks whether, but for the job with the employer, the employee would have come into contact with the customers.[122]

The second test for determining whether an employer has a near-permanent relationship with its customers or clients is the "nature of the business" test.[123] This test recognizes that certain businesses are more amenable to success under the near-permanency test and, therefore, have an easier time proving a legitimate business interest in their customers.[124] For example, plaintiffs have a relatively high degree of success under the near-permanency test where they are engaged in a professional practice, sell a unique product or service, or are under contracts with customers.[125] On the

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118. Outsource Int'l, Inc. v. Barton, 192 F.3d 662, 667 (7th Cir. 1999) (applying Illinois law).
119. McRand, Inc. v. van Beelen, 486 N.E.2d 1306, 1311–12 (Ill. App. Ct. 1985).
120. A.B. Dick Co. v. Am. Pro-Tech, 514 N.E.2d 45, 49 (Ill. App. Ct. 1987).
121. *See A.B. Dick Co*., 514 N.E.2d at 49; *McRand, Inc*., 486 N.E.2d at 1311–12; Agrimerica, Inc. v. Mathes, 557 N.E.2d 357, 363 (Ill. App. Ct. 1990); Hanchett Paper Co. v. Melchiorre, 792 N.E.2d 395, 401 (Ill. App. Ct. 2003).
122. *McRand, Inc*., 486 N.E.2d at 1312 (citing Cockerill v. Wilson, 281 N.E.2d 648 (Ill. 1972); Canfield v. Spear, 254 N.E.2d 433 (Ill. 1969)).
123. *Outsource Int'l*, 192 F.3d at 667.
124. Office Mates 5, N. Shore, Inc. v. Hazen, 599 N.E. 2d 1072, 1081 (Ill. App. Ct. 1992).
125. *Id. See* Frank B. Hall & Co. v. Payseur, 396 N.E.2d 1246 (Ill. App. Ct. 1979) (insurance brokerage); Booth v. Greber, 363 N.E.2d 6 (Ill. App. Ct. 1977) (electrolysis); Wolf & Co. v. Waldron, 366 N.E.2d 603 (Ill. App. Ct. 1977) (certified public accountants); Arpac Corp. v. Murray, 589 N.E.2d 640 (Ill. App. Ct. 1992) (manufacturer of sophisticated and complicated shrink or plastic wrap packaging machinery); *A.B. Dick Co*., 514 N.E.2d 45 (maintenance and

other hand, plaintiffs have less success under the near-permanency test when they are engaged in businesses where customer loyalty is not endangered and customers can meet their needs by using several suppliers simultaneously.[126] Such a business is largely characterized by the existence of a highly-competitive industry in which customers satisfy their buying needs through cross-purchasing.[127] Therefore, the "nature of the business" test is divided into two categories based on the type of business at issue: sales, when generally no permanent relationship exists with customers, and professional services, when generally a near-permanent relationship is presumed to exist.[128]

2. The Fourth District's Decision in Sunbelt Rentals Inc. v. Ehlers

Sunbelt Rentals, Inc. rented and sold industrial equipment to commercial and residential customers in 400 nationwide branches.[129] In May 2003, Ehlers accepted a sales representative position with Sunbelt.[130] In June 2003, Ehlers entered into a written employment agreement with Sunbelt, which contained restrictive covenants prohibiting Ehlers from competing with Sunbelt for a period of one year after the termination of the agreement.[131]

As a sales representative, Ehlers was responsible for (1) developing and maintaining a customer base with construction, agricultural, and industrial clients and (2) all aspects of the client relationship, including sales, rentals, negotiations, scheduling, delivery, and billing.[132] Ehlers performed his duties for Sunbelt at its Bloomington, Illinois branch until March 2008, when Sunbelt transferred him to its Champaign, Illinois branch.[133] While in Champaign, Ehlers continued to perform his sales responsibilities.[134]

In early January 2009, Ehlers accepted a sales representative position with Midwest Aerials & Equipment, Inc. in its Bloomington, Illinois

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repair services for copiers, microfiche, and offset printing equipment); J.D. Marshall Int'l, Inc. v. Fradkin, 409 N.E.2d 4 (Ill. App. Ct. 1980) (exclusive exporter of domestic manufacturers).

126. *Office Mates*, 599 N.E. 2d at 1082. *See* Label Printers v. Pflug, 564 N.E.2d 1382 (Ill. App. Ct. 1991); Southern Ill. Med. Bus. Assoc. v. Camillo, 546 N.E.2d 1059 (Ill. App. Ct. 1989); Reinhardt Printing Co. v. Feld, 490 N.E.2d 1302 (Ill. App. Ct. 1986).

127. *Office Mates*, 599 N.E.2d at 1082.

128. *See* Lawrence & Allen, Inc. v. Cambridge Human Res. Group, Inc., 685 N.E.2d 434, 444 (Ill. App. Ct. 1997); Springfield Rare Coin Galleries, Inc. v. Mileham, 620 N.E.2d 479, 487 (Ill. App. Ct. 1993).

129. Sunbelt Rentals, Inc. v. Ehlers, 915 N.E.2d 862, 863 (Ill. App. Ct. 2009).

130. *Id.*

131. *Id.* at 863–64.

132. *Id.* at 863.

133. *Id.* at 864.

134. *Id.*

office.[135] Midwest was engaged in the business of renting and selling aerial work platforms to industrial and construction customers.[136] On January 16, 2009, Sunbelt terminated Ehlers' employment after Ehlers offered Sunbelt his written resignation.[137] Ehlers did not provide a reason for his departure.[138] Sunbelt soon discovered, however, that Ehlers had accepted a sales position with Midwest.[139]

In February 2009, Sunbelt sued Ehlers and Midwest seeking preliminary and permanent injunctive relief.[140] Specifically, Sunbelt claimed that (1) Ehlers violated the restrictive covenants of his employment agreement with Sunbelt when he accepted Midwest's employment offer and (2) Midwest tortiously interfered with Sunbelt's employment agreement with Ehlers.[141] In granting Sunbelt a preliminary injunction, the trial court found that the time-and-territory terms of the restrictive covenants in Sunbelt's employment agreement with Ehlers were reasonable.[142] Thus, the trial court enjoined Ehlers and Midwest from violating the restrictive covenants of Ehlers' employment agreement with Sunbelt.[143] In reaching its decision, the trial court recognized the legitimate-business-interest test but did not specifically apply the test.[144] Rather, the court determined that the legitimate-business-interest test had been encompassed by the time-and-territory reasonableness test recently used by the supreme court in *Mohanty v. St. John Heart Clinic*.[145, 146]

On appeal, the Fourth District Appellate Court of Illinois addressed whether the trial court abused its discretion by issuing a preliminary injunction because (1) the court failed to follow controlling precedent and (2) Sunbelt did not have a sufficient legitimate business interest.[147]

The Fourth District began its analysis with a summary of Illinois precedent regarding the legitimate-business-interest test, noting that it had been "cited in one form or another by all the districts of the Illinois Appellate Court, including this one, when deciding restrictive-covenant

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135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 865.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. Mohanty v. St. John Heart Clinic, 866 N.E.2d 85 (Ill. 2007). *See supra* text accompanying notes 85–98.
146. *Sunbelt Rentals*, 915 N.E.2d at 865.
147. *Id.* at 863.

cases."[148] The court, however, asserted that the Illinois Appellate Court created the legitimate-business-interest test "out of whole cloth."[149] Accordingly, the Fourth District rejected the legitimate-business-interest test "because (1) the Supreme Court of Illinois has never embraced the 'legitimate-business-interest' test and (2) its application is inconsistent with the supreme court's long history of analysis in restrictive covenant cases . . . ."[150] In doing so, the Fourth District provided courts with a test to employ when presented with the issue of whether a restrictive covenant should be enforced.[151] The court stated:

> The lesson of the supreme court's decisions . . . is that courts at any level, when presented with the issue of whether a restrictive covenant should be enforced, should evaluate only the time-and-territory restrictions contained therein. If the court determines that they are not unreasonable, then the restrictive covenant should be enforced. Thus, this court need not engage in an additional discussion regarding the application of the "legitimate-business-interest" test because that test constitutes nothing more than a judicial gloss incorrectly applied to this area of law by the appellate court.[152]

The Fourth District held that the restrictions in Ehlers' contract were reasonable and consistent with supreme court precedent on time-and-territory restrictions.[153]

III. ANALYSIS

For over thirty years, Illinois courts have applied the legitimate-business-interest test when analyzing whether a restrictive covenant in restraint of trade is valid.[154] In applying the legitimate-business-interest test, courts have cited to Illinois Supreme Court precedent as support for its origin.[155] The Fourth District, however, has recently rejected the legitimate-business-interest test, stating that it has no basis in Illinois precedent and was created "out of whole cloth."[156] Illinois courts should not follow the Fourth District's abandonment of the legitimate-business-

148. *Id.* at 867.
149. *Id.*
150. *Id.* at 870.
151. *Id.* at 869.
152. *Id.*
153. *Id.* at 871.
154. *See id.* at 867.
155. *See* Nationwide Adver. Serv., Inc. v. Kolar, 329 N.E.2d 300, 301–02 (Ill. App. Ct. 1975).
156. *Sunbelt Rentals*, 915 N.E.2d at 867.

interest test because it deviates from precedent and fundamental policy concerns, leaving employees subject to the whims of employers.

This section offers a reassessment of the legitimate-business-interest test and proposes a solution to the conflict among the five districts of the Illinois Appellate Court. Specifically, Part A reassesses the validity of the legitimate-business-interest test in Illinois and argues that the test promotes good public policy in Illinois; Part B suggests a possible resolution to the conflict among the Illinois Appellate Court that would allay possible concerns of the Fourth District.

A. Reassessment of the Legitimate-Business-Interest Test

This section reassesses the validity of the legitimate-business-interest test by examining the test's origin in Illinois precedent. Finding that the legitimate-business-interest test is valid, this section then argues that the test should be utilized by Illinois courts because it promotes good public policy.

1. The Legitimate-Business-Interest Test is Consistent with Illinois Precedent

In promulgating the legitimate-business-interest test, the First District cited to Illinois Supreme Court precedent as support for its conclusion that certain factors must be shown for an employee's business interest to be deemed proprietary and protectable.[157] A review of the cases cited, and other Illinois Supreme Court precedent, reveals that the legitimate-business-interest test is rooted in Illinois Supreme Court precedent.

The First District's conclusion that an employer can demonstrate a protectable business interest by proving that the employee acquired confidential information through his employment and subsequently attempted to use it for his own benefit[158] is entrenched in Illinois Supreme Court precedent.[159] For almost nine decades, the supreme court has protected employers' trade secrets through the enforcement of restrictive covenants.[160] In *House of Vision v. Hiyane*, the supreme court stated: "[W]here specialized knowledge, such as secret processes or the like are involved, restraints may protect against the competition resulting from

157. *See Kolar*, 329 N.E.2d at 301–02 (citing Cockerill v. Wilson, 281 N.E.2d 648 (Ill. 1972); Canfield v. Spear, 254 N.E.2d 433 (Ill. 1969)).
158. *Kolar*, 329 N.E.2d at 302.
159. *See* Victor Chem. Works v. Iliff, 132 N.E. 806 (Ill. 1921); Schulenburg v. Signatrol, Inc., 212 N.E.2d 865, 869 (Ill. 1965); House of Vision, Inc. v. Hiyane, 225 N.E.2d 21, 24 (Ill. 1967).
160. *See Iliff*, 132 N.E. at 806; *Schulenburg*, 212 N.E.2d at 869; *House of Vision*, 225 N.E.2d at 24.

disclosure or appropriation."[161] The language employed by the First District in pronouncing the legitimate-business-interest test parallels the language used by the Illinois Supreme Court in *House of Vision*.[162]

Likewise, the First District's requirement that an employer demonstrate near-permanent customer relationships and that but for his association with the employer, the employee would never have had contact with the clients in question,[163] is based on Illinois Supreme Court precedent. In 1896, the Illinois Supreme Court defined a restraint as "reasonable" when it is written "only as to afford a fair protection to the interests of the party in whose favor it is imposed."[164] Sixty years later, the supreme court stated that reasonableness depends on whether the restraint imposed is greater than is necessary to protect the promisee.[165] These definitions of "reasonable" force courts analyzing the enforcement of a restrictive covenant to look at the interests of the promisee.

Applying these definitions in *Canfield v. Spear*[166] and *Cockerill v. Wilson*,[167] the Illinois Supreme Court necessarily looked to the interests the plaintiffs were trying to protect. In *Canfield*, the supreme court noted that the defendant was a newcomer to the community and that he became known in the city of Rockford only because of his affiliation with the plaintiffs.[168] Thus, the court concluded the restrictive covenants in the defendant's contract were reasonable because of the plaintiffs' interest in protecting their clientele.[169] Similarly, the supreme court noted in *Cockerill* that the interest the plaintiff sought to protect by the restrictive covenant was his interest in his clients.[170] The court observed that by bringing the defendant into the association, the plaintiff was bringing him in contact with a clientele which plaintiff had established over a period of years.[171] Enforcing the restrictive covenant, the court concluded the protection of clientele was a legitimate interest of an employer.[172]

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161. *House of Vision*, 225 N.E.2d at 24.
162. *Compare id.* ("[W]here specialized knowledge, such as secret processes or the like are involved, restraints may protect against the competition resulting from disclosure or appropriation."), *with Kolar*, 329 N.E.2d at 302 ("A covenant not to compete will be enforced if the employee acquired confidential information through his employment and subsequently attempted to use it for his own benefit.").
163. *Kolar*, 329 N.E.2d at 302.
164. Hursen v. Gavin, 44 N.E. 735, 735 (Ill. 1896).
165. Bauer v. Sawyer, 134 N.E.2d 329, 331 (Ill. 1956).
166. Canfield v. Spear, 254 N.E.2d 433 (Ill. 1969).
167. Cockerill v. Wilson, 281 N.E.2d 648 (Ill. 1972).
168. *Canfield*, 254 N.E.2d at 434.
169. *See id.* at 434–35.
170. *Cockerill*, 281 N.E.2d at 651.
171. *Id.*
172. *Id.*

From this precedent, the First District correctly discerned that an employer has a proprietary interest in its customers if the customer relationship is near-permanent and if defendant would never have had contact with the clients in question but for the association with plaintiff.[173] The requirement of near-permanency flows naturally from both *Canfield*[174] and *Cockerill*.[175] Furthermore, a near-permanency requirement is consistent with Illinois's historical requirement that courts look at the promisee's interest to decide the reasonableness of a restrictive covenant.

The Fourth District's main argument for invalidating the legitimate-business-interest test was that the test has not been embraced by the Illinois Supreme Court.[176] As main support for his argument, Justice Steigmann discussed the supreme court's most recent decision on the enforceability of a restrictive covenant.[177] Justice Steigmann noted that in *Mohanty v. St. John Heart Clinic*,[178] the supreme court enforced a restrictive covenant that undermined the physician-patient relationship without even acknowledging the existence of the legitimate-business-interest test.[179] In particular, Justice Steigmann remarked that the Illinois Supreme Court considered the parties' evidence to determine only whether the limitations as to time and territory were unreasonable.[180] Concluding that the limitations as to time and territory were not unreasonable, the *Mohanty* court enforced the restrictive covenant.[181]

While Justice Steigmann's observations are correct, he fails to note particular language used by the Illinois Supreme Court that mirrors the language of the legitimate-business-interest test. Rebutting the physicians' reasons for finding that restrictive covenants should be disfavored in physician employment contracts,[182] the supreme court stated that "restrictive covenants protect the business interests of established physicians and, in this way, encourage them to take on younger,

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173. *See* Nationwide Adver. Serv., Inc. v. Kolar, 329 N.E.2d 300, 302 (Ill. App. Ct. 1975) (citing *Cockerill*, 281 N.E.2d 648; *Canfield*, 254 N.E.2d 433).
174. *Canfield*, 254 N.E.2d 433.
175. *Cockerill*, 281 N.E.2d 648.
176. Sunbelt Rentals, Inc. v. Ehlers, 915 N.E.2d 862, 870 (Ill. App. Ct. 2009). *See also* Lifetec, Inc. v. Edwards, 880 N.E.2d 188, 201 (Ill. App. Ct. 2007) (Steigmann, P.J., dissenting).
177. *Sunbelt Rentals*, 915 N.E.2d at 868–69. *See also Lifetec, Inc*., 880 N.E.2d at 203–04 (Steigmann, P.J., dissenting).
178. Mohanty v. St. John Heart Clinic, 866 N.E.2d 85 (Ill. 2007).
179. *Sunbelt Rentals*, 915 N.E.2d at 868. *See also Lifetec, Inc*., 880 N.E.2d at 204 (Steigmann, P.J., dissenting).
180. *Sunbelt Rentals*, 915 N.E.2d at 869. *See also Lifetec, Inc*., 880 N.E.2d at 204 (Steigmann, P.J., dissenting).
181. *Sunbelt Rentals*, 915 N.E.2d at 869. *See also Lifetec, Inc*., 880 N.E.2d at 204 (Steigmann, P.J., dissenting).
182. *See supra* note 93.

inexperienced doctors."[183] Though not specifically using the term "legitimate business interest," the supreme court was obviously referring to the physicians' business interests in their clientele. The *Mohanty* court recognized that an established physician is not likely to take on younger doctors, bringing them into contact with clientele the established physician spent years developing, if there is a chance the younger doctors could leave and take clients with them.

Thus, the *Mohanty* court clearly acknowledged the near-permanent relationship between physicians and their patients. Furthermore, physicians provide professional services where, generally, a near-permanent relationship is presumed to exist.[184] For that reason, the supreme court only had to address whether the time and territory restrictions were reasonable.[185]

In light of the above authority, it is apparent that the legitimate-business-interest test is founded in Illinois Supreme Court precedent. The supreme court cases cited above are in direct conflict with Justice Steigmann's statement that the Illinois Appellate Court created the legitimate-business-interest test "out of whole cloth."[186] Thus, the Fourth District's argument that the Illinois Supreme Court has never embraced the legitimate-business-interest test lacks support.

2. The Legitimate-Business-Interest Test Promotes Good Public Policy

Illinois courts have found contracts in total restraint of trade void because of the injury to the public and because of the injury to the person being restrained.[187] A contract in total restraint of trade injures the public because the public is deprived of the productiveness and utility of the person being restrained.[188] The restrained person is injured by a contract in total restraint of trade because he or she is being deprived of the

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183. *Mohanty*, 866 N.E.2d at 95.

184. *See* Lawrence & Allen, Inc. v. Cambridge Human Res. Group, Inc., 685 N.E.2d 434, 444 (Ill. App. Ct. 1997); Springfield Rare Coin Galleries, Inc. v. Mileham, 620 N.E.2d 479, 487 (Ill. App. Ct. 1993).

185. *See also* Alexis Costello, *Fourth District's "Lack of Interest" Makes Non-Competition Agreements Easier to Enforce*, 22 DUPAGE COUNTY BAR ASS'N BRIEF 38, 42 (2010) ("A further analysis of the *Mohanty* decision, however, suggests that the court recognized the already stated presumption that physicians have a legitimate business interest that needs to be protected, namely their practice; therefore, if the time and territory restrictions are reasonable, the agreement will likely be upheld.").

186. *Sunbelt Rentals*, 915 N.E.2d at 867.

187. *See* Hursen v. Gavin, 44 N.E. 735, 735 (Ill. 1896) ("Undoubtedly, contracts in total restraint of trade are void . . . ."); Ryan v. Hamilton, 68 N.E. 781, 783 ("That contracts in general restraint of trade are generally held to be illegal is beyond controversy.").

188. *Hursen*, 44 N.E. at 735.

opportunity to practice his or her occupation and earn an income.[189] Contracts in partial restraint of trade, however, have traditionally been enforced by Illinois courts as long as the restraint is supported by adequate consideration, is ancillary to a valid employment contract or relationship, protects a legitimate business interest, and imposes reasonable restrictions.[190] The limitations imposed on contracts in partial restraint of trade ensure that restrictive covenants will not unduly injure the public or the person being restrained.

If the legitimate-business-interest test were abandoned, however, employers would be able to enforce restrictive covenants broadly, injuring both the public and the restrained person. Presumably, an employer seeking to enforce a restrictive covenant would only have to demonstrate the restraint is ancillary to another valid agreement and the restraint is reasonable.[191] In an employment context, the requirement of ancillarity would always be met if the restrictive covenant were included as part of an employment agreement.[192] Therefore, this requirement would not provide any form of limitation on the enforceability of an employer's restrictive covenant.

Similarly, the requirement that a restraint be reasonable would not impose any form of limitation on the enforceability of an employer's restrictive covenant. Without a requirement that an employer's business interest be "legitimate," an employer will always be able to claim that he or she has an interest in limiting competition by former employees. Without the legitimate-business-interest test, this argument will have merit because the former employee will have developed some enhanced skill while working for the former employer which the employee would not have acquired but for the employment. Therefore, a competitor would gain the benefit of the employee's enhanced abilities without paying for the cost of training the employee to develop those abilities.

Thus, if Illinois courts were to adopt this method of determining "reasonableness," employers could place broad restraints into the contracts of every single employee, for no other reason than to stifle competition, and the restraints would be enforced so long as the time and territory restrictions were not unreasonable.[193] For instance, an employer could place a covenant

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189. *Id.*

190. Lawrence & Allen, Inc. v. Cambridge Human Res. Group, Inc., 685 N.E.2d 434, 440 (Ill. App. Ct. 1997).

191. *See id.*

192. *See* RESTATEMENT (SECOND) OF CONTRACTS § 187 cmt. b (1981).

193. *See also* Costello, *supra* note 185, at 44 ("Without finding a legitimate business interest, employers may be able to manipulate a non-competition agreement such that it looks reasonable in time and territory, yet the true purpose of the non-competition agreement may be nothing more than an attempt to avoid competition.").

not-to-compete within a five-mile radius for six months in the contract of a janitor. Without the legitimate-business-interest test, this restrictive covenant would presumably be upheld even though the employer has no legitimate business interest in having the janitor not compete with his business. The restraint would simply be a drain on society and a detriment to the employee.

The legitimate-business-interest test, however, recognizes that determining the reasonableness of restraints cannot be done in a vacuum. Rather, it is necessary to ask, "Reasonable in relation to what?" Because Illinois Supreme Court precedent defines "reasonable" in a way that mandates courts analyzing the enforcement of a restrictive covenant to look at the interests of the promisee,[194] the answer must be "in relation to the interests the employer wants to protect."[195] Thus, the legitimate-business-interest test promotes good public policy by forcing employers to demonstrate that the restraint is needed for the protection of confidential information or near-permanent customer relationships.[196] The legitimate-business-interest test, therefore, ensures that the restraint will not be oppressive to the person being restrained and will not be injurious to the interests of the public.

B. Resolution

For the past thirty years, employers in Illinois seeking to enforce a restrictive covenant have had the burden of proving a legitimate business interest.[197] After the *Sunbelt Rentals* decision, however, employers in the Fourth District need only demonstrate that the time and territory restrictions are reasonable.[198] While the reasoning in *Sunbelt Rentals* is flawed, the Fourth District might have a valid argument that Illinois courts have been too limited in defining what interests are "legitimate." Limiting legitimate business interests to either confidential information or near-permanent customer relationships may place too high of a burden on employers while not providing adequate protection to their interests.

The solution, however, is not to abandon the legitimate-business-interest test. As Section III.A.2 of this Comment demonstrates, abandoning the legitimate-business-interest test deviates from fundamental public policy concerns and leaves employees without protection from an employer's desired contract terms. Rather, the solution is to expand the

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194. *See supra* text accompanying notes 164–65.
195. *See* discussion *supra* Part II.B.1.
196. *See* Nationwide Adver. Serv., Inc. v. Kolar, 329 N.E.2d 300, 301–02 (Ill. App. Ct. 1975).
197. *See id.*
198. *See* Sunbelt Rentals, Inc. v. Ehlers, 915 N.E.2d 862, 869 (Ill. App. Ct. 2009).

categories of legitimate business interests. Courts outside of Illinois have generally stated that if the restraint on trade is ancillary to an employment contract, "the central inquiry must always be the extent to which the employee may unjustly enrich himself by appropriating an asset of the employer for which the employee has not paid and using it against that very employer."[199] While allowing employers to protect more than simply confidential information or near-permanent customer relationships, this generic test still ensures that courts analyzing the reasonableness of restrictive covenants look at the interests the promisee is trying to protect. By focusing on the promisee's legitimate interests, the test protects the public and the person being restrained from being unduly injured.

In fact, the Illinois Supreme Court may purposely be evading the term "legitimate-business-interest test" for this very reason. While recognizing that confidential information and near-permanent customer relationships are protectable business interests,[200] the supreme court has yet to apply the legitimate-business-interest test by name. Rather than be confined to the Illinois Appellate Court's legitimate-business-interest test, the Illinois Supreme Court may be allowing itself more flexibility and latitude for assessing restrictive covenants.

If the Fourth District's concern is that the legitimate-business-interest test places too great a burden on employers, the solution is not to completely do away with the legitimate-business-interest test. Keeping in mind important public policy concerns, a logical solution to the rift within the Illinois Appellate Court is to expand the categories of legitimate business interests. An expansion of legitimate-business-interest categories would lessen the burden employers face while still protecting the public and the person restrained from being unreasonably injured.

IV. CONCLUSION

The legitimate-business-interest test has been applied by the Illinois Appellate Court when determining the reasonableness of restrictive covenants for over thirty years. In a recent decision, however, the Fourth District held the legitimate-business-interest test invalid. The Fourth District stated that the test had never been embraced by the Illinois Supreme Court and was inconsistent with supreme court precedent. A review of Illinois precedent, however, reveals that the legitimate-business-interest test is rooted in Illinois Supreme Court decisions. Further, the legitimate-

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199. 2 FARNSWORTH, *supra* note 15, at 29 (quoting Reddy v. Cmty. Health Found. Of Man, 298 S.E.2d 906, 916 (W. Va. 1982)).

200. *See* House of Vision, Inc. v. Hiyane, 225 N.E.2d 21, 24 (Ill. 1967); Cockerill v. Wilson, 281 N.E.2d 648, 651 (Ill. 1972).

business-interest test promotes good public policy that has been recognized by Illinois courts for over one-hundred years. By rejecting the legitimate-business-interest test, the Fourth District deviated from this public policy and left employees susceptible to broad restraints imposed by employers. Instead of abolishing the legitimate-business-interest test altogether, Illinois courts should redefine the test, keeping in mind the essential public policy at stake. In this way, Illinois courts can broaden the categories of enforceable restrictive covenants while still protecting employees and the public from sweeping restraints.