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A NON-COMPETE CASE IS AN ANTITRUST CASE: AN ANALYSIS OF OKLAHOMA'S POST-EMPLOYMENT RESTRAINT LAW

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Introduction

Too often, courts treat non-compete agreements in employment contracts as unenforceable then attempt to determine if the agreement fits one of the statutory exceptions. This tendency is natural given the language of title 15, section 217 of the Oklahoma Statutes: "Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind . . . is to that extent void."[1] An employment contract by which an employee agrees not to compete with the employer after termination of the employment relationship is certainly a "contract by which . . . one is restrained from exercising a lawful profession, trade or business."[2] But not every such agreement is "to that extent void."[3] Both statutory and judicial exceptions allow some of these agreements to be enforceable.[4] The non-statutory exceptions are a consequence of the judiciary's long and evolving history with this area of the law. Ultimately, they are compelled by state and federal antitrust law, as well as economic policy inherited from the English common law.

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1. 15 OKLA. STAT. § 217 (2011).

2. *Id.*; *see also* Neal v. Pa. Life Ins. Co., 1970 OK 13, ¶ 6, 480 P.2d 923, 924 (noting employees' agreement not to compete with employer for one year after termination of employment "restrains the plaintiffs from pursuing a lawful profession").

3. 15 OKLA. STAT. § 217.

4. *See, e.g.*, *id.* § 218 (creating an exception as to sale of good will of a business); *id.* § 219 (dissolving a partnership); *id.* § 219A (soliciting the business of established customers of the former employer); 15 OKLA. STAT. § 219B (Supp. 2013) (soliciting co-workers to leave a former employer); *see also* Cardiovascular Surgical Specialists, Corp. v. Mammana, 2002 OK 27, 61 P.3d 210 (accepting referrals of business, including former customers, from non-parties to the contract); Bayly, Martin & Fay, Inc. v. Pickard, 1989 OK 122, ¶ 18, 780 P.2d 1168, 1175 (accepting the business of former clients "[w]here no active solicitation has occurred"); Tatum v. Colonial Life & Accident Ins. Co., 1970 OK 27, 465 P.2d 448 (soliciting the business of former clients with respect to products or services not sold by the former employer). Whether the judicial exceptions survived the enactment of section 219A has not been addressed.

This Article demonstrates the antitrust nature of non-compete issues—that all cases involve some application of the antitrust law's rule of reason[5]—and argues that beginning to analyze non-compete agreements with the statutory exceptions to section 217 leads to the "dark woods"[6] of statutory construction. In addition, this Article explores the issues that the 2001 enactment of title 15 section 219A created for legal practitioners who draft non-compete agreements. Of particular focus is the effect of this statute on the long-settled holdings in *Tatum v. Colonial Life & Accident Insurance Co.*[7] and *Bayly, Martin & Fay, Inc. v. Pickard*,[8] and the antitrust analysis of post-employment restraints employed in those cases. Both cases had established additional exceptions to section 217 and interpreted the statute pursuant to a test of reasonableness. This Article argues for an interpretation of section 219A that is consistent with the following: (1) the case law existing at the time the statute was enacted, and (2) the rule of reason that the Oklahoma Supreme Court previously adopted when interpreting section 217.

I. The Historical Perspective

For three reasons, it is particularly important for practitioners who work with post-employment restraints to understand the history of this body of law. First, the guild system from which restrictive covenant law originated is, to some extent, still with us. Modern corporations descended from the medieval guilds, and some guilds—bar associations, for example—remain to this day. Second, the historical perspective provides an opportunity to catalogue the development of exceptions to the general common law rule, which at one point prohibited all post-employment restraints. From that perspective, it becomes apparent that the relevant considerations are not much different today than they were three hundred years ago. In addition, the English courts' focus on the reasonableness of the restraint when developing the common law supports application of the rule of reason in these cases. Third, the common law history explains the evolution of the

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5. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911) (holding that antitrust laws are interpreted pursuant to the common law "standard of reason").

6. "Midway on our life's journey, I found myself / In dark woods, the right road lost." DANTE ALIGHIERI, THE INFERNO OF DANTE canto I, 3 (Robert Pinsky trans., Farrar, Straus & Giroux 1994) (1320).

7. 1970 OK 27, ¶ 12, 465 P.2d 448, 452.

8. 1989 OK 122, ¶ 11, 780 P.2d 1168, 1171.

economic context in which early non-compete cases were decided—from the guild system to a free market economy.

A. The Guild System

It is commonly accepted that all contracts restricting an individual's ability to practice a lawful trade or profession were illegal at common law.[9] As the Oklahoma Supreme Court has recognized: "At first agreements in restraint of trade were those made by craftsmen and tradesmen having only a localized trade or business, and at a time when a craftsman was required to follow only his trade, and at that time the law permitted no restraint."[10] As Blackstone noted, prior to the development of the guild system "every man might use what trade he pleased."[11] But Blackstone recognized that the Statute of Apprentices, passed in 1563, essentially revoked the freedom to practice any trade.[12] That statute limited an apprenticeship to seven years but granted the exclusive right to practice a trade to those who had completed an apprenticeship.[13]

During the height of the medieval guild system, guilds received patents from the sovereign.[14] These patents essentially granted a monopoly over a particular trade because only guild members could practice the trade

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9. *See Standard Oil*, 221 U.S. at 51 ("Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made them. In the interest of the freedom of individuals to contract, this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void."). *But see* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 630–32 (1960) (noting that statement was derived from four cases decided between 1414 and 1711 involving "unethical" masters who were attempting to extend the traditional period of indenture by apprentices and journeymen and, thereby, interfering with their right to practice a particular trade or engage in a particular business). Blake argues, with good reason, that the statement is true only as it relates to restraints on future employment that were inconsistent with the custom and practice in guilds regarding the rules for apprenticeships. *Id.* at 632–34.

10. Wesley v. Chandler, 1931 OK 477, ¶ 6, 3 P.2d 720, 722 (quoting the petition).

11. 1 WILLIAM BLACKSTONE, COMMENTARIES *427.

12. *Id.* (citing Statute of Artificers 1563, 5 Eliz. 1 c. 4, § 31).

13. Statute of Artificers § 31; *see also* Blake, *supra* note 9, at 633 ("In 1563, the Statute of Apprentices made a seven-year apprentice period mandatory, but long before its enactment this period had been required by most of the guilds.") (footnote omitted).

14. Carlo Marco Belfanti, *Guilds, Patents, and the Circulation of Technical Knowledge: Northern Italy During the Early Modern Age*, 45 TECH. & CULTURE 569, 577 (2004) ("The guilds' tendency to slow progress down was balanced by the ability of city councils and princes to grant patents . . . .").

associated with that guild.[15] And only masters were admitted as members, after having served a lengthy apprenticeship.[16] Guild members then restricted access to knowledge of the trade, the raw materials necessary to produce the end product, and the markets in which the product could be sold.[17] As a result, it was difficult to practice a trade outside the framework of a guild. This result was "looked upon as a hard law, or as a beneficial one, according to the prevailing humor of the times."[18]

Blackstone described apprentices as a class of servants, usually bound for a term of years "to serve their masters, and be maintained and instructed by them."[19] In exchange for this maintenance and instruction, the rules of service protected guild masters' interests; during the apprenticeship, the master enjoyed the exclusive benefits of the apprentice's labor without having to pay wages.[20] And the anti-competitive rule against practicing a profession without having served an apprenticeship protected the interest of the apprentice.[21] Blackstone also noted that supporters of the Statute of Apprentices responded to the criticism that it tended to create monopolies with a pernicious effect on trade by pointing out that the guild system provided employment opportunities for the youth and created skilled workers, both of which generally benefitted trade and the public.[22]

In the first reported non-compete case, John Dyer agreed that he would not practice his craft of dyeing fabric in the town of his former master for six months following the conclusion of his apprenticeship and gave a bond to secure that promise.[23] When Dyer's former master sued to enforce the terms of the agreement, the court not only denied relief but also stated that

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15. *See id.*

16. *See* Blake, *supra* note 9, at 633.

17. Belfanti, *supra* note 14, at 572–76.

18. BLACKSTONE, *supra* note 11, at *427.

19. *Id.* at *426.

20. *Id.*; *see also* Blake, *supra* note 9, at 633 ("A corollary of the long period of training, in which wages as such were either nonexistent or nominal, was that at its end the apprentice was to be free as a journeyman to practice his trade for hire wherever he chose until he could gain entry to the inner circle of craftsmen.").

21. BLACKSTONE, *supra* note 11, at *428 ("[N]o one would be induced to undergo a seven years' servitude, if others, though equally skillful, were allowed the same advantages without having undergone the same discipline . . . .").

22. *Id.* ("But another of their arguments goes much further; viz., that apprenticeships are useful to the commonwealth, by employing of youth, and learning them to be early industrious . . . .").

23. Dyer's Case, YB 2 Hen. 5, fol. 5, pl. 26 (1414) (Eng.); *see also* Blake, *supra* note 9, at 635 n.32 (citing Dyer's Case, YB 2 Hen. 5, fol. 5, pl. 26).

had the master been present in court when the case was heard, the judge would have thrown the master in jail.[24] The master was entitled to Dyer's exclusive service during the period of his apprenticeship.[25] But once the apprenticeship ended, Dyer was free to practice his trade without further restraint from his master.[26]

Discontent with post-employment restraints traces its roots to two early concerns with the guild system. First, the community would be deprived of the services of any apprentice prevented from working, and it was likely the apprentice would then become a public charge. Second, enforcement of covenants against practicing a given profession outside the guild would concentrate the benefits of the monopoly in relatively few masters.[27] But these "medieval economic ideals"[28] existed within a mercantile economy that eventually gave way to the industrial revolution. And the evolving public policy in England favoring a capitalist economy required a more "unrestrained" view of non-competition agreements to facilitate a developing free market economy.[29] Not surprisingly, Adam Smith, the founding father of capitalism, was a critic of the guild system and argued that it restrained "free competition."[30]

It is therefore understandable that courts' antagonism to post-employment restraints began to wane during the three hundred years after *Dyer's Case*.[31] Decided in 1711, *Mitchel v. Reynolds*[32] "is . . . the starting place for the modern law of restraints in employment contracts."[33] In *Mitchel*, the court enforced an agreement not to compete against the seller of a bakery business because the buyer acquired the existing location and

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24. Bill C. Berger, *From* Dyer's Case *to Hard Bargains: Six Centuries of Covenants Not to Compete*, COLO. LAW., Apr. 2007, at 39, 39.

25. *See* Blake, *supra* note 9, at 633, 636.

26. *See id.*

27. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 279 (6th Cir. 1898) ("The other [objection to restraints] was that such restraints tended to give the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same mean might exclude others."), *aff'd*, 175 U.S. 211 (1899).

28. Wesley v. Chandler, 1931 OK 477, ¶ 7, 3 P.2d 720, 722.

29. East-India Co. v. Sandys (1685) 10 St. Tr. 371 (Eng.).

30. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 101 (Sálvio Marcelo Soares ed., MetaLibri Digital Library 2007) (1776), http://www.ibiblio.org/ml/libri/s/SmithA_WealthNations_p.pdf.

31. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 51 (1911).

32. (1711) 24 Eng. Rep. 347, 1 P. Wms. 181.

33. Blake, *supra* note 9, at 637.

the business's existing customers.[34] The court balanced the seller's interest in continuing to practice his trade against the buyer's expectation of purchasing an ongoing business and concluded that enforcing the agreement was beneficial to the public.[35] "[A] man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade; and part with it to another . . . ."[36] The court also considered the significance of the economic impact that a contrary decision might have; forcing buyers to risk future competition from sellers would reduce the sales prices that sellers could obtain.[37] *Mitchel* was also the first case in which a court made the important distinction between a "general" and "particular" (or ancillary) restraint, a distinction carried forward into modern antitrust law.[38]

By the end of the nineteenth century, judicial attitudes had evolved even further. In *Gibbs v. Consolidated Gas Co. of Baltimore*, the United States Supreme Court noted that *Mitchel v. Reynolds* was decided in the following way:

> [U]nder a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and, if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained.[39]

And in the time since *Gibbs*, this focus on the effect that a particular restraint has on the public has become the central theme in antitrust analysis. As the Court later recognized, "[i]t is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'"[40] The Oklahoma Supreme Court has similarly recognized the importance of promoting the public interest: "The fundamental test of the reasonableness of restraint is its effect on the public."[41]

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34. *Mitchel*, 24 Eng. Rep. at 347, 1 P. Wms. at 181.
35. *Id.* at 348–50, 1 P. Wms. at 182–88.
36. *Id.* at 349, 1 P. Wms. at 186.
37. *Id.* at 350–51, 1 P. Wms. at 190–91.
38. *See, e.g.*, Anderson v. Shawnee Compress Co., 1906 OK 64, ¶ 7, 87 P. 315, 318.
39. 130 U.S. 396, 409 (1889).
40. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209, 224 (1993) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).
41. Bd. of Regents of the Univ. of Okla. v. NCAA, 1977 OK 17, ¶ 15, 561 P.2d 499, 506 (citing Lynch v. Magnavox Co., 94 F.2d 883, 891 (9th Cir. 1938)).

As new exceptions to the general common law rule developed, employees were no longer bound to serve a lengthy apprenticeship without pay, and employers were no longer protected by the exclusive license of the guild system.[42] This shift came after society and courts came to recognize that enforcing certain covenants to restrain trade could actually be beneficial to trade.[43] In order to incentivize business owners to hire the best employees and train them, employers needed tools through which they could prevent those employees from "set[ting] up a rival business in the vicinity after learning the details and secrets of the business."[44] Employers were permitted to condition employment on post-employment restraints as long as they were no more restrictive than necessary to protect the employer's legitimate interests and were not otherwise injurious to the public interest.[45] Stated differently, if the post-employment restraint was merely secondary to the main purpose of an otherwise legitimate employment contract and did not tend to create the adverse economic impact resulting from common law monopolies, it was enforceable.[46]

B. The Common Law Exceptions

Since *Mitchel* was decided in 1711, five exceptions to the common law ban on employment restraints have been recognized:

> [C]ovenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant,

42. Blake, *supra* note 9, at 638.
43. United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898) ("After a time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced."), *aff'd*, 175 U.S. 211 (1899).
44. *Id.* at 281.
45. Horner v. Graves (1831) 131 Eng. Rep. 284, 7 Bing. 735.
46. *Addyston Pipe*, 85 F. at 282.

> or agent not to compete with his master or employer after the expiration of his time to service.[47]

With respect to these exceptions, courts focus their analysis on the purpose of a particular restraint and whether it is "such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public."[48] The historical case law determined that these five categories of restraints could be enforced without threatening the pernicious effect on trade that had resulted from the creation of monopolies.[49]

II. The Antitrust Issues

The "evils" of the monopoly include the monopolist's ability to engage in the following activities: (1) fixing a price injurious to the public; (2) raising prices by limiting production; and (3) reducing quality while maintaining prices.[50] Over time, agreements that artificially fixed the price of goods or services, limited the availability of those goods or services, or reduced their quality came to be known as contracts "in restraint of trade."[51] As the Supreme Court recognized in *Business Electronics Corp. v. Sharp Electronics Corp.*, "[t]he term 'restraint of trade' in the [Sherman Act], like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances."[52]

Modern federal antitrust law began with the Sherman Act,[53] which was enacted in 1890 and intended "to be a comprehensive charter of economic

47. *Id.* at 281.

48. Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. [1894] AC 535, 567 (HL) (UK). More recent cases have cited this nineteenth century approach with approval. *See Addyston Pipe*, 85 F. at 281; Wesley v. Chandler, 1931 OK 477, ¶ 10, 3 P.2d 720, 722.

49. *See Addyston Pipe*, 85 F. at 282 ("It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.").

50. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 52 (1911).

51. *Id.* at 54.

52. 485 U.S. 717, 731 (1988).

53. 15 U.S.C. §§ 1–7 (2018).

liberty aimed at preserving free and unfettered competition as the rule of trade."[54] Sherman Act protections, like antitrust laws generally, represent "the Magna Carta of free enterprise"[55] by protecting commerce from undue restraints.[56] Section 1 of the Sherman Act provides as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[57]

But every contract restrains trade to some extent.[58] Consequently, like the English court in *Mitchel v. Reynolds*,[59] the Supreme Court first announced in *Standard Oil Co. of New Jersey v. United States* that the Sherman Act should be interpreted pursuant to "the standard of reason which had been applied at the common law."[60] And the Court gave the classic statement of this rule of reason in *Board of Trade of Chicago v. United States*: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[61]

Application of the rule requires analyzing "facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption."[62]

A rule of reason analysis thus involves three considerations: (1) the relevant market (determined by the products and geographical area affected by the restraint);[63] (2) the effect of the restraint on competition in that

54. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

55. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

56. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911) ("The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference,—that is, an undue restraint.").

57. 15 U.S.C. § 1.

58. Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains.").

59. (1711) 24 Eng. Rep. 347, 1 P. Wms. 181.

60. *Standard Oil*, 221 U.S. at 60.

61. *Bd. of Trade*, 246 U.S. at 238.

62. United States v. Topco Assocs., Inc., 405 U.S. 596, 607 (1972) (citing *Bd. of Trade*, 246 U.S. at 238).

63. United States v. Grinnell Corp., 384 U.S. 563, 570–72 (1966); *see also* Teleco, Inc. v. Ford Indus., Inc., 1978 OK 159, ¶¶ 12–13, 587 P.2d 1360, 1364 (adopting the same analysis for Oklahoma antitrust law).

market;[64] and (3) any pro-competitive benefits that outweigh the anti-competitive effects of the restraint.[65]

A. Oklahoma Antitrust Law

Oklahoma's general antitrust statute was originally enacted in 1910 and later renumbered in title 79.[66] That statute was repealed in 1998[67] and recodified—without change—in the Oklahoma Antitrust Reform Act.[68] The statute provides: "Every act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal."[69]

Prior to the adoption of the Antitrust Reform Act, the Oklahoma Supreme Court generally used federal antitrust law to resolve Oklahoma antitrust issues.[70] For example, in the 1950s, the Supreme Court established that certain restraints are so injurious to competition that "because of their pernicious effect on competition and lack of any redeeming virtue [they] are conclusively presumed to be unreasonable."[71] Oklahoma followed suit in the 1970s when it recognized that certain restraints constitute a per se violation of Oklahoma's antitrust law.[72]

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64. Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343 (1982).

65. Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979); *see also* Beville v. Curry, 2001 OK 1, ¶ 12, 39 P.3d 754, 759 (citing Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978)) ("Our analysis must proceed under the 'rule of reason,' which prohibits restraints only if the adverse effects on overall competition outweigh the pro-competitive benefits of the restraint.").

66. *See* 79 OKLA. STAT. § 1 (superseded 1998). For the history of pre-statehood antitrust law, see State *ex rel.* Dabney v. Wm. Cameron & Co., Inc., 1930 OK 583, ¶¶ 8–16, 294 P. 104, 105.

67. Repealed by 1998 Okla. Sess. Laws ch. 356, § 14 (effective July 1, 1998).

68. 79 OKLA. STAT. §§ 201–212 (2011).

69. *Id.* § 203(A). The statute is similar but not identical to the Sherman Act. By including every "act" within the statute's proscription, some unilateral conduct was prohibited in contrast to only concerted action prohibited by section 1 of the Sherman Act. *Compare id. with* 15 U.S.C. § 1 (2018). Based on that distinction, the United States Court of Appeals for the Tenth Circuit affirmed an antitrust judgment based on unilateral conduct that violated Oklahoma's antitrust statute. *See* Harolds Stores, Inc. v. Dillard Dep't Stores, Inc., 82 F.3d 1533, 1550–51 (10th Cir. 1996).

70. *See, e.g.*, Teleco, Inc. v. Ford Indus., Inc., 1978 OK 159, ¶ 3, 587 P.2d 1360, 1362; Bd. of Regents of the Univ. of Okla. v. NCAA, 1977 OK 17, ¶ 14 n.13, 561 P.2d 499, 505 n.13.

71. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

72. *See Teleco*, ¶ 8, 587 P.2d at 1363.

In addition, antitrust analysis often distinguishes between a "horizontal restraint" and a "vertical restraint." A "vertical restraint" involves "persons at different levels of the market structure."[73] One common example of a vertical arrangement would be a contract between a manufacturer and distributor, or a wholesaler and retailer.[74] Each performs a different function but ultimately serves the same customers. In contrast, a "horizontal restraint" involves "an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition."[75]

The Oklahoma Supreme Court expressly adopted the federal rule of reason to use when interpreting the general antitrust statute in 1977.[76] Much of this Article focuses on the antitrust rule used for the interpretation of section 1 of the Sherman Act[77] and its Oklahoma counterpart, title 79, section 203(A).[78] The Oklahoma Supreme Court is well acquainted with that rule, its definitional concepts, and the required analysis.[79]

The Oklahoma Supreme Court's policy of relying on federal antitrust law has now been codified as part of the Reform Act. Under this statute, "[t]he provisions of this act shall be interpreted in a manner consistent with Federal Antitrust Law 15 U.S.C., Section 1 et seq. and the case law applicable thereto."[80]

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73. Crown Paint Co. v. Bankston, 1981 OK 104, ¶ 10, 640 P.2d 948, 950 (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972)). Ultimately, *Crown Paint* rejected the argument that an agreement between a manufacturer and its distributor constituted a horizontal restraint. *Id.* ¶ 12, 640 P.2d at 951.

74. *See id.* ¶¶ 10, 24, 640 P.2d at 950, 951.

75. *Id.* ¶ 10, 640 P.2d at 950 (quoting *Topco*, 405 U.S. at 608).

76. Bd. of Regents of the Univ. of Okla. v. NCAA, 1977 OK 17, ¶ 15, 561 P.2d 499, 506 (citing *Topco*, 405 U.S. at 596).

77. 15 U.S.C. § 1 (2018).

78. 79 OKLA. STAT. § 203(A) (2011).

79. *See, e.g.*, *Crown Paint*, ¶¶ 9–12, 640 P.2d at 950–51 (rejecting argument that the contract was a per se violation and applying a rule of reason analysis to determine validity of vertical restraint) (citing and discussing N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958); *Topco*, 405 U.S. at 608); Teleco, Inc. v. Ford Indus., Inc., 1978 OK 159, ¶ 21, 587 P.2d 1360, 1365 (determining the relevant product market and the absence of a submarket) (citing United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 401 (1956)).

80. 79 OKLA. STAT. § 212.

B. Oklahoma's Employment Related Antitrust Law

Clearly, a non-compete covenant in an employment agreement is a "contract . . . in restraint of trade" in terms of both federal[81] and Oklahoma antitrust law.[82] Apparently, however, non-compete agreements in Oklahoma employment contracts are entitled to a special place in Dante's *Inferno*. They even have their own statute. Title 15, section 217 provides as follows: "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, 219, 219A and 219B] of this title, . . . is to that extent void."[83] The first Oklahoma Legislature enacted section 217 in 1908, and its original language has largely endured, barring a minor amendment in 2001.[84] Further, the substantive language of section 217 is identical to the statute in effect in the Oklahoma Territory immediately prior to the enactment of section 217.[85]

It is significant that the restraint of trade language included in section 217 was identical to the statute that had been enacted for the Oklahoma Territory at the same time as the Sherman Act, which prohibited contracts, combinations, and conspiracies in restraint of trade.[86] As the Supreme Court recognized in S*tandard Oil*, "where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary."[87] And, that was the approach followed "in

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81. 15 U.S.C. § 1.

82. 79 OKLA. STAT. § 203.

83. 15 OKLA. STAT. § 217 (2011).

84. 2001 Okla. Sess. Laws ch. 406, § 3.

85. *Compare* 15 OKLA. STAT. § 217, *with* 1 WILSON'S REVISED AND ANNOTATED STATUTES OF OKLAHOMA 317 (1903) ("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.").

86. W. A. MCCARTNEY, JOHN H. BEATTY & J. MALCOLM JOHNSTON, THE STATUTES OF OKLAHOMA, 1893, at 220 (Guthrie, Oklahoma State Capital Printing Co., 1893) ("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.").

87. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59 (1911) (citing Swearingen v. United States, 161 U.S. 446 (1896); United States v. Wong Kim Ark, 169 U.S. 649 (1898); Keck v. United States, 172 U.S. 434 (1899); Kepner v. United States, 195 U.S. 126 (1904)).

the Indian Territory prior to statehood, where the common law relating to contracts governed."[88]

> There is no discord in the authorities that, where the [employment] restraint is no more extensive as to area than the protection of the party with whom the contract is made reasonably requires, the public not being likely to be injured by such an agreement, every other person being at liberty to practice within such limits, such contract is reasonable and valid, unless otherwise vitiated.[89]

Nonetheless, section 217 and its predecessor were viewed as changing the common law rule.[90] As the Oklahoma Supreme Court noted in *Bayly, Martin & Fay, Inc. v. Pickard*, "the common law rules which analyzed covenants not to compete based on their reasonableness did not survive the enactment of §§ 217–219."[91] Oklahoma adopted only two of the five common law exceptions to the prohibition on restraints of trade.[92] Those two exceptions include: (1) agreements by the seller of a business not to compete with the buyer[93] and (2) agreements by partners dissolving a partnership to cease carrying on the business of the partnership.[94]

As a result, an employer in the new State of Oklahoma was prohibited from preventing a former employee from setting up a "rival business," even though employers in the Indian Territory had been able to do so under *Addyston Pipe's* common law rule.[95] This literal interpretation prevailed in

88. Threlkeld v. Steward, 1909 OK 203, ¶ 6, 103 P. 630, 631 (enforcing an agreement by a physician who sold his medical practice not to practice medicine in the same area for two years).

89. *Id.* ¶ 5, 103 P. at 631.

90. Hulen v. Earel, 1903 OK 76, ¶ 9, 73 P. 927, 930 (refusing to enforce an agreement by one departing partner not to practice medicine in the vicinity of the remaining partner's practice because it did not fit the statutory exceptions to the predecessor of 15 OKLA. STAT. § 217 (2011)). "But, no matter what may be the rule in other states governing this class of contracts, we have a statute which governs such contracts in this [Oklahoma] territory." *Id.* ¶ 6, 73 P. at 930.

91. 1989 OK 122, ¶ 10, 780 P.2d 1168, 1171.

92. *See* John F. Fischer, II, *Antitrust Law in Oklahoma*, 48 JOURNAL [OKLA. B.J.] 413, 420 (1977).

93. *See* 15 OKLA. STAT. § 218 (2011).

94. *Id.* § 219.

95. *Cf.* United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); E.S. Miller Labs., Inc. v. Griffin, 1948 OK 149, ¶ 8, 194 P.2d 877, 879.

the only two early section 217 cases that did not involve the sale of goodwill or the dissolution of a partnership.[96] In both cases, the Oklahoma Supreme Court failed to consider the reasonableness of the post-employment restraint or the effect on competition if the restraint was enforced.

Early cases viewed section 217 as providing a "rigid" rule that prohibited every contract limiting an individual's freedom of employment, subject only to the two statutory exceptions.[97] Courts apparently assumed that the employment contract, which effectively (if not expressly) restrained an employee from practicing a lawful trade or profession for a competitor during the term of employment, was not one of those prohibited by section 217. But they did not interpret the term "every" in section 217 in the same manner as the term "every" in title 79, section 1.[98]

However, in 1970, the Oklahoma Supreme Court began to abandon its rigid interpretation of section 217. In *Tatum v. Colonial Life & Accident Insurance Co.*, the court enforced a narrowly drawn non-compete agreement that prevented a departing insurance salesmen from selling the same lines of insurance to his former employer's customers for two years.[99] In doing so, the court distinguished the health and accident insurance policies that the former employee previously sold from all other types of insurance.[100] This analysis is consistent with determining that a relevant "submarket" (i.e., health and accident policies) existed and therefore made it unnecessary to determine the effect of the restraint on the market for all insurance products.

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96. *See* Neal v. Pa. Life Ins. Co., 1970 OK 13, 480 P.2d 923 (invalidating a provision in an insurance salesman's employment contract preventing him from going to work for any other insurance company in the same territory for a period of one year); *E.S. Miller Labs.*, 1948 OK 149, 194 P.2d 877 (invalidating a provision in a pharmaceutical salesman's employment contract that prevented him from going to work for any other pharmaceutical company in the same territory for a period of two years); *see also* A.W. Gans, Annotation, *Statutes Prohibiting Restraint on Profession, Trade, or Business as Applicable to Restrictions in Employment or Agency Contracts*, 3 A.L.R.2d 522 (1949).

97. *See* Wesley v. Chandler, 1931 OK 477, ¶ 8, 3 P.2d 720, 722.

98. *Compare E.S. Miller Labs.*, ¶ 11, 194 P.2d at 879 (finding that a territorial restraint for a period of two years in a pharmaceutical salesman's employment contract violated 15 OKLA. STAT. 217 (1941)), *with* Thomas v. Belcher, 1939 OK 142, ¶ 4, 87 P.2d 1084, 1085 (finding that an agreement between a wholesaler and a retailer limiting the retailer to a specific territory was not unreasonable or a violation of 15 OKLA. STAT. 217 (1931)).

99. 1970 OK 27, ¶¶ 7, 12, 465 P.2d 448, 450–51.

100. *Id.* ¶ 8, 465 P.2d at 451.

The non-compete agreement in *Tatum* did not prevent the employee from selling other lines of insurance to his former employer's existing customers; nor did it prohibit the employee from selling any line of insurance to any individual who was not a customer of his former employer.[101] The non-compete agreement merely required the employee "to maintain a 'hands-off' policy with respect to those whom he knows are 'insureds' under then-outstanding group policies, or franchise policies, of health and/or accident insurance issued by the plaintiff company."[102]

Given this limited restraint, the court concluded that the agreement was only intended to prevent the employee from using company information that he received and customer relationships that he developed for a reasonable period of time after the employment ended.[103] Unlike the agreements that were invalidated in *Miller Laboratories* and *Neal*, the agreement in *Tatum* did not otherwise prevent him from competing with his former employer.[104] As a result, the court held that the restrictive covenant did "not, in any manner or to any extent whatsoever, restrain the defendant from exercising a lawful profession, trade, or business of any kind whatsoever, either in competition with the plaintiff or otherwise."[105]

Seven years later, the Oklahoma Supreme Court further eroded its rigid interpretation of section 217. In *Board of Regents of the University of Oklahoma v. NCAA*, the court applied a rule of reason analysis to find that a contract provision between a university and an athletic association that limited the number of coaches the university could hire did not violate Oklahoma's general antitrust law.[106] And the court also rejected the argument that the contract violated section 217.[107] The court found that the contract did not prevent the coaches from practicing their trade or profession, but instead merely limited the number of coaches the university could hire.[108] The court reasoned that "[a]n agreement which is reasonable and proper and which the parties have a right to make is not void as

101. *Id.*
102. *Id.* ¶ 7, 465 P.2d at 451.
103. *Id.* ¶ 8, 465 P.2d at 451.
104. *Id.* ¶ 7, 465 P.2d at 451.
105. *Id.*
106. 1977 OK 17, ¶ 17, 561 P.2d 499, 506–07.
107. *Id.* ¶ 19, 561 P.2d at 508.
108. *Id.*

contrary to public policy even though contractual duties toward third parties may be incidentally involved."[109]

In *Crown Paint Co. v. Bankston*, the Oklahoma Supreme Court again considered the argument that a contractual restraint violated both title 79, section 1 and title 15, section 217.[110] *Crown Paint* involved a contract between a paint manufacturer and one of its wholesale distributors in which the manufacturer agreed not to sell paint to the wholesaler's retail customers.[111] Although the manufacturer argued that a contract prohibiting it from selling paint to the wholesaler's customers was illegal, the court held that the contract did not violate title 79, section 1.[112] The court reasoned that it was a reasonable "vertical" restraint between companies at different levels of the market structure, not a "horizontal" market division agreement between competitors.[113] The court also found that the contract did not violate section 217.[114] After reviewing *Board of Regents of the University of Oklahoma v. NCAA*, the court held "that not all restraints of trade are outlawed by 15 O.S. 1971 § 217. Only those restraints which are unreasonable are outlawed."[115]

Finally, in *Bayly, Martin & Fay, Inc. v. Pickard*, the Oklahoma Supreme Court formally adopted the antitrust rule of reason that had previously been applied to title 79, section 1 for section 217 cases.[116] "Although the rule of reason . . . had been incorporated as a matter of law into agreements falling within the parameters of 79 O.S. 1981 § 1, its application to § 217 was questionable before the *Crown Paint* and *NCAA* decisions."[117]

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109. *Id.* (citing Gulf Refining Co. v. Boren, 50 S.W.2d 883, 888 (Tex. Civ. App. 1932)).
110. 1981 OK 104, ¶ 4, 640 P.2d 948, 949.
111. *Id.* ¶ 1, 640 P.2d at 949.
112. *Id.* ¶¶ 8, 11–12, 640 P.2d at 950–51.
113. *Id.* ¶¶ 12–13, 640 P.2d at 951.
114. *Id.* ¶¶ 23–24, 640 P.2d at 952.
115. *Id.* ¶ 23, 640 P.2d at 952.
116. 1989 OK 122, ¶¶ 11–12, 780 P.2d 1168, 1170–71.
117. *Id.* ¶ 11, 780 P.2d at 1171 (footnotes omitted). Neither *Board of Regents of the University of Oklahoma* nor *Crown Paint* involved a contract between an employer and an employee in the traditional sense. *Board of Regents of the University of Oklahoma* involved a contract between an employer and a third-party which limited the number of employees the employer could hire. 1977 OK 17, ¶ 17, 561 P.2d 499, 506–07. *Crown Paint* involved a contract between a principal and an independent agent not subject to the principal's control necessary to create an employer/employee relationship. *Crown Paint*, ¶ 1, 640 P.2d at 949. But section 217 is not limited to contracts between employers and employees. It addresses "every contract" that restrains one from exercising a lawful trade or profession. *See* Robert C. Smith, Jr., *Contracts*, 4 OKLA. CITY U. L. REV. 193, 210–13 (1979).

The next section discusses the difference between the antitrust rule of reason and the version of the "rule of reason" that appears in the Restatement of Contracts.[118] Despite the differences, it is clear that the *Bayly* court was referring to the antitrust rule, rather than the Restatement version. First, although the dissent described the rule of reason in Restatement terms,[119] the majority adopted a different view.[120] Although the majority cited section 515 of the Restatement of Contracts (1932) for the proposition that the rule of reason may be altered by statute, it did not cite or discuss section 188 of the Restatement (Second) of Contracts relied on by the dissent.[121]

Second, the *Bayly* court cited three United States Supreme Court cases to support its holding.[122] All three of those cases hold that the antitrust version of the rule of reason applies to section 1 of the Sherman Act.[123] The court also cited *Teleco, Inc. v. Ford Industries, Inc.*, in which the Oklahoma Supreme Court expressly adopted the Sherman Act's rule of reason and its "relevant market analysis."[124]

As a result, the rule of reason determines the enforceability of post-employment restraints after *Bayly*. And, further, there is no practical difference between those covenants and contracts challenged under title 79, section 203. Therefore, the Oklahoma rule of reason cases decided pursuant to section 203 and its predecessor (section 1) are relevant to the rule of reason analysis when courts decide the enforceability of post-employment restraints pursuant to section 217.

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118. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(a)–(b) (AM. LAW INST. 1981) (commenting that the promise is a violation if "(a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public").

119. *Bayly*, ¶ 2, 780 P.2d at 1176 (Opala, V.C.J., concurring in part and dissenting in part) ("A restraint is deemed reasonable only if it (1) is no greater than is required for the employer's protection, (2) does not impose undue hardship on the employee and (3) is not injurious to the public.") (footnote omitted).

120. *Id.* ¶¶ 10–12, 780 P.2d at 1170–73.

121. *See id.* ¶ 11 & n.8, 780 P.2d at 1171 & n.8.

122. *Id.* ¶ 11 & n.7, 780 P.2d at 1171 & n.7 (citing United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 386 (1956); United States v. Am. Tobacco Co., 221 U.S. 106, 181 (1911); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 64 (1911)).

123. *E.I. du Pont*, 351 U.S. at 386–87; *Am. Tobacco Co.*, 221 U.S. at 180–82; *Standard Oil*, 221 U.S. at 64–65.

124. 1978 OK 159, ¶¶ 12–13, 587 P.2d 1360, 1364, *cited in Bayly*, ¶ 11 n.7, 780 P.2d at 1171 n.7.

C. The Restatement Analysis

The "reasonableness" of a post-employment restraint is not to be confused with its "fairness" to the employee because "[m]ere unfair competition, without more, does not violate antitrust laws."[125] However, Restatement (Second) of Contracts section 188 states that an employment restraint is unreasonable if (1) it "is greater than is needed to protect the [employer's] legitimate interest, or" (2) "the [employer's] need is outweighed by the hardship to the [employee] and the likely injury to the public."[126]

Although the Restatement uses the term "rule of reason,"[127] it is not the same rule of reason analysis used in antitrust cases. The two rules differ most notably in two facets. First, the Restatement does not require courts to conduct a relevant market analysis or balance the procompetitive and anticompetitive economic effects that a restraint has on the relevant market. Second, the Restatement uniquely considers the hardship an employee faces due to the restraint whereas hardship on the employee will not sanction an agreement which otherwise violates the antitrust laws.[128]

As the Introductory Note to the Restraint of Trade topic states, non-compete agreements "are governed by extensive federal and state" legislation, and federal antitrust law "has so completely occupied the field as to make the common law rules of little or no consequence except as they

125. Beville v. Curry, 2001 OK 1, ¶ 27, 39 P.3d 754, 764 (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)). Fairness is generally associated with particular business practices and methods of competition deemed unfair such as the theft of trade secrets or the disparagement of a competitor or its products. *See* Tatum v. Colonial Life & Accident Ins. Co., 1970 OK 27, ¶¶ 10–12, 465 P.2d 448, 451–52. These kinds of practices are specifically precluded by other Oklahoma statutes and do not depend on the existence of any contract subject to review pursuant to section 217. *Id.* ¶ 12, 465 P.2d at 452; *see also* Unfair Trade Practices Act, 79 OKLA. STAT. § 81 (repealed 1998); Brenner v. Stavinsky, 1939 OK 131, ¶ 17, 88 P.2d 613, 615 (enjoining a former employee, in the absence of any restrictive covenant, from using the former employer's customer list to compete after the employment terminated).

126. RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW INST. 1981); *cf.* Teresa L. Green, Note, *The Shifting Landscape of Restrictive Covenants in Oklahoma*, 40 OKLA. CITY U. L. REV. 449, 452 (2015) (advocating reliance on the Restatement "guidelines to help determine when a restraint becomes unenforceable").

127. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a.

128. *Id.* § 188(1)(b); *see, e.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 681, 698–99 (1978) (holding an ethical ban on competitive bidding among professional engineers violated Sherman Act).

may give meaning to some of the more general terms of that legislation."[129] The Note states that the Restatement discussion is directed at the common law rules and is not intended to displace aspects of the topic that are controlled by legislation (and, presumably, the case law interpreting that legislation).[130]

Even so, employee hardship was not even a prohibiting factor under the later common law rules. At common law, an employer could prevent a departing employee from competing regardless of any hardship on the employee if the restraint was otherwise reasonable.[131] The Oklahoma Court of Appeals has made the following observation on the topic:

> The Restatement consideration of the fairness of the restraint from the employee's perspective is derived from later common law cases. This focus . . . minimizes the rule of reason's concern with the effect of the restraint on competition . . . . The "fairness" of particular competitive acts is the specific focus of other statutes; the "true test of legality" pursuant to a rule of reason analysis is whether the restraint "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[132]

In addition, the Restatement view of injury to the public is "measured against the urgency of the employer's claim to protection, rather than against some extrinsic standard."[133] All post-employment restraints impose some hardship on the departing employee. But the Restatement's employee hardship factor permits "consideration of the personal circumstances of the restrained employee—his financial circumstances or other factors unrelated to the employment relationship."[134] As a result, the hardship factor injects uncertainty into contract enforcement. From the employer's perspective, the same post-employment restraint might be enforceable as to one employee but unenforceable as to that employee's less fortunate colleague. The

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129. RESTATEMENT (SECOND) OF CONTRACTS ch. 8, topic 2, intro. note.

130. *Id.*

131. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

132. Inergy Propane, LLC v. Lundy, 2009 OK CIV APP 8, ¶ 31, 219 P.3d 547, 558 (footnotes and citation omitted) (quoting Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918)).

133. Blake, *supra* note 9, at 650.

134. *Id.*

hardship factor also forces the court to undertake "a particularly difficult task of balancing competing interests."[135] In contrast, the antitrust version of the "[r]ule of [r]eason analysis provides an analytical framework for consistent application of uniform legal principles to determine what is 'reasonable' regardless of the nuances and particularities of the market at issue."[136]

Ultimately, the hardship factor is based on a policy decision that assumes post-employment restraints result from "unequal bargaining power" and are made by employees who "give scant attention to the" consequences of their contracts.[137] In this regard, the Restatement view privileges legal protection of employees over "respect for the power of independent persons to bargain for, or away, contractual provisions."[138]

Nonetheless, the Restatement and antitrust rule of reason would reach the same result in some cases. For example, an employee who develops a close relationship with the employer's customers can be prevented from working in the same business in the area where the employer's customers are located for a reasonable period of time.[139] This is broader than the restraint approved in *Tatum*.[140] However, in a relevant market, where the employer's customers are located in a limited area, this would essentially accomplish the same result reached in *Tatum*.[141]

Likewise, an employee who gains information that is valuable to the employer's competitors and who can engage in the same trade or profession in fields unrelated to the employer's business can be prevented from working in the same business as the employer for a reasonable period of time.[142] The opportunity to practice the same profession, although in a different field, is consistent with the result in *Tatum*.

These examples demonstrate the commonality between some aspects of the Restatement and the rule of reason's focus on harm to consumers.

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135. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a.

136. Vanguard Envtl. Inc. v. Curler, 2008 OK CIV APP 57, ¶ 16, 190 P.3d 1158, 1165.

137. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. g.

138. Berry & Berry Acquisitions v. BFN Props., 2018 OK 27, ¶ 13, 416 P.3d 1061, 1068 (quoting *In re* Kaufman, 2001 OK 88, ¶ 22, 37 P.3d 845, 855).

139. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. g, illus. 6.

140. 1970 OK 27, ¶¶ 8–10, 465 P.2d 448, 451.

141. *Cf.* Thayne A. Hedges Reg'l Speech & Hearing Ctr., Inc. v. Baughman, 1998 OK CIV APP 122, 996 P.2d 939 (holding that an agreement by speech and language pathologist not to contract with any entity served by employer for two years following termination was reasonable).

142. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. g, illus. 9.

Although Restatement section 188 was not intended to control in cases governed by a statute like section 217, it may, nonetheless, provide useful insights regarding the enforceability of some post-employment restraints—at least from a historical perspective. But where the Restatement analysis departs from the antitrust version of the rule of reason by focusing on harm to the employee, rather than harm to consumers, *Bayly* holds that the antitrust rule controls.[143]

III. Antitrust Analysis of Post-Employment Restraints

A complete rule of reason analysis is not necessary in every antitrust case. If the anticompetitive effect of a particular restraint is obvious, an "abbreviated analysis" dispensing with a detailed relevant market analysis may be appropriate.[144] An abbreviated rule of reason analysis is often sufficient to determine the legality of a non-compete agreement in an employment contract. And the Oklahoma Supreme Court has not yet conducted a complete rule of reason analysis in a section 217 case involving a non-compete agreement between an employer and an employee.[145] Nonetheless, the essential purpose of the analysis remains "the protection of competition, not competitors."[146] "The fundamental test of the reasonableness of restraint is its effect on the public."[147] This is no less true

143. *See* Bayly, Martin & Fay, Inc. v. Pickard, 1989 OK 122, ¶ 11, 780 P.2d 1168, 1171–72 (noting that the "rule of reason" incorporated into agreements subject to 79 OKLA. STAT. § 1, now § 203, is incorporated into agreements subject to section 217).

144. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 778 (1999) ("The obvious anticompetitive effect that triggers abbreviated analysis has not been shown."); *see also* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 463 (1986) (holding it unnecessary to precisely define the relevant market before finding a horizontal agreement to withhold x-rays from customers an unreasonable restraint of trade); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109–10 (1984) ("This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (commenting that the legality of an agreement among competitors not to discuss prices could be determined without "elaborate study of the industry").

145. *See, e.g.*, Howard v. Nitro-Lift Techs., L.L.C., 2011 OK 98, 273 P.3d 20, *vacated on other grounds*, 568 U.S. 17 (2012) (per curiam) (holding that any deviation from the statutory exception in 15 OKLA. STAT. § 219A invalidates the restraint).

146. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224–25 (1993) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)) (emphasis removed).

147. Bd. of Regents of the Univ. of Okla. v. NCAA, 1977 OK 17, ¶ 15, 561 P.2d 499, 506 (citing Lynch v. Magnavox Co., 94 F.2d 883, 891 (9th Cir. 1938)).

for section 217, which "was adopted for the protection of individuals engaged in lawful professions, trades, and business, and for the benefit of the public."[148] In other words, for a "[r]estraint of trade to be illegal" pursuant to section 217, it "must be inimical to the public interest."[149]

Economic analysis supports this focus on harm to the public. The evolution of the enforcement of antitrust laws has been "heavily driven . . . by antitrust economics."[150] The last one hundred years of antitrust case law shows "a consensus that guidance must be sought in economics" and that

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148. Neil v. Pa. Life Ins. Co., 1970 OK 172, ¶ 8, 474 P.2d 961, 963.

149. *Bd. of Regents of the Univ. of Okla.*, ¶ 19, 561 P.2d at 508 (citing Richardson v. Paxten Co., 127 S.E.2d 113, 117 (Va. 1962)); *cf.* Graham v. Hudgins, Thompson, Ball & Assocs., Inc., 1975 OK 122, ¶ 7, 540 P.2d 1161, 1164 ("The State Act has as its purpose prohibition of personal restraints on individual employment effecting the right to act freely and under no penalty or loss."). *Graham* held that section 217 prohibited enforcement of a forfeiture provision in the employer's profit-sharing plan, triggered by an employee's resignation and employment by a competitor of the employer. *Id.* ¶¶ 7–8, 540 P.2d at 1164. The plan was funded solely by contributions from the employer, and, according to the United States District Court for the Northern District of Oklahoma in an earlier decided case, the employee's right to receive distributions of the funds allocated to his account during his six-year employment had not vested. *See* Graham v. Hudgins, Thompson, Ball & Assocs., Inc., 319 F. Supp. 1335, 1336–38 (N.D. Okla. 1970). Nonetheless, *Graham* treated the funds as compensation to which the employee was entitled and, noting that there was a split of authority on the issue, adopted the "more acceptable view" followed in Ohio which treated retirement benefits as part of an employee's compensation. *Graham*, ¶¶ 10–11, 540 P.2d at 1164–65.

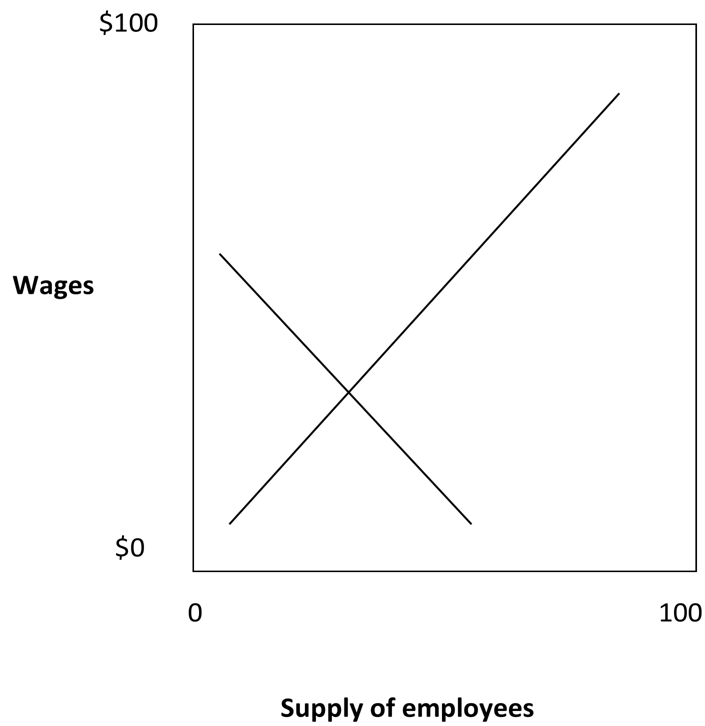
Graham is unique in its determination that after termination an employee can "act freely and under no penalty or loss." *Id.* ¶ 7, 540 P.2d at 1164. Decided before *Bayly* and after *Tatum*, *Graham* did not consider whether the forfeiture provision was a reasonable restraint. *Graham* is also unique in its observation that the Sherman Act deals with a subject matter entirely different than section 217, i.e., monopolistic practices. *Id.*

The federal court had specifically decided that the forfeiture provision did not violate section one of the Sherman Act. *Graham*, 319 F. Supp. at 1337. But it also decided that as a covenant not to compete, there was no showing that the forfeiture provision restrained the market for the employee's services, and, therefore, no reason to analyze its reasonableness. *Id.* "[T]he only restraint that appears to be imposed on [employee] is that of his desire for payment of his inchoate share of the funds of the Plan. [Employee] makes no claim that this forfeiture provision coerces any prospective employer into not hiring him." *Id.* at 1337–38. *Bayly,* and the cases on which it relies to invoke the rule of reason in section 217 cases, make the *Graham* court's distinction of federal law in this area no longer tenable.

150. Daniel L. Rubinfeld, *On the Foundations of Antitrust Law and Economics*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 51, 58 (Robert Pitofsky ed., 2008).

"[t]here is no generally accepted principle of statutory interpretation that shows that the courts were wrong to go this route."[151]

In any given market, the supply of workers and the demand for their services can be described by a typical supply/demand curve, with the rate of wages depicted on the vertical axis and the supply of workers depicted on the horizontal axis.

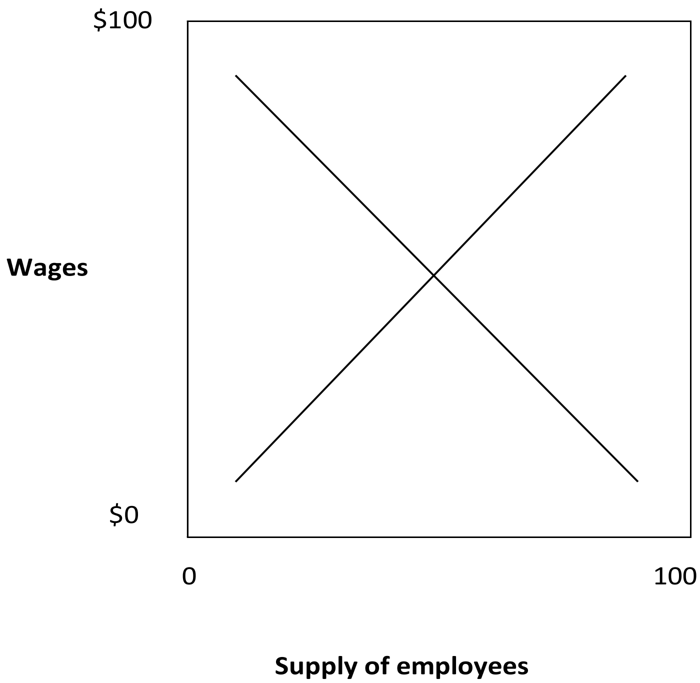


The "demand" curve for labor slopes down and to the right, representing employers' increased willingness to hire more employees as wages decrease.[152] The "supply" curve slopes up and to the right, indicating that more employees are willing to work as wages increase.[153]

151. RICHARD A. POSNER, ANTITRUST LAW 35 (2d ed. 2001).

152. Matthew C. Palmer, Note, *Where Have You Gone, Law and Economics Judges? Economic Analysis Advice to Courts Considering the Enforceability of Covenants Not To*

According to one author, wages fall when courts refuse to enforce non-compete agreements.[154] As depicted in the following graph, when employers lack the protection of non-compete agreements, they are no longer willing to pay the same wage that they would pay to an employee who poses no threat of poaching the employer's business upon termination of the employment relationship.



Compete Signed After At-Will Employment Has Commenced, 66 OHIO ST. L.J. 1105, 1141 n.154 (2005).

153. *Id.*

154. *See id.* at 1146 ("Similarly, under an unenforceability ruling, the demand curve for labor would shift downward."); *cf.* Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L., ECON., & ORG. 376 (2011) (predicting that enforcement of non-compete agreements would, (1) reduce mobility but result in longer tenured executives, (2) result in lower but more salary-based compensation for executives which would be offset by the employer's increased investment in training and educating its managers thereby raising the manager's individual human capital). This study does not attempt to quantify the economic value of longevity and better trained and educated executives in terms of the overall compensation package received by executives who are subject to enforceable non-compete agreements.

Depending on the nature of the market, unemployment may rise, as the equilibrium wage and number of employees who are willing to work for that wage decrease. Regardless, additional costs "will be borne by consumers as well as employers and employees."[155] This is the kind of adverse impact on competition and consumers that the antitrust laws are designed to prevent. "[A]ntitrust [law] is not only or primarily a system to ensure that business rivals do not behave unfairly or in a predatory manner toward other businesses. It is rather a 'consumer welfare' system of laws."[156]

Because antitrust law focuses on competition as opposed to individual competitors, it is difficult for an employee to show how being prevented from doing the same job, with the same customers but for a different employer, harms competition in the relevant market. This is especially true because "[i]t is not enough for plaintiff to allege[] that he has been injured—he must have suffered an antitrust injury."[157] From the consumers' perspective, nothing changes when an employee changes employers; the two employers continue to compete for the consumers' business. There may be economic consequences to the departing employee, but protecting against those consequences at the expense of all other employees whose wages are likely to suffer does not benefit consumers.

More importantly, courts seek to preserve competition between the two employers. "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services . . . the statutory policy precludes inquiry into the question whether competition is good or bad."[158] As long as the departing employee can continue to practice their trade or profession, reasonable restraints on the employee's ability to compete with the former employer and necessary to protect the former employer's ability to compete with its competitors will be enforced.[159]

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155. Palmer, *supra* note 152, at 1147.

156. Robert Pitofsky, *Introduction* to HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 150, at 5.

157. Beville v. Curry, 2001 OK 1, ¶ 27, 39 P.3d 754, 764 (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 31 (1984)). *Beville* did not involve a contract between an employer and an employee but an alleged conspiracy between a hospital and a prospective employer by which the plaintiff was denied employment. *Id.* ¶¶ 2–3, 39 P.3d at 756–57. *Beville* is relevant to section 217 because the damage issue regarding proof of an antitrust injury would be the same. *Id.* ¶¶ 27–29, 39 P.3d at 764.

158. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

159. Tatum v. Colonial Life & Accident Ins. Co., 1970 OK 27, ¶ 7, 465 P.2d 448, 451.

IV. The Legacy of the "Tatum Rule"

Since *Tatum* was decided, twelve reported cases have applied section 217 to some form of post-employment restraint. In cases where the contract prohibited an employee from soliciting the business of former customers, courts consistently applied the "*Tatum* Rule" and enforced the restraint.[160]

However, in three cases, the court found that the contract restricted customer solicitation to a greater degree than was permitted. In *Bayly, Martin & Fay, Inc. v. Pickard*, the Oklahoma Supreme Court held that the prohibition was too broad to be judicially reformed because it also covered prospective clients and all lines of insurance, including those that the employee had not sold for the previous employer.[161] In *Howard v. Nitro-Lift Technologies, L.L.C.*, the court declined to modify the contract by limiting the non-solicitation of "past or present" customers to present customers.[162] And the court held that it could not determine whether the contract's reference to "present customers" was equivalent to the "established customers" language in the statute.[163] Finally, in *Autry v. Acosta, Inc.*, the

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160. *See, e.g.*, Cardiovascular Surgical Specialists, Corp. v. Mammana, 2002 OK 27, ¶¶ 19–20, 61 P.3d 210, 214–15; Inergy Propane, LLC v. Lundy, 2009 OK CIV APP 8, ¶¶ 31, 36, 50, 219 P.3d 547, 558, 560; Thayne A. Hedges Reg'l Speech & Hearing Ctr., Inc. v. Baughman, 1998 OK CIV APP 122, ¶ 3, 996 P.2d 939, 941; Key Temp. Pers., Inc. v. Cox, 1994 OK CIV APP 123, ¶¶ 8–9, 17, 884 P.2d 1213, 1215–17.

For cases not involving a solicitation of former customers provision, see Bd. of Regents of the Univ. of Okla. v. NCAA, 1977 OK 17, ¶ 19, 561 P.2d 499, 508 (holding the contract between third parties to limit the number of employees hired did not violate section 217); Crown Paint Co. v. Bankston, 1981 OK 104, ¶¶ 11–18, 640 P.2d 948, 950–51 (holding an agreement by manufacturer not to sell to customers of wholesaler did not violate section 217); Scanline Med., L.L.C. v. Brooks, 2011 OK CIV APP 88, ¶¶ 13–15, 259 P.3d 911, 913–14 (refusing to enforce a contract that prohibited the employee from selling competing medical devices); Loewen Grp. Acquisition Corp. v. Matthews, 2000 OK CIV APP 109, ¶¶ 22–24, 12 P.3d 977, 982 (refusing to enforce a contract prohibiting the employee from owning or working for a competing business); Cohen Realty, Inc. v. Marinick, 1991 OK CIV APP 71, ¶¶ 1, 8, 817 P.2d 747, 748–49 (refusing to enforce a contract that prevented the employee from working as a real estate broker or "competing in any manner").

161. 1989 OK 122, ¶¶ 16, 20, 780 P.2d 1168, 1174–75.

162. 2011 OK 98, ¶¶ 26–28, 273 P.3d 20, 29–30, *vacated on other grounds*, 568 U.S. 17 (2012) (per curiam). The Oklahoma Supreme Court's Opinion was vacated because its analysis conflicted with federal law on an arbitration issue: who gets to decide whether a non-compete agreement is enforceable, court or arbitrator. *Nitro-Lift Techs.*, 568 U.S. at 20–21. The United States Supreme Court determined that pursuant to federal law and the parties' arbitration agreement it was for the arbitrator, not the court, to determine the enforceability of the non-compete agreement. *Id.* at 22.

163. Howard v. Nitro-Lift Techs., L.L.C., 2011 OK 98, ¶¶ 26–28, 273 P.3d 20, 29–30.

court declined to determine whether the contract prohibition on soliciting the business of "Clients that [Employee] represented while employed" was equivalent to the statutory "established customers" language.[164]

The two latter cases involved the construction and application of title 15, section 219A, which was enacted after *Bayly* was decided. The principal focus of this Article concerns the effect of section 219A on the *Tatum* Rule, the holding in *Bayly*, and antitrust analysis of post-employment restraints.

The Oklahoma Legislature enacted title 15, section 219A in 2001:

> 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.[165]

The statute establishes a third statutory exception to the contracts prohibited by section 217: soliciting the business of a former employer's established customers.[166] The genesis for the statute appears to have been *Loewen Group Acquisition Corp. v. Matthews*.[167] *Loewen* involved a prohibition on owning or operating a funeral home within fifteen miles of any home owned by the former employer.[168] Because the employer owned several funeral homes, the court found that the employee was effectively

164. 2018 OK CIV APP 8, ¶ 31, 410 P.3d 1017, 1023–24.

165. 15 OKLA. STAT. § 219A(A) (2011); 2001 Okla. Sess. Laws ch. 406, § 4.

166. A fourth statutory exception was added in 2013 permitting agreements which prohibit the solicitation of employees of a former employer to change employers. 15 OKLA. STAT. § 219B (Supp. 2013); 2013 Okla. Sess. Laws ch. 194, § 1. That exception deals principally with unfair methods of competition and is beyond the scope of this Article.

167. *See* 2000 OK CIV APP 109, 12 P.3d 977; *see also* Jeb Boatman, Note, *Contract Law: As Clear as Mud: The Demise of the Covenant Not to Compete in Oklahoma*, 55 OKLA. L. REV. 491, 492 (2002).

168. *Loewen*, ¶ 3, 12 P.3d at 979.

prevented from working anywhere in Oklahoma City, not just within fifteen miles of the home where the employee had worked.[169]

To date, section 219A has been subject to two competing interpretations. Some courts interpret the statute as invalidating any post-employment restraint between an employer and employee except one prohibiting the departing employee from soliciting the business of the former employer's established customers.[170] According to this interpretation, the Legislature intended to "change" existing law and only permit one kind of post-employment restraint. Such an interpretation would abandon the use of the rule of reason.

An alternative interpretation argues that the statute was intended to resolve one aspect of the third rule of reason factor—namely that the procompetitive benefits of an agreement not to solicit established customers outweigh its anticompetitive effects.[171] According to this view, section 219A "codifies" the *Tatum* Rule but leaves the parties free to negotiate other limitations on post-employment activities, subject to the rule of reason.[172]

A. The "Change" Argument

One author has suggested that section 217 reflects the motto of the State of Oklahoma, "*Labor Omnia Vincit*,"[173] and represents an "employee-friendly" law.[174] That view is consistent with the literal language of section 217 and the holdings in the two pre-*Tatum* cases: *E. S. Miller Laboratories, Inc. v. Griffin*[175] and *Neal v. Pennsylvania Life Insurance Co*.[176] The change interpretation implies that the Legislature intended to return to the pre-

169. *Id.* ¶ 18, 12 P.3d at 981.

170. *See, e.g.*, Boatman, *supra* note 167, at 501 (noting that section 219A permits a hands-off provision but "invalidates any other type of restrictive covenant between employers and employees"); Green, *supra* note 126, at 462–63 ("[Section 219A] does not allow employers to restrain the employee with noncompete agreements except for the limited exception where 'the employee may be barred from soliciting . . . *established customers*.'") (quoting Howard v. Nitro-Lift Techs., L.L.C., 2011 OK 98, ¶ 21, 273 P.3d 20, 28, *vacated on other grounds*, 568 U.S. 17 (2012) (per curiam)).

171. *See* Inergy Propane, LLC v. Lundy, 2009 OK CIV APP 8, ¶ 28, 219 P.3d 547, 557.

172. *Id.* ¶¶ 24, 28, 219 P.3d at 556–57.

173. Translated as "labor conquers all." ALBERT H. ELLIS, A HISTORY OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OKLAHOMA 185 (1923), https://babel.hathitrust.org/cgi/pt?id=mdp.35112105459467&view=1up&seq=211.

174. Green, *supra* note 126, at 459.

175. 1948 OK 149, ¶ 11, 194 P.2d 877, 879.

176. 1970 OK 13, ¶ 6, 480 P.2d 923, 924.

Tatum days, eliminate any consideration of the reasonableness of a post-employment restraint, and avoid potentially inconsistent results by prohibiting all restraints except the "hands-off-existing-customers" restraint that was specifically approved in *Tatum*.[177] To reach the change interpretation, one must construe the first sentence of section 219A(A) and section 219A(B) to mean that any post-employment restraint, other than a hands-off-established-customers provision, prevents a departing employee from engaging in "the same business as that conducted by the former employer" and is void.[178]

B. The "Codification" Argument

The codification interpretation is supported by the proposition that if the Legislature had intended to change existing law and return to the pre-*Tatum* approach, it could have done so expressly.[179] The codification interpretation views section 219A as a statutory effort to preserve one kind of post-employment restraint that had previously been deemed reasonable—the hands-off-existing-customers restraint—but to have done so within the broader context of the post-*Tatum* case law.[180] This interpretation relies on traditional statutory construction and points out various inconsistencies and unintended results, including conflict with federal law, that adoption of the change interpretation would likely create. The codification interpretation reads the first sentence of section 219A as resonating the holding in *Tatum*; if the post-employment restraint does not absolutely prevent the departing employee from engaging in the same business as the employer and the restraint is otherwise reasonable, it is enforceable.

V. The Proper Construction of Section 219A

The change and codification interpretations of section 219A cannot be reconciled. This Article argues that the codification interpretation is sounder than the change interpretation and the more legally supported interpretation of the statute. Three reasons support this conclusion: (1) traditional principles of statutory construction, (2) the unintended

177. *See* Green, *supra* note 126, at 459–62.

178. 15 OKLA. STAT. § 219A(A) (2011).

179. *See* Boatman, *supra* note 167, at 512 ("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.").

180. *See* Green, *supra* note 126, at 462–63.

consequences that would result from adopting the change interpretation, and (3) the potential for conflict with federal law.

A. Statutory Construction

The subject matter of section 219A was the focus of litigation and legal interpretation for decades prior to enactment. Given that history, the first question to resolve in applying the 2001 statute is whether the Legislature sought to abrogate that historical body of law when it enacted section 219A.

> [B]y amending a statute the Legislature may have intended (1) to change existing law or (2) to clarify ambiguous law. The exact intent is ascertained by looking to the circumstances surrounding the amendment. If the earlier version of a statute definitely expresses a clear and unambiguous intent or has been judicially interpreted, a legislative amendment is presumed to change the existing law. Nonetheless, if the earlier statute's meaning is in doubt or uncertain, a presumption arises that the amendment is designed to clarify, i.e., more clearly convey, legislative intent which was left indefinite by the earlier statute's text.[181]

If one interprets section 219A to prohibit any post-employment restraint in an employment contract other than one preventing a departing employee from directly soliciting the business of the former employer's established customers, then one must assume the Legislature intended to change the existing interpretation of section 217. But the Legislature chose to enact section 219A as a separate statute, rather than amend section 217.

Numerous judicial decisions have subjected section 217 to a rule of reason type approach since 1970. Consequently, it is significant that the Legislature did not clearly state an intention to abrogate use of the rule of reason in section 217 cases when it enacted section 219A. As the Oklahoma Supreme Court recognized in *Couch v. International Brotherhood of Teamsters*, "[f]ailure of the Legislature to change the law for a long period of time after judicial construction thereof amounts to Legislative approval and ratification of the construction placed upon the statute by the Court."[182]

In addition, the change interpretation requires the addition of language to section 219A. The phrase "shall be permitted to engage in the same

181. Samman v. Multiple Injury Tr. Fund, 2001 OK 71, ¶ 13, 33 P.3d 302, 307 (footnotes omitted).

182. 1956 OK 239, ¶ 6, 302 P.2d 117, 119 (per curiam) (citing McCain v. State Election Bd., 1930 OK 323, 289 P. 759).

business as that conducted by the former employer" must be interpreted to mean that any post-employment restraint, except a hands-off-existing-customers provision, prevents an employee from engaging in the same business as the employer.[183] But language expressing that interpretation is nowhere to be found in section 219A, "[a]nd[] the general rule is that nothing may be read into a statute which was not within the manifest intention of the legislature as gathered from the language of the act."[184] If the Legislature intended to prohibit any post-employment restraint except the one mentioned in section 219A, the Legislature could have done so in a clearer and more direct way. For example, the Legislature could have worded the statute to provide that "all post-employment restraints except a hands-off-existing-customers provision are void." It did not.

In fact, the statute specifically contemplates covenants by which the employee agrees not to engage in other kinds of competitive conduct when it discusses "[a] person who makes an agreement with an employer . . . not to compete with the employer after the employment relationship has been terminated."[185] The only statutory limitation imposed on an "agreement . . . not to compete" is that the employer cannot prevent the departing employee from engaging in the same or a similar business.[186] Consequently, an employee subject to this kind of non-compete agreement can engage in the same business as long as he or she does not compete with the former employer and, if included in the employment contract, "directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer."[187] This interpretation is grammatically consistent with the language of the statute and does not depend on the addition of language not included in the statute.[188] And this interpretation would preserve rule of reason analysis but leave the question of whether any other types of restraints are prohibited by section 217 for future determination.

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183. 15 OKLA. STAT. § 219A(A).

184. Stemmons, Inc. v. Universal C.I.T. Credit Corp., 1956 OK 221, ¶ 19, 301 P.2d 212, 216.

185. 15 OKLA. STAT. § 219A(A).

186. *Id.*

187. *Id.*

188. Warren v. Stanfield (*In re* Guardianship of Stanfield), 2012 OK 8, ¶ 11, 276 P.3d 989, 994 ("When determining the meaning of an unambiguous statute, the ordinary rules of grammar must be applied unless they lead to an absurd result.") (citing Gilbert Cent. Corp. v. State, 1986 OK 6, 716 P.2d 654).

But, in a jurisprudential vacuum, even this interpretation of section 219A could lead to undesirable results. For example, the hands-off-established-customers provision in section 219A(A) is not limited to the goods and services sold by the former employer. Nonetheless, an employer should not be able to prevent a departing employee from attempting to sell to anyone, including the former employer's established customers, goods or services that the former employer does not sell. Yet the change interpretation would permit the employer to engage in this kind of overreaching and ultimately anticompetitive conduct.

The change interpretation essentially reads section 219A as a replacement for section 217. That interpretation would be on firmer analytical ground if, for example, the statute provided: Every contract by which one is restrained from practicing a trade or profession is void, except one prohibiting an employee from soliciting the sale of goods, services or a combination of goods and services from the established customers of the former employer. The codification interpretation avoids the unintended consequences of that kind of language by construing section 217, as interpreted by the *Tatum* line of cases, alongside section 219A and giving effect to each statute.[189] According to this view, section 217 permits reasonable post-employment restraints, and section 219A provides that a hands-off-established-customers covenant is reasonable. But the codification interpretation also leads to the conclusion that an agreement which prevents a departing employee from engaging in a completely different business with a former employer's "established customers" has no procompetitive benefits.[190]

Finally, the language in section 219A that authorizes a hands-off-established-customers covenant fails to address the location and duration limitations that have previously been held to be necessary for such a post-employment restraint to be enforceable. For example, section 219A does not impose any reasonable time limit for the enforcement of a restraint and could therefore apply indefinitely.[191] The rule of reason prevents that result.

189. *See* Okla. Nat. Gas Co. v. State *ex rel.* Vassar, 1940 OK 137, ¶ 10, 101 P.2d 793, 796 (noting that statutes regarding the same subject are to be construed so as to give effect to every part and harmonize each section with the others).

190. *See* 15 OKLA. STAT. § 219A(A).

191. Similar issues have been noted in other contexts, for example, applying the same rule to high-level managers with little or no customer contact that is applied to employees with direct customer contact. *See* Memorandum from Gary W. Derrick, Subcommittee

The change argument does not and would require courts to read a reasonableness test into the statute for certain aspects of the analysis where the existing statutory language does not resolve the issue. If, as the change interpretation requires, section 219A can be implemented from the language of the statute alone and without reference to the rule of reason, no principle of statutory construction is available to create exceptions for what the statute leaves out. But it is fundamental that statutory construction must "begin with consideration of the language used and courts should not read into a statute exceptions not made by the Legislature."[192] If the Legislature abrogated use of the rule of reason for interpreting section 217, it also abrogated use of that rule to determine the reasonableness of a particular hands-off provision covered by section 219A.

As a matter of statutory construction, therefore, it is more likely that the Legislature intended to "more clearly convey" one of the judicially created exceptions to section 217 when it enacted section 219A, thus codifying the hands-off-existing-customers covenant of the *Tatum* Rule.[193] That construction also avoids problematic results that the Legislature likely did not intend to create.

B. Unintended Consequences of the Change Interpretation

The change construction of section 219A would also conflict with long-settled issues regarding the interpretation of section 218. For example, a corporate employee who owns company stock can agree not to solicit established or *potential* customers upon termination of the employment relationship and sale of stock back to the corporation.[194] That kind of agreement has been consistently upheld.[195] Although the sale of good will

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Chair, to the Bus. Ass'ns Section of the Okla. Bar Ass'n (June 27, 2001) (on file with author); *see also* Boatman, *supra* note 167, at 510–11.

192. Ledbetter v. Okla. Alcoholic Beverage Laws Enf't Comm'n, 1988 OK 117, ¶ 7, 764 P.2d 172, 179.

193. *See* Samman v. Multiple Injury Tr. Fund, 2001 OK 71, ¶ 13, 33 P.3d 302, 307 (discussing general statutory interpretation principles).

194. *Compare* Key v. Perkins, 1935 OK 142, ¶¶ 3, 14, 46 P.2d 530, 531–32 (finding the sale of twenty percent of the corporation's stock found sufficient to enforce the restrictions), *with* Bayly, Martin & Fay, Inc. v. Pickard, 1989 OK 122, ¶ 9, 780 P.2d 1168, 1170 (finding the sale of a "miniscule amount of stock—.08%" insufficient to invoke the goodwill exception in sections 217 and 218).

195. Berry & Berry Acquisitions v. BFN Props. LLC, 2018 OK 27, ¶ 16, 416 P.3d 1061, 1069. *Berry* settles a previously assumed but unresolved issue of Oklahoma law. *See* Oliver v. Omnicare, Inc., 2004 OK CIV APP 93, ¶¶ 6, 14, 103 P.3d 626, 629–30 (holding that

associated with the company's stock has historically been viewed as a section 218 case,[196] a partial stock sale accompanied by a general non-compete agreement is a "provision in a contract between an employer and an employee in conflict with the provisions of [section 219A]."[197] As the Oklahoma Supreme Court recognized in *Hogg v. Oklahoma County Juvenile Bureau*, "[w]hen a strict literal construction leads to an inconsistent or incongruent result between provisions, we will utilize rules of statutory construction to reconcile the discord and ascertain the legislative intent."[198]

The change interpretation also creates a conflict between section 217 and Oklahoma's general antitrust statute.[199] Although section 217 addresses contracts that restrain the practice of a trade or profession, both statutes address contracts that restrain trade.[200] Although the antitrust statute is clearly interpreted pursuant to the antitrust rule of reason,[201] the change interpretation would apply a different analytical rule to contracts which restrain the practice of a lawful trade or profession.

Oklahoma public policy prevented enforcement of non-compete agreement despite Ohio choice of law provision in the employment contract); Herchman v. Sun Med., Inc., 751 F. Supp. 942, 947 (N.D. Okla. 1990) (finding that a non-compete agreement in a Texas employment contract violated Oklahoma public policy and was unenforceable in Oklahoma). The public policy issue in *Berry* was whether a restrictive covenant clearly enforceable pursuant to the Texas choice of law provision in an employment contract "violates the public policy of Oklahoma—a determination that hinges on the whether the non-compete is enforceable under Oklahoma law." *Berry*, ¶ 14, 416 P.3d at 1068–69. As a result, without respect to the enforceability of a restrictive covenant pursuant to the law of any other state chosen by the parties to govern an employment contract, if the covenant violates Oklahoma antitrust law, it will not be enforced in this State.

196. *See, e.g.*, *Bayly*, ¶ 13 n.11, 780 P.2d at 1172 n.11.

197. 15 OKLA. STAT. § 219A(B) (2011).

198. 2012 OK 107, ¶ 7, 292 P.3d 29, 33 (citing St. John Med. Ctr. v. Bilby, 2007 OK 37, ¶ 6, 160 P.3d 978, 979).

199. *See* 79 OKLA. STAT. § 203 (2011).

200. *Compare* 15 OKLA. STAT. § 217 ("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."), *with* 79 OKLA. STAT. § 203(A) ("Every . . . contract . . . in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal.").

201. *See* Bd. of Regents of the Univ. of Okla. v. NCAA, 1977 OK 17, ¶¶ 15–18, 561 P.2d 499, 505–08; *see also* 79 OKLA. STAT. § 212 ("The provisions of this act shall be interpreted in a manner consistent with Federal Antitrust Law 15 U.S.C., Section 1 et seq. and the case law applicable thereto.").

C. Conflict with Federal Law

The change argument further produces a conflict between section 217 and federal antitrust law. The Sherman Act applies to restraints of trade "among the several States, or with foreign nations."[202] In adopting the Sherman Act, "Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations, and conspiracies in restraint of trade, and to that end to exercise all the power it possessed."[203] Further, "as the dimensions and complexity of our economy have grown, the federal power over commerce, and the concomitant coverage of the Sherman Act, have experienced similar expansion."[204] As Congress's power under the Commerce Clause has long been interpreted to extend to local activities that substantially affect interstate commerce as well as activities actually occurring in interstate commerce,[205] it has become clear "that the jurisdictional requirement of the Sherman Act may be satisfied under either the 'in commerce' or the 'effect on commerce' theory."[206]

It is now rare to find a business that does not involve or effect interstate commerce.[207] Consequently, where the Sherman Act applies, a post-employment restraint prohibiting solicitation of business from established

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202. 15 U.S.C. § 1 (2018).

203. Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 435 (1932).

204. Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 328–29 (1991) (footnote omitted).

205. Wickard v. Filburn, 317 U.S. 111, 124 (1942).

206. McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 242 (1980) (citing Hosp. Bldg. Co. v. Rex Hosp. Tr., 425 U.S. 738, 743 (1976); Gulf Oil Co. v. Copp Paving Co., Inc., 419 U.S. 186, 194–95 (1974); United States v. Women's Sportswear Mfr. Ass'n, 336 U.S. 460, 464 (1949); Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235–37 (1948)).

207. *See, e.g.*, *Summit Health*, 500 U.S. at 329 (holding that although a hospital's primary activity was providing health care services in a local market, an excluded ophthalmologist showed that the hospital was engaged in interstate commerce for Sherman Act jurisdiction); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 435–36 (1990) (holding a group refusal to accept appointments of indigent defendants by private practice attorneys in the District of Columbia was a per se violation of the Sherman Act); Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 348 (1982) (holding that an agreement by physicians not to exceed maximum fee schedule established for patients in one particular county in Arizona was a per se violation of the Sherman Act); *McLain*, 444 U.S. at 245 (holding that real estate brokerage activity facilitating local real estate transactions had a substantial effect on interstate commerce satisfying Sherman Act jurisdictional requirement); Goldfarb v. Va. State Bar, 421 U.S. 773, 783–85 (1975) (finding that title examination by local attorneys as part of real estate transactions was an integral part of interstate commerce for Sherman Act jurisdiction).

customers—even if sanctioned by section 219A—will still have to satisfy a federal rule of reason analysis to be enforceable.[208] The following example illustrates the problem.

When executed, an employment contract that contains a post-employment restrictive covenant is similar to a vertical restraint. The employee agrees not to work for a competitor during the term of employment. But the agreement does not raise any antitrust issues because the contract is analogous to an exclusive dealing arrangement between a manufacturer and its distributor, or a wholesaler and its retailer. In addition, the employer generally lacks market power to adversely affect competition in the relevant market as a result of the contract.[209] If an employee subject to a section 219A-type "hands off" non-compete agreement leaves and goes to work for the employer's competitor, the "vertical" nature of the agreement does not change—it is still an agreement between an employer and a former employee. It does not become a horizontal agreement between the former employer and the new employer merely because the employee takes existing contractual obligations to the new employment. And the agreement would be generally enforceable, regardless of whether federal law or Oklahoma law applies.

However, if the employee leaves and starts a competing business, the non-compete agreement becomes a "horizontal restraint," that is, one between two competitors at the same market level.[210] A market division agreement between competitors withdraws the "supply" of potential sellers and raises prices.[211] An agreement between competitors to divide territories, or in the case of a non-compete agreement, to divide customers within a relevant market would violate both federal and State antitrust laws.[212]

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208. *See* OKLA. CONST. art. 1, § 1 ("The State of Oklahoma is an inseparable part of the Federal Union, and the constitution of the United States is the supreme law of the land.").

209. *See* Beville v. Curry, 2001 OK 1, ¶ 13, 39 P.3d 754, 759–60 (requiring proof of market power to establish antitrust injury in the absence of actual adverse effects on competition).

210. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972).

211. ERNEST GELLHORN, WILLIAM E. KOVACIC & STEPHEN CALKINS, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 236 (5th ed. 1994).

212. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 295–96 (6th Cir. 1898) (finding agreement among competitors to allocate geographical territories and some customers within those territories exclusively to each competitor violated section 1 of the Sherman Act), *aff'd*, 175 U.S. 211 (1899); Crown Paint Co. v. Bankston, 1981 OK 104, ¶¶ 9–11, 640 P.2d 948, 950–51 (following federal law); *see also* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 47, 49–50 (1990) (per curiam) (holding an agreement by bar review companies

The change interpretation of section 219A forecloses this method of analysis and would enforce a hands-off-established-customers non-compete agreement even though the former employee's new business might offer a lower price, better service, or improved product. This result becomes even more problematic when one considers that "[l]ow prices benefit consumers regardless of how those prices are set."[213] "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."[214] Application of the change interpretation to this example would produce an obviously problematic result from both a federal antitrust law and supremacy clause perspective.

Further, even if such a non-compete agreement is treated as a horizontal agreement, the employer may still be able to show that there are procompetitive benefits to consumers that outweigh the anticompetitive effects. Although the change interpretation of section 219A forecloses that debate, the rule of reason analysis does not. "In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."[215]

A different example clearly illuminates the difference between the change interpretation of section 219A and a rule of reason analysis. Assume an automobile salesperson employed by a high-end, luxury new car dealer is subject to a section 219A type hands-off-existing-customers agreement. If the salesperson leaves and goes to work in the relevant market for a

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not to compete in each other's designated territory to be illegal); *Topco*, 405 U.S. at 608 (holding an agreement by supermarket owners to operate only in their exclusive territory to be illegal); United States v. Sealy, Inc., 388 U.S. 350, 354–56 (1967) (holding an agreement by competitors who owned manufacturer to sell its products only in their assigned territories to be illegal); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (describing agreements to divide markets by competitors as per se illegal). Market division agreements between competitors have generally been treated as per se offenses. However, in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 226 (D.C. Cir. 1986), the court applied a rule of reason analysis after concluding that *Topco* and *Sealy* had been overruled. In *Palmer,* the Court's citation to *Topco* for the proposition that market division agreements by competitors are "classic examples" of a per se antitrust violation strongly suggests that *Topco* has not been overruled. *Palmer*, 498 U.S. at 49 (quoting *Topco*, 405 U.S. at 608).

213. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990).

214. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

215. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007).

competitor in the high-end, luxury new car market, the first employer is entitled to enforce the non-compete agreement and prevent the salesman from contacting that employer's established customers, regardless of whether the change or codification interpretation of section 219A is followed.

However, if the salesperson leaves and goes to work for a used truck dealer, the first employer would still be entitled to enforce the non-compete agreement pursuant to the change interpretation of section 219A. But because this business would likely satisfy the interstate commerce jurisdictional requirement of the Sherman Act, federal law would mandate a rule of reason analysis. The rule of reason analysis would focus on the difference between the high-end, luxury new car market and the used truck market to determine whether they were in the same or different product markets. If the court established they comprised two different product markets, the first employer would bear the burden to show that there were procompetitive benefits that outweighed the anticompetitive effects of enforcing the non-compete agreement. Because a high-end, new car dealer is unlikely to have an interest in customers seeking to purchase used trucks, the non-compete agreement would presumably fail the rule of reason analysis and be held unenforceable.[216]

Unlike the change argument, the codification interpretation would harmonize the construction of section 219A with federal antitrust law and avoid inconsistent outcomes that would entirely depend upon the existence or absence of interstate commerce. The codification interpretation also honors the intent of the Antitrust Reform Act to align Oklahoma antitrust law "consistent with Federal Antitrust Law 15 U.S.C., Section 1 et seq. and the case law applicable thereto."[217]

VI. Judicial Interpretation of Section 219A

To date, six cases have addressed the application of section 219A.[218] To read these cases in anything other than the historical context of section 217

216. *Cf.* Cardiovascular Surgical Specialists, Corp. v. Mammana, 2002 OK 27, ¶ 18, 61 P.3d 210, 214 ("One surgeon has no legitimate business interest in another surgeon's referral base regardless of a past employer-employee relationship.").

217. 79 OKLA. STAT. § 212 (2011).

218. *See* Howard v. Nitro-Lift Techs., L.L.C., 2011 OK 98, ¶¶ 6, 23, 273 P.3d 20, 24, 29 (holding a prohibition on employment with any company in the same business in the United States held unenforceable), *vacated on other grounds*, 568 U.S. 17 (2012); *Mammana*, ¶ 19 n.5, 61 P.3d at 214 n.5; Autry v. Acosta, Inc., 2018 OK CIV APP 8, ¶ 32, 410 P.3d 1017,

jurisprudence risks the "inconsistent or incongruent" results to be avoided in statutory construction.[219] The Oklahoma Court of Civil Appeals made the following observation in *Inergy Propane, LLC v. Lundy*:

> Section 219A was not enacted in a vacuum. Nor does the language of the statute evidence any legislative intent to supplant the existing and extensive case law interpreting section 217. Those cases and the analytical approach developed therein provide the context within which to resolve the issues not specifically addressed by the language of section 219A. What the statute does eliminate is the need for part of the rule of reason analysis. . . . [T]he pro-competitive benefits of an agreement between an employer and an employee preventing the employee from "directly solicit[ing] the sale of goods, services or a combination of goods and services from the established customers of the former employer" after termination of the employment outweigh the anti-competitive effects of that agreement.[220]

The Court's interpretation of section 219A in *Lundy* is consistent with the Oklahoma Supreme Court's approach in *Cardiovascular Surgical Specialists Corporation v. Mammana*.[221] The third aspect of the non-compete provision in that case provided that the employee would not "solicit or divert business of any patient who had been a patient of Cardiovascular within one year of the termination, without Cardiovascular's advanced written consent."[222] The *Mammana* court held that this non-compete provision was "consistent with the Legislature's

1023–24 (holding a prohibition on engaging in the same business unenforceable); Scanline Med., L.L.C. v. Brooks, 2011 OK CIV APP 88, ¶¶ 12–15, 259 P.3d 911, 913–14 (holding a prohibition on selling competing medical devices in the United States unenforceable); Inergy Propane, LLC v. Lundy, 2009 OK CIV APP 8, ¶¶ 24–28, 219 P.3d 547, 555–57; Eakle v. Grinnell Corp., 272 F. Supp. 2d 1304, 1310, 1313 (E.D. Okla. 2003) (noting that, after extensive discussion, section 219A was not applicable but still holding a broad prohibition on post-employment competition in employment agreement enforceable because part of a stock sale).

219. Hogg v. Okla. Cty. Juvenile Bureau, 2012 OK 107, ¶ 7, 292 P.3d 29, 33.

220. *Lundy*, ¶ 28, 219 P.3d at 557.

221. *See Mammana*, ¶¶ 14–20, 61 P.3d at 213–15 (interpreting section 217).

222. *Id.* ¶ 15, 61 P.3d at 214.

recent enactment [of section 219A] concerning noncompetition agreements."[223]

In *Howard v. Nitro-Lift Technologies, L.L.C.*, the Oklahoma Supreme Court commented on the *Lundy* decision: "The [Oklahoma Court of Civil Appeals] determined, at least in some instances, the rule of reason would be applicable even under the confines of [section 219A]. It held that the statute addressed the balance of competitive effects under a rule of reason analysis finding the non-solicitation agreement enforceable."[224]

In *Lundy*, the Court of Civil Appeals used a rule of reason approach to determine the enforceability of a hands-off-existing-customers non-compete agreement.[225] Although the Oklahoma Supreme Court did not repudiate or overrule the *Lundy* analysis in *Nitro-Lift*, the court did note that *Lundy* was "persuasive only and lack[ed] precedential effect."[226]

In *Nitro-Lift*, the Supreme Court analyzed a restrictive covenant that prohibited a departing employee from working for any other company engaged in the same business as the employer for a period of two years and also prohibited solicitation of past and present customers.[227] The *Nitro-Lift* court interpreted section 219A in the following way:

> It provides that where an employee has executed a covenant not to compete with an employer, the employee "**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**

223. *Id.* ¶ 19 n.5, 61 P.3d at 214 n.5. Because Dr. Mammana signed the contract before section 219A became effective, it is not clear whether the Court was applying the "new" law or merely acknowledging its existence. The Court did not engage in an analysis of the statute's retroactive effect. However, it is noteworthy that section 219A became effective after the case was tried but before the appellate decision was rendered. And, there are well-settled legal principles which would justify retroactive application of the statute. *See, e.g.*, Starkey v. Okla. Dep't of Corr., 2013 OK 43, 305 P.3d 1004; Wickham v. Gulf Oil Corp., 1981 OK 8, 623 P.2d 613. "[Section] 219A is the Legislature's pronouncement on Oklahoma's public policy regarding covenants not to compete." *Nitro-Lift Techs.*, ¶ 20, 273 P.3d at 28 (footnote omitted).

224. *Nitro-Lift Techs.*, ¶ 1 n.3, 273 P.3d at 23 n.3.

225. *Lundy*, ¶ 28, 219 P.3d at 557.

226. *Nitro-Lift Techs.*, ¶ 1 n.3, 273 P.3d at 23 n.3.

227. *Id.* ¶ 6, 273 P.3d at 24.

combination of goods and services from the established customers of the former employer."[228]

According to *Nitro-Lift*, section 219A was enacted to "prohibit[] employers from binding employees to agreements which bar their ability to find gainful employment in the same business or industry as that of the employer."[229] Although stated differently, this is essentially the same concern expressed forty years earlier by the *Tatum* court: "[T]he contractual provision in the present case does not, in any manner or to any extent whatsoever, restrain the defendant from exercising a lawful profession, trade, or business of any kind whatsoever, either in competition with the plaintiff or otherwise."[230] What differentiates the two decisions is their use of rule of reason analysis. The former did not utilize such analysis, relying on statutory construction to resolve the case; the latter introduced rule of reason analysis to Oklahoma law along with judicial balancing of the legitimate interests of employers and employees in particular cases in the service of economic competition for the ultimate benefit of consumers.

Conclusion

In 1911, the United States Supreme Court observed that in a span of less than one hundred years, the changing economic environment had transformed market practices that had been deemed harmful at common law into procompetitive benefits.[231] As the Court recognized, "contracts or acts . . . at one time deemed to be of such a character as to justify the inference of [competitive harm] . . . were at another period thought not to be of that character."[232] Moreover, it is not just the law's view of particular business conduct that has changed—the growth in complexity of our modern economy has manifested a similar expansion in "the federal power over commerce, and the concomitant coverage of the Sherman Act."[233]

Section 219A, when interpreted in accordance with section 217 jurisprudence, statutorily permits one kind of post-employment restraint that had previously been determined reasonable. Pursuant to that interpretation, section 219A codifies the "hands-off-existing-customers"

228. *Id.* ¶ 20, 273 P.3d at 28 (quoting 15 OKLA. STAT. § 219A).
229. *Id.* ¶ 21, 273 P.3d at 28.
230. Tatum v. Colonial Life & Accident Ins. Co., 1970 OK 27, ¶ 7, 465 P.2d 448, 451.
231. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 57–58 (1911).
232. *Id.* at 58–59.
233. Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 328–29 (1991) (footnote omitted).

part of the *Tatum* Rule and protects competition by encouraging employers "to employ the ablest assistants, and to instruct them thoroughly."[234] At the same time, consumers benefit from the limitation that section 219A permits because departing employees may "find gainful employment in the same business or industry as that of the employer."[235] Because section 219A codified a specific exception to the prohibition on post-employment restraints in section 217, rather than replacing section 217, the rule of reason provides safeguards against those post-employment restraints not specifically authorized by section 219A.

Although Oklahoma law on post-employment restraints is not policy neutral, it does not necessarily "disfavor" such restraints. In the nineteenth century, the Supreme Court established a policy preference in favor of agreements that benefit consumers and competition, based on a choice to embrace one economic system over the alternatives. What benefits consumers depends, to some extent, on evolving economic principles and changes in the way people conduct business. The challenge of the law in this area, is (as it has historically been) to adapt fundamental legal principles to current market conditions. A flexible application of the rule of reason has successfully accomplished that adaption in the past, and there is no reason why it cannot continue to do so.

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234. United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

235. Howard v. Nitro-Lift Techs., L.L.C., 2011 OK 98, ¶ 21, 273 P.3d 20, 28, *vacated on other grounds*, 568 U.S. 17 (2012) (per curiam) (citing Scanline Med., L.L.C. v. Brooks, 2011 OK CIV APP 88, 259 P.3d 911).