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DRAFTING AND ENFORCING RESTRICTIVE COVENANTS NOT TO COMPETE

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I. INTRODUCTION

Restrictive covenants not to compete in the same or similar business in a specified area for a stated period of time have provided a steady source of litigation within the State of Wisconsin and elsewhere. In fact, the Wisconsin Supreme Court has very recently ruled on three cases involving such covenants. In two of the three cases, the covenants were held unreasonable and unenforceable,¹ and in the other the reasonableness of the covenant was not in issue.² Many attorneys are called on to draft restrictive covenants, and, with the current status of the law, this stage is of primary importance. Because such a covenant restricts a person's employment and ability to provide a livelihood, it has not been favored in the eyes of the law.³ The common law and statutory law have required strict construction of such agreements and refused to enforce those of questionable reasonableness. Conse-

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1. Estate of Schroeder, 53 Wis. 2d 59, 191 N.W.2d 860 (1971); Holsen v. Marshall & Ilsley Bank, 52 Wis. 2d 281, 190 N.W.2d 189 (1971).

2. Oudenhoven v. Nishioka, 52 Wis. 2d 503, 190 N.W.2d 920 (1971).

3. See Little Rock Towel & Linen Supply Co. v. Independent Linen Service Co., 237 Ark. 877, 377 S.W.2d 34 (1964); Marshall v. Covington, 81 Idaho 199, 339 P.2d 504 (1959); Purchasing Associates, Inc. v. Weitz, 13 N.Y.2d 267, 196 N.E.2d 245 (1963). See also Note, *Validity and Enforceability of Restrictive Covenants Not to Compete*, 16 CASE W. RES. L. REV. 161, 168 (1964). However, in the recent case of Oudenhoven v. Nishioka, 52 Wis. 2d 503, 190 N.W.2d 920 (1971), the Wisconsin court stated that an arrangement whereby an older doctor took in a younger doctor and the younger doctor in return promised not to open practice in the same area, should the arrangement terminate, was not disfavored. The court evidently felt that this fact situation was not unique and not unusually unreasonable. However, such an arrangement still must comply with the test of "reason"—a standard which must be met by the proponent of the covenant. Consequently, while the court stated that such covenants are not disfavored, they are to the extent that the freedom to contract as one sees fit is subject to stringent court review. Further reason for the court's stating as it did was that this was one of the very few cases in which no challenge of the covenant on the ground that it was unreasonable was raised.

quently, the drafter must be extremely careful.

There is a long line of cases⁴ and a statute⁵ in Wisconsin which require an enforceable restrictive covenant not to compete after a term of employment to be reasonably necessary for the protection of the legitimate interests of the employer and, at the same time, not oppressive or harsh on the employee or injurious to the interests of the general public. Wisconsin courts have always closely construed the circumstances surrounding a restrictive covenant; and the Wisconsin legislature, in 1957, further restricted such covenants by enacting Wisconsin Statutes section 103.465, which provides:

A covenant by an assistant, servant or agent not to compete with his employer or principal during the term of the employment or agency, or thereafter, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any such restrictive covenant imposing an unreasonable restraint is illegal, void and unenforceable even as to so much of the covenant or performance as would be a reasonable restraint.

The leading Wisconsin case, *Lakeside Oil Co. v. Slutsky*,⁶ decided since the enactment of Section 103.465, referred to the statute and the five basic requirements necessary to enforcement of a restrictive covenant agreement, which are as follows: (1) The agreement must be necessary for the protection of the employer; (2) it must provide a reasonable time period; (3) it must cover a reasonable territory; (4) it must not be unreasonable as to the employee; and (5) it must not be unreasonable as to the general public.

What is reasonable and unreasonable will in all instances depend on the facts. But the lawyer need not approach this subject blindfolded. Like other courts, the Wisconsin Supreme Court has, throughout the years, dealt with the imprecise word, "reasonable," and has held a covenant unreasonable and illegal if it is greater

4. *Union Central Life Ins. Co. v. Balistreri*, 19 Wis. 2d 265, 120 N.W.2d 126 (1963); *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, 98 N.W.2d 415 (1959); *Journal Co. v. Bundy*, 254 Wis. 390, 37 N.W.2d 89 (1949); *Wisconsin Ice & Co. v. Lueth*, 213 Wis. 42, 250 N.W. 819 (1933); *Milwaukee Linen Supply Co. v. Ring*, 210 Wis. 467, 246 N.W. 567 (1933); *Eureka Laundry Co. v. Long*, 146 Wis. 205, 131 N.W. 412 (1911).

5. WIS. STAT. § 103.465 (1969).

6. 8 Wis. 2d 157, 98 N.W.2d 415 (1959).

than is required for the protection of the person for whose benefit the restraint is imposed, or if it imposes undue hardship on the person restricted, or if the territory as defined in the contract was, in fact, larger than the area covered by the defendant while employed by the plaintiff.⁷ The "reasonable" test is a constant headache to a person drafting a covenant as he must always be thinking, "Will a court consider this restriction valid under these facts?"

II. DRAFTING THE COVENANT

The drafter must keep in mind the facts of the various cases in which a covenant has been deemed reasonable or unreasonable. He must learn from the thinking and decisions of the court. In particular, the *Slutsky* case must be studied. *Slutsky* involved a covenant which consisted of an agreement "not to re-enter the gasoline and petroleum business in Milwaukee for a space of two (2) years, either directly or indirectly."

A. Necessity

Necessity, duration of the covenant and territory encompassed, and reasonableness as to the employee and the general public are obviously dependent upon each other. In cases involving restrictive covenants not to compete, an employer is attempting to retain customers⁸ in a specified area or to protect his market and investment by keeping confidential information, such as trade or business secrets,⁹ away from competitors. The necessity of protecting these assets is also the justification for the duration of the covenant and the area encompassed by it.

The position or relationship of the employee with the employer is fairly indicative of the latter's need for protection—a need which is not uniform in all businesses and against all employees. However, in many situations, such as in the case of an expert salesman or a sale of a business and resulting covenant not to compete by the then owner, necessity can be readily and easily seen. Neverthe-

7. Cases cited note 4 *supra*. See also Wis. STAT. § 103.465 (1969); RESTATEMENT OF CONTRACTS § 515 (1932).

8. For a discussion and cases regarding retention of existing customers as a factor influencing an employer's need for protection, see Annot., 43 A.L.R.2d 94, 162 (1955); Annot., 41 A.L.R.2d 15, 71 (1955).

9. For a discussion and cases regarding trade or business secrets and confidential information as a factor influencing the employer's need for protection, see Annot., 43 A.L.R.2d 94, 185 (1955); Annot., 41 A.L.R.2d 15, 102 (1955).

less, it should be remembered that the mere opportunity of the employee to deal with his employer's customers does not determine necessity, or the period of time or area which might be reasonable in regard to protection of the employer. In contrast, the fact that an employee has access to his employer's business methods, trade secrets or other confidential information indicates the necessity of the restraint for the employer's protection and generally forms a basis for holding, rather consistently, that the covenant was reasonably necessary.¹⁰

The Wisconsin court in *Slutsky* found the restrictive covenant necessary for the protection of the employer. Weighing such facts as the defendant's personal relationship with the customers, the employer's lack of contact with these customers, the highly competitive industry, and the customers' identification and confidence in the defendant, the court concluded that the defendant commanded such influence and control so as to enable him to take away customers. The court went on to make the obvious observation that customers may be the single most important asset of most businesses and, consequently, there was a legitimate interest to protect.

B. Duration

As to the second element, the court determined the two-year restriction to be reasonable. It noted that "reasonableness" in this respect depends upon the length of time required to obliterate in the minds of plaintiff's customers the identification formed during the period of employment. The court discussed *Eureka Laundry Co. v. Long*,¹¹ wherein a two-year restraint was held reasonable for a route salesman making frequent and regular customer contacts. It concluded that two years, under the facts, was not an unreasonable length of time in which to allow the plaintiff to protect his business from the defendant.

Thus, in Wisconsin, a restrictive covenant protecting an employer's customer contacts in a situation of necessity will be enforced provided it is no longer than two years in duration. Because

10. See, e.g., *Hulsenbusch v. Davidson Rubber Co.*, 344 F.2d 730 (8th Cir. 1965). For a discussion of trade secrets in relation to covenants not to compete, see *Stedman, Trade Secrets*, 23 OHIO ST. L.J. 4 (1964).

11. 146 Wis. 205, 131 N.W. 412 (1911). Many other cases have held two years to be reasonable under such circumstances. See *Annot.*, 41 A.L.R.2d 15, 179 (1955).

the drafting of a covenant in excess of two years may call for a ruling by the Wisconsin Supreme Court, a drafter should have a sound factual basis for exceeding two years.

The reasonable duration of a covenant protecting an employer from confidential information gained by an employee has not gained the attention of the Wisconsin Supreme Court, and, hence, the drafter in this area will find himself more in the dark. Suffice it to say, the cases in other jurisdictions vary as to reasonable duration, but it appears that a restriction longer than two years is more apt to be justified in regard to confidential information than to salesmanship. The theory behind this distinction is that a salesman given two years protection is apt to gain the confidence of a customer, while inside or confidential information could, depending on the type of information and business, be such that it could be decisive for years. All in all, however, the drafter will be wise to make the covenant even shorter than necessary—especially in Wisconsin, where there is no real guideline as to what the court will deem reasonable—or run the risk of having an unenforceable agreement.

C. Territory

The third requirement of a valid covenant not to compete is that the territory covered must be reasonable. As a general rule of thumb, it can be said that a territorial restraint will be upheld as reasonable “where the area of the restraint is limited to the territory in which the employee during the term of his employment was able to establish contact with his employer’s customers.”¹² This territory will obviously vary with both the type of work performed by the employee and the nature of the business involved.

Clearly, these two factors—the employee’s position in his employer’s organization and the nature of the employer’s business—determine to a very great degree the reasonableness of the territorial extent of the restraint in so far as the latter is based on the need of the employer to protect his customer contacts. For this reason practically all the cases specifically mention the position of the employee and the nature of the employer’s business.¹³

The Wisconsin approach, as stated in *Slutsky*, has been one of

12. See Annot., 43 A.L.R.2d 94, 117 (1955).

13. *Id.* at 163.

upholding a restriction as reasonable if it is limited to such territory as constituted the employee's activities, and goes no further. In *Slutsky*, for example, the court found reasonable a restriction limited to seventy-five percent of the employee's sales and, hence, confined to the area where the employee principally operated. On the other hand, in *Union Central Life Insurance Co. v. Balistreri*,¹⁴ the court found unreasonable a covenant which prohibited the employee, who had confined his insurance-sales activity to within Milwaukee County, from writing insurance anywhere the company was licensed to operate. The restriction was deemed to be much greater than that required for the employer's protection, imposing an undue hardship upon the defendant.¹⁵ In *Wisconsin Ice & Coal Co. v. Lueth*,¹⁶ the Wisconsin Supreme Court again emphasized the importance of the area covered by the employee. In this particular case, the covenant involved an area more extensive than that in which the defendant had worked and, hence, was struck down.

Area alone, however, is not the sole consideration. As the court pointed out, "The propriety of a territorial restriction must be considered in connection with the circumstances of the parties and the activities of the employee."¹⁷ Also to be weighed in the determination as to reasonableness is the nature of the particular business involved.¹⁸

A reasonable area is more difficult to ascertain when the covenant is designed to protect an employer from an ex-employee's using trade or business secrets or confidential information. The customer contact theory only protects the employer in the area in which the employee was employed—while an area of restraint, where the necessity for the covenant is based on confidential or secret information, will be deemed reasonable if the area is confined to the territory in which the employer in the prosecution of his business makes use of the information. The drafter may, however, have difficulty in protecting a planned area of expansion. And, this very situation of potential expansion may be the primary reason for the covenant. In Wisconsin the problem is acute due to lack of authority on this subject.

14. 19 Wis. 2d 265, 120 N.W.2d 126 (1963).

15. *Id.* at 270-71, 120 N.W.2d at 129.

16. 213 Wis. 42, 250 N.W. 819 (1933).

17. *Id.* at 45, 250 N.W. at 820.

18. *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d at 165, 98 N.W.2d at 420.

It should also be noted that an employer may be entitled to protection against an ex-employee's use of trade secrets even absent a contract. It has been held that an agreement to that effect may be implied from the confidential relationship of employer-employee.¹⁹ The mere fact, however, that an ex-employee, possessing trade secrets, accepts employment with a competitor is not sufficient to warrant relief unless the facts are such so as to persuade a trier of fact that the hiring was devious in itself.²⁰ This would place a very difficult burden on the former employer, to say the least, and, consequently, a written agreement is far and away the best procedure.

Further, much information an employee learns on the job will be deemed general information and not secret or confidential material, and, as to this, an employer will have no protection unless there can be drafted an express agreement which will meet the "reasonableness" test. A written agreement will ease the burden of proof on a plaintiff in that it may eliminate the distinction between secret information and general information, provided necessity for the agreement can be shown.

D. Reasonableness as to Employee

As stated earlier, the fourth requirement of a valid covenant not to compete is that it be reasonable as to the employee. To illustrate, in the *Slutsky* case, the court took notice of the fact that the defendant was not prevented from becoming a salesman or proprietor of a different business or from engaging in any other occupation. Weighing such factors as Slutsky's high school education, his success as a salesman, and his ownership of real estate and a home, the court concluded that even at age 40, without a college degree, "no great hardship" would be imposed by requiring him "to use his talents as a salesman in other fields of endeavor."²¹ To quote the court:

While the keeping of his promise may be inconvenient to the defendant and may now be undesirable from his standpoint, it is not unduly harsh or oppressive on him in relation to the relatively greater harm to the employer if the covenant is not enforced.²²

19. See 42 AM. JUR. 2d, *Injunctions* § 112 (1969).

20. *Id.*

21. 8 Wis. 2d at 166, 98 N.W.2d at 421.

22. *Id.*

E. Reasonableness as to General Public

Finally, a valid covenant not to compete must be reasonable as to the general public. Again turning to the *Slutsky* case as an illustration, the court took notice of the interest of the public in the employee's particular services and any possible stifling of competition or creation of a monopoly. Concluding that whether the defendant competed or not would have no effect on the public, as there was no danger that the enforcement of the restrictive covenant would result in the defendant's becoming a public charge,²³ the court enforced the covenant.

The case from whence the public charge analogy stems is *Milwaukee Linen Supply Co. v. Ring*,²⁴ which involved a disabled and handicapped man who had delivered towels and linen for the plaintiff but could not find other employment in 1933. It would appear that this "public charge" test must be considered in terms of this case, which was decided during the depression. It is doubtful that a similar fact situation would arise today, and it is equally doubtful that a restrictive covenant would be entered into in such a situation wherein enforcement would cause a person to become a public charge. In such a situation, there would seemingly be a lack of necessity in the first instance. Consequently, one must conclude that the court is being extremely liberal as to the requirement that the covenant be reasonable as to the general public.

F. Care in Drafting

As previously noted, if the covenant is unreasonable in any respect, it is unenforceable in all respects. Therefore, the drafter must be careful to be reasonable in all five aspects. Reasonableness, of course, will depend on the facts and situation of the employee and the employer. But, a drafter would be well to provide as follows:

Reason for Covenant	Whereas this is a contract of employment ²⁵ entered into to hire _____ to make sales to employer's customers,
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23. *Id.* at 167, 98 N.W.2d at 421.

24. 210 Wis. 467, 246 N.W. 567 (1933).

25. In regard to a contract of employment, this clause should be included where applicable so that the proponent is not met with the argument that the agreement lacks consideration and is unenforceable. In any event, it is best to state the consideration so that this issue does not arise.

which involves contacting said customers, developing customers and identifying with and gaining confidence of said customers by _____, and

Whereas it is understood between employer and employee that employer's customers and customer relation is one of employer's most important assets,²⁶

Noncompete
Provision
Area

It is hereby agreed that if employee, voluntarily or involuntarily, terminates or has his employment terminated, he agrees not to compete, directly or indirectly, within the area which constituted the field or area of his activities at the time of termination²⁷ and,

Duration

It is further agreed that said noncompete agreement contained herein shall run for a period of two years from the date of termination.

The necessity for the covenant must be determined by the drafter before he attempts to consider the restriction as to time and area. Consequently, the drafter would be wise to premise the actual covenant with the reasons for it. After considering this matter and writing the premise, the restrictions as to time and area fall naturally into line. However, the factors of reasonableness as to the employee and general public are totally dependent upon the fact situation. Consequently, a drafter is unable to compose a covenant that can assure freedom from problems in these areas.

III. ENFORCEMENT OF THE COVENANT

A. *Discovery of Competition by an Ex-Employee*

After employment has been terminated for one reason or another, there are numerous methods of disguised competition which

26. There is a presumption that a necessity for protection, present when the contract is entered into, continues.

27. It might prove beneficial to a drafter to insert the clause, "at the time of termination and within one year prior to termination," or other clause to this effect, so as to protect the employer from an employee's use of expertise gained prior to termination, but in a job not performed by the employee *at* termination.

may be attempted to avoid the restrictive covenant. The most blatant, and one without disguise at all, is that of striking out on one's own or joining a competitor and competing in the same area, engaging in the same business. However, in many instances, the competition will not be so obvious. The ex-employee will attempt to hid behind the veil of incorporation in one manner or another. It may be as simple an attempt as forming a corporation with his own capital and hiring others to do the work he did for his prior employer, or it may even go as far as having the employee's wife form a corporation and run the business herself, with the husband attempting to create the illusion that he is making a living from other products and customers. This latter situation may be avoided by having the wife also sign a separate covenant not to compete.

It is because of the inventiveness of the human mind and the numerous schemes available by use of the corporate veil that the covenant should provide against competition either "direct or indirect." In this regard, it must be remembered that the ex-employer will have the burden of proving the competition, which most likely will be somehow disguised. There will usually be considerable circumstantial evidence, including customer contacts, financing agreements, purchases from suppliers, or work on development of a product or source of supply. But in some circumstances the evidence of competition may be difficult to find and, if found, deemed indirect or not significantly important so as to constitute proof of actual competition. By including indirect competition in the prohibitive agreement the employer may reduce somewhat the difficult burden of proof.

B. *Seeking an Injunction*

Assuming that an employer has determined that an ex-employee is competing, the question becomes how to enforce the covenant. One method would be to serve a summons and complaint requesting a permanent injunction and damages and to seek a temporary injunction by bringing on an order to show cause with an affidavit stating that there will "likely" be irreparable harm if a temporary injunction is not issued.²⁸ In the *Slutsky* case, the trial

28. WIS. STAT. § 268.02(1) (1969):

When it appears from his pleading that a party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure him, or when during the litigation it shall appear

court granted a temporary injunction and later a permanent injunction. The supreme court affirmed the trial court's decision, stating:

It is reasonable to assume that actual damage was prevented because a temporary injunction was granted within ten days after the defendant's company commenced business. In seeking an injunction it is not necessary to prove that the plaintiff has suffered irreparable damage but only that he is *likely* to suffer such damage.²⁹

Without question, the burden of both pleading and proving the necessity of a restrictive covenant and its reasonableness rests upon the party attempting to enforce the covenant.³⁰ The nature of the employment relationship and business must be pleaded, and the plaintiff must be prepared to prove the reasonableness in all aspects. Further, a plaintiff must expect to be met with strong arguments against the granting of the temporary restraining order and, quite likely, will be met with a demurrer based on reasonableness of the covenant or some other ground.³¹

C. Use of Conspiracy Theory

Where an ex-employee is hiding behind another corporation or person, the plaintiff may, to get around the restrictive covenant, allege a conspiracy or concert of activity. It has long been held that a conspiracy to breach a contract is actionable,³² and that an individual may be liable for damages done in pursuance of a conspiracy, despite the fact that if not done within such a scheme, the person would not have been liable. This rule of law would be particularly applicable to the situation wherein a wife sets up a corporation competing with her husband's ex-employer or wherein some other person or entity attempts to take advantage of the ex-employee's expertise developed while on his prior job.

In civil actions where conspiracy is alleged, the burden rests on the plaintiff to establish proof of such allegations by clear and

that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

29. 8 Wis. 2d at 168, 98 N.W.2d at 421-22 (emphasis added).

30. Fullerton Lumber Co. v. Torborg, 270 Wis. 133, 138, 70 N.W.2d 585, 587-88 (1955).

31. See Oudenhoven v. Nishioka, 52 Wis. 2d 503, 190 N.W.2d 920 (1971).

32. Cranston v. Bluhm, 42 Wis. 2d 425, 147 N.W.2d 337 (1969).

satisfactory evidence, the middle burden of proof.³³ Although such proof is always difficult, a plaintiff has some help in that a finding may be inferred from established facts and circumstantial evidence.³⁴ Indeed, in an action for damages for conspiracy no express agreement between the defendants need be shown—a concurrence in a common purpose is sufficient.³⁵

One word of caution. At the hearing on the order to show cause, where the plaintiff is seeking a temporary injunction, it is wise to call witnesses and provide other evidence of the concert or conspiracy; otherwise, the court will, in all probability, only restrict the ex-employee, and no one else, or not issue the temporary injunction in the first instance. In both situations, this would cause very untoward consequences were the restrictive covenant for a short, but reasonable, time—as, for instance, two years. The covenant would continue to run without the plaintiff's getting its benefit. This may well necessitate a motion to advance the date of trial, pursuant to section 270.12(2) of the Wisconsin Statutes, and later, at trial, the seeking of an injunction for the remaining time of the covenant running from the date of judgment.³⁶

The bringing of an action based on conspiracy or concert of action may necessitate the inclusion of such corporation or other person in the suit. Such inclusion may prove very beneficial with respect to monetary damages—the next facet of enforcement requiring examination.

D. Damages

After all other burdens and obstacles have been met, the plaintiff finally gets a break. Obviously, he is not able to prove his damages for a breach of a covenant not to compete with mathe-

33. Eiden v. Hovde, 260 Wis. 573, 51 N.W.2d 531 (1952); Lange v. Heckel, 171 Wis. 59, 175 N.W. 788 (1920); Schultz v. Frankfort Marine, Accident & Plate Glass Ins. Co., 151 Wis. 537, 139 N.W. 386 (1913).

34. South Side Lumber Co. v. John Eller Lumber Co., 161 Wis. 399, 154 N.W. 621 (1915); Patnode v. Westenhaver, 114 Wis. 460, 90 N.W. 467 (1902).

35. Norvell v. McGraw-Edison Co., 316 F. Supp. 198 (E.D. Wis. 1970); Cox v. Cox, 259 Wis. 259, 48 N.W.2d 508 (1951); Ziegler v. Hustisford Farmers Mut. Ins. Co., 238 Wis. 238, 298 N.W. 610 (1941).

36. It would appear that a permanent injunction restraining the individual for the length of the covenant commencing with the date of judgment should be granted along with damages for loss of profits. After all, an injunction is based on equity and the only way the agreed benefit can be achieved is through enforcement for the period specified in the covenant along with damages resulting from the improper competition.

mathematical precision or exactness. Precisely how much business, how many clients, and how much profit have been lost and will be lost in the future cannot be known. The courts, in general, and the Wisconsin Supreme Court in particular, have adopted a very liberal rule of proof of damages to meet this problem. The wrongdoers will neither be permitted to profit by their own wrongful acts nor be permitted to object to proof that is not based upon a mathematical certainty. To illustrate, in *Novo Industrial Corp. v. Nissen*,³⁷ after selling a crane business with a five-year noncompete agreement, the former owner and general manager established a competing business in the same line of machinery, in violation of the agreement. Faced with the issue of how to assess and prove damages by reason of such violation, the Wisconsin Supreme Court disclaimed any need for mathematical accuracy and held it sufficient if damages could be estimated with a reasonable degree of certainty. To quote the court:

The standard used by the trial court to ascertain damages is not perfect. But many damage measures are inaccurate to a certain extent. Under the particular circumstances of this case the trial court set the damages as reasonably, fairly, and certainly as it could. It did not err in determining damages. Moreover, in its evaluation of damages the trial court undoubtedly acted in accordance with the well-established rule that by having caused the uncertainty of proof, the contract breacher is precluded from demanding a more precise measure of damages.³⁸

Because the amount of the award is an issue of fact facing the court, it is incumbent upon the plaintiff to introduce into evidence all available data covering the financial condition of the employer, the ex-employee, and any persons or corporations alleged to have been conspiring to breach the contract. With such data, the court must determine the value of the customers or suppliers lost as a result of the breach and the diminution of profits.³⁹ Although it is sufficient if there is a certain standard or fixed method by which profits sought to be recovered may be estimated with a fair degree of accuracy,⁴⁰ any attempt to reach even such a low standard is

37. 30 Wis. 2d 123, 140 N.W.2d 280 (1966). It should be noted that the issue of reasonable time was not raised.

38. *Id.* at 132-33, 140 N.W.2d at 285.

39. *Id.* at 130-31, 140 N.W.2d at 284. See *Pressure Cast Products Corp. v. Page*, 261 Wis. 197, 51 N.W.2d 898 (1952). See also RESTATEMENT OF CONTRACTS § 331 (1932).

40. See 22 AM. JUR. 2d *Damages* § 172 (1965).

fraught with difficulties. For example, at the time of trial, a plaintiff may be operating at its productivity of the two years prior to termination of employment and breach of the contract; however, that plaintiff might possibly have enjoyed greater sales and profits had not the employee decided to compete. Further, any comparison of profits made prior to and following breach of the contract must include a consideration of the normal increase in business which might have been expected in light of past developments and existing conditions.⁴¹

IV. CONCLUSION

In summary, it can be said that in the area of covenants not to compete, primary emphasis should be placed upon the drafting stage. Protected by a covenant which is reasonable as to time, place, the public, and the employee, and which grants no more protection to the employer than that reasonably necessary, an employer may prevent possible loss of customers, suppliers, and profits as a result of action on the part of a former employee. In enforcing such a covenant, the plaintiff's attorney must pierce the veil of activity conducted by the defendant and determine whether it, in fact, involves the prohibited competition. If so, injunctive or monetary relief may be sought. Although the task of proving damages is never easy and the amount recoverable cannot be accurately predicted, upon proof of breach of an enforceable covenant, assistance from the courts, via liberal rules, might aid in the successful conclusion of a noncompete case.

41. See 25 C.J.S. *Damages* § 90 (1966).