Covenants Not to Compete: The Real Question for Enforcement

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I. INTRODUCTION

In 1776, in AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Adam Smith wrote that the real price of everything is the toil and trouble of acquiring it.[1] Likewise, John Locke proposed that one acquires an ownership of property in those things with which he joins his own labor.[2] Our nation's founding documents and our national conscience reflect the moral values expressed by Smith and Locke. Two centuries of market economy built on these

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1. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 21 (Digireads.com Publishing 2009) (1776).

2. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

doctrines of property and profit create the controversies inherent in drafting and enforcing covenants not to compete.[3]

A covenant not to compete is a contract. The sanctity of contract in law parallels the almost religious belief in the ownership of property. This, in turn, is the foundation of market economy and competitive capitalism. On one hand, our society recognizes the benefits of the competitive marketplace. In theory, it nurtures higher quality production and products, labor and service, and all at the best prices to the consumer. On the other hand, our society values equally the predictability and security available for parties free to contract and the companion right of the individual to own property. We expect the legal infrastructure to protect not only the right to contract but also the ownership of property.

Contract is not the only source of these conflicting protections. Common law employment loyalty and intellectual property laws recognize such rights.[4] However, covenants not to compete represent a front line between them. In a highly mobile society, employers know that the best-qualified applicants often come from their competitors. As of March 2011, the Bureau of Labor Statistics reported that professional and business services, areas where the most covenant agreements exist, hired the most employees of any industry.[5] In December 2015, this sector still had among the highest number of open jobs available and among the highest growth rate.[6]

Some conclusions have been drawn based on a longitudinal survey of the number of jobs held, labor market activity, and earnings growth among the youngest baby boomers. These results show that, on average, the least educated men changed jobs more often than the most

3. Black's Law Dictionary defines covenant not to compete as follows: "A promise, usu. in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer." *Covenant*, BLACK'S LAW DICTIONARY (10th ed. 2014).

4. *See* discussion *infra* Section III.

5. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, JOB OPENINGS AND LABOR TURNOVER SURVEY—MARCH 2011 2 (May 11, 2011), https://www.bls.gov/news.release/archives/jolts_05112011.pdf.

6. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, JOB OPENINGS AND LABOR TURNOVER—DECEMBER 2015, tbl. 1 (Feb. 9, 2016), https://www.bls.gov/news.release/archives/jolts_02092016.pdf.

educated men across the survey age group, while the opposite was true among women.[7]

> Men without a high school diploma held 13.3 jobs from ages of 18 to 44, while men with a bachelor's degree or more education held 11.0 jobs. Women with at least a bachelor's degree held 11.7 jobs from ages 18 to 44, compared to an average of 9.7 jobs for women without a high school diploma.[8]

The younger baby boomers considered by the study were born between 1957 and 1964.[9]

Therefore, the largest single work force age group approaching retirement has set the standard and the pattern for a highly mobile employment life. The competitive market for labor requires employers, especially in business and professional services, to hire from their competition. Employers need to attract and retain qualified candidates. At the same time, they must find a way to prevent a drain on protectable business information and other assets when the same employees decide to move on.

The purpose of this Article is two-fold. First, it will evaluate and illustrate the standard balancing tests in the law between enforcement of contract covenants not to compete in employment and the refusal to do so as an unreasonable restraint of trade. Second, it will offer a new focus for clarifying enforceability to assist businesses and the courts going forward. Definitional cases from several state courts are cited. A few cases are briefed to illustrate the tensions in the balancing formulas. I suggest that the standard approach illustrated by the Tennessee cases represent the majority of jurisdictions. The prob-

7. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, NUMBER OF JOBS HELD, LABOR MARKET ACTIVITY, AND EARNINGS GROWTH AMONG THE YOUNGEST BABY BOOMERS: RESULTS FROM A LONGITUDINAL STUDY 2 (Mar. 31, 2015), https://www.bls.gov/news.release/pdf/nlsoy.pdf.

8. U.S DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, NUMBER OF JOBS, HELD, LABOR MARKET ACTIVITY, AND EARNINGS GROWTH AMONG THE YOUNGEST BABY BOOMERS: RESULTS FROM A LONGITUDINAL SURVEY 2 (September 10, 2010), https://www.bls.gov/news.release/archives/nlsoy_09102010.pdf.

9. *Id.* at 1.

lem is that this approach invites litigation and leaves open more questions than answers. Nineteen states have regulatory statutes governing enforceability in this context.[10] These various statutes codify the common law problems instead of offering solutions. The court decisions and statutes create insecurity on two fronts. The freedom of qualified employees in affected industries to move from job to job can be restricted, while, at the same time, employers fear losing important competitive information and other business assets.

Therefore, it is proposed that employers, the Bar, and the judiciary, be reacquainted with the real value of an employee under a more Lockean theory of property. For example, we ask what the employer has added to the value of the employee that legally, and enforceably, should remain secure from competitors? And upon what terms? My solution retains some of the current balancing approach used in opinions, but simplifies it, creating better security in the protection of property and restraint of unfair competition by clarifying the property right. This is not a new idea but one that requires a fresh priority of focus. The definitions will better assess the protectable interests of an employer, and, thereby, more clearly define those interests for the purpose of drafting and enforcing covenants not to compete.

In Section II, this Article will evaluate the current balancing test of "reasonableness" and how it is illustrated in a variety of cases. In the third part, this Article will evaluate the reasoning behind those decisions, and whether the conclusions might be better resolved by an evaluation that simply decides whether the employer has given the employee the fruit of its labor in tangible or intangible form, limiting the employee's freedom to move that asset pursuant to ordinary rules of the ownership of property. The goal is to refine the factual and legal analysis to subsume a number of current factors in one idea for clearer guidelines going forward.

10. *See* RUSSELL BECK, EMPLOYEE NONCOMPETES: A STATE BY STATE SURVEY (2014), http://www.beckreedriden.com/wp-content/uploads/2013/08/Noncompetes-50-State-Survey-Chart-20130814.pdf.

II. THE CURRENT BALANCING TEST

A. Some Primary Definitional Cases

The following is not intended to be an exhaustive study of all the cases in Tennessee that evaluate covenants not to compete. The cases used are seminal or illustrative of the current law. They have been chosen to demonstrate the values that consistently govern the controversy.

It has been noted, without surprise, that non-compete covenants have become common, and enforcement varies from state to state.[11] That being said, "the majority of states enforce these agreements by the 'rule of reason'—considering an agreement valid if it does not prevent the individual from being gainfully employed and if it does not appear longer in duration or broader in scope than necessary to protect the employer."[12]

It has been asserted that the enforcement of non-compete clauses "significantly impedes entrepreneurship and employment growth."[13] At the same time, it is acknowledged, however, that enforcement of such agreements could promote innovation and economic growth by encouraging employers to develop certain sorts of assets.[14]

B. The Rule of Reasonableness

AssuredPartners, Inc. v. Schmitt[15] cites the Illinois Supreme Court "rule of reasonableness test" to determine the enforceability of a restrictive covenant.[16] The opinion defines the test as follows: "A restraint on trade is reasonable only if it: (1) is no greater than is required to protect a legitimate business interest of the employer; (2)

11. Sampsa Samila & Olav Sorenson, *Non-Compete Covenants: Incentives to Innovate or Impediments to Growth*, SOC. SCI. & HUMANIT. RES. COUNCIL OF CAN. 1, 2 (Oct. 5, 2010), https://ssrn.com/abstract=1411172.

12. *Id.* at 5 (citing Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 629 (1999)).

13. *Id.* at 1.

14. *Id.* at 3.

15. 44 N.E.3d 463, 471 (Ill. App. Ct. 2015).

16. *Id*. (citing Reliable Fire Equip. Co. v. Arredondo, 965 N.E.2d 393 (Ill. 2011)).

does not impose undue hardship on the employee; and (3) is not injurious to the public."[17]

In *AssuredPartners*, the employee, Schmitt, was working as a professional liability insurance broker for ProAccess, LLC, when it was acquired by AssuredPartners in 2011.[18] Schmitt signed a covenant not to compete as part of the original employment agreement with ProAccess and built a substantial book of business for ProAccess between 2006 and 2011, before the acquisition.[19] In the original agreement, the parties carved out the book of business in attorney professional liability insurance that Schmitt had created prior to coming to ProAccess.[20] Shmitt's expertise and success remained in professional liability insurance, primarily for attorneys.[21] As part of the acquisition, AssuredPartners required new agreements, and the non-compete provisions restricted Schmitt from engaging in any insurance brokerage of any kind anywhere in the United States or its territories in the event of his separation.[22] Schmitt signed the agreement only after having his own attorney review it.[23] Upon his resignation from AssuredPartners, Schmitt began immediately brokering wholesale attorney professional liability insurance with another retail insurance group.[24]

The court found enforcement of the covenant unreasonable on these facts.[25] The opinion noted that the parties had originally carved out the professional liability experience from the first covenant, acknowledging Schmitt's prior expertise in this area and his valuable contacts.[26] Furthermore, Schmitt developed this niche for Assured.[27] Also, it was important to the court that the broad language of the covenant virtually prevented Schmitt from brokering any kind of insurance rather than limiting him to activities developed by Assured.[28]

17. *Id.*
18. *Id.* at 467.
19. *Id.*
20. *Id.*
21. *Id.* at 466.
22. *Id.* at 467.
23. *Id.* at 468.
24. *Id.* at 469.
25. *Id.* at 472.
26. *Id.* at 467.
27. *Id.* at 472.
28. *Id.* at 472–73.

AssuredPartners is helpful in showing the implicit property principle behind the rationale of the rule of reasonableness. However, the vague terms "unreasonableness" and "legitimate business interests" create barriers to seeing the real value at issue in the case. Schmitt brought with him the property he acquired, defined by valuable contacts and experience in a niche market. AssuredPartners benefitted from this asset during his employment with them but did not create that asset. This property evaluation is much clearer than the idea of a rule of reasonableness or trying to define legitimate business interests.[29]

The Tennessee Supreme Court evaluated a standard covenant not to compete in *Central Adjustment Bureau, Inc. v. Ingram*,[30] which has become the foundation of the law on this topic in Tennessee. Although the primary issue in that case was the sufficiency of the consideration for the covenant not to compete as a contract, the Court also addressed both the enforceability of that particular covenant, and covenants generally.[31] The Court noted that the question of "whether the chancellor had the authority to modify a covenant not to compete which is otherwise unreasonably broad," was a matter of first impression.[32] In deciding the case, the Court necessarily discussed two different approaches used by other jurisdictions.[33] The first approach is called the "blue pencil rule," which provides that "an unreasonable restriction against competition may be modified and enforced to the extent that a grammatically meaningful reasonable restriction remains after the words making the restriction unreasonable are stricken."[34]

However, the Court instead endorsed the "rule of reasonableness," which provides that, "unless the circumstances indicate bad faith on the part of the employer, a court will enforce covenants not to

29. *See also* FirstEnergy Sols. Corp. v. Flerick, 521 F. App'x 521 (6th Cir. 2013). The court in *FirstEnergy* defined the rule of reasonableness using a 9-point analysis developed in *Extine v. Williamson Midwest Inc*., 200 N.E.2d 297 (Ohio 1964), and summarized in *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985 (6th Cir. 2007). *Id.* at 526. *FirstEnergy* enforced a covenant by showing the employer developed the information that the employee took out with him. *Id.* at 529.

30. 678 S.W.2d 28 (Tenn. 1984).

31. Id. at 30.

32. *Id.* at 36.

33. *Id.* at 35–37.

34. *Id*. at 36 (citing Solari Indus., Inc. v. Mallady, 264 A.2d 53 (N.J. 1970)).

compete to the extent that they are reasonably necessary to protect the employer's interests 'without imposing undue hardship on the employee and when the public interest is not adversely affected.'"[35]

Establishing a primary precedent in Tennessee regarding the enforcement of covenants not to compete, the *Central Adjustment Bureau* court explained the preference for the "rule of reasonableness" in the following discussion:

> We are persuaded that the rule of reasonableness is the better rule. It is consistent with an extension of the rule of reasonableness set forth in *Allright Auto Parks v. Berry,* [219 Tenn. 280, 409 S.W.2d 361 (1966)]. In adopting it, we do not intend to retreat from the general rule precluding courts from creating new contracts for parties. . . . We are guided instead by the special nature of covenants not to compete already discussed.[36]

The *Central Adjustment Bureau* opinion also relied upon Williston and Corbin in reaching this conclusion as follows:

> This is not making a new contract for the parties; it is a choice among the possible effects of the one that they made, establishing the one that is the most desirable for the contractors and the public at large. Partial enforcement involves much less of a variation from the effects intended by the parties than total nonenforcement would. If the arguments in favor of partial enforcement are convincing, no court need hesitate to give them effect.[37]

C. "Special Facts" or "Legitimate Business Interests"

Both the *AssuredPartners* and the *FirstEnergy* cases used the term "legitimate business interests" as part of the analysis to establish

35. *Id.* (quoting Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971)).

36. *Id.* at 37 (citation omitted).

37. *Id*. (citing Samuel Williston & Arthur L. Corbin, *On the Doctrine of* Beit v. Beit, 23 CONN. B.J. 40, 49–50 (1949)).

one side of the balancing test for enforceability of the non-compete covenants.[38] The term requires ad hoc definitional effort by the courts in determining on a case by case basis what it means. When coupled with a longer list of factors, as in *Extine*, the reasoning of the cases becomes muddied, and the law is hard for business managers to predict.

Similarly, in *Hasty v. Rent-A-Driver, Inc.*,[39] the court addressed the validity of a covenant not to compete generally in an employment contract and invented a point of analysis called "special facts." In that case, the employee brought suit against the employer challenging the validity of the covenant not to compete contained in his employment contract.[40] In the case, the employee was a truck driver.[41] He was employed by Rent-A-Driver, which was in the business of leasing services of truck drivers to other businesses.[42] At the time he began working for Rent-A-Driver, he had about fifteen years of experience as a truck driver.[43] Rent-A-Driver assigned him to its account with Aladdin Industries, Inc.[44] The employee was leased to Aladdin for his entire tenure with Rent-A-Driver.[45] After approximately twenty months of employment, the employee left Rent-A-Driver and went to work as a driver for Personnel Service Division, a competitor of Rent-A-Driver.[46] Personnel Service Division also supplied drivers to Aladdin.[47]

Interestingly, the Court in *Hasty* noted that any competition by a former employee may well injure the business of the employer. Therefore, not every injury indicates a protectable interest of the employer. An employer cannot by contract restrain ordinary competition. Unhelpfully, the Court fashioned the following rule: "In order for an

38. FirstEnergy Sols. Corp. v. Flerick, 521 F. App'x 521, 526 (6th Cir. 2013); Assured Partners, Inc. v. Schmitt, 44 N.E.3d 463, 473 (Ill. App. Ct. 2015).

39. 671 S.W.2d 471, 473 (Tenn. 1984).

40. *Id.*

41. *Id.* at 472.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

employer to be entitled to protection, there must be special facts present over and above ordinary competition."[48] The court analyzed whether there were "special facts" in the case over and above ordinary competition upon which to base enforcement of the covenant not to compete.[49] The court found that there were numerous cases addressing the issue of the interests entitled to protection, and the cases were not entirely reconcilable with each other.[50] There are certain interests emerging as being entitled to the protection of non-competition agreements.[51] The Court recognized cases where the employee is closely associated with the employer's customers or business or has had repeated contact with those customers.[52] Covenants had also been held reasonable to prevent misuse of customer lists.[53] Further, the Court noted that training in conjunction with "other factors" has been cited in upholding the reasonableness of a covenant.[54] After reviewing authority for the proposition that general knowledge and skill the employee might have, even if acquired after expensive training, however, did not necessarily constitute a protectable interest of the employer.[55]

48. *Id.* at 473.

49. *Id.*

50. *Id.*

51. *Id.* ("Such legitimate business interests include trade or business secrets or other confidential information.").

52. *Id.* (citing Matthews v. Barnes, 293 S.W. 993, 994 (Tenn. 1927), and Hospital Consultants, Inc. v. Potyka, 531 S.W.2d 657, 661 (Tex. App. 1975)).

53. *Id.* In *Hasty*, the court began by noting that covenants not to compete are not favored in Tennessee because they are in restraint of trade. *Id.* at 472. It also noted a "modern trend" to construe covenants favorably to the employee. *Id.* The Court went on to say, however, that such covenants are not invalid per se for those reasons, and may be enforced, provided they are reasonable under the circumstances. *Id.* "Each case must stand or fall on its own facts." Allright Auto Parks, Inc. v. Berry, 409 S.W.2d 361, 363 (Tenn. 1966). The *Hasty* court outlined certain elements that should always be considered in ascertaining the reasonableness of such agreements. *Hasty*, 671 S.W.2d at 472. Citing the *Allright* case, the Court noted that among these elements are the consideration supporting the agreement, the threatened danger to the employer in the absence of such an agreement, the economic hardship imposed on the employee by such a covenant, and whether such a covenant would be inimical to the public interest. *Id.* (citing *Allright*, 409 S.W.2d at 363).

54. *Hasty*, 671 S.W.2d at 473.

55. *Id.*

In conclusion, the *Hasty* Court found that the employee was privy to no trade or business secrets or other confidential information, had come into the firm with extensive experience in driving a truck, and received no additional training. As such, the court found no "special facts" that could justify the enforcement of the non-competition clause.[56]

Taken together, these cases have raised more questions than they have answered in evaluating the enforcement of covenants not to compete. The injection of amorphous terms such as "reasonableness," "special facts," "ordinary competition," and "legitimate business interests" are vague and beg enforcement questions. The terms appear to be useful and have been codified in many state statutes attempting to regulate the enforcement of employment covenants not to compete. The interpretation of these statutes retains the imprecise analysis of the cases and does not add clarity to the law.[57] Instead of clearly articulating a property interest that either does or does not exist, as the court in *Hasty* could easily have done, the confusing balancing tests and notions of reasonableness can result in unjust results as illustrated by the following case.

In *Columbus*, the "plaintiff['s] staffing agency employed the defendant therapists at a state residential care facility for severely disabled persons."[58] The plaintiff staffing agency had been "under exclusive contract" with the state for those services that would expire in June of 2003.[59] The employee therapists "executed restrictive covenants in

56. *Id.* at 474. Interestingly, and pertinent to this Article, the Court indicated that Rent-A-Driver had shown no need for a covenant in the face of the resulting restraint and hardship on the employee. *Id.* The only loss Rent-A-Driver could prove was that it loses something less than 9% of its drivers to competitors annually. *Id.* The Court concluded that that is the type of injury that results from ordinary competition and cannot be restrained by contract. *Id.*; *see also* Wyndham Vacation Resorts, Inc. v. Consultant Group, No. 2:12–cv–00096, 2014 WL 1922791 (M.D. Tenn. May 14, 2014) (citing Murfreesboro Med. Clinic, P.A. v. Udom, 166 S.W.3d 674 (Tenn. 2005) for the concept that there must be a legitimate business interest to protect).

57. See Hiles v. Americare Home Therapy, 183 So. 3d 449 (Fla. Dist. Ct. App. 2015); Pattridge v. Starks, 181 So. 3d 192 (La. Ct. App. 2015); and Coats v. Bastian Bros., Inc., 741 N.W.2d 539 (Mich. Ct. App. 2007) for examples of cases interpreting substantially similar state statutes with uneven results.

58. Columbus Med. Servs., LLC v. Thomas, 308 S.W.3d 368, 370 (Tenn. Ct. App. 2009).

59. *Id.* at 372.

their employment agreements with the plaintiff agency under which they were prohibited from working at the same state facility for a year after termination of their employment with the plaintiff."[60] As the plaintiff agency's contract was set to expire, the state, by law, requested bids for staffing of the facility under a new contract.[61] "Through the bidding process," a new staffing agency, and defendant in the case, Liberty Health Care Corporation, won the contract.[62] Liberty "then met with the [employee] therapists . . . and offered to hire them to continue working at the facility."[63] Liberty "was aware of the non-compete covenants and agreed up front to indemnify the employees" in the event Columbus Medical Services "tried to enforce those covenants."[64] The employees "accepted positions with [Liberty] and continued working at the [state] facility."[65] At trial, the Court concluded the non-compete covenants were enforceable, that the employees had breached their covenants, and that Liberty had tortiously induced the defendant employees to breach those contracts.[66]

On appeal, the Tennessee Court of Appeals concluded there were two issues to be decided in the case. First, did Columbus Medical Services have a legitimate protectable business interest covered by the non-competes?[67] Second, were the non-compete covenants reasonable under all circumstances?[68] The state facility serviced by Columbus, and then by Liberty, served a residential "patient population . . . comprised of persons with profound intellectual and physical disabilities."[69] Columbus argued that the covenants not to compete in the employment contracts of the therapists were designed to protect the

60. *Id.* at 372–73.

61. *Id.* at 370.

62. *Id.* at 372.

63. *Id.* at 370.

64. *Id.*

65. *Id.*

66. *Id*. at 382. Interestingly, the non-compete provision in the employees' contracts had a liquidated damages clause stating that the parties recognized damages incurred by Columbus in the event of a breach might be difficult to ascertain, and, therefore, each employee would owe Columbus $10,000.00 in liquidated damages. *Id.* at 373.

67. *Id.* at 384.

68. *Id.*

69. *Id.* at 377.

efforts that Columbus had made in recruiting the best qualified therapists for hard-to-fill and sensitive positions.[70]

The *Columbus* court found the Liberty employee testimony particularly important in defining the protectable interests that Columbus may have in the covenants not to compete. Indicating there was no inflexible formula for deciding the question of reasonableness, the court considered certain factors:

> [I]f there is a legitimate business interest to be protected and the time and territorial limitations are reasonable, then non-compete agreements are enforceable. Factors relevant to whether a covenant is reasonable include: (1) the consideration supporting the covenant; (2) the threat and danger to the employer in the absence of the covenant; (3) the economic hardship imposed on the employee by the covenant; and, (4) whether the covenant is inimical to the public interest. Also, the time and territorial limits must be no greater than necessary to protect the business interests of the employer.[71]

The Court of Appeals found these four points created a "threshold [test in deciding] whether the employer had a legitimate business interest" to be protected.[72] Citing the older precedents, the court noted that ordinary competition was not a reason to support the covenant not to compete.[73] It also noted the "special facts" holdings from those cases. Additionally, citing *Vantage Technology, LLC v. Cross*,[74] the *Columbus* court noted that:

70. *Id.* at 375. A Columbus employee testified that the solution they provide is to find out specifically what each customer needs and utilize employees to satisfy those needs. *Id.* An employee of the defendant agency, Liberty, testified that Liberty was interested in hiring the same therapists because of the importance of "the continuity of care" at a facility with a resident population like the one in question. *Id.* at 378–79. She explained that continuity of care in this context meant more than just avoiding a break in service but also meant maintaining the same individuals in the therapist positions. *Id.* at 379.

71. *Id.* at 384 (citations omitted).

72. *Id.* at 384–85.

73. *Id.* at 385.

74. 17 S.W.3d 637 (Tenn. Ct. App. 1999).

> Considerations in determining whether an employee would have such an unfair advantage in competing with the employer include: (1) whether the employer provided the employee with specialized training; (2) whether the employee is given access to trade or business secrets or other confidential information; and, (3) whether the employer's customers tend to associate the employer's business with the employee due to the employee's repeated contacts with the customers on behalf of the employer. These considerations may operate individually or in tandem to give rise to a properly protectable business interest.[75]

In the case, and relying upon precedent from other jurisdictions, the Court of Appeals found that the universe of legitimate business interests is not limited to those three enumerated in *Vantage*.[76] Importantly, the opinion states that the staffing agency had protectable property interests in its client base and the relationship with the clients for whom it provided staff.[77] One precedent had coined the term "opportunistic disintermediation," meaning when firms and individuals cut out the "middleman" of the staffing agency when supplying the same employees for the same services.[78] Noting that enforceability of covenants always presents a conflict between the fundamental policy supporting the parties' freedom to contract and the policy disfavoring contractual restraints of trade, the *Columbus* court adopted the view that "the nature of an employment agency's business is unique in that its main service is to provide the 'costly and valuable commodity' of time, effort, and expense in finding and putting together prospective employees and employers and negotiating contracts related to their

75. *Columbus Med. Servs., LLC*, 308 S.W.3d at 385 (citing *Vantage*, 17 S.W.3d at 644).

76. *Id.* at 389. In its analysis, the *Columbus* court referenced cases dealing specifically with covenants not to compete in employment staffing agency cases. *See id.* at 388–89. It defines the special facts relevant to staffing agency cases in the context of covenants not to compete. *Id.* at 386–89.

77. *Id.* at 388– 89.

78. *Id.* at 386; *see also* Consultants & Designers, Inc. v. Butler Serv. Grp., Inc., 720 F.2d 1553, 1558 (11th Cir. 1983).

employment."[79] The court concluded that, therefore, Columbus Medical Services had a legitimate business interest in protecting itself against "opportunistic disintermediation" or the loss of highly skilled employees on these facts in the context of renegotiated staffing contracts.[80]

The Court then addressed whether enforcement of the covenants was otherwise reasonable under the circumstances of the case. It noted that this is done by balancing Columbus's protectable business interest against the hardship enforcement would impose on the therapists.[81] The court found important the fact that each of the employee therapists described their individual circumstances and their efforts at finding alternative employment at the termination of the Columbus contract.[82] Several described the work they were doing for the state facility and the hardship that losing their employment at that facility would have created.[83] The Appellate Court found it material that each of the employees had had a difficult time finding similar employment.[84] Each one had specific personal issues involved that were aggravated by the termination of their employment contract at the end of the contract term.[85] Liberty, the defendant staffing agency, used the specific employees' expertise as a reason for hiring them.[86] While the trial court noted that the employees carried a heavy burden of proof, it found that the scales tipped in the employees' favor due to the egregious conduct of Liberty in inducing the breach of the covenants when hiring the therapists.[87] Based upon those facts, the court found that in evaluating the reasonableness and enforceability of these covenants, the "difficult" and "intolerable" situation suffered by the employee

79. *Columbus Med. Servs., LLC*, 308 S.W.3d at 389.
80. *Id.* at 389–90.
81. *Id.* at 390–92.
82. *Id.* at 378–79.
83. *Id.* at 378.
84. *Id.* at 391.
85. Id. at 378–79.
86. Id.
87. Id. at 381.

therapists in trying to find additional employment outweighed the protectability of Columbus's otherwise legitimate business interest.[88]

The *Columbus* case is enlightening in terms of the elements used across the majority of jurisdictions to determine the enforceability of covenants not to compete. It should be noted here that, in the cases it relied upon from other jurisdictions, the *Columbus* opinion identified a property interest in the investments and decisions made in compiling the highly trained and specialized staff required by its customers.[89]

In contrast, the court in *Vantage Technology, LLC v. Cross* enforced a covenant not to compete and modified the geographic restriction to make it reasonable.[90] In that case, Vantage Technology provided technical services to ophthalmologists in hospital settings.[91] Specifically, Vantage provided equipment, supplies, instruments, and other surgical accouterments at particular hospitals for cataract and other ophthalmological surgeries.[92] Hospitals often compete with one another in attracting surgeons by offering the equipment the surgeons prefer.[93] Companies like Vantage are necessary to provide this equipment where the hospitals cannot afford to have them available at their

88. *Id.* at 392. The court also found that the public has an interest in encouraging an employment agency such as Columbus to invest resources in finding, securing, and placing qualified therapists in a vulnerable patient population. *Id.* at 392–93. Permitting enforcement of non-compete covenants would serve that purpose. However, the court still felt that the enforcement of the non-competes on the facts of the *Columbus* case would negatively impact the patient population and was "a highly significant factor." *Id.* at 393. The court found that the continuity-of-care issue was an important part of this discussion, and, therefore, enforcement of the covenants in the *Columbus* case would also negatively implicate the public interest. *Id.*

89. See Hiles v. Americare Home Therapy, Inc., 183 So. 3d 449 (Fla. Dist. Ct. App. 2015), for a discussion of factors similar to those in *Columbus* constituting "legitimate business interests" compelling the court to enforce the covenant in that case. In *Hiles*, the court used the Florida statute concerning covenants to support its conclusion. 183 So. 3d at 454; FLA. STAT. ANN. § 542.335 (West 2016). The items enumerated in the statute are illustrative for constituting property interests implicitly recognized in the case law. 183 So. 3d at 454. However, see Fla. Hematology & Oncology v. Tummala, 927 So. 2d 135 (Fla. Dist. Ct. App. 2006), and Infinity Home Care, LLC v. Amedisys Holding, 180 So. 3d 1060 (Fla Dist. Ct. App. 2015), which together represent a split in jurisdictions within Florida in spite of the statute.

90. Vantage Tech., LLC v. Cross, 17 S.W.3d 637, 651 (Tenn. Ct. App. 1999).

91. *Id.* at 640.

92. *Id.* at 641.

93. *Id.*

own expense.[94] As such, "Vantage had an interest in initiating, developing, and sustaining relationships" with both hospitals and surgeons.[95] Part of Vantage's service was building and strengthening relationships with these surgeons by collecting and recording the preferences each had in selecting its services.[96] As part of its service, Vantage provided technician services.[97] No special medical training or education was required for these technicians.[98] It took only a single day to train a technician how to operate the equipment.[99]

The defendant, Cross, began employment with Vantage as a technician in October 1994.[100] "He had no prior experience, training, or education directly relevant to the" work he was hired to perform.[101] "In January, 1995, [he] signed a covenant not to compete" with Vantage.[102] Vantage provided services to a number of hospitals in its market area from October of 1994 to August of 1996.[103] Cross worked for Vantage during that time frame.[104] Cross ultimately "serviced forty-nine hospitals in at least six states" while working for Vantage.[105] In the summer of 1996, Vantage wanted Cross to work in Ohio rather than Tennessee,[106] but Cross had developed a relationship with a specific surgeon at one of the hospitals in his service area.[107] Instead of moving to Ohio, Cross agreed to work directly for this surgeon and provided the same services for him on a full-time basis.[108] He and the surgeon essentially began a co-venture and purchased the necessary machinery to perform the services that Cross had been trained to do by Vantage.[109]

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 642.
99. *Id.*
100. Id.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 642–43.
105. *Id.* at 643.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*

Citing Tennessee courts' reluctance to enforce covenants not to compete as restraints of trade, and the other balancing factors previously described, the *Vantage* court found that "an employer may have a protectable interest in the *unique* knowledge and skill that an employee receives through special training by his employer, at least when such training is present along with other factors tending to show a protectable interest."[110] The court specifically identified specialized training, trade secrets, confidential information, and special customer relationships as important factors in enforcing the covenant not to compete.[111] Interestingly, the Court noted that "[a]n employer may also have a legitimate protectable interest in relationships between its employees and its customers."[112] It specifically noted, "[t]he employee in essence becomes 'the face' of the employer" and becomes part of the employer's good will.[113]

Also, the Court noted that "[w]hile the relevant factors mentioned . . . must each be analyzed in isolation, they must also be analyzed in tandem."[114] Based on the facts, the *Vantage* court found that the number of hours Cross worked, the number of Vantage customers that he serviced, his training, and the relationships established with the hospitals and surgeons were all built on the foundation of Vantage's good will.[115] Cross was made privy to surgical preferences.[116] He had knowledge of Vantage's other customers and the prices that it charged for his services.[117] It was through Vantage that he developed the relationship with the surgeon for whom he ultimately went to work.[118] The Court found that relationship, "as well as the information that flowed through it, [gave] Cross an unfair advantage in competition against [Vantage]."[119]

110. *Id.* at 645 (citing Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 473 (Tenn. 1984).

111. *Id.*

112. *Id.* (citing *Hasty*, 671 S.W.2d at 473).

113. *Id.*

114. *Id.* at 646.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

Balancing the factors, the *Vantage* Court addressed the hardship imposed upon Cross and the public interest at issue. The Court noted that if the covenant was enforced, Cross merely lost that to which he was not otherwise entitled.[120] The Court did not find that a public interest was damaged in precluding enforcement of the covenant.[121] However, the Court did find that the geographical scope was somewhat burdensome.[122] The Court noted that under the authority laid down by *Central Adjustment Bureau*,[123] *Allright Auto Parks*,[124] and *Ehlers*,[125] the Court could modify that portion of the covenant, rendering it reasonable under all the other circumstances.[126]

The holding in *Vantage*, therefore, is authority for the theme of this paper. A protectable property interest, once identified, is the basis for enforcing covenants, and the idea of special facts—a vague quest for legitimate business interests in general—or employee hardship is irrelevant as a secondary inquiry. *Columbus*, then, is plainly wrong on substantively similar facts.

Finally, it is helpful to review the holding in *Hamilton-Ryker Group, LLC v. Keymon*.[127] While *Keymon* is primarily a trade secrets case, its facts illuminate factors for weighing the enforceability of an employer's protectable interest through covenants not to compete. Hamilton-Ryker is a temporary staffing agency with offices throughout states in the southeast.[128] Keymon was hired several years prior to the facts at issue in this case.[129] She signed a series of non-compete agreements during her employment and, in fact, was never working without one.[130] At the time of her termination, she was working as a district manager and primary sales person for Hamilton-Ryker in one

120. *Id.* at 647.

121. *Id.*

122. *Id.* at 647–48.

123. Central Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 28 (Tenn. 1984).

124. Allright Auto Parks v. Berry, 409 S.W.2d 361, 363 (Tenn. 1966).

125. Ehlers v. Iowa WareHouse Co., 188 N.W.2d 368, 370 (Iowa 1971).

126. *Vantage Tech., LLC*, 17 S.W.3d at 648.

127. No. W2008-00936-COA-R3-CV, 2010 WL 323057 (Tenn. Ct. App. Jan. 28, 2010).

128. *Id.* at *1.

129. *Id.*

130. *Id.*

small geographical area in Shelby County, Tennessee.[131] She was working primarily for one client of Hamilton-Ryker.[132] During an agreed-upon leave of absence, Keymon e-mailed to herself from her company computer hundreds of pages of internal documents, including customer lists, delivery schedules, pricing analysis, and profit analysis information.[133] Within hours, she telephoned a primary contact at the company client.[134] Within a week, she had begun to work directly for the client.[135]

The Tennessee Court of Appeals affirmed the trial court in finding that the information used by Keymon to set up a competing business violated the covenant not to compete.[136] Importantly, the Court found that even though some of the information might have been available "by other means, the integration and aggregation of" the information became a trade secret.[137] The Court found that her taking it directly from the internal records of the employer in the form in which the employer had collected it constituted improper use of a trade secret and unfair competition.[138] The information itself, coupled with the aggregation of the information and Keymon's activities at the time of her exit, constituted a property interest.[139]

D. A Clarified Definition of Property

This article contemplates the use of non-compete clauses to help protect employer property rights in intellectual property developed by the employer in the form of human relationships, tacit knowledge, routines and practices, know-how, and other information entrusted to employees in the execution of their duties for the employer. It is contemplated that this information, which is acquired by the employer and then developed in the employee, is a protectable

131. *Id.* at *3–4.
132. *See id.* at *3.
133. *Id.* at *4.
134. *Id.* at *7.
135. *Id.* at *4–5.
136. *Id.* at *12.
137. *Id.* at *15.
138. *Id.*
139. *Id.* at *15–16.

property interest that could be enforced for a period of time and within a certain radius of the employer's business.

It is acknowledged that there are other laws that specifically protect this kind of information in other well-defined areas. These laws include protection of trade secrets, copyright, patents, and others specifically enumerated by statute.[140] Additionally, related common law theories protect from inducement to breach of contracts, intentional interference with business relationships, and uphold the fiduciary duties of employees to corporations.[141] While it is unnecessary to develop these theories in the context of this paper, definitions used in these cases can determine the nature of the employer's property interest in the kind of information contemplated here.

For example, in *Stangenberg v. Allied Distribution & Bldg. Serv. Co.*[142] Mr. Stangenberg and Mr. Jenkins formed Allied Distribution and Building Service Company, Inc.[143] It furnished janitorial and building maintenance services to various other clients.[144] Stangenberg owned fifty-one percent of the capital stock with Jenkins owning the other forty-nine percent.[145] "Stangenberg was elected president and chairman of the board and was in charge of the day-to-day operations[.]"[146] Jenkins supplied capital and acted as vice president and chief financial officer.[147] South Central Bell was the only client of Allied, who served South Central Bell in "Kentucky, Alabama, . . . Louisiana, and . . . Tennessee."[148] "In 1979, Gerald Montgomery was

140. See, e.g., TENN. CODE ANN. § 47-25-1701 (LEXIS, current through the 2016 Regular Sess. and the 2nd Extraordinary Sess. of the 109th Tenn. General Assembly) for the Uniform Trade Secrets Act in Tennessee.

141. See TENN. CODE ANN. § 63-1-148 (LEXIS, current through the 2016 Regular Sess. and the 2nd Extraordinary Sess. of the 109th Tenn. General Assembly) for Tennessee's statute limiting restrictions in covenants not to compete regarding health care providers. *See also* Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691 (Tenn. 2002) (detailing Tennessee's law in tortious interference with business relationships cases).

142. 86-12-II, 1986 WL 7618 (Tenn. Ct. App. July 9, 1986).

143. *Id.* at *2.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

hired by Allied as district manager for the Knoxville District."[149] Montgomery ultimately acquired ten percent of Allied's stock in equal amounts from both Stangenberg and Jenkins.[150] In 1983, as a result of a planned reorganization, South Central Bell planned to consolidate east and middle Tennessee divisions at the expiration of their contract with Allied.[151] Allied desired to obtain the new consolidated contract beginning January 1, 1984.[152] Many meetings were held between Stangenberg, Jenkins, and Montgomery discussing the cost of labor, materials, supplies, various markets to be served, the cost of existing contracts per square foot, profit margins, and other sensitive business information as part of the planning process.[153] "Stangenberg prepared several work sheets . . . specifically detail[ing]" various factors and calculations important to the bidding process.[154]

"South Central Bell rejected Allied's informal proposal and decided to accept sealed bids on the" new contract period.[155] "Formal invitations to bid on the consolidated contract were delivered to selected bidders on August 25, 1983."[156] Two weeks prior, Stangenberg, "without warning or provocation, attacked Jenkins with a metal baseball bat."[157] There was never any reason given for the assault except that Stangenberg alleged Jenkins had insulted him with a look.[158] After the attack, Jenkins called a meeting of the shareholders to elect a new president.[159] In the meantime, Stangenberg decided to form a new company, Service Corporation, "to attempt to obtain the upcoming consolidated South Central Bell contract."[160] Stangenberg, interestingly, used Allied's corporate attorney to form his new company and to serve as his registered agent for service of process.[161] Stangenberg

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at *2–3.
154. *Id.* at *3.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*

resigned from Allied, contacted South Central Bell, and informed them of his desire to bid on the contract through his new company.[162] He completed paperwork required by South Central Bell for that purpose, and opened a line of credit to finance the arrangement.[163] In spite of Stangenberg's new company failing to meet the appropriate bidding deadlines, South Central Bell included Stangenberg's company on an equal basis with Allied and others in the bidding process.[164] At the opening of the bidding, Stangenberg's new company, Service, was the low bidder and obtained the contract.[165]

Litigation was initially commenced by Stangenberg in 1983, alleging he was entitled to a bonus for the previous fiscal year.[166] The results of the evidence at trial and the Appellate Court's ruling on Stangenberg's bonus is irrelevant for the purpose of this discussion. Allied alleged and put forth evidence that Stangenberg had been guilty of the use of trade secrets and confidential information obtained during his tenure at Allied and during the conversations with the other principals of Allied in planning for the South Central Bell bid.[167] Allied also alleged that Stangenberg was guilty of unfair trade practices and usurpation of corporate opportunity.[168]

The trial court found, and the Appellate Court upheld, that Stangenberg did not take trade secrets or confidential information out with him.[169] Significantly, the Court followed the majority of the jurisdictions in concluding that remembered information is not confidential in most cases.[170] The Court concluded that there was no basis in

162. *Id.* at *4.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at *5–6.

168. *See id.* at *7.

169. *Id.*

170. *Id.* In coming to that conclusion, the Appellate Court quoted the Restatement of Torts, § 757 (1939), as follows:

> An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4)

the findings or evidence that Stangenberg used confidential information as defined by the Restatement of Torts.[171] The "remembered information as to the plaintiff's prices, the frequency of service, and the specific needs and business habits of particular customers was not confidential."[172]

However, citing *Tennessee Dressed Beef Co. v. Hall*,[173] the Court of Appeals in *Stangenberg* explained the trust and confidence officers and directors of a corporation owe to their company as follows:

> [I]f there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, which is, from its nature in the line of the corporation's business, and if of practical advantage to it, and which is one in which the corporation has an interest or reasonable expectancy, and if, by embracing the opportunity, the self interest of the officer or director will be brought into conflict with that of the corporation, the law will not permit him to seize the opportunity for himself.[174]

On the basis of the facts as presented at trial, "the Chancellor found that the consolidated South Central Bell contract represented a valuable business opportunity that Allied was ready, willing, and able to undertake . . . ."[175] The court further acknowledged that Stangenberg knew about the contract based upon his position as an officer and director of Allied.[176] Citing the rule that the fiduciary duty of officers

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> the value of the information to him and to his competitors; (5) the amount of money or effort expended by him in developing the information; and, (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. at *6.

171. *Id.* at *6–7.

172. *Id*. at *7.

173. 519 S.W.2d 805, 808 (Tenn. Ct. App. 1974).

174. *Id.* at 808.

175. *Stangenberg*, 1986 WL 7618, at *7 (quoting *Tenn. Dressed Beef Co.*, 519 S.W.2d at 808).

176. *Id.*

and directors extends to transactions begun during their tenure but consummated after their tenure has ended, the court concluded that the profits linked to the contract and realized by Stangenberg in his new company properly belonged to Allied under the "Corporate Opportunity Doctrine."[177]

The value of *Stangenberg* here is two-fold. First, the law currently supports the rule that property merely remembered by the employee is not protectable, even though the information could otherwise be proprietary and protectable. Second, the implicit and explicit opportunities available to an employer and known to the employee constitute property of the company.

III. CLARIFIED ENFORCEMENT FOCUS

In "Non-Compete Covenants: Incentives to Innovate or Impediments to Growth," Samila and Sorenson conclude that the enforcement of non-compete clauses significantly impedes entrepreneurship and employment growth.[178] They state that:

> Based on a panel of metropolitan areas in the United States from 1993 to 2002, our results indicate that, relative to states that enforce non-compete covenants, an increase in the local supply of venture capital in the states that restrict the scope of these agreements has significantly stronger positive effects on (i) the number of patents, (ii) the number of firm starts, and (iii) employment.[179]

The introduction to their paper suggests that "states might benefit broadly by relaxing their enforcement of these agreements."[180]

177. *Id.* In *Tennessee Dressed Beef Co. v. Hall*, the court defined the "Corporate Opportunity Doctrine" as "a species of the duty of a fiduciary to act with undivided loyalty; it is one of the manifestations of the general rule that demands of an officer or director the utmost good faith in his relation to the corporation which he represents." *Tenn. Dressed Beef Co.*, 519 S.W.2d at 808.

178. Samila & Sorenson, *supra* note 11, at 1.

179. *Id.*

180. *Id.* at 5.

The authors evaluate and digest the various jurisdictions and their differences in terms of enforcement of covenants. They suggest that, "[t]o the extent that non-compete covenants restrict the mobility of employees, they encourage firms to allocate resources to the development of certain sorts of assets, such as intellectual property, human capital and inter-firm relations."[181] They state that non-compete clauses effectively give the employer property rights in intellectual property developed by the companies in the form of "tacit knowledge: routines and practices that are not easy to codify."[182] Following an interesting analysis of the strengths and weaknesses of enforcement versus non-enforcement of non-compete covenants, the authors state that "our results imply that not only does the enforcement of non-compete agreements limit entrepreneurship, consistent with the earlier findings of Stewart and Sorenson (2003), but also it appears to *impede* innovation."[183] Further, they state "[b]oth incumbents and entrants therefore may well benefit from a greater mobility of employees."[184] Therefore, the authors seem to be saying that the property interests protected by employee covenants not to compete are not good for business development, and according to their research, relaxing of enforcement necessarily weakens or destroys that interest, allowing greater employee flexibility. Alternatively, Kate O'Neill proposes that rather than the extensive balancing tests that have been utilized by most jurisdictions, the courts and, therefore, counsel and parties, would be better served by evaluating not only the "legitimacy of the employer's claim" of a protectable interest, but also by "weighing the caliber of the bargaining process" and the quality of the assent of the employee to the contract in the first place.[185]

These authors illustrate divergent reasons advocating for the restriction of enforcement of covenants not to compete. This desire to weaken the value of such covenants resonates with the reluctance of courts to enforce them in the first place. The often-repeated maxim

181. *Id.* at 7.

182. *Id.*

183. *Id.* at 26.

184. *Id.*

185. Kate O'Neill, *'Should I Stay or Should I Go?'— Covenants Not to Compete in a Down Economy: A Proposal for Better Advocacy and Better Judicial Opinions*, 6 HASTINGS BUS. L.J. 83 (2010).

that courts disdain the enforcement of covenants not to compete as restraints of trade is consistent with these conclusions. Furthermore, O'Neill addresses a very real need in terms of the disparity of contract autonomy between most employers and most would-be employees.

However, an analysis of the foregoing survey of the experience of the parties in the enforcement cases shows that the majority of these facts can be subsumed under the question of whether the employer has a protectable property right in the custody of the exiting employee. Samila and Sorenson accurately point out that although trademark, patent, copyright, trade secret, and other statutory and common law provisions address specific areas of concern in this arena, much of the employer's theoretically protectable interest exists as implicit and intangible property in the employee's control.[186]

Rather than building on the judicial reluctance to enforce covenants not to compete, the better approach seems to be acknowledging the protectable property right of the employer and protecting that from being lost. Defining the assets covered by the non-compete in this way replaces the reluctance to enforce the restriction with centuries of legal precedent to do so.

There can be no one formula for answering all questions related to whether the employer has a legitimate property right on these terms. Nevertheless, our market economy runs on the premise that the real value of everything is the toil and trouble of acquiring it. Where the employer has integrated, identified, aggregated, refined, or otherwise appropriated information, people, processes, and products as its own by adding something to it, the employer acquires ownership in the finished product. This is a protectable, enforceable, exclusive property right. Such a right is the foundation of our market system.

Columbus[187] recognized precisely the labor added by the employer, which falls under this protectable category.[188] The labor added by Columbus Medical Services might best be illustrated by the following list. Columbus originally obtained the contract with the state to serve a residential patient population of profoundly intellectually and physically disabled individuals.[189] Columbus identified the kinds of

186. Samila & Sorenson, *supra* note 11, at 7.

187. Columbus Med. Servs., LLC v. Thomas, 308 S.W.3d 368, 372 (Tenn. Ct. App. 2009).

188. *See supra* text accompanying notes 58–89.

189. *Columbus Med. Servs., LLC*, 308 S.W.3d at 372.

skills a group of therapists would need to best protect that population.[190] Columbus grouped these therapists together based upon these skills.[191] Columbus trained the therapists by "some of the best consultants in the country."[192] Through the aggregate efforts of all the therapists together, Columbus acquired intrinsic and intimate knowledge of the needs of the patient population.[193] Because of this very specific and effective labor, Columbus acquired a protectable right in the employees who cumulatively contained this information.[194] The court used the prevailing balancing test to determine that Columbus, in fact, had a protectable interest.[195] Under the theory here, all of this information together is a protectable property interest. The only balancing test needed, perhaps, concerns the time duration and the geographical limitations as part of the property definition. However, it will be clear in each case how those elements are defined. For example, in *Columbus*, the fact that Columbus was serving a specific population is the basis for the property interest as we have defined it.[196] No balancing test is required. Further, the employees' hardship is irrelevant by this definition. It is proposed in this evaluation of the enforceability of covenants not to compete that time and territorial limits are built into the property formula. Time limits considered "reasonable" under the older case law are defined by the nature of the property interest and the determination of whether that interest will dissipate over time. Territorial limits are defined by the actual experience of the employer in the market in each case. The employees, as a unitary whole, took something from Columbus that did not belong to them in the first place. Similarly, in *Vantage Technologies*[197] and *Hamilton-Ryker Company*,[198] the employers created property interests in the employees by

190. *Id.* at 386–93.
191. *Id.* at 393.
192. *Id.* at 377.
193. *See id.* at 393.
194. *Id.* at 388.
195. *See id.* at 394.
196. *See id.* at 393–394.
197. *See supra* text accompanying notes 90–126.
198. *See supra* text accompanying notes 127–39.

giving them intimate knowledge of the needs and processes of the companies' clients. The aggregate of the relationships developed, in addition to the services performed, define the property being protected.

The need for clarity in defining the property interest as the basis for whether to enforce covenants not to compete can be illustrated by the split in jurisdictions within the state of Florida over how to define a statutory test based on the "legitimate business interest" as codified by legislation.[199] In *Hiles*, on facts very similar to *Columbus*, the District Court of Appeal in Florida found that Ms. Hiles, a home health liaison, was not bound by a covenant not to compete when she left her employment with America Home Therapy, Inc. and took with her documents and knowledge related to the company's referral sources and its patients.[200] Relying upon a Florida opinion from 2006,[201] and having diligently listed the information Ms. Hiles took with her, the court in *Hiles* ruled that the statute governing enforcement of covenants not to compete did not recognize referral sources as a protected legitimate business interest.[202] However, the opinion recognized that a recent opinion in another Florida district had ruled precisely the opposite way based on the same statutory language and very similar facts.[203]

A clearer illustration of the need for clarity cannot be drawn than the foregoing conflict between the results in the *Hiles* and *Infinity Home Care* cases and the unjust result of *Columbus*. In fact, all of the cases reviewed here acknowledge, either implicitly or explicitly, the property ownership principle. The cases and statutes may call it by other names, but therein lies the disparate results.

Additionally, in *Vantage*, the court identified the protectable interest as "goodwill."[204] Corporation law already identifies goodwill as

199. *See supra* note 89.

200. Hiles v. Americare Home Therapy, Inc., 183 So. 3d 449, 455 (Fla. Dist. Ct. App. 2015).

201. Fla. Hematology & Oncology v. Tummala, 927 So. 2d 135 (Fla. Dist. Ct. App. 2006).

202. *Hiles*, 183 So. 3d at 454.

203. *Id.*at 455; *see* Infinity Home Care, LLC v Amedisys Holding, LLC, 180 So. 3d 1060 (Fla. Dist. Ct. App 2015).

204. Vantage Tech., LLC v. Cross, 17 S.W.3d 637, 645–46 (Tenn. Ct. App. 1999).

a valuable commodity in the transfer of assets between businesses.[205] *Vantage* also recognized that the information that flows through relationships is an asset.[206] As such, it is property. Therefore, information contained in the memory of the employee should be protectable, and cases that have held otherwise would have a different result.[207] Other attributes of the desirable employee, such as trust, confidence, knowledge of opportunities sensitive to the corporation, information advantageous to the company, and others, would best be protected through the enforcement of an appropriate covenant not to compete, especially where other statutes and common law principles will not apply. The covenant would, of course, be appropriately limited by time and geographical radius.

IV. CONCLUSION

The alternative emphasis on enforcement proposed here does not eliminate the need for the court's scrutiny under ordinary contract law involving the adequacy of consideration, the adequacy of the assent, or the evaluation of the effect on the best interests of the public. However, the balancing test itself, once these threshold questions have been cleared, could be simplified by identifying the value of the employer's ownership interest in what the employee is taking away. The well-worn pieces of the balancing test, including the appropriateness of the geographical area, appropriateness of the term of the covenant, whether the employee will suffer unnecessary harm, and the nature of that harm, become secondary to the legitimacy of the ownership interest of the employer. Evaluating the cost of the labor of the employer in the asset in the possession of the exiting employee eliminates a discussion of amorphous terms like "reasonableness," "special facts," "legitimate business interests," and "ordinary competition." Where the use of those terms and the *ad hoc* application of the facts of each case

205. *See id.*; *see generally* Richard S. Miller & Sons, Inc. v. United States, 537 F.2d 446 (Ct. Cl. 1976); 19 AM. JUR. 2d *Corporations* § 2448 (2016).

206. *Vantage Tech., LLC*,17 S.W.3d at 645.

207. *See* Stangenberg v. Allied Distribution & Bldg. Serv. Co., Inc., No. 86-12-II, 1986 WL 7618 at *7 (Tenn. Ct. App. July 9, 1986).

to those terms has created an unpredictable body of law and an insecurity in contracting parties, the valuation of the real value defined as a property interest shortens and clarifies the analysis.

As noted in some of the cases we have reviewed, this new analysis will change the result. However, in making rough places level ground,[208] the way becomes easier. The employee who is harmed by not being able to find work, such as in the *Columbus Medical Services* case, might have to suffer the consequences of the natural result of taking something that belonged to the employer. But state legislatures and courts will have clearer guidelines for creating law that protects property and is predictable. These guidelines will be consistent with centuries of law concerning private property and the sanctity of contract. Cases like *Hasty*, for obvious reasons, will not be changed.

The mandate for employers will be that they should evaluate carefully the toil and trouble they have in each employee before crafting a covenant not to compete. The contract itself should be clear in the definition of that property interest. The employee should agree that it belongs to the employer regardless of any hardship the employee might face if she leaves. The consistency of the application of ownership principles in resolving a shortened balancing test would give clearer guidance to the parties contracting and better security in the development of essential business information.

208. *Isaiah* 42:16 (English Standard Version).