Contract Law: As Clear as Mud: The Demise of the Covenant Not to Compete in Oklahoma

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NOTES

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1. Introduction

Covenants not to compete, and in particular, employment covenants not to compete, have provided a steady stream of confusing and uncertain litigation since early Medieval courts and Parliament began to address these contracts.¹ In the 2001 legislative session, the Oklahoma legislature amended Oklahoma law on employment covenants not to compete in an attempt to resolve the confusion surrounding these types of contracts. This legislation is embodied in title 15, sections 217 and 219A of the Oklahoma Statutes, and the amendments read as follows:

§ 217 Restraint of Trade Void
Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by Sections 218 and 219 of this title, or otherwise than as provided by Section 2 of this act, is to that extent void.

§ 219A Non-Compete Employment Contracts
A. A person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer.

B. Any provision in a contract between an employer and an employee in conflict with the provisions of this section shall be void and unenforceable.²

While the new amendments do not affect sections 218 or 219 of title 15, which provide exceptions to the prohibition on restrictive covenants for the sale of the goodwill of a business³ and the dissolution of a partnership,⁴ respectively, the new

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¹ Harlan M. Blake, Employee Agreements Not to Compete, 73 HARV. L. REV. 625, 626 (1960).
² 15 OKLA. STAT. §§ 217, 219A (2001) (amendments italicized). Only South Dakota's statutory law on covenants not to compete also specifically allows non-solicitation agreements while disallowing general covenants not to compete. See S.D. CODIFIED LAWS § 53-9-11 (Michie 2002) ("An employee may agree with an employer . . . not to solicit existing customers of the employer . . . .").
³ Section 218 reads:
amendments, and section 219A in particular, make several important changes to Oklahoma's law on noncompetitive covenants between employers and employees.\(^5\)

Senator Glenn Coffee (R-District 30) and Representative Raymond Vaughn (R-District 81) introduced the current amendments, bundled together with several other measures, on February 5, 2001.\(^7\) This was not, however, Representative Vaughn's first involvement with the issue of restrictive covenants. His involvement dates back to 1999, when he represented an employee who was facing what Vaughn believed to be the negative effects of a covenant not to compete.\(^4\) The case, *Loewen Group Acquisition Corp. v. Matthews*,\(^9\) discussed fully *infra*, brought to Vaughn's attention the great uncertainty and unfairness that could result under the then-current state of Oklahoma law.\(^10\)

Following a successful disposition of the case, Representative Vaughn first attempted to pass an amendment clarifying title 15, section 217 in February 2000.\(^11\)

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One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county and any county or counties contiguous thereto, or a specified city or town or any part thereof, so long as the buyer, or any person deriving title to the goodwill from him carries on a like business therein. Provided, that any such agreement which is otherwise lawful but which exceeds the territorial limitations specified by this section may be deemed valid, but only within the county comprising the primary place of the conduct of the subject business and within any counties contiguous thereto.

*15 Okla. Stat. § 218 (2001).*

4. Section 219 reads:

Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within a specified county and any county or counties contiguous thereto, or a specified city or town or any part thereof. Provided, that any such agreement which is otherwise lawful but which exceeds the territorial limitations specified by this section may be deemed valid, but only within the county comprising the primary place of the conduct of the business of the subject partnership and within any counties contiguous thereto.

*Id. § 219.*

5. Throughout this note, the terms “covenants in restraint of trade,” "covenants not to compete," "noncompetitive covenants," and "restrictive covenants" will be used interchangeably. A covenant not to compete is a contract in which one party agrees not to engage in certain activities that are in competition with another party, usually a former employer. Gerald T. Laurie & David A. Harbeck, *Balancing Business Protection with the Freedom to Work: A Review of Noncompete Agreements in Minnesota*, 23 WM. MITCHELL L. REV. 107, 108 (1997).


8. Interview with Representative Raymond A. Vaughn, House Sponsor of SB 662, in Edmond, Okla. (Oct. 16, 2001) [hereinafter Vaughn Interview].


11. Oklahoma Legislature Homepage, Status of Measures, History, 2001 Regular Session, Measure
This bill, cosponsored by Senator Mark Snyder (R-District 41), met with an interesting and somewhat historic demise. After passing the House Judiciary Committee, a general vote of the House, and the Senate Judiciary Committee without a single vote cast against the measure, the bill came before the full Senate. During debate, Senate Minority Leader Mark Snyder (cosponsor) inserted a "right-to-work" amendment into the bill. The "right-to-work" amendment thrust what had been a relatively obscure bill dealing with restrictive covenants into the center of a political firestorm that had raged in Oklahoma for decades. The amended bill failed on a vote of fifteen for and thirty-three against.

The current amendments met with comparatively greater success. By May 24, 2001, both the Senate and House had passed the amendments with only two votes against enactment, and the legislature passed the amendments without change in their substantive language from the time of introduction to the time of their passage in both houses. The Governor signed the bill into law on June 4, 2001, and the amendments went into effect statewide that same day.

The amendments attempt to bring clarity to noncompetitive employment covenants, and this note will argue that the amendments do just that. By bringing Oklahoma statutes into accord with the development of case law, Oklahoma practitioners, and especially those unfamiliar with the intricacies of Oklahoma law, will be more certain as to the types of covenants that Oklahoma courts will enforce. This note, however, also will argue that the amendments are inadequate in one major respect: the changes exclude several types of restrictive covenants that are desirable to Oklahoma employers and employees. In addressing these concerns, this note also will provide suggestions for the legislature to continue the process of improving Oklahoma's law on restrictive employment covenants.

In an effort to address these issues, this note will first review the common law treatment of covenants in restraint of trade. Next, Part III will discuss Oklahoma's law on noncompetitive covenants prior to the 2001 amendments. Part IV will focus on...
on the areas of law reconciled by the amendments, and Part V will provide guidance to courts and practitioners in navigating the statutory standards of section 219A. Finally, Part VI will highlight several types of covenants that the amendments seem to exclude completely.

II. Common Law History of Employment Covenants Not to Compete

From common law England to modern America, restrictive covenants have reflected the tension among several competing policy concerns. These concerns include personal economic freedom, freedom of contract, and general business ethics. Employers raise these policies as concerns regarding the protection of trade secrets from unethical competitors, the preservation of established client relationships, and the protection of time and money invested in training new employees. In opposition to these concerns stand issues of economic mobility, personal freedom, the diminution of future bargaining power, and the stagnation of ideas, processes, and methods.

Consistent with its English law roots, American contract law generally requires that courts enforce contracts without reference to the fairness of the terms. While American law has given a substantial presumption of validity to most types of contracts, this has not been the case with restrictive employment agreements. In fact, most courts and legislatures have looked with disfavor on these types of agreements and have only allowed them, if at all, under limited circumstances.

A. English Common Law

Early English courts found all restrictive employment covenants to be void and unenforceable. This total ban on noncompete agreements resulted, in large part, because of the guild system. During the Middle Ages, an individual's ability to

19. Blake, supra note 1, at 626; see also Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685 (Ohio Ct. Com. Pl. 1952) (outlining the development of restrictive covenants in England and America); 1 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.3 (2d ed. 1998). The tension between the concerns of employers and those of employees is evidenced in modern America by the existence of websites such as http://www.breakyourowncontract.com/ (last visited Oct. 21, 2002).
20. Blake, supra note 1, at 627.
21. Id.
23. 1 FARNSWORTH, supra note 19, §§ 2.2, 2.7.
24. Blake, supra note 1, at 629.
25. Id.
26. Id.
27. Id. at 632.
succeed economically was directly related to his ability to learn a skill as an apprentice.\textsuperscript{28} Accordingly, the guild system was the dominant labor force in England, and every employment covenant decision of this era was rendered in the context of this system.\textsuperscript{29} The guild system had elaborate rules and regulations, imposed both from within the guilds and from political bodies such as Parliament and local authorities.\textsuperscript{30} In addition, the guilds were not merely an economic/labor system, but also were a cultural force that both reflected and controlled the mores of Medieval England.\textsuperscript{31} Because of the complex economic and cultural identity of the early guild system, English courts based many of the decisions striking down restrictive employment covenants on a violation of laws or traditions that were unique to this system.\textsuperscript{32} Additionally, the dominant goal of early English courts was the attainment of fair conditions of commerce and industry,\textsuperscript{33} which further motivated courts to strike down employment noncompete agreements in favor of economic independence.\textsuperscript{34}

Even with the decline of the guild system and the change of focus from fair conditions to the achievement of national prominence that occurred in the sixteenth century, English courts continued to invalidate restrictive employment covenants.\textsuperscript{35} In all likelihood, a desire to encourage free trade and individual initiative motivated this continued practice.\textsuperscript{36}

During the eighteenth and nineteenth centuries, however, freedom of contract emerged as a dominant policy concern, and, in reaction, English courts began to allow limited restraints on trade.\textsuperscript{37} \textit{Mitchel v. Reynolds}\textsuperscript{38} is most often cited as the watershed case of this era, ushering in a truly modern approach to restrictive covenants.\textsuperscript{39} In \textit{Mitchel}, the defendant assigned a five-year lease of a bakery to the plaintiff.\textsuperscript{40} The defendant also agreed that he would not work as a baker in the same

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\footnote{29}{Blake, supra note 1, at 632. Professor Blake further argues that the customary rules of apprenticeship played a decisive role in the reasoning of these early decisions striking down all restrictive employment covenants. \textit{Id.} For example, a typical apprenticeship lasted seven years, and many of the early cases struck down efforts by enterprising masters to extend this period through the use of restrictive covenants. \textit{Id.} at 632-33.}
\footnote{30}{\textit{Id.} at 633.}
\footnote{31}{\textit{Id.} at 634.}
\footnote{32}{\textit{Id.} at 632.}
\footnote{33}{8 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 56-57 (2d ed. 1937).}
\footnote{34}{These motivations led one Medieval judge, in striking down a restrictive employment covenant, to exclaim, "By God, if the plaintiff were here he should go to prison until he paid a fine to the King." Blake, supra note 1, at 636 n.33 (quoting Dyer's Case, Y.B. 2 Hen. 5, 5, Mich. 26 (C.P. 1414)).}
\footnote{35}{8 HOLDSWORTH, supra note 33, at 61.}
\footnote{36}{\textit{Id.} at 57.}
\footnote{37}{Agee, supra note 28, at 348-49.}
\footnote{38}{1 P. Wins. 181, 24 Eng. Rep. 347 (Q.B. 1711).}
\footnote{39}{8 HOLDSWORTH, supra note 33, at 60-61. Indeed, Professor Blake notes that early "cases which failed to cite \textit{Mitchel v. Reynolds} are difficult to find." Blake, supra note 1, at 639.}
\footnote{40}{Mitchel, 24 Eng. Rep. at 347.}
\end{footnotes}
parish for the duration of the lease. 41 In upholding the covenant not to compete, Chief Justice Parker reasoned that "particular restraints, if imposed upon a good and adequate consideration so as to make it a proper and useful contract" were valid. 42 The *Mitchel* court further reasoned that courts should judge such restrictions by looking to whether the restraint "prevented [the party] from earning his livelihood . . . or deprived the public by depriving it of the abilities of one of its members." 43 While *Mitchel* addressed a covenant not to compete formed ancillary to the sale of a business, the line of cases following *Mitchel* firmly established the modern "rule of reason" test in England for evaluating restrictive employment covenants as well. 44

B. American Development

American courts of the nineteenth century followed the later English rule, allowing reasonable restraints of trade if limited by duration and geographic scope. 45 While many early American courts refused to enforce covenants that extended to an entire state without regard to their reasonableness, 46 this approach changed with *Oregon Steam Navigation Co. v. Winsor*. 47 In *Winsor*, the United States Supreme Court upheld a covenant that a former steamship owner would not compete with its purchaser in the state of California. The *Winsor* Court reasoned that the covenant was reasonable, even though its geographic scope encompassed an entire state, because "in this country . . . state lines interpose such a slight barrier to social and business intercourse." 48 Shortly after *Winsor*, New York, Massachusetts, and Rhode Island also announced a rule of reason without regard to state boundaries. 49 Thus, by the end of the nineteenth century, U.S., as well as English, courts had adopted the rule of reason as the dominant test to judge covenants not to compete. This rule continues as the dominant method of assessing the validity of most types of restrictive covenants. 50

41. *Id.*
42. *Id.* at 348.
43. *Id.* at 350.
45. See Pike v. Thomas, 7 Ky. (4 Bibb) 486, 488 (1817); Pierce v. Woodward, 23 Mass. (6 Pick.) 206, 208 (1828) (sale of grocery store with verbal agreement not to compete within certain distance); Palmer v. Stebbins, 20 Mass. (3 Pick.) 188, 193 (1825) (exclusive agreement to carry all goods of obligor and not encourage competition with boatman to carry goods); Pierce v. Fuller, 8 Mass. 223, 225 & note [a] (1811) (purchase of stage line between Boston and Providence, Rhode Island); Nobles v. Bates, 7 Cow. 307, 309 (N.Y. 1827).
47. 87 U.S. (20 Wall.) 64 (1874).
48. *Id.* at 67.
49. Blake, *supra* note 1, at 644.
50. *Id.* at 645. Another interesting twist in the law of restrictive covenants in the U.S. came with the enactment of the Sherman Antitrust Act in 1890. 15 U.S.C. § 1 (2000). From the earliest interpretation of the Sherman Act, it was clear that U.S. courts must evaluate certain contracts, combinations, or conspiracies that restrain trade under a reasonableness standard. The Sixth Circuit Court
III. Pre-Amendment Oklahoma Law on Employment Covenants Not to Compete

A. Evolution of Case Law from a Strict Evaluation to a Rule of Reason Approach

Prior to the 2001 amendments, Oklahoma had a long and most uncertain relationship with restrictive employment covenants. In 1890, Oklahoma adopted the Dakota Territory’s law on covenants in restraint of trade.51 The Revised Laws of 1910 compiled this statute, along with others, and codified it as title 12, sections 978-980.52 These statutes remained unchanged for decades, with the legislature adopting minor amendments in 1989.53

While the statute itself may have remained relatively unchanged for more than 100 years, its interpretation by Oklahoma courts has not.54 In 1948, E.S. Miller of Appeals announced this holding in United States v. Addyson Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff’d, 175 U.S. 211 (1899).

In Addyson, the government charged six cast-iron manufacturers with dividing territory and fixing prices. Id. at 273. The manufacturers argued that their activities were not illegal under section 1 of the Sherman Act because Congress did not intend the Sherman Act to invalidate the common law rule of reason. Id. at 278.

The court, while partially relying on a naked/ancillary distinction, held that the activities of the manufacturers violated the Sherman Act because they were an unreasonable restraint of trade. Id. at 291. On appeal, the United States Supreme Court affirmed the use of the rule of reason to evaluate some contracts, combinations, or conspiracies in restraint of trade. Addyson, 175 U.S. at 247.

Many commentators have urged that courts should apply a stricter standard to restrictive employment covenants in light of the federal antitrust laws; however, these suggestions have gone largely unheeded. See Charles A. Sullivan, Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade, 1977 U. ILL. L. REV. 621, 647-50 (as noted in Agee, supra note 28, at 351); see also Blake, supra note 1, at 628. While the law that governs antitrust cases is different than the law applied to employment covenants not to compete, the use of the rule of reason by the United States Supreme Court in the former context has greatly influenced courts in using that same test to evaluate the latter. Agee, supra note 28, at 351-52.

51. The 1890 version reads:

Section 7. Every Contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by the next two sections, is to that extent void.

Section 8. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city or part thereof, so long as the buyer, or any person deriving title to the goodwill from him carries on a like business therein.

Section 9. Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof.

OKLA. STAT. ch. 17, art. 4, §§ 7-9 (1890).

For the text of the Law of the Dakota Territory see COMPILED LAW OF THE DAKOTA TERRITORY (Bismarck, Dakota 1887).

52. 12 OKLA. STAT. §§ 978-980 (1910). The 1910 version is substantively identical to the 1890 version cited supra note 51.

53. The 1989 amendment substituted the phrase "Sections 218 and 219 of this title" for the phrase "the next two sections" in section 217. 15 OKLA. STAT. ANN. §§ 217-219 (West 2000).

Laboratories v. Griffin provided the Oklahoma Supreme Court its first opportunity to interpret title 15, section 217. In Miller, the court examined a covenant that prohibited a pharmaceutical salesman from competing with his former employer for two years after the employment terminated. The court held that the covenant was void. The Miller court reasoned that while the common law rule allowed reasonable restraints of trade, this rule of reason did not survive the enactment of section 217. The court further reasoned that because of this literal reading, any covenant must be specifically exempted by the statute itself to be valid.

More than twenty years later, the Oklahoma Supreme Court began to relax this strict reading of section 217 in Tatum v. Colonial Life & Accident Insurance Co. In Tatum, the court reviewed a covenant that restrained an insurance salesman from selling group accident or health coverage to known clients of his former employer for two years following termination. The Tatum court held that the covenant was valid and enforceable. The court reasoned that the Tatum covenant was distinguishable from the Miller covenant in that the former only partially restrained the agent's ability to sell insurance. The Tatum court further reasoned that the covenant did not violate section 217 because it did not attempt to protect the former employer against fair competition, but only against the unfair competition that would result from the former employee using information and relationships gained during his employment.

In 1977, Board of Regents of the University of Oklahoma v. NCAA provided the next step in the evolution of the interpretation of section 217. In NCAA, the court evaluated an NCAA rule that prohibited participating schools from hiring more than a specified number of assistant coaches. While attacking the rule primarily on antitrust grounds, many of the coaches argued that the prohibition on hiring assistant coaches violated section 217. The Oklahoma Supreme Court held that the provision did not violate Oklahoma's prohibition on covenants in restraint of trade because "statutes invalidating contracts in restraint of trade must be determined by its [sic] reasonableness." The NCAA court further held that contracts in reasonable restraint of trade do not violate section 217.

55. 1948 OK 149, 194 P.2d 877.
56. Id. ¶ 1, 194 P.2d at 878.
57. Id. ¶ 11, 194 P.2d at 878.
58. Id. ¶ 5-11, 194 P.2d at 878-79.
59. Id. ¶ 11, 194 P.2d at 878.
61. Id. ¶ 1, 465 P.2d at 449.
62. Id. ¶ 12, 465 P.2d at 451.
63. Id. ¶ 7, 465 P.2d at 451.
64. Id. ¶ 8, 465 P.2d at 451.
65. 1977 OK 17, 561 P.2d 499.
66. Id. ¶ 1, 561 P.2d at 501.
67. Id. ¶ 19, 561 P.2d at 508.
68. Id. ¶ 19, 561 P.2d at 508.
69. Id.
Four years later, in *Crown Paint Co. v. Bankston*, the Oklahoma Supreme Court provided the final blow to the strict reading of section 217 employed in *Miller*. As in *NCAA, Crown Paint* presented an agreement that the defendant Bankston primarily contested on antitrust grounds; however, the defendant raised section 217 as an alternate argument to invalidate the covenant. The *Crown Paint* court clearly affirmed the ruling of *NCAA*, holding again that section 217 only invalidates unreasonable restraints of trade. As the court would later note, the combined holdings of *NCAA* and *Crown Paint* squarely returned Oklahoma law on restrictive employment covenants to the majority rule of reason approach.

B. What Are "Reasonable" Employment Restraints Under a Rule of Reason Analysis?

After establishing that section 217 only invalidates unreasonable restraints of trade, it next becomes necessary to determine the elements of a "reasonable" restraint of trade. *Loewen Group Acquisition Corp. v. Matthews* clearly outlines these elements. In *Loewen*, the Oklahoma Court of Civil Appeals analyzed a covenant that restricted the former employee of a funeral home from operating funeral homes within a fifteen-mile radius of any funeral home operated by the former employer. In finding the restraint unreasonable, the court considered three factors: (1) whether the restraint was no greater than is required for the employer's protection; (2) whether the restraint imposed undue hardship on the employee; and (3) whether the restraint injured the public.

When considering these factors, the court looked to the geographic scope of the restraint, the duration of the restraint, and to whether the covenant restrained all competition or only the "unfair" competition of an employee who had gained valuable information and relationships during employment. The *Loewen* court went on to hold that "any agreement that seeks to prohibit fair competition can never be reasonable." Finally, the court again pointed to the non-solicitation agreement upheld in *Tatum* as an example of a valid restriction because it only restrained the former employee from soliciting business from the clients of the former employer.

71. Id. ¶ 21-24, 640 P.2d at 951-52.
72. Id. ¶ 23, 640 P.2d at 952.
75. 2000 OK CIV APP 109, 12 P.3d 977.
76. Id. ¶ 3, 12 P.3d at 979.
77. Id. ¶ 15, 12 P.3d at 980.
78. Id. ¶ 18-20, 12 P.3d at 981-82.
79. Id. ¶ 21, 12 P.3d at 982.
80. Id.
C. Reformation by the Court of Unreasonable Covenants

The final major development in the area of restrictive employment covenants is the reformation of unreasonable covenants by the court. Reformation differs from what is commonly known as the "blue-pencil" doctrine. The "blue-pencil" doctrine derives its name from the tradition of "striking, or penciling out, void, offensive or unreasonable language in a contract without rendering the entire agreement unenforceable." In contrast to the "striking out" of the blue-pencil doctrine, Oklahoma courts engage in all-out judicial modification of offensive or overbroad provisions.

The Oklahoma Supreme Court addressed the issue of judicial reformation in Bayly, Martin & Fay, Inc. v. Pickard. In Bayly, the court struck down an agreement that precluded an employee from soliciting the customers of his former employer for three years after termination. In doing so, the court recognized that judicial modification of an unreasonable covenant is justified if the court can cure the defects by the "imposition of reasonable limitations on the activities embraced, time, or geographic limitations." The Bayly court noted, however, that a court cannot reform a covenant so offensive that it would require the court to supply material terms of a contract. Loewen addressed another aspect of judicial reformation. In Loewen, the Oklahoma Court of Civil Appeals reviewed a covenant that prohibited a former employee from operating, owning, or working at a funeral home within a fifteen-mile radius of any home owned by the former employer. The court held that the covenant was unreasonable and therefore void. In refusing to reform the agreement, the court stated that it would not modify the covenant because the employer had designed the covenant to prevent fair competition, not to protect sensitive client information or established relationships. This holding firmly

82. Many commentators argue that judicial modification gives greater effect to the intent of the parties than merely striking the offensive provision and enforcing what remains. See, e.g., 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1390 (1962), reprinted in 15 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1390 (interim ed. 1993).
83. 1989 OK 122, 780 P.2d 1168. On judicial modification see also Loewen, ¶ 24, 12 P.3d at 982 (refusing to modify a covenant because it would require material alteration of essential elements); Key Temp. Pers., Inc. v. Cox, 1994 OK CIV APP 123, ¶ 17, 884 P.2d 1213, 1217 (upholding a trial court's modification of a restrictive covenant); Cohen Realty, Inc. v. Marinick, 1991 OK CIV APP 71, ¶ 7, 817 P.2d 747, 749 (finding that a covenant was "incurable").
84. Bayly, ¶ 3, 780 P.2d at 1169.
85. Id. ¶ 14, 780 P.2d at 1173.
87. Bayly, ¶ 19, 780 P.2d at 1175.
89. Id. ¶ 24, 12 P.3d at 982.
90. Id. ¶¶ 20-22, 12 P.3d at 982.
establishes that an Oklahoma court will not modify a covenant that is "fundamentally flawed," i.e., a covenant designed to protect against "fair" competition.\footnote{Id. § 24, 12 P.3d at 982.}

\section*{IV. The Amendments Reconcile Statutes and Case Law}

As explained in Part I, the major addition of the 2001 amendments is section 219A, which specifically enables employers and employees to enter into non-solicitation agreements. However, section 219A also invalidates any other type of restrictive covenant between employers and employees.

While these amendments initially may seem radical, a close inspection of Oklahoma case law reveals that the amendments simply bring Oklahoma statutes in line with established case law.\footnote{At first glance, it may seem that Oklahoma case law does not provide a complete picture of Oklahoma law on covenants not to compete because the reported cases only address "employee," rather than "executive," noncompete agreements. It may seem attractive to argue that, under pre-amendment Oklahoma law, surely Oklahoma courts would have enforced a noncompete agreement negotiated as part of a CEO's multimillion dollar employment contract. This argument, however, is flawed for at least three reasons. First, pre-amendment Oklahoma statutory and case law do not consider "fairness in bargaining power" or "executive status" as relevant factors in judging the validity of noncompete agreements. \textit{See} COLO. REV. STAT. § 8-2-113(2)(d) (1994) (specifically noting that, under Colorado law, "[e]xecutive and management personnel and officers and employees who constitute professional staff to executive and management personnel" are exempt from Colorado's ban on covenants not to compete — Oklahoma law has no such provision). Second, and closely related, because the Oklahoma Supreme Court never articulated any such employee/executive distinction in its case law, if accepted, such arguments would provide absolutely no guidance to attorneys attempting to navigate Oklahoma's already unclear law on covenants not to compete. This, in turn, highlights the final problem with any employee/executive distinction: where does Oklahoma courts draw the line between valid executive covenants and impermissible organizational structure? Certainly, every employee, except those at the apex of organizational structures, are "managed" by someone, and the sliding scale of bargaining power along that hierarchy of management cannot provide meaningful direction to Oklahoma courts or practitioners. So, while the policy arguments in favor of noncompetitive covenants may prove persuasive, policy makers should resist the temptation to argue that any such exception existed, or should have existed, under pre-amendment case law. Such whittling away at the law on covenants not to compete would further muddy an already unclear area of the law. \textit{But see} E-mail from Gary Derrick, Chair, Oklahoma General Corporation Act Committee, to Jeb Boatman (Oct. 1, 2002, 10:56:48 CST) (on file with author) ("Case law alone describes only slices of life, which we then extrapolate to reach an understanding of "the law." Regarding the [Oklahoma] restrictive covenants cases; this relatively large number of cases covers a surprisingly narrow factual range. . . . We do not have cases dealing with executive officers, start-up promoters, essential consultants, recipients of venture capital, licensees, or others with respect to whom restrictive covenants would be more reasonable.").} While Oklahoma courts historically have been extremely hostile to most types of employer-employee restrictive covenants,\footnote{\textit{See} supra Part III.A; \textit{see also} Neal v. Penn. Life Ins. Co., 1970 OK 13, 480 P.2d 923; Cohen Realty, Inc. v. Marinick, 1991 OK CIV APP 71, 817 P.2d 747.} Oklahoma courts have not expressed this same hostility toward non-solicitation agreements. Prior to the 2001 amendments, with the exception of \textit{Board of Regents of the University of Oklahoma v. NCAA},\footnote{It is important to recognize that \textit{NCAA} is essentially an antitrust case. While the court does in fact uphold a restrictive agreement that is not a non-solicitation agreement, it does so summarily and without any meaningful analysis.} every reported case in which the
Oklahoma courts have upheld a restrictive covenant as reasonable has involved a non-solicitation agreement. Oklahoma courts consistently return to the limited nature of non-solicitation agreements and the protection they provide from unfair competition as themes in upholding the use of these types of restrictive agreements.

For example, the Oklahoma Supreme Court upheld a non-solicitation agreement for the first time in *Tatum v. Colonial Life & Accident Insurance Co.* The non-solicitation agreement in *Tatum* specifically prohibited a terminated employee from [s]elling, or attempting to sell, any form of accident or health insurance to or on any of the [former employer's] insureds under group policies or franchise policyholders, and from inducing, or attempting to induce, any of the [former employer's] insureds under group policies or franchise policyholders to cancel, lapse, or fail to renew their policies with [the former employer].

In finding the covenant valid, the Oklahoma Supreme Court denominated the covenant a mere "hands-off" policy, a term that is echoed in several subsequent opinions. The court reasoned that, as a "hands-off" policy with respect to the former employer's customers, the restriction did not preclude the former employee from exercising his profession by selling insurance to noncustomers and therefore did not violate section 217. The court further reasoned that the parties had not designed the non-solicitation agreement to protect the former employer against legitimate forms of competition, but rather to protect the former employer against the unfair use of information and relationships acquired during employment.

The Oklahoma Court of Civil Appeals undertook a similar analysis in *Key Temporary Personnel, Inc. v. Cox.* In *Key,* the court upheld a non-solicitation agreement that prevented a former employee from soliciting the clients of the

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97. *Id.,* ¶ 7, 465 P.2d at 451; see also *Baughman,* ¶ 3, 996 P.2d at 941; *Key,* ¶ 9, 884 P.2d at 1216.
99. *Id.,* ¶ 8, 465 P.2d at 451. Importantly, courts can also analyze the use of customer information and client lists under a "trade secrets" rubric. The law of trade secrets is beyond the scope of this note; however, on this topic see 78 OKLA. STAT. §§ 51-55 (2001). See also *Central Plastics Co. v. Goodson,* 1975 OK 71, 537 P.2d 330. For a detailed discussion see ROGER M. MILGRAM, MILGRAM ON TRADE SECRETS § 1.09 (2001).
100. 1994 OK CIV APP 123, 884 P.2d 1213.
employer for a period of nine months following termination.\textsuperscript{101} The Key court recognized that the covenant in question, like the covenant in Tatum, was merely a "hands-off" provision with respect to a limited number of former clients and that the non-solicitation agreement only protected against an unfair competitive advantage.\textsuperscript{102}

A final illustrative case is Thayne A. Hedges Regional Speech and Hearing Center, Inc. v. Baughman.\textsuperscript{103} In Baughman, the non-solicitation agreement required that an employee not contract with any "group, agency, client and/or agency contracting with or served by" the former employer for a period of two years following termination.\textsuperscript{104} The Oklahoma Court of Civil Appeals held that the non-solicitation agreement was valid, in large part, because it only required a "hands-off" policy with respect to former clients.\textsuperscript{105} The Baughman court reasoned that the protection of existing contracts and clients is a legitimate business concern.\textsuperscript{106}

\textbf{V. Suggestions for Navigating the New Amendments}

The amendments to title 15, sections 217-219A, raise several interesting and important drafting issues and areas of potential litigation. Thus, courts and practitioners should be aware of potential pitfalls in navigating the new amendments.\textsuperscript{107}

\textbf{A. Courts and Practitioners Should Limit the Definition of "Established Customers"}

The recent amendments provide an "established customers" standard for deciding which customers a former employee may not solicit. The statute, however, does not define this standard.\textsuperscript{108} Conversations with Representative Vaughn, the House sponsor and chief proponent of the amendments, indicate an intent that courts should interpret the "established customers" standard very broadly.\textsuperscript{109} Such an interpretation, however, would create at least two problems. First, it is a settled canon of statutory construction that courts must attempt to give meaning to each

\textsuperscript{101} Id. ¶ 4, 17, 884 P.2d at 1214-15, 1217.
\textsuperscript{102} Id. ¶ 9, 884 P.2d at 1215-16.
\textsuperscript{103} 1998 OK CIV APP 122, 996 P.2d 939.
\textsuperscript{104} Id. ¶ 1, 996 P.2d at 940.
\textsuperscript{105} Id. ¶ 3, 996 P.2d at 941.
\textsuperscript{106} Id.
\textsuperscript{107} For general guidance on drafting covenants not to compete see 2 FARNSWORTH, supra note 19, § 5.3a.
\textsuperscript{108} Courts have defined "customer" in another context to mean "one who has had repeated dealings with another." Lyons v. Otter Tail Power Co., 297 N.W. 691, 693 (N.D. 1941). Although this definition did not deal with restrictive employment covenants, it still supports the idea that practitioners, and ultimately Oklahoma courts, should provide some type of "frequency of business" limitation on the term "established customer."
\textsuperscript{109} Vaughn Interview, supra note 8. In fact, Representative Vaughn suggests that the amendments preclude solicitation of any client on the business' "customer list," meaning any client that the business has ever served. Id. During the interview, he used the example of a law firm, saying that a non-solicitation agreement should prohibit a former employee from contacting a client for whom a lawyer in the firm drafted a will twenty years earlier. Id.
word within a statute. If Oklahoma courts interpreted the "established customer" standard to mean any customer that the business has ever dealt with, the "established" language of "established customer" would be superfluous. Second, such a broad standard could result in oppressive results by keeping a former employee from contacting businesses that have no intention of remaining a client of the former employer and that have not conducted business with the former employer for years. In any event, the absence of a defined standard for "established customers" invites litigation, and the Oklahoma legislature should further define this standard.

While it is advisable that the legislature address this omission to provide further certainty, as it stands, courts and practitioners must look to prior case law for guidance in interpreting the "established customer" standard. Key Temporary Personnel, Inc. v. Cox, discussed previously, involved a standard similar to the "established client" language of section 219A. In Key, the non-solicitation agreement provided that upon termination, for a term of nine months, the former employee would not

directly or indirectly solicit, divert or attempt to solicit or divert any client of the Company, provided that client was a client of the Company at the time of the Employee's termination and provided further the client remains a client of the Company during the nine month non-solicitation period.

In granting a preliminary injunction, the trial judge enjoined the former employee from soliciting (1) Key clients assigned to the employee during her employment and (2) Key clients who, although not assigned to the former employee, were known by the employee to be Key clients. The order further provided that a business would only be considered a client if it had purchased services from Key within the previous six months. The order also required Key to provide the former employee with a list of clients assigned to her during her employment and a list of clients that the former employee knew to be Key clients. Finally, the order required Key to update the list twice a month to reflect clients who had not purchased services during the previous six months. On appeal, the Oklahoma Court of Civil Appeals affirmed the trial court's interpretation of "client" as reasonable and upheld the injunction.

111. Importantly, no other state's statutory law on covenants not to compete uses the phrase "established customer." See generally COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (Brian M. Malsberger ed., 2d ed. 1996).
113. Id. ¶ 4, 884 P.2d at 1214-15.
114. Id. ¶ 5, 884 P.2d at 1215.
115. Id.
116. Id. ¶ 6, 884 P.2d at 1215.
117. Id.
118. Id. ¶ 17, 884 P.2d at 1217.
While the covenant in Key did not specifically use the term "established clients," the functional definition affirmed by the court as reasonable provides two principles for navigating section 219A. First, the court defined "clients" to include both clients assigned to the former employee and those merely known to be clients by the former employee. Following this guidance, it seems reasonable that practitioners need not limit non-solicitation agreements to only restrict contact with clients assigned to the employee during employment, but may draft covenants to include all known clients of the former employer.

Second, the Key court limited "clients" to those businesses that had purchased services within the past six months. It seems reasonable, following this guidance, that practitioners should employ a similar limitation in drafting and litigating the "established" standard of section 219A. At the very least, courts and practitioners should limit the restricted clients to those clients who frequently conduct business with the former employer. By limiting the restricted clients, courts will protect employees from overbroad non-solicitation agreements that restrict access to all clients who have ever conducted business with the former employer regardless of the current status of the business relationship. In addition, a "frequency of business" limitation will provide some assurance to an employer that a court may not invalidate its covenant as outside of the "established client" language of section 219A.

Finally, in drafting covenants that attempt to meet the "established client" standard of section 219A, practitioners should include a severability or judicial modification clause. Under pre-amendment law, the Oklahoma Supreme Court clearly affirmed the ability of a court to judicially modify an offensive covenant, and there is little reason to believe that a court faced with a good-faith attempt to meet the "established client" standard of 219A would not do so today. It seems especially likely that a court would modify an overbroad non-solicitation agreement when the parties themselves have included a provision expressly calling for such modification. An appropriate provision could read: "The parties agree that each sentence, term, or provision of the agreement shall be considered severable and/or open to judicial modification and that should one portion of the agreement be deemed not in accord with Oklahoma law, the other provisions of the agreement will not be affected."

B. Limitations as to Time and Geographic Scope Under Section 219A

The language of section 219A does not address whether non-solicitation agreements under the new amendments must accord with the pre-amendment reasonableness standards as to duration and geographic scope. However, because courts will likely at least continue to employ a reasonable duration standard, practitioners must look to prior case law for guidance.

119. Id. ¶ 5, 884 P.2d at 1215.
120. Employers could receive maximum protection by providing new employees with a list of all clients considered "established" at the time of hiring, thus ensuring that every client of the former employer would fall into the limitation employed in Key.
121. Id.
122. See supra note 83-85 and accompanying text.
123. See Bowers et al., supra note 81, at 88.
While unique circumstances may persuade them to do so in the future, to date, Oklahoma courts have refused to extend the reasonable duration standard beyond two years.\textsuperscript{124} In fact, in striking down the covenant in \textit{Loewen}, the Oklahoma Court of Civil Appeals specifically refused to enforce a three-year covenant not to compete.\textsuperscript{125} The \textit{Loewen} court reasoned that because "the time period . . . [was] one year longer than that approved" in previous cases, it was too restrictive.\textsuperscript{126} Because of this reluctance to approve covenants that last for longer than two years, a prudent practitioner should not extend the duration of a non-solicitation agreement beyond two years, unless extremely unique circumstances warrant such an extension.\textsuperscript{127}

Oklahoma courts have been less clear regarding the permissible geographic scope of restrictive employment covenants. However, the propriety of any geographic standard seems questionable at best when dealing with non-solicitation agreements. The policies behind the use of non-solicitation agreements — the protection of insider information and established business relationships\textsuperscript{128} — are not necessarily bounded by geographic borders. The need to protect these interests should reasonably extend to any area of the country where an "established client" is located. Nonetheless, under pre-amendment law, Oklahoma courts followed the rule that each restriction must be "no greater than is required for the employer's protection from unfair competition,"\textsuperscript{129} and, in light of Oklahoma's historic antipathy toward employment covenants not to compete,\textsuperscript{130} courts could continue to require some type of geographic limitation on non-solicitation agreements, even though there seem to be few, if any, policy justifications for such a restriction.

A comparison of the holdings of two recent pre-amendment decisions will expose the inconsistency imposed by the pre-amendment geographic standard. In the \textit{Loewen} decision, the Oklahoma Court of Civil Appeals invalidated a restrictive covenant that prohibited a nursing home employee from operating a nursing home within a fifteen-mile radius of any existing nursing home owned by the employer.\textsuperscript{131} The court reasoned that this restriction would preclude operation of any nursing home within nearly the entire Oklahoma City metro area, and was therefore unreasonable.\textsuperscript{132} However, in \textit{Baughman}, the Oklahoma Court of Civil Appeals upheld a restriction


\textsuperscript{125} Loewen Group Acquisition Corp. v. Matthews, 2000 OK CIV APP 109, ¶ 24, 12 P.3d 977, 982.

\textsuperscript{126} Id. ¶ 18, 12 P.3d at 981.

\textsuperscript{127} Because of the reluctance of Oklahoma courts to uphold covenants that endure beyond two years, contracting parties should include in a noncompete clause any unique considerations or circumstances that require a restriction longer than two years. See 1 FARNSWORTH, supra note 19, ¶ 3.6 (noting that courts interpret contracts in accord with the parties' objective intent as evidenced by, among other things, the language of the contract itself).

\textsuperscript{128} Key Temp. Pers., Inc. v. Cox, 1994 OK CIV APP 123, ¶ 10, 884 P.2d 1213, 1216.

\textsuperscript{129} Loewen, ¶ 15, 12 P.3d at 980.

\textsuperscript{130} See supra note 96 and accompanying text.

\textsuperscript{131} Loewen, ¶ 18, 12 P.3d at 981.

\textsuperscript{132} Id.
that precluded a former employee from soliciting any customers of the former employer, seemingly without reference to geographic scope. In affirming the restriction, the court reasoned that it did not extend beyond the geographic area in which the employer operated and therefore was not overbroad. This reasoning could arguably be used to extend a restriction to an area much larger than that struck down in Loewen if, for example, an employer operated on a statewide or even national scale.

Considering these seemingly contradictory holdings, however, the latter reasoning is more appropriate for non-solicitation agreements. Employers use non-solicitation agreements to protect against the unfair competitive advantage that employees gain by exposure to information and relationships during their employment, and it is reasonable that this need for protection could extend to the entire state, or even entire nation, depending on the scope of the employer's business. Because the interests protected by non-solicitation agreements are not necessarily bounded by geographic boundaries, Oklahoma courts should no longer require a geographic limitation on permissible non-solicitation agreements under section 219A.

133. 1998 OK CIV APP 122, ¶ 1, 996 P.2d 939, 940.
134. Id. ¶ 3, 996 P.2d at 941.
135. See supra note 129 and accompanying text.
136. The issue of nationwide enforcement raises interesting and complex conflict of laws issues. For example, in Fort Smith Paper Co., Inc. v. Sadler Paper Co., 482 F. Supp. 355, 356-57 (E.D. Okla. 1979), the plaintiff argued that the court should apply Arkansas law, which allowed restrictive employment covenants, to the challenge of a covenant by an Oklahoma citizen in a federal court sitting in diversity. The court reasoned that, even if the covenant were valid under Arkansas law, it would be unenforceable in Oklahoma because of Oklahoma's strong public policy against such restrictions. Id. at 357. The court stated that Oklahoma law had long held that "contracts which are contrary to the public policy of Oklahoma will not be enforced by Oklahoma courts regardless of their validity in the state where made." Id. This holding seems especially pertinent to businesses that operate on a national scope, and practitioners, when drafting or litigating this issue, should ascertain the validity of restrictive covenants in every jurisdiction in which a business operates. See also Herchman v. Sun Med., Inc., 751 F. Supp. 942, 945 n.2 (N.D. Okla. 1990) (stating that, even if choice of law rules led a court to follow Texas' law on covenants not to compete, nonetheless, an Oklahoma court, or a federal court sitting in diversity, is not "obligated to enforce a foreign contract which is repugnant to the public policy" of Oklahoma).

137. See Research & Trading Corp. v. Pfuhl, CIV No. 12527, 1992 WL 345465, at *12 (Del. Ch. Nov. 18, 1992) ("If . . . the employer's customer base . . . extends throughout the nation, or indeed even internationally, . . . then it is appropriate that an employee subject to a non-competition agreement be prohibited from soliciting those customers on behalf of a competitor regardless of their geographic location."); Ellis v. James V. Hurson Assoc., Inc., 565 A.2d 615, 620 (D.C. 1989) ("[T]he territorial limitation requirement is generally inapposite where the preliminary injunction entered by the trial court enjoins [an employee], not generally from competing in the same field as [the former employer], but merely from soliciting [the former employer's] customers."); Sentry Ins. v. Dunn, 411 So. 2d 336, 337 (Fla. Dist. Ct. App. 1982) (holding that an employer need not limit the geographic scope of a non-solicitation agreement); W.R. Grace & Co. v. Mouyal, 422 S.E.2d 529, 533 (Ga. 1992) ("Requiring an express geographic territorial description in all cases is not in keeping with the reality of the modern business world in which an employee's 'territory' knows no geographic bounds, as the technology of today permits an employee to service clients located throughout the country and the world."). Oklahoma practitioners, however, should continue to employ a severability or judicial modification clause in all non-solicitation agreements until Oklahoma courts definitively settle this issue. See supra note 83-85 and
C. Courts Should Not Apply the Amendments Retroactively to Invalidate Pre-Amendment Covenants

There is justified concern among businesses and practitioners as to the effect of section 219A on covenants formed before June 4, 2001. Generally, courts have two options with the enactment of a new or amended statute: (1) the statute/amendment can be applied retroactively, even to govern legal relationships formed under a previous statutory scheme; or (2) the statute/amendment will not be applied retroactively, and legal relationships will be governed by the law in force at the time of their formation. The latter approach is more appropriate for applying section 219A for at least two reasons. First, the Oklahoma Supreme Court, in Franklin v. Sovereign Camp W.O.W., announced a strong presumption against retroactive application of statutes. In Franklin, the court held that "[t]here is a presumption . . . that statutes are intended to operate prospectively only, and [the statute] ought not to have a retrospective operation unless [the statute is] so clear, strong, and imperative that no other meaning can be annexed to [it]." The Franklin court reviewed a law that governed the permissible activities of fraternal organizations operating in Oklahoma. In finding that the law did not apply retroactively to govern a dispute between a fraternal organization and a former member, the Oklahoma Supreme Court noted that legislative intent can be found by looking to the language employed in the statute itself. The Franklin court then highlighted the use of phrases in the statute in question, such as "shall be transferred," "shall be suspended or expelled," and "shall have the right," to show an intent that the statute only apply prospectively. Finally, in noting ambiguous language in the statute, the Oklahoma Supreme Court reasoned that "[e]very reasonable doubt is to be construed and resolved against a retroactive operation of a statute." Following the reasoning of Franklin, courts should not apply section 219A retroactively because the language employed, such as "shall be permitted" and

accompanying text.

139. While this approach may ensure that courts will evaluate covenants formed prior to June 4, 2001, under a rule of reason standard, this may be little consolation to Oklahoma employers. As discussed in Part IV, supra, prior to the amendments, Oklahoma courts had only upheld a true covenant not to compete in one case. Because of this legacy of hostility to true covenants not to compete, businesses and practitioners should review pre-amendment covenants to ensure that they accord with the actual practice of Oklahoma courts.
140. 1930 OK 195, 291 P. 513.
141. Id. ¶ 30, 291 P. at 515; see also Baker v. Tulsa Bldg. & Loan Ass'n, 1936 OK 568, ¶ 8, 66 P.2d 45, 49 (refusing to apply a statute retroactively because courts generally should construe contracts in light of the law in effect at the time they were created).
142. Franklin, ¶ 9, 291 P. at 514.
143. Id. ¶ 23, 291 P. at 515.
144. Id. ¶¶ 32-34, 291 P. at 515-16.
145. Id. ¶ 38, 219 P. at 516 (citing Ducey v. Patterson, 86 P. 109, 112 (Colo. 1906)).
"shall be void," shows legislative intent that section 219A apply prospectively only.146

Second, section 219A should only apply prospectively because a retroactive application would raise serious questions regarding section 219A's constitutionality. It is a fundamental canon of statutory interpretation that between two competing statutory interpretations, courts prefer an interpretation that avoids possible constitutional infirmities.147 While an exhaustive review of Contract Clause jurisprudence is beyond the scope of this note,148 even a cursory review indicates that a retroactive application of section 219A would raise serious issues regarding the unconstitutional impairment of vested contractual obligations. The Oklahoma Supreme Court provided guidance on the issue of the impairment of contractual rights in Baker v. Tulsa Building & Loan Ass'n.150 In Baker, the court addressed whether the repeal of a statute could change contractual relationships formed prior to the repeal.151 In refusing to evaluate the contract in light of the repeal, the Baker court noted "'[u]nder section 10, art. 1, of the Constitution of the United States, and section 15, art. 2, of the state Constitution, the Legislature [is] prohibited from impairing the obligation of a contract made pursuant to existing provisions of law" by amendment or repeal.152

146. Even the language "is to that extent void" found in section 217, which seems to indicate a present intent to make void, must be "construed and resolved" against retroactivity because, in light of the overwhelming use of the future tense, the legislature has not employed words that are "so clear, strong, and imperative" that no other interpretation is reasonable. id. ¶ 30, 219 P. at 515.

Cardiovascular Surgical Specialists, Corp. v. Mammana, 2002 OK 27, 2002 WL 530188 (Okla. Apr. 9, 2002), supports this conclusion. Without analyzing the issue of retroactive application, the Oklahoma Supreme Court applied pre-amendment law to a noncompete agreement in April 2002 — over nine months after the amendments to section 219A took effect — presumably because the parties formed the noncompete agreement in 1996. id. ¶ 3, 2002 WL 530188, at *1.


148. Article 1, Section 10 of the United States Constitution reads:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. CONST. art. I, § 10 (emphasis added).

Article 2, Section 15 of the Oklahoma Constitution reads:

No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed. No conviction shall work a corruption of blood or forfeiture of estate: Provided, that this provision shall not prohibit the imposition of pecuniary penalties.

OKLA. CONST. art. 2, § 15 (emphasis added).


150. 1936 OK 568, 66 P.2d 45.

151. Id. ¶ 2, 66 P.2d at 46.

Accordingly, section 219A should not affect the validity of covenants formed prior to June 4, 2001. Not only does the language of the amendments fail to overcome the strong presumption against retroactivity, but an interpretation of retroactivity also would raise serious constitutional issues of the impairment of contractual obligations in violation of Article 1, Section 10 of the United States Constitution and article 2, section 15 of the Oklahoma Constitution. Under fundamental canons of statutory interpretation, an interpretation that avoids these constitutional issues, i.e., an interpretation of prospective application only, is strongly preferred.153

VI. The Amendments Adversely Affect Businesses by Excluding Desirable Covenants

Much of the criticism surrounding the amendments to title 15, sections 217 and 219A, relate to the types of covenants the amendments specifically invalidate.154 This criticism, however, may be unfairly directed at the recent amendments. Even before the amendments, Oklahoma courts rarely upheld general noncompete agreements and broadly worded non-solicitation agreements. Nevertheless, the amendments to section 219A solidify this long-standing practice by clearly excluding several desirable covenants.

First, while the recent amendments do allow non-solicitation agreements, they do not allow general noncompete agreements. For example, Company A could prohibit one of its salesmen from soliciting A's established customers when the salesman goes to work for Competitor B. But, Company A could not prohibit the salesman from going to work for Competitor B in a nonsales capacity, or even from working in a sales capacity that did not solicit A's "established clients."155 The real problem of this limitation is seen clearly in areas of employment that do not involve client contact. For example, a non-solicitation agreement could not prohibit an executive officer of Corporation A from becoming an executive officer of a competing corporation, because executives almost never "directly solicit" clients.156 This result is unreasonable given section 219A's apparent policy concerns of protecting against an unfair competitive advantage gained by exposure to client information and client relationships.157 Surely, the concern regarding client information and relationships would be greater with an executive than for an average employee, because an executive has access to all client information and likely has established relationships

153. See supra note 140-141 and accompanying text.
154. Memorandum from Gary W. Derrick, Chair, Oklahoma General Corporation Act Committee (June 27, 2001) (on file with author).
155. Id. Mr. Derrick also notes similar problems with employees such as scientists or other technical employees who have no contact with "established customers." Id.
156. Id. Note, however, that an employer might prohibit the executive from working for a competitor under trade secrets law. See PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1266-67 (7th Cir. 1995) (prohibiting an executive from working for his former employer's competitor based on the theory that the executive would inevitably disclose the former employer's trade secrets).
157. See supra note 129 and accompanying text.
with the executive officers of the former employer's clients.\footnote{158} Yet, it seems that the recent amendments invalidate this type of covenant.

Furthermore, while specifically allowing non-solicitation agreements directed at "established clients," the amendments arguably invalidate several other types of important non-solicitation agreements. The most notable are provisions that prohibit a former employee from contacting the employees of the former employer.\footnote{159} This type of "nonpiracy" provision seeks to reduce the "pied piper" phenomenon in which several lower level employees follow a highly ranked or respected employee to a competitor.\footnote{160} While nonpiracy covenants are motivated in part by concerns beyond the protection of client information and established relationships,\footnote{161} established client relationships are at even greater risk when large groups of employees defect to a competitor.\footnote{162} Accordingly, it would be reasonable to allow this type of agreement. However, because nonpiracy provisions are not aimed at the solicitation of "established clients" and arguably serve to restrict competition, amended section 219A invalidates these agreements.\footnote{163}

Finally, while the amendments provide guidance as to the permissibility of employment noncompete agreements, they do not address several other areas in which noncompete agreements are common.\footnote{164} For example, the amendments do not address noncompete agreements in association with "distributor agreements, dealer agreements, franchise agreements, agencies, technology sharing arrangements and joint ventures."\footnote{165} There are two possibilities with regard to these types of agreements. First, in light of the apparent intent of the amendments to return to a more literal reading of the statutes,\footnote{166} the amendments could invalidate these types of agreements. However, a more plausible scenario is that courts will recognize that the amendments in question specifically address employer-employee restrictive covenants and no other type of restrictive covenant. With cases like NCAA, Crown Paint, and Bayly clearly establishing a rule of reason analysis for all restrictive

\footnote{158} Additionally, executives may possess nonproprietary information, such as business strategies, that would enhance the risks of losing established clients. For example, if a departing executive left a business only to implement identical business plans and strategies at a competitor, knowing full well that those specific strategies ensure the loyalty of the former employer's established clients, the risks are great that such conduct would attract at least some of these established clients.

\footnote{159} Memorandum from Gary W. Derrick, supra note 155. Mr. Derrick notes the existence of similar issues with the solicitation of vendors as well. \textit{Id.}

\footnote{160} Bowers et al., \textit{supra} note 81, at 87.

\footnote{161} \textit{Id.}

\footnote{162} \textit{See} Owens v. Penn Mut. Life Ins. Co., 851 F.2d 1053, 1055 (8th Cir. 1988) (upholding a noncompete agreement as reasonable under Arkansas law when an insurance agent left his employer and took ten other insurance agents with him. These agents, in turn, encouraged their former clients to change insurance companies).

\footnote{163} \textit{See} Communication Tech. Sys., Inc. v. Densmore, 583 N.W.2d 125, 128 (S.D. 1998) (holding that South Dakota's law allowing limited non-solicitation agreements does not allow nonpiracy agreements because the plain language of the statute only covers conduct between a former employee and a customer, not a former employee and his employer).

\footnote{164} Memorandum from Gary W. Derrick, \textit{supra} note 155.

\footnote{165} \textit{Id.}

\footnote{166} \textit{Id.}
covenants in Oklahoma, if the legislature intended a complete return to a *Miller*-type interpretation, it should pass a more explicit legislative directive. Until it does so, the restraining power of judicial precedent militates against a return to *Miller* for covenants outside of the employment context. Thus, Oklahoma courts should continue to evaluate the validity of these covenants under a rule of reason approach.⁶⁷

Even though the amendments specifically forbid several types of noncompete agreements, all hope is not lost. Businesses can protect sensitive information through the use of confidentiality agreements, which the amendments arguably do not disallow.⁶⁸ Further, businesses should consider using common law claims, such as tortious interference with contractual relations, to protect interests that are unprotectable via noncompete agreements under the recent amendments.⁶⁹

**VII. Conclusion**

The recent amendments to title 15, sections 217 and 219A, bring some clarity to restrictive employment covenants by aligning Oklahoma's statutory law with the actual practice of Oklahoma courts. While the amendments do provide this higher degree of clarity, they are only a beginning, not a sufficient ending point. The legislature should further clarify Oklahoma law by defining terms such as "established customers" and by making clear whether the pre-amendment duration and geographic limitations on restrictive covenants survive the enactment of section 219A. In addition, if the legislature intended a return to a strict interpretation, like the standard used in *Miller*, for restrictive covenants not directly addressed by section 219A, it should pass a clear legislative directive to Oklahoma courts to abandon the rule of reason analysis for covenants not addressed by section 219A. Finally, the amendments invalidate several types of restrictive employment covenants, such as general covenants not to compete with employees who do not have contact with clients and non-solicitation agreements that protect an employer's current workforce and vendors, even though these covenants share many of the same policy justifications as the non-solicitation agreements permitted under section 219A. The next undertaking of the Oklahoma legislature in the area of restrictive employment covenants should be to address these vital issues.

*Jeb Boatman*

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⁶⁷. However, after the discussion in Part IV noting that Oklahoma courts rarely enforce true covenants not to compete, regardless of their reasonableness, the assertion that courts should continue to analyze all other covenants not to compete under a rule of reason approach may be more structure than actual substance.

⁶⁸. See Mai Basic Four, Inc. v. Basics Inc., 880 F.2d 286, 287-88 (10th Cir. 1989) (holding that a confidentiality agreement "cannot be characterized as [a] restrictive covenant[,] and must be treated separate and apart from agreements not to compete"; enforcing the confidentiality agreement).

⁶⁹. See Brock v. Thompson, 1997 OK 127, ¶¶ 31-33, 948 P.2d 279, 293.