

Non Compete Agreements in Arkansas: Can They Be Enforced?



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It is not uncommon for employers to insist that certain of their employees sign “non compete” agreements¹ as a condition of their being hired or as a condition of their continued employment. Such agreements typically prohibit an employee (after he or she is no longer employed by the original employer) from competing with the original employer for a specified period of time and within a specified area. Legal challenges to such agreements are common, and it is generally believed that non compete agreements are rarely enforced in Arkansas courts. In fact, Arkansas decisions almost always state that non compete agreements are not favored by the law, but may be enforceable if three requirements are met: (1) The geographical restriction must not be overly broad; (2) A reasonable time limit must be imposed; and (3) The employer must have a legitimate interest to protect. In addition, the covenant must stand or fall as is, and cannot be modified by the court to an extent that may be considered reasonable.

This article provides an overview of recent cases involving non compete agreements in Arkansas, and observes that, although non compete agreements have been invalidated by Arkansas courts in many cases, in a surprising number of cases such agreements have been held to be legal and enforceable under Arkansas law.

Cases in which non compete agreements were held unenforceable:

Geographical area: A case which provides an excellent summary of Arkansas law on this subject is *Bendinger v. Marshalltown Trowell Co.*² In this case, the Supreme Court considered a case involving an Iowa company whose principal place of business was Fayetteville, and which was in the business of the sale of trowels and related merchandise.³ The employee (Bendinger) was an industrial engineer who had initially been hired in 1970, and who in 1978 signed a non compete agreement.

1. Also referred to as “restrictive agreements” or “covenants not to compete.”

2. 994 S.W.2d 468 (Ark. 1999).

3. A trowel is a “flat bladed hand tool for leveling, spreading, or shaping substances such as cement or mortar.” AMERICAN HERITAGE DICTIONARY.

The agreement provided that Benginger “shall not, for a period of two years following the termination of (his) employment with (Marshalltown), directly or indirectly render service to a business competitor of (Marshalltown).”⁴ In 1993 Bendinger began to fear that he might be replaced as plant manager, and in due course took a job with Kraft Tool Company which hired him as its plant manager. Marshalltown filed suit in the Washington County Chancery Court, which held that the restrictive agreement was enforceable. This was appealed to the Supreme Court.

The court began by observing that “non-competition clauses in employment contracts have been the source of litigation for over 500 years.”⁵ It was noted that Arkansas has followed the general trend in this area, and that the following general principles are well settled:

- The party challenging the validity of a non compete agreement has the burden of showing that the agreement is unreasonable and contrary to public policy.
- The law will not protect parties against ordinary competition.
- Covenants not to compete in employment contracts are subject to stricter scrutiny than those connected with the sale of a business.
- Courts review such agreements on a case by case basis.⁶

The Supreme Court then reversed the lower court and held that the agreement in question was overbroad due to the fact that it did not contain a geographic restriction. Marshalltown argued that a geographic restriction was unnecessary since they competed with Kraft on a nationwide basis. Marshalltown also stated in oral arguments that they defined “competitor” as any company in the trowel industry that is in competition with Marshalltown for sales in the United States; hence, by their definition of “competitor” the geographic area was the United States. However, the court stated that the term “competitor” was not specifically so defined in the contract, and “we are unable to rewrite the restrictive covenant to supply it.”⁷ Hence, in this case the failure to articulate clearly and specifically a reasonable geographical area, to include a definition of the term “competitor,” resulted in the entire non compete agreement being invalidated by the Supreme Court.

Another case in which the Supreme Court invalidated a non compete agreement on the basis of it being overly broad from a geographical perspective is *HRR Arkansas v. River City Contractors*.⁸ In this case HRR Arkansas was in the restoration and home repair business, and entered into a contract with River City Contractors. Under the terms of the contract neither River City nor its sole shareholder (T.M.) was permitted to engage in the business of insurance restoration or a similar business within 10 miles of a speci-

4. 994 S.W.2d 468, 470.

5. 994 S.W.2d at 471, citing *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224 (N.D. Iowa 1995).

6. 994 S.W.2d at 472.

7. 994 S.W.2d at 473. The court stated that “the court has held that the contract must be valid as written, and the court will not apportion or enforce a contract to the extent that it might be considered reasonable,” citing *McLeod v. Meyer*, 372 S.W.2d 220 (Ark. 1963).

8. 87 S.W.3d 232 (Ark. 2002).

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fied address in Little Rock,⁹ or “such others established by HRR.” When the working relationship between HRR and T.M. broke down, T.M. was fired and shortly thereafter engaged in the kinds of activities prohibited by the non complete agreement. The Supreme Court held the non compete agreement to be overly broad from a geographical perspective. The court cited with approval the language of the trial judge, who stated that the “such others” language “apparently leaves the corporation in control of designating a prohibited geographic location at some time without any assent of the employee,” and that the “ambiguous term fails to establish an enforceable geographic location.”¹⁰ In invalidating this particular covenant, the court was careful to point out that “we noted (in *Bendinger*) that not every restrictive covenant that failed to contain a geographic restriction would be considered unreasonable.”¹¹ However, in this case the failure to clearly articulate a reasonable geographic area totally invalidated the non compete agreement, even as to activities within 10 miles of the specified address.¹²

The issue of the reasonableness of the geographical limitation was also addressed in two recent cases decided by the Arkansas Court of Appeals. In *Moore v. Midwest Distribution, Inc.*¹³ the employee was in the business of setting up product displays for a company known as Hubb Group, or HGDS. The non compete agreement stated that

Moore could not provide services to any present or former customer of HGDS for a period of one year following termination of employment. The geographic scope applied to “those geographical areas in which the Contractee acts as independent contractor including, but not limited to, the State of Arkansas, Illinois, Iowa, Kansas, Missouri, Nebraska, New Mexico, Oklahoma, Texas, and any other state that contractor has granted a contract or agreement within.”¹⁴ Upon termination of his employment with HGDS, the employee went to work for one of HGDS’ competitors within the state of Arkansas. The Chancery Judge in Crawford County upheld the non compete agreement, and issued an injunction in favor of the employer. This was reversed by the Court of Appeals. Among the reasons stated by the court was the fact that whereas Oklahoma was listed as an area where the former employee could not compete with HGDS, HGDS did not conduct any business in Oklahoma. It was stated by the court that “by including in the scope of the non-compete agreement’s geographic restriction a state that appellee has never worked in, appellee more broadly limited appellant’s working than is reasonably necessary to protect appellee’s trade area.”¹⁵ It is interesting to note that the employee was in fact competing with HGDS in Arkansas, not Oklahoma, but that fact was irrelevant since the validity of the agreement must stand or fall as written, and

9. 2824 Barrow Road.

10. 87 S.W.3d at 239.

11. 87 S.W.3d at 239.

12. As stated in *Bendinger v. Marshalltown Trowell Co.*, 994 S.W.2d 468 (Ark. 1999) and *McCloud v. Meyer*, 372 S.W.2d 220 (Ark. 1963).

13. 65 S.W.3d 490 (Ark. App. 2002).

14. 65 S.W.3d at 493.

15. 65 S.W.3d at 494.

“the court will not apportion or enforce a contract to the extent that it might be considered reasonable.”¹⁶

The Court of Appeals also reversed the Chancery Court and invalidated a non compete agreement in the case of *Jaraki v. Cardiology Associates*.¹⁷ In this case a cardiologist entered into a non compete agreement with his employer which barred him from competing with a former employer for a period of two years within a seventy-five mile radius of Jonesboro. Among other things the Court of Appeals held that the geographic area involved was overly broad. The reason? The seventy-five mile radius included at least some of the city of Memphis, which was outside of the trade area of the employer. Stating that “where a geographic restriction is greater than the trade area, the restriction is too broad and the covenant not to compete is void.”¹⁸ Again, it is irrelevant that the former employee was actually competing within the seventy five mile radius and testified that he had no intention of moving to Memphis; the non compete agreement could not be modified to the extent that it might be considered reasonable.¹⁹

Two trial court cases which received considerable publicity in Northwest Arkansas further illustrates the legal principles articulated in the previous cases. In *Stephen Gibbs v. Ch. 40/29*, a local weatherman attempted to move from one Ft. Smith television station

to another also in Ft. Smith, despite the non compete agreement to which he had agreed. The trial court judge initially issued a temporary restraining order barring his working for the competing station, but shortly thereafter rescinded the order, finding that the non compete agreement was overbroad from a geographical perspective. The reason? The non compete agreement defined the geographical area as any area in which the grade B signal of the “competing” station overlapped the grade B signal of Ch. 40/29. An expert witness testified that by this standard Mr. Gibbs would be precluded from working at television stations in Springfield, Missouri, Joplin, Missouri, Tulsa, Oklahoma, as well as two stations in Little Rock. However, according to expert witnesses, stations in these cities were not regarded as competitors of stations in Ft. Smith, being in different “dominant marketing areas.” Hence, the non compete agreement was held to be overly broad from a geographic perspective. Noting that under Arkansas law the court did not have the authority to rewrite the agreement for the parties, the court held that the non compete agreement was invalid and Mr. Gibbs was free to compete with his former employer in the same city.²⁰

In the second case, Bo Mattingly was employed by Nexstar Broadcasting Group (KNWA/KFTA television) as a sportscaster on what was marketed as “Razorback Nation.” He and the television station had a non com-

16. 65 S.W.3d at 494, citing *Bendinger v. Marshalltown Trowell Co.*, 994 S.W.2d 468 (Ark. 1999).

17. 55 S.W.3d 799 (Ark. App. 2001).

18. 55 S.W.3d at 804.

19. There was also the issue of how the seventy-five miles was to be measured. The employer argued that “driving distance” was to be used, which would not have extended to Memphis, but the court stated that the contract only referred to a “seventy five mile radius,” and not “driving distance.”

20. It was noted that under Missouri law the court would be able to enforce the covenant where the breach occurs within an area in which the restriction would clearly be enforceable (*Sigma Chemical Company v. Harris*, 794 F.2d 371 (8th Cir. 1986), but not so in Arkansas (*McCleod v. Meyer*, 372 S.W.2d 220 (Ark. 1963)).

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pete agreement which prevented Mattingly from making any on-air appearances, by radio, television, cable, or otherwise for a period of one year following the termination of the agreement. Mattingly subsequently resigned his position with the television station and created his own radio sports talk program (Cumulus Broadcasting was the owner of the station). In the ensuing lawsuit Nexstar claimed that the radio show illegally competed with “Razorback Nation” in violation of the non compete agreement. Judge Mary Ann Gunn found that the non compete agreement was unenforceable due to the fact that Nexstar did not have a legitimate interest to protect in relation to its covenant not to compete. Judge Gunn ruled that “Razorback Nation” was a brand and franchise, and that Mattingly’s radio program did not disturb that brand. Furthermore, Nexstar promoted the Razorback Nation brand itself, and not Mattingly as an individual. Also Mattingly did not receive any special training, and was not privy to trade secrets or customer lists. Furthermore, the sports talk radio show and the “Razorback Nation” television show reached different markets and different audiences. Finally, it was ruled that the covenant was overly broad in that it prevented Mattingly from employment in markets outside of the markets in which he was employed by Nexstar. As a result, Nexstar’s motion for a preliminary injunction was denied, and Nexstar subsequently dismissed its complaint without prejudice.²¹

Time: There are few recent cases reported in which a non compete agreement was invalidated on the basis of the fact that the non compete agreement was for an excessive period of time. This is no doubt due to the fact that the time period of two years has become fairly standard in contracts of this kind. There is also some authority in Arkansas to suggest that even longer time periods might be upheld. In any event, what might be regarded as an excessive time period would only be one factor that a judge might rely upon to find a non compete agreement to be unreasonable. For example, in *Quality Liquid Feeds, Inc. v. Plunkett*,²² the Court of Appeals found that a two year non complete agreement “would severely restrict (the employee’s) ability to earn a living and that it was therefore unreasonable”²³ In this case the employee was found to have graduated only from high school and to have no other marketable skills other than to sell liquid feed; hence, the two year restriction was held to be unreasonable as to him. This issue is discussed in a later section of this paper.

Legitimate interest to protect: It has often been stated in non compete cases that the employer must have a legitimate interest to protect above and beyond a mere desire to limit competition. This might be represented by such things as special training being given to the employee, or he or she having access to trade secrets or confidential business information, or the use of advertising or other promotions, such as might be used for mem-

21. Nextar Broadcasting Group, Inc. v. Bo Mattingly and Cumulus Broadcasting, LLC, Case No. CV-07-1895-4.

22. 199 S.W.3d 700 (Ark. App. 2004).

23. 199 S.W.3d at 707.

bers of the broadcast media. A good example of a case in which this issue was addressed is *Federated Mutual Insurance Company v. Bennett*.²⁴ In this case an employee was hired as the sales representative of an insurance company, and was in fact the only sales representative assigned to a particular territory. The non compete agreement stated that for two years following termination of the employment he could not solicit any of the customers that he had been servicing for the employer. In May of 1990 the employer quit working for Federated and began selling insurance for a competing insurance company. When sued by his former employer he argued that the non compete agreement was unreasonable and hence against public policy. The telling argument that was accepted by the chancery judge was that his former employer had no valid interest in preventing him from selling lines of insurance not offered by the former employer. The evidence at trial indicated that the former employee provided insurance policies to several of his former customers, but only sold them types of insurance that they could not obtain from his former employer. Technically this was prohibited by the non compete agreement, but the court stated that “the chancellor concluded that appellee was not exercising unfair competition in selling a product that appellants did not sell and found the covenant not to compete to be overly broad and void. We agree.”²⁵ The result, of course, was that the entire covenant was in-

valid, permitting the employee (if he chose) to sell insurance that in fact was offered by his former employer, since “it has long been the rule that, when a covenant not to compete is too far-reaching to be valid, we will not make a new contract for the parties.”²⁶

Another case involving an insurance salesman is *Rebsamen Insurance v. Milton*,²⁷ which dealt with a non compete agreement virtually identical to that of the previous case. Here the Court of Appeals affirmed the ruling of the Chancellor that the former employee had no information or special training that the former employer had an interest in protecting. In so ruling, the court distinguished this case from a 1977 case, *Borden, Inc. v. Huey*,²⁸ in which the non compete agreement was upheld. The court quoted from the Chancellor’s ruling as follows:

... there are two areas in which this case is distinguishable from *Borden, Inc. v. Huey*. First, Milton worked for Rebsamen less than ten months. Secondly, the testimony reflects that much of Milton’s time was spent in office and detail work in organizing and straightening out (the employer’s) business and in collections. This precluded Milton from having any significant amount of time to build up a personal relationship with customers so as to bind customer loyalty to himself instead of the agency.²⁹

24. 818 S.W.2d 596 (Ark. App. 1991).

25. 818 S.W.2d at 599.

26. 818 S.W.2d at 599, citing *Rector-Phillips-Morse, Inc. v. Vroman*, 489 S.W.2d 1, 4 (Ark. 1973).

27. 600 S.W.2d 441 (Ark. App. 1980).

28. 547 S.W.2d 760 (Ark. App. 1977).

29. 600 S.W.2d at 444.

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The court concluded by stating that “we find Rebsamen has failed to prove that they have a valid interest to protect. They have failed to prove possession of trade secrets in its business. Nor have they proven Milton took any business assets with him upon termination of his employment ‘An employer cannot use this type of contract as a subterfuge to rid himself of a possible future competitor.’”³⁰

Justice Newbern dissented, expressing the opinion that the non compete agreement was reasonable, merely prohibiting the employee from dealing with customers of the former employer. Justice Newbern stated that:

I fear the majority’s misconstruction of our supreme court’s cases, albeit in an area of ad hoc decision-making, may make it virtually impossible for an employer and employee to enter an agreement which purports to protect the legitimate interest of an employer in not having his efforts turned to his disadvantage. Just as an employer should not be allowed to use such a covenant to eliminate prospective competitors through subterfuge, an employee should not be allowed to use a subterfuge which preys upon judicial distaste for such covenants in a way that would permit him or her to take sharp advantage of an employer by taking a job with the design of learning an employer’s practices so they may thereafter be used against him.³¹

The case of *Import Motors, Inc. v. Luker*³² involved a non compete clause agreed to by a shop manager in a newly established foreign car repair service and Fiat dealership in Springdale. The contract prohibited the shop manager from engaging in the business of auto service and maintenance for two years after termination of employment within an area of twenty five miles of Springdale. The trial court judge ruled in favor of the former employee and refused to enforce the non compete agreement. In affirming this decision, the Court of Appeals quoted extensively from the trial court judge’s opinion:

. . . In the case at bar, there are admittedly no trade secrets involved. Nor are there allegations that the employee had access to any information confidential to the employer such as lists of customers, or that the employee received any special training during employment. . . . It is certainly a legitimate interest of an employer to protect the group of customers it develops from *unfairly* being drained away by a former employee. An employer may not, however, shield itself from ordinary competition.

In the instant case, the evidence reflects that Leon Luker excelled in his work as an automobile mechanic specializing in repair of foreign cars Upon leaving his employment with plaintiff, many of the same customers followed him to his new place of

30. 600 S.W.2d at 444, citing *Bailey v. King*, 398 S.W.2d 906 (Ark. 1966).

31. 600 S.W.2d at 446, Justice Newbern, dissenting.

32. 599 S.W.2d 398 (Ark. App. 1980).

business. There is no evidence that he solicited customers to leave Import Motors. Those who followed Luker did so because they were satisfied with his prior work Undoubtedly Import Motors has not found a mechanic as talented as Luker or one whose services are valued as highly. That alone does not justify a restraint of trade.³³

In *Moore v. Midwest Distribution, Inc.*³⁴ and *Jaraki v. Cardiology Associates*,³⁵ two cases discussed previously, non compete agreements were invalidated on the bases of unreasonable geographical areas. Another reason cited in both cases was the lack of a legitimate interest to protect. In *Moore* the Court of Appeals stated that:

In the present case, appellee's president, Kevin Barrett, testified that appellant had been provided with no special training. In addition, he stated that appellant had not been provided with any trade secrets, confidential business information, or customer lists We hold that appellant did not use any information to gain an unfair advantage over appellee. As such, we hold that appellee did not have a legitimate interest to be protected by the agreement.³⁶

In *Jaraki* the Court of Appeals held that the referral base established by the employer over a fifteen to sixteen year period was reflective of the former employer's goodwill and reputation; however, it was not deemed to be an interest in need of protection. In addition, it was noted that Dr. Jaraki did not receive any special training during the time of his employment so as to enable him to gain an unfair competitive advantage over his former employer. The court concluded by stating that "the non compete is unenforceable because no valid interest exists that is in need of protection and the geographic limitations are too broad."³⁷

Public Policy: In a few cases courts have held that a non compete agreement must be disallowed based upon the interests of the general public. A good example of this is *Duffner v. Alberty*,³⁸ a case involving orthopedic surgeons in Fort Smith. The non compete agreement was for one year and within a radius of thirty miles of the former employer's offices in Fort Smith. The court stated that "all other considerations must give way where matters of public policy are involved . . . we are of the opinion that the contract provision prohibiting appellant from practicing medicine within thirty miles of the City of Fort Smith constitutes an undue interference with the interests of the public right of availability of the orthopedic surgeon it prefers to use" ³⁹ In the *Jaraki* case the court stated

33. 599 S.W.2d at 400.

34. 65 S.W.3d 490 (Ark. App. 2002).

35. 55 S.W.3d 799 (Ark. App. 2001).

36. 65 S.W.3d at 493.

37. 55 S.W.3d at 804.

38. 718 S.W.2d 111 (Ark. App. 1986).

39. 718 S.W.2d at 114.

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that they would have to determine whether a non compete agreement involving a cardiologist would constitute an undue interference with a patient's right to use the doctor of his or her choice, but did not further discuss the issue. In any event, it seems to be unlikely that an Arkansas court would enforce a non compete agreement which unduly impaired a patient's right to use the physician of his or her choice.

The right of the public to choose was specifically stated as a reason not to enforce a non compete agreement in a case involving termite and pest control services. In *Evans Laboratories, Inc. v. Melder*⁴⁰ the Supreme Court upheld a lower court ruling that the non compete agreement was unenforceable. Here two individuals were hired by Evans Laboratories in McGehee, one as the branch manager and the other as a routeman servicing customers in that area. They subsequently left their employ and went into business as Delta Pest Control. This resulted in Evans losing a large number of customers who switched from Evans to Delta. There was no proof that these customers had been solicited by the two former employees. The Supreme Court affirmed the lower court's ruling that the non compete agreement was invalid, stating that:

In the circumstances we are of the view that the provision which prohibits (former employee) from accepting

the requests of appellant's former customers, whom he formerly serviced, is undue interference with the interests of the public's right to the availability of a serviceman it prefers to use. In other words, it results in an unreasonable restraint of trade.⁴¹

Cases in which non compete agreements were held enforceable:

Although non compete agreements are not favored by the law, it is nevertheless true that such agreements have been enforced in a number of appellate decisions in Arkansas. As recently as 2008 the Arkansas Court of Appeals upheld a non compete agreement relating to an insurance sales agent. In *Freeman v. Brown Hiller, Inc.*,⁴² a sales agent in Fort Smith agreed to a non compete agreement when she was hired in 2001. The agreement provided that for a term of two years after termination of the employment relationship she could not solicit the business of any of the customers of the employer. The agreement contained no geographical limitation. The trial court judge upheld the agreement, and this ruling was affirmed by the Court of Appeals. The court relied primarily on the precedent set in the 1985 case of *Girard v. Rebsamen Insurance Co.*⁴³ In both cases the former employee had the right to sell insurance wherever he or she pleased, with the proviso that he/she not solicit customers of the former employer for a

40. 562 S.W.2d 62 (Ark. 1978).

41. 562 S.W.2d at 64. In dissent, Justice Fogleman stated that the restraint would apply only to a very small segment of the public, and that the contacts between a serviceman and a customer is entirely due to the efforts of the employer, and that is entitled to protection from undue interference after the employment is terminated.

42. 281 S.W.2d 749 (Ark. App. 2008).

43. 685 S.W.2d 526.

period of two years. Citing *Gerard*, the court stated that “we explained that the single most important asset of most businesses is their stock of customers and that protection of that asset is a legitimate interest. We also noted that an employer is especially vulnerable to losing customers when his employee deals with customers away from the business and builds up personal relationships that bind the customers to him.”⁴⁴ The court further stated that no geographical restriction was necessary or even relevant, as the former employee was free to sell insurance anywhere, so long as there was no solicitation of the former employer’s customers. The court noted one difference in the facts of the two cases: in *Girard* the covenant applied only to customers that the former employee serviced, whereas in *Freeman* the covenant applied to all customers of the former employer. The court stated that this broader protection was justified due to the fact that the employer had an interest in protecting the confidential information contained within the documents it wished to protect, including customers lists and information associated with such lists.⁴⁵ The court concluded by stating that “we cannot say that the nondisclosure and noncompetition provisions were broader than necessary to protect (the employer’s) interests”⁴⁶

Another recent case involving an insurance agent is *Sensabaugh v. Farmers Ins. Exchange*,⁴⁷ decided by a U.S. District Court in 2006. In this case the contract of employment of an insurance agent included a non compete agreement stating that for a period of one year after the termination of the employment the agent will not solicit or accept the insurance business of any policy holder of the former employer.⁴⁸ The court began by reviewing the jurisprudence in Arkansas regarding non compete agreements, as well as cases nationwide involving Farmer’s Insurance and this particular non compete agreement. The court noted that “none of these cases found the noncompetition clause at issue to be overly broad.”⁴⁹ The court agreed with Farmer’s Insurance that it had a legitimate interest in preventing unfair competition by a former agent who acquired confidential information and personal relationships as a result of his association with Farmer’s. However, the court held that the covenant must be “narrowly tailored to apply only to the customer base that the covenantee has a legitimate interest in protecting.”⁵⁰ After reviewing the pertinent facts and relying on the rulings of the Court of Appeals in *Freeman* and *Girard*, the court held that the non compete agreement was valid and enforceable. The court

44. 281 S.W.2d at 755.

45. The employer alleged that such documents had a value of \$100,000.

46. 281 S.W.2d at 756.

47. 420 F. Supp. 2d 980 (E.D. Ark. 2006).

48. The judge described this as more than a non-solicitation agreement (since the agent could not even accept customers that were not solicited), but less than a covenant not to compete (since he could still compete, but not service his former employer’s customers).

49. 420 F. Supp. 2d at 986.

50. 420 F. Supp. 2d at 986, citing *Federated Mutual Ins. Co. v. Bennett*, 818 S.W.2d 596 (Ark. App. 1991).

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rejected the argument that the “non solicitation” mandate was unreasonable as it would prevent the former employee from even advertising to the general public; it was stated that such advertisements could be made even though Farmer’s policyholders might see them. It was also held that the one year time period was reasonable.⁵¹

Another recent Arkansas case in which a non compete agreement was upheld is *AERT v. ACS*,⁵² decided by the Supreme Court in 2008. This case involved an employee who was hired for the programming and design of control systems. The non compete agreement was for a period of two years, and the geographical area was the state of Arkansas. Under the terms of the agreement the former employee could not solicit former clients, and could not compete with the former employer in the state of Arkansas. A Benton County jury resolved the non compete issue in favor of the former employer (ACS). With regard to this issue, the Supreme Court stated that only the geographic scope of the agreement was properly before the court. The court indicated that substantial evidence support the jury’s decision in favor of the former employer. The evidence indicated that ACS performed work throughout the state, specifically including El Dorado, Osceola, and Harrison. The court found that “the jury was free to believe (the employer’s) testimony that restricting (the employee) from performing competitive ac-

tivities within the state of Arkansas was reasonably necessary to protect the interests of ACS.”⁵³ Hence, the jury’s verdict on this point was affirmed.

In a 1977 case, *Borden, Inc. v. Huey*,⁵⁴ the Supreme Court upheld a non compete agreement, rejecting the argument that the time period was overly broad. This case involved a company engaged in the sale of frozen food, and the time period involved was one year.⁵⁵ The Chancellor held this time period to be unreasonable, but the Supreme Court reversed. The evidence indicated that the time period had previously been two years, but was reduced to one, which Borden’s district manager testified was reasonable in his opinion. The court agreed, stating that “many decisions in other states have recognized the importance of such ‘customer-contact’ by employees. ‘The most important single asset of most businesses is their stock of customers’”⁵⁶

In *Statco Wireless v. Southwestern Bell*,⁵⁷ a 2003 case decided by the Court of Appeals, a non compete agreement was again upheld. In this case a cellular telephone service provider (Southwestern Bell Wireless) sought an injunction to prevent its former corporate sales agent from misappropriating trade secrets and violating the covenant not to compete. The main issue addressed by the court was whether the employer had a legitimate interest worthy of protection. The trial court found that there was training sufficient to justify a

51. Citing *Orkin Exterminating Company v. Murrell*, 206 S.W.2d 185 (Ark. 1947).

52. 275 S.W.3d 162 (Ark. 2008).

53. 275 S.W.3d at 172.

54. 547 S.W.2d 760 (Ark. 1977).

55. The geographic area was the county seats of the counties which had sold Borden’s products within the last two years of the employee’s time with the firm. Both the Chancellor and the Supreme Court held this to be reasonable.

56. 547 S.W.2d at 761, quoting from 41 A.L.R.2d 15, 71 (1955).

57. 95 S.W.3d 13 (Ark. App. 2003).

non compete agreement, and the appellate court stated that they would defer to the trial court's superior position to judge the facts. The court also noted that "in any event, the furnishing of special training is just one matter to be considered under the *Duffner* analysis. We must also consider whether SWBW made trade secrets, confidential information, or customer lists available to Statco."⁵⁸ The trial court found that this was the case, and the Court of Appeals held that this finding was not clearly erroneous. The Court of Appeals also agreed with the trial court's finding that the covenant was not overly broad, even though it applied not only to the competing corporation, but also that corporation's officers, directors, and key employees. It was noted that the non compete agreement was an arms length transaction between two business entities as opposed to the usual agreement between a corporate employer and an individual employee. Considering the fact that the former "employee" was a corporate entity, it was regarded as reasonable for the non compete agreement to extend to that company's officer, directors and key employees.

Finally, there is the case of *Dawson v. Temps Plus, Inc.*⁵⁹ in which the Arkansas Supreme Court once again upheld a non compete agreement in a case involving most unusual facts. In this case Ms. Lemons, a resident of Blytheville, wanted to start her own temporary employment business (Temps Plus). She invited Donald Dawson to invest in her business, and he purchased 49% of the company's stock (with Ms. Lemons having the other 51%). When Lemons wanted to expand the business Dawson sold his stock

to Temps Plus. Under the terms of the sale Dawson agreed that he would not compete with Temps Plus within seventy miles of Blytheville for a period of five years.

About ten months later Dawson started his own temporary employment business in Blytheville. He even hired two of Temps Plus employees. Almost immediately thereafter he received a letter from the attorney for Temps Plus demanding that he cease operations in violation of the covenant not to compete. After consulting with counsel, Dawson ceased doing business. Apparently the new business had been in operation only three or four days. However, within two weeks Dawson's brother formed a corporation (Steve Dawson Employment Services - SDES) and went into the temporary employment business. He promptly hired the two former Temps Plus employees that had initially been hired by his brother. Temps Plus sued both Dawson brothers, both former Temps Plus employees, as well as SDES.

With regards to the non compete agreement between Temps Plus and Donald Dawson, the trial court found the agreement enforceable and awarded damages in the amount of \$62,228.97, plus just over \$20,000 in attorney's fees. The ruling was appealed to the Supreme Court, which agreed with the lower court that the non compete agreement was enforceable. The main issue before the court was whether Temps Plus had a legitimate interest to protect. The Supreme Court held that it did. The court stated that "Dawson was a local businessman who had the wherewithal to start a new business. Furthermore, he knew the temporary agency business and how profitable it could be in Blytheville. He

58. 95 S.W.3d at 17, citing *Duffner v. Alberty*, 718 S.W.2d 111 (Ark. 1986).

59. 987 S.W.2d 722 (Ark. 1999).

Summary

also needed temporary employees on occasion for his own welding business.”⁶⁰ In this respect the court seems to be treating the contract between Dawson and Temps Plus as the sale of a business together with a non compete agreement, rather than as a non compete agreement between an employer and an employee.⁶¹ Had it been treated as a typical employer / employee non compete agreement, the legitimate interest requirement would have necessitated that the employer have provided such things as special training, advertising, or allowing the employee access to customer lists or business plans, which was not the case here.

It was also ruled that Dawson’s brother Steve had no liability, nor did his company SDES, as they did not have any contractual relationship with Temps Plus. With regards to Donald Dawson’s liability, the court stated that he was in violation of the non compete agreement only for the three or four days his temp business was open prior to shutting down after receiving the letter of complaint from Temps Plus’ attorney. Hence, the damages of over \$62,000 were deemed excessive and disallowed by the court, with only nominal damages to be awarded. In addition, the award of attorney’s fees was reversed, the Supreme Court ordering the lower court to come up with a new award based only upon the nominal damages awarded to Temps Plus.⁶²

Although there is a common belief that non compete agreements between an employer and an employee are extremely difficult to enforce in Arkansas courts, in fact a number of recent decisions have upheld such agreements. However, an employer must be extremely careful in drafting such agreements to make sure that the agreements do no more than protect the legitimate interests of the employer. It is important to include a geographical limitation which is no more extensive than the area in which the employer is actually engaged in business, and the duration of the non compete agreement must also be reasonably limited. These are particularly important considerations in Arkansas, which does not permit courts to modify or reform a non compete agreement which is otherwise overly broad. Finally, the employer must be able to document that it has a legitimate interest to protect other than the mere desire to limit competition. Such an interest may be associated with the employee having access to trade secrets or confidential business information, having received special training or having been advertised as an agent of the employer. Under the appropriate circumstances and with careful planning in the drafting of the non compete agreement, an employer should have a good chance of successfully enforcing a non compete agreement in an Arkansas court.

60. 987 S.W.2d at 727.

61. As stated previously, non compete agreements associated with the sale of a business are looked on much more favorably than those associated with an employer/employee relationship.

62. It thus appears that Donald Dawson successfully dodged liability for compensatory damages and attorney’s fees simply by closing his business immediately and allowing his brother to open a similar business with at least some of the same employees.