Non-Compete Agreements in Connecticut:

Everything You Need to Know

Joseph C. Maya, Esq.

MAYA | MURPHY, P.C.

Jmaya@mayalaw.com

266 Post Road East
Westport, CT
203.221.3100

Mayalaw.com

261 Madison Avenue
New York, NY
212.682.5700

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I. INTRODUCTION

Employment is the lifeblood of personal and professional self-esteem, and the lifeline by which to support one's family. Employment mobility is more important than ever as our country faces uncertain economic times. Employment is conceptually simple: a business entity requires certain services and hires employees to meet its needs. Often the priorities and concerns of the employer and the employee will diverge. Both, however, wish to be protected from adverse consequences upon termination of the employment relationship. The employer seeks protection from a former employee engaging in actions harmful to the company, while the employee wants free rein to secure new employment. Employer protection often takes the form of restrictive covenants, of which "non-competition agreements" are perhaps the best known.

II. NON-COMPETES AS CREATURES OF CONTRACT

The touchstone of an employer-employee relationship is the employment contract, a document that can take as many forms as there are jobs to fill. They frequently have many of the same sections: identification of the parties, the specific employment position, location, term (if any), duties, compensation, and restrictive covenants. Restrictive covenants protect the interests of the employer by restricting the activities of an employee upon termination and can take several forms, including "confidentiality clauses," "non-solicitation clauses," or "non-competition clauses" a/k/a "covenants not to compete." A covenant not to compete is the most common legal vehicle to preclude a former employee from obtaining new employment that would likely cause the company to suffer adverse consequences. While Connecticut law pays lip service to the notion that "every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful,"[1] the courts have enforced restrictive covenants as long as they

are reasonable in temporal and geographic scope and provide the employer with no more protection than it reasonably requires.

Restrictive covenants are contractual provisions to which signatory parties agree and intend to be legally bound. Courts have justified their role in enforcing restrictive covenants by enunciating a policy statement that "to permit a party who has voluntarily entered into such an agreement, for a valuable consideration perhaps in large part based on it, to escape the consequences of his acts… smacks of unfairness and savors of an encouragement to dishonesty."[2] Courts view it as unconscionable to permit a party to avoid contractual obligations contained in an enforceable agreement that he willingly entered into and from which he received a sufficient benefit. This policy is based on the idea of "fairness" and is meant to discourage contractual breaches. A crucial factor in a court asserting its power to enforce a restrictive covenant is that the underlying agreement must itself be valid and enforceable.

A. Consideration for the Covenant Not to Compete

An enforceable contract requires the parties to experience a respective benefit or detriment that they would not otherwise receive or suffer in association with the terms and conditions they agree to, a legal concept referred to as "consideration." This essential element of a contract is defined as "any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor. . . ."[3] The employee gives the employer his time, energy and resources in exchange for a variety of benefits, including salary, healthcare, 401(k), severance package, and bonuses. The existence and adequacy of consideration is crucial

to the validity of an employment contract: "the doctrine of consideration is fundamental to the law of contracts, the general rule being that in the absence of consideration an executory promise is unenforceable."[4] Under Connecticut law, courts may refuse to enforce a restrictive covenant when the contract lacks bargained-for and sufficient benefits or detriments.[5]

It is customary (but not necessary) for the ebb and flow of consideration between the parties to be detailed and acknowledged in the employment agreement. Courts have been open to accepting evidence of an oral agreement to establish the requisite consideration. Affidavits have been used to prove an oral agreement whereby an employee consented to signing a non-compete agreement in exchange for a promotion or other form of benefit associated with his employment.[6] Under certain circumstances, oral agreements have been similarly upheld.

(i) <u>At Will Employment</u>

A more complex sub-issue with respect to consideration is determining what is "adequate" in order to validate and render an employment agreement enforceable. Under Connecticut law, the standard differs depending on whether or not the employee is classified as an "at-will employee." This classification has distinct attributes with regard to the adequacy of consideration and will be scrutinized by the courts.

The state of Connecticut adheres to the "At-Will Employment Doctrine." "[I]n Connecticut, an employer and employee have an at-will employment relationship in the absence of a contract to the contrary," that "grants parties the right to terminate the relationship for any reason, or no reason, at any time without fear of legal liability."[7] At-will employment is the default employment relationship unless the parties contractually declare otherwise. Permanent employment is classified as an "indefinite general hiring" where either party may terminate the

employment relationship without liability to the other when there is not a contract specifying consideration for the services to be rendered in conjunction with employment.[8] This At-Will Employment Doctrine is subject to certain limitations and restrictions under Connecticut law as further informed by public policy. Courts may recognize and grant an exception to the doctrine when a termination is otherwise a clear violation of public policy.[9]

(ii) Other than "At Will" Employment

The bar is set considerably higher for employers that provide employees with a contract of employment and the courts are more demanding in what they will deem "adequate consideration" to bind the parties to the employment and non-compete agreement. If the non-compete agreement or the employment contract containing a restrictive covenant is executed **prior** to the employee commencing work, there is a prima facie case for adequate consideration flowing from the clauses stipulating the employee's compensation and other employment-related benefits. There is an issue, however, when the parties execute a non-compete agreement **after** employment has begun and the employer brings an action to enforce the non-compete provision. In Connecticut, for other than at-will employees, continued employment alone is insufficient consideration and there must be a new and adequate defined benefit to make the non-compete agreement binding.[10] The courts require that the employer confer a new/enhanced benefit upon the employee in order to induce him to additionally covenant post-employment to abstain from certain activities. It is a well-settled facet of Connecticut employment law that with respect to other than "at will" employees, "continued employment is not [adequate] consideration for a covenant not to compete entered into after the beginning of the employment."[11]

(a) Past Consideration

As a corollary, consideration offered when executing one contract cannot be carried forward and applied to subsequent contracts so as to render both contracts valid and enforceable. Past consideration is for the same reason inadequate to support a restrictive covenant sought to be imposed after employment begins[12] or to support the imposition of a new contractual obligation on an employee after the commencement of work pursuant to an employment agreement.[13] A court may decline enforcement of a restrictive covenant against a non-"at-will" employee when the only consideration was continued employment by the plaintiff employer.[14]

The situation is different when an employee is classified as "at-will" with the bar set much lower for a court to find "adequate consideration". Connecticut has historically accepted continued employment as adequate consideration for the imposition of new obligations under a restrictive covenant after employment has begun. This principle applies to both state and federal courts located in the state of Connecticut, as the federal court has specifically acknowledged that "Connecticut recognizes that continued employment is adequate consideration to support non-compete covenants with at-will employees."[15] The policy underlying the different treatment of "at-will" employees is based upon the fundamental nature of "at-will" employment. Under this employment relationship, the employer at any time it sees fit has the right to terminate the employee for any reason, or no reason at all. The prospect of continued employment as consideration for a non-compete is viewed as a new bargaining event where new benefits are offered and conferred upon the parties. The employer receives services and benefits associated with the restrictive covenant while the employee receives continued employment, a benefit he is not otherwise entitled to under the existing employment relationship.[16] As a practical matter,

however, all the employee receives is the employer foregoing its right for yet another day to fire the employee for good cause, bad cause, or no cause at all.

B. Signatures

A second issue that can affect a non-compete's enforceability is absence of the signatures of the parties. Several issues can arise when a contract is not signed by both parties at the same time, when one party fails to sign altogether, or when a party questions in good faith whether he signed the agreement at all. The employer and the employee must sign the non-compete agreement to make it legally binding when the agreement is clearly a bilateral contract.[17] A purported written agreement can be rendered unenforceable if one party fails to sign. Agreements stipulating that the signatures of *both* parties are necessary do not become legally binding until *both* of the parties have actually affixed their signatures to the document.[18] Parties have occasionally argued that they "intended to sign" the agreement, but this position has been rejected and courts have held that "intent to sign" is not a substitute for an actual signature.[19] A separate issue arises when both parties apparently sign the restrictive covenant but one of them cannot recall if they actually did so and for that reason questions the enforceability of the agreement. Where a party disputes or cannot recall signing, the courts have accepted testimony from handwriting experts to ascertain the validity of the signatures on the non-compete agreement.[20]

C. The Need for a "Meeting of the Minds"

There must be in fact a meeting of the minds with regard to the contractual terms and conditions in order to create an enforceable agreement between the parties. Courts have held that "in order to form a binding and enforceable contract, there must exist an offer and an acceptance

based on a mutual understanding by the parties…The mutual understanding must manifest itself by a mutual assent between parties."[21] This requirement means that "it is not the subjective meeting of the minds, but the objective manifestation of mutual assent, that is essential to the making of a contract."[22] The parties are presumed to have had a "meeting of the minds" in the opinion of the court when the language in the contract is clear and unambiguous in articulating the contractual clauses.

A party may challenge the agreement and argue that it is invalid and unenforceable because of ambiguous language that fails to demonstrate the requisite meeting of the minds. Courts, however, are reluctant to invalidate a non-compete agreement based upon one party's subjective interpretation of the contractual language. The courts "will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity"[23] and have further stated that "any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms."[24] Words and phrases in contracts are given their ordinary, plain meaning and courts will not construe their meaning to favor one party's interpretation over the other.

There may be cause to invalidate a restrictive covenant, however, when its provisions transcend mere ambiguity and call into question such essential contractual elements as the identification of parties, dates, and terms.[25] Where multiple versions of an agreement exist and they contain material discrepancies, courts are inclined to conclude that there is insufficient evidence to support even a "probable cause finding of a bona fide agreement. . . ."[26]

Parties have sometimes tried to assert that a particular restrictive covenant is invalid and unenforceable because the party failed to completely and/or thoroughly read the document before

signing. This is not a valid defense and courts have consistently held that "the failure to read a contract before signing it in no way diminishes its binding force."[27] A party, absent proof of accident, fraud, mistake, or unfair dealing, cannot escape contractual obligations by asserting that he failed to read the provisions contained in the contract he signed and entered into with the other party.[28] Simply put, failure to read a contract does not in any way diminish the enforceability of its respective contractual obligations as allocated to the parties.

D. Mootness

Close attention must be paid to the period of time specified in the non-compete agreement as this will likely determine the applicable period of enforcement for the agreement's provisions. Courts can only enforce the provisions of a non-compete agreement in accordance with its contractually agreed upon temporal limit. Various states approach this issue differently and have established divergent policies regarding whether to extend the duration of a non-compete agreement in order to provide a remedy for a contractual breach.[29] Some jurisdictions, following a Florida Supreme Court decision,[30] have permitted courts to exercise "broad equitable power to extend even an expired restrictive covenant as a remedy for breach."[31] Connecticut courts have thus far refused to apply this expansive standard to extend a restrictive covenant's duration when applying Connecticut law.[32] Connecticut state law renders moot a request for enforcement of a non-compete upon the expiration of the time limitation specified in the agreement. It should be noted, however, that some non-compete provisions by their terms extend the operative period for the same amount of time as an employee has been shown to be in breach.

III. TERMINATION OF EMPLOYMENT

The enforcement of a non-compete agreement is not dependent upon the circumstances surrounding the termination of the employee. A restrictive covenant can be legally binding whether the employee voluntarily terminates his employment or the employer releases the employee from its employ. Termination does not invalidate a non-compete agreement. A non-compete agreement is legally binding and enforceable post-termination and Connecticut courts have routinely held that "termination of employment at [the] initiative of [the] employer does not itself render [a] noncompetition provision invalid."[33] Furthermore, the enforceability of a restrictive covenant will not turn on whether an employee experienced a voluntary or involuntary termination.[34]

Similarly, constructive discharge does not invalidate a non-compete agreement executed under Connecticut law. A claim of constructive discharge is usually a defense offered by a former employee to argue that although he or she terminated the employment it was only as a result of employer bad faith and impropriety that rendered continued employment virtually impossible. Constructive discharge occurs "when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily."[35] The nature of termination is irrelevant to an agreement's validity and enforceability and "under Connecticut law, there is no reason to believe that a constructive discharge invalidates a covenant not to compete when a straightforward termination otherwise would not."[36]

IV. ENFORCEMENT OF A NON-COMPETE

The trip-wire for the enforcement of a restrictive covenant is a breach by a former employee of contractual provisions contained in the agreement. An employer is entitled to relief if a former employee is engaging, or threatening to engage, in activities expressly prohibited by a non-compete agreement, that would cause harm to the employer. A former employee's violation of a non-compete agreement constitutes a breach and "dictate[s] that the plaintiff is entitled to enforce the agreement."[37] An employer may also be entitled to relief where the former employee has not yet breached the agreement, but is threatening to do so. Under these circumstances, the former employer may be entitled to injunctive relief from the court restraining any breach irrespective of the potential damage.[38]

A. Injunctive Relief

For an employer to obtain an injunction against a former employee seeking the enforcement of the non-compete agreement, it must demonstrate both breach *and* incurred or imminent irreparable harm. Breach alone is insufficient to warrant the issuance of an injunction[39] and the courts have held that "a party seeking a temporary injunction must first establish irreparable harm."[40] The Supreme Court of the United States has rarely commented on the subject of non-competes but in *Doran v. Salem Inn, Inc.,*[41] the court reiterated the traditional standard for granting injunctive relief, stating that it "requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits."[42] Thus, a successful plaintiff must show that it has incurred or is likely to incur

irreparable harm from the actual or proposed activities of a former employee constituting a contractual breach.

When determining whether a party has violated the terms of a non-compete agreement courts are sometimes faced with very peculiar circumstances that necessitate further legal analysis. Such situations include those where a party's actions hover between the permissible and impermissible, questions regarding the similarities between old and new employment, and the permissibility of working for a former client upon termination from the plaintiff employer.

B. Questions of Degree

Two typical situations that require the court to determine what constitutes prohibited conduct and therefore a breach of a non-compete agreement are (a) defining the parameters of "competing business activity" and (b) discerning the permissible engagement within the restricted geographical area. Some defendants assert the defense that they were merely "marketing" and that this does not amount to a "competing business activity" that would violate a restrictive covenant. Marketing is in fact a "competing business activity" in violation of non-compete agreements and marketing includes not only the actual sale of products or services, but also *any efforts* to promote and effectuate a sale of those products or services.[43] Furthermore, the courts have stated that activities that are not competitive on their face may in fact be competitive and therefore constitute a breach of a non-compete agreement if they produce a competing activity.[44] A second issue is addressing a party's actions when he engages in activities within the prohibited geographic area, even though the new employer's place of business does not, itself, violate the terms of the agreement. Courts have consistently held that this situation involves competing business activities and breach of the restrictive covenant. The specific location of

new employment may not violate a non-compete agreement but conducting business operations and acting in furtherance of the new employment within the prohibited area **does** constitute a breach.[45] Contracts that restrict employment activities focus on competing activities of former employees rather than the particular location of the employee's new office.[46]

Whether, or to what extent, prior and current employment is similar may also impact a court's determination of whether a breach occurred. Employment, even with a direct competitor, will not create a breach of a non-compete agreement **if** the details of the case demonstrate starkly contrasting differences between the old and new positions.[47] A plaintiff employer has the burden of proving that it is likely to succeed on the merits of the case and that the former employee will render "similar services" to the new employer and thereby facilitate unfair economic activities. In order to receive injunctive relief from the court, the plaintiff must submit evidence demonstrating the occupational similarities and how the new employment has or is likely to result in a breach of a non-compete agreement. [48]

A. Former Clients

A further bone of contention is whether covenants not to compete prohibit an employee from working for a former client that had a relationship with his or her prior employer. Courts have rejected the theory that the prohibition on competing business activities extends to former clients and have concluded that employers are not thereby entitled to enforcement of a non-compete agreement. Injunctive relief for breach of a non-compete agreement is designed to prevent a former employee from working for a competing company rather than a former client.[49] Connecticut courts will deny injunctive relief when "such relief appears to be more logically directed to an employee engaged in a competing business than to an employee accepting employment not with a competing business, but a former client."[50] The general rule in

Connecticut is that working for a former client, unless specifically prohibited in the non-compete agreement, does not create a breach of the contract.[51]

B. The Parol Evidence Rule

Lastly, a final principle of contract law that applies to the enforcement of covenants not to compete is the application of the Parol Evidence Rule, a rule that may prohibit the use of evidence outside the four corners of the non-compete contract concerning matters included within the finalized document. The Parol Evidence Rule essentially prohibits the use of evidence not contained in a finalized agreement that vary or contradict the terms of the contract.[52] When litigating a case regarding the enforcement of a non-compete agreement, in most cases, parties may not present collateral evidence (written articles, oral representations, etc.) that contradict the finalized written restrictive covenant. A finalized restrictive covenant document will cause most courts to refuse admission of conflicting evidence and to admit some supplemental evidence only to clarify ambiguous provisions of the contract. The courts will consider a contract as the "final agreement" when "there is no evidence to contradict a finding that the parties intended the writing to be the final expression of the parties."[53]

V. THE TEST FOR REASONABLENESS/ENFORCEABILITY

The application of basic contract principles is just one step in the process of enforcement of a covenant not to compete. Once the court has determined that the parties properly executed a non-compete agreement, it must analyze the enforceability of the agreement's provisions. Connecticut has developed a five-prong test to assess the enforceability of a restrictive covenant. It examines the reasonableness of the restrictions to determine how enforcement would impact the relevant parties: the employer, the employee, and the public at large.[54] When determining the

enforceability of a Connecticut non-compete agreement, the court will look to 1) the reasonableness of the time restriction, 2) the reasonableness of the geographical restriction, 3) the degree of protection afforded to the employer, 4) whether it unnecessarily restricts the employee's ability to pursue his career, and lastly 5) the degree to which is interferes with the interests of the public.[55] This five-prong test used by Connecticut courts is disjunctive rather than conjunctive, meaning that a non-compete agreement can be deemed unenforceable and invalidated if it negatively impacts even a single factor.[56] A non-compete agreement is analyzed in its entirety when a court is determining its enforceability but a single unreasonable provision can be sufficient to invalidate the entire agreement and preclude enforcement.[57] While certain factors may assume greater importance, the legal analysis of non-compete agreements in Connecticut shows that each factor is essentially on equal footing and of equal weight when deciding enforceability of a restrictive covenant.

The factors used in the application of the five-prong reasonableness test can be divided into two categories: enumerated restrictions and subsequent consequences of the express restrictions. Time and geographical restrictions (factors #1 and #2) generally constitute crucial provisions in the non-compete and establish the parameters for what post termination activities are and are not permissible for the employee. Analysis of the remaining factors involves an assessment of the consequences of the enumerated restrictions and how they impact the parties and the public.

A. Temporal Limitation

The pertinent time/duration will prohibit an employee from engaging in certain enumerated activities for a specific period of time. The reasonableness of a particular time

restriction will vary from case to case and will depend heavily on the particular facts of the case and the specific characteristics of the position and industry. A fifteen-year restriction may be appropriate and enforceable in one case while it would be excessive and unreasonable in another.[58] The nature of the industry/profession that is the subject of a non-compete agreement is critical to determining whether a contractual time restriction is reasonable and enforceable. For example, restrictive covenants in the funeral services industry can be longer due to the familial return rate and referral characteristics[59] while courts have held that restrictive covenants in the software industry must be shorter because of the constant and "rapid changes in the software industry."[60]

The reasonableness and enforceability of the time restriction can also be a function of the enumerated geographical restriction. The interrelationship between these two aspects of a covenant not to compete can be very important in determining its overall enforceability. A time restriction that on its face seems unreasonable may in fact be completely reasonable when you take into account the geographical restriction. A lengthy time restriction on competing activities can be reasonable under circumstances where it is paired with a narrow geographical restriction.[61] A seemingly unreasonable time restriction may be deemed reasonable under the circumstances when "read in conjunction [with] the narrow geographic restriction" contained in the agreement.[62]

B. Geographic Limitation

For many employees, the geographical restriction can be more problematic and of greater concern than the time restriction. The courts in this state have repeatedly asserted that "the general rule is that the application of a restrictive covenant will be confined to a geographic area

which is reasonable in view of the particular situation."[63] The court analyzes the geographic restriction in the same manner as it evaluates the time restriction- the geographic terms are analyzed in the context of the specific facts of the situation and the particular industry in which the employer and employee are engaged. Non-compete agreements executed under Connecticut law can be invalidated when a geographic restriction is so broad that it severely limits or prevents a former employee "from carrying on his usual vocation and earning a livelihood, thus working undue hardship."[64]

A valid restrictive covenant will clearly define the geographic restriction prohibiting the employee upon termination from engaging in competing business activities within a specific area. The total lack of specified geographical restriction creates an unintended consequence in the form of a global restriction on competition, an effect that the courts consider "patently and grossly unreasonable."[65] Courts are likely to invalidate a non-compete agreement for lack of a defined geographic restriction regardless of whether that characteristic of the agreement was intentional or purely by mistake. If intentional, a global restriction on competition is unconscionable and unenforceable under Connecticut law. Courts will also refuse enforcement of such a non-compete if the lack of geographical restriction was a mistake or error in drafting and execution. Employers should not be allowed the benefit of enforcing the agreement merely because of an unintended, ambiguous clause that was the product of sloppy drafting of the agreement.[66]

(i) Weighing Respective Consequences

A crucial component in analyzing the enforceability of a geographical restriction is the potential consequences for the employer and the employee. Employers have the right to protect

themselves but not by seeking to impose excessive and unreasonable restrictions that needlessly harm or unduly restrict former employees. A court may deny enforcement when the restrictive covenant goes beyond protecting the employer's legitimate interest in existing customer relationships and seeks to exclude all competition in a very large territory where the employer conducts or could possibly conduct business.[67] Geographical restrictions, regardless of duration, that go beyond what is required for a fair protection of the employer are unenforceable on the grounds that they are unreasonable restraints of trade in direct contravention of Connecticut law.[68] [69] The availability of future employment for the former employee is a major factor in a court's determination of the enforceability of a geographical restriction. A restriction will be upheld when the circumstances demonstrate that there is ample opportunity for the employee to obtain new employment outside of the contractually prohibited area without causing undue hardship(s).[70]

Smaller geographical restrictions are generally easier to assess and enforce but this is not to say that a court will automatically deny enforcement of a restriction that on its face establishes a large prohibited area. Courts have enforced non-compete agreements containing a large geographical restriction clause when there are other clauses that narrow the actual prohibited area. One such case,[71] involved a restrictive covenant that prohibited competing activities for one year following termination within the area described as the "Standard Metropolitan Statistical Areas of [the] Eastern Seabord,"[72] an area that includes metropolitan areas from Portland, Maine to Miami, Florida and home to roughly 36% of the country's population.[73] This area, at face value, is excessive and would normally be unconscionable to enforce, but the court ultimately held that the geographical restriction clause was valid and enforceable because subsequent clauses placed restrictions on the area and severely limited its

impact on the employee by stating that the restriction pertained only to the employer's clients within the six months prior to termination and on who's account the former employee had personally worked.[74] This was sufficient to limit the effect of the stated geographical restriction and render it enforceable in light of the peculiar circumstances surrounding the case.

When contesting the enforceability of geographical or time restrictions, the employee ultimately bears the burden of proving that a restriction is "too broad", "unreasonable," or "excessive."[75] Under Connecticut law, the challenging party bears the burden of demonstrating that the non-compete is unenforceable.[76] The employer generally has the benefit of a rebuttable presumption that the employee must overcome to show that a restriction is unreasonable and therefore unenforceable.

C. Fair Protection to the Employer

The third prong in the test for reasonableness and enforceability of a non-compete agreement is analysis of the fair degree of protection afforded to the employer. The courts in Connecticut have a long-standing policy of enforcing non-competes in order to protect an employer's interests and have long recognized that a restrictive covenant is a valuable business asset that is entitled to protection.[77] While the employer's interests are a valid concern, their protection cannot come at a cost of occupational ruin of former employees. The general rule with regard to analyzing the fair degree of protection for the employer is that contracts in restraint of trade "should afford only a fair protection to the interest of the party in whose favor it is made, and must not be so large in its operation as to interfere with the interests of the public [and the former employee]."[78] The court balances the equities for the parties involved in the legal action. Only after a court has identified and weighed the competing equities of the parties

can it conclude that "although some hardship would result to the individual defendants [former employees] as a consequence of this injunction, it would not be greatly disproportionate to the plaintiff's [employer's] injury."[79] A court's ruling will inevitably favor one party over the other, but this prong ensures that the unsuccessful party does not experience extreme and unduly harsh consequences.

D. The Ability to Secure Future Employment

The fourth prong in the test to ascertain the enforceability of a non-compete agreement is ensuring that the contractual provisions do not unnecessarily restrict the employee's ability to pursue his or her career through securing appropriate employment upon termination. The general rule is that employers are legally permitted to protect themselves in a reasonably limited market area but may not overreach to the degree that the restriction prevents the former employee from practicing his or her trade in order to make a living.[80] Connecticut courts believe the interests of the employee should also be protected and that terms of a restrictive covenant become unenforceable when they block him from "pursing his occupation and [is] thus prevented from supporting himself and his family."[81] This restraint of trade is a clear violation of Connecticut law and public policy that militate against unreasonable restrictive covenants. Courts should narrowly read and interpret non-compete agreements and the clauses contained therein because "sound public policy considerations strongly militate against sanctioning the loss of a person's livelihood."[82] Despite this general policy, employees remain free to covenant to refrain from competing activities in exchange for an employment benefit, a promise that is enforceable if the courts conclude that the agreement is reasonable.[83]

E. The Public Interest

The final prong of the enforceability test is determining whether the agreement and its provisions interfere with the interests of the public. In order to be valid and enforceable, a non-compete agreementmust not have a widespread detrimental effect on the public, particularly with respect to consumers. It is a fundamental tenant of Connecticut public and legal policy that agreements and specific contractual clauses cannot deny the public access to important goods or services. Therefore, the extent of the agreement's effect on the public must be taken into account when determining whether to enforce a restrictive covenant.[84] Courts will examine the provisions of the agreement, keeping in mind that "the determinant is not whether the public's freedom to trade has been restricted in *any* sense, but rather whether that freedom has been restricted unreasonably."[85] Thus, a non-compete agreement may be invalidated and enforcement denied on the grounds of the public's interests only if interference with those interests is so significant as to be classified by the adjudicating court as "unreasonable."

One of the chief concerns with this prong of the enforceability test is preventing monopolistic activities within certain public segments of the economy. The courts have the authority to examine the scope and severity of a non-compete agreement's effect(s) on the public as well as the "probability of the restrictions creating a monopoly in the [relevant] area of trade."[86] Upon examination of the facts and the possible consequences of the restrictive covenant, Connecticut courts may deny enforcement where the agreement runs contrary to public policy and the contractual restraints are unreasonable.[87]

This enforceability test, as articulated in and enforced under Connecticut case law, is designed to protect the legitimate interests of both the employee and the employer. It is utilized

in a manner that ensures that the consequences of a restrictive covenant are reasonable, appropriate for the specific circumstances, and not punitive. The enforceability test attempts to control and limit the detriments incurred by a party to the action and protect it from oppressive restrictions. In establishing enforceability, the core principle is the notion that a party should not be subject to excessive and unreasonable restrictions that were "not [designed] to protect legitimate business interests, but rather to prevent [the employee] from working for competitors."[88]

VI. TYPES OF BREACH

There are various circumstances under which an individual can be found in violation of a restrictive covenant. The two most common types of activity that result in litigation are (a) the solicitation of prohibited parties in violation of the time and/or geographical restrictions and (b) the unauthorized dissemination of confidential and proprietary information belonging to the plaintiff employer.

A. Solicitation

Solicitation activities can generally be divided into two categories: direct solicitation and indirect solicitation. Under a theory of direct solicitation, the employer alleges that the former employee personally solicited business in violation of the covenant not to compete. The employer bears the burden of proof and must submit sufficient evidence to the court showing that the former employee knowingly took action to solicit business from prohibited parties. On the other hand, cases involving the theory of indirect solicitation have a plaintiff employer that "support[s] its position that one who is not a party to a non-compete contract can be enjoined from activity prohibited by the contract where the person or entity is operating indirectly for the

party to the contract."[89] Under this scenario, the employer alleges that a former employee induced a third party to engage in activities the employee personally was contractually prohibited from doing, using knowledge or information that the employee acquired during his or her employment with the plaintiff employer. In order to be successful in an "indirect solicitation" claim, the employer must demonstrate that the actions the nonaffiliated parties evince "conscious disregard" of the non-compete agreement by the former employee.[90] A court may find breach even though the employee did not personally violate its terms but instead used information to induce a third party to perform activities that would otherwise be considered a contractual breach.

Allegations of impermissible solicitation are only valid and successful if the target of the solicitation is actually a prohibited party within the purview of the terms of the non-compete agreement. There are many categories of clients or customers that may or may not be protected, a characteristic that is determined by the nature of the client or customer.

The business sources that an employer seeks to protect with a restrictive covenant are its current and past clients. A restriction limited to the plaintiff's current and past customers is not overly broad, unreasonable, or unenforceable under the laws of Connecticut.[91] Current clients are easily and readily identifiable, giving courts relatively few issues with determining who falls into this class of clients. On the other hand, past customers can be a bit trickier in the sense that certain companies have very long histories, a sizeable client base, extensive geographical presence, and diversified subsidiaries. Many employers place limitations in their non-compete agreements with regard to who is protected as a "past client." Common restrictions for defining "past clients" include establishing a period of time the client has been affiliated with the company, as well as specifying that the employee is only prohibited from soliciting those clients

that he or she had a professional relationship with and on whose account the employee worked. Such restrictions make the provisions themselves more reasonable, and courts look favorably on limitations that reduce the scope of the restraint on trade and appropriately define the client class.

A more difficult classification of clients to identify is "potential clients." This class is much more amorphous and, in theory, every participant in the economy *could* be a potential client. A restrictive covenant encompassing potential clients creates a virtually limitless prohibition on solicitation for the employee upon termination. Enforceability under this scenario greatly depends on the agreement's definition of "potential clients." Restrictions on potential clients are reasonable and enforceable so long as the clients classified as such are "readily identifiable and narrowly defined."[92] Therefore, a clause that prohibits the solicitation of potential clients is permissible and enforceable so long as the agreement narrowly and specifically construes this class of clients.

Companies that engage in service-based industries - professions including but not limited to lawyers, doctors, accountants, financial advisors, hair stylists, and personal trainers - potentially have an additional class of clients to consider when drafting a restrictive covenant and suing for its enforcement. Many professionals in a service-based industry have "personal or private clients" that are not affiliated with their employer but to whom the professional provides services on the side and off the company's clock. Even upon executing a non-compete agreement, employees are generally not enjoined from continuing to provide services to personal or private clients.[93] Because these clients did not have an official relationship with the employer, courts have held it would be unfair to include them on lists of prohibited clients.[94] These personal clients are not receiving services from the employee as a result of a business connection

to the employer, and as such they fall outside the protections and restrictions enumerated in any restrictive covenants.

B. Use of Confidential/Proprietary Information

The second common activity alleged to constitute breach of a non-compete agreement is the employee's dissemination of confidential or proprietary information that gives his new employer an economic advantage, thus creating unlawful competition. Former employees cannot "use trade secrets, or other confidential information he [or she] has acquired in the course of his employment [with the plaintiff employer], for his [or her] own benefit or that of a competitor to the detriment of his [or her] former employer."[95] To qualify as confidential information or a trade secret in Connecticut, the information must reflect a substantial degree of secrecy.[96] Employers typically seek injunctive relief when the alleged breach of a restrictive covenant takes the form of the misappropriation of confidential information. Legal remedies are inadequate in most, if not all, of these cases because the "loss of trade secrets [and/or confidential information] cannot be measured in money damages…[because a] trade secret, once lost is, of course, lost forever."[97]

(i) Trade Secrets

Connecticut has developed several statutes pertaining to "trade secrets" and their unlawful misappropriation that clearly contravenes non-compete agreements. A category of confidential information, trade secrets are "the property of the employer and cannot be used by the employee for his own benefit [or the benefit of another]."[98] Connecticut courts use the term "trade secret" to mean any "formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors

who do not know or use it."[99] The content of a trade secret must be undisclosed, and courts will not enforce a non-compete agreement to protect knowledge that is generally and widely known in the respective industry or that is publically disclosed.[100] When determining whether certain information qualifies as a trade secret and entitles the owner to protection under a non-compete agreement, the court examines the following factors: a) the extent to which the information is known outside the business, b) the extent to which the information is known by employees and others involved in the business, c) the extent of measures taken by the company to guard the secrecy of the information, d) the value of the information to the company and its competitors, e) the amount of effort and money expended by the company in developing the information, and f) the ease or difficulty with which the information could be properly acquired or duplicated by others.[101]

The elements of breach of a restrictive covenant by misappropriating trade secrets and confidential knowledge hinge on the defendant acquiring, disclosing, or using the knowledge via "improper means." Under Connecticut law, "improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage through electronic or other means, including but not limited to searching through trash.[102] Furthermore, Connecticut has a statute of limitations with regard to actions against a party for the misappropriation of trade secrets and confidential knowledge in contravention of a covenant not to compete. Parties are barred from commencing an action beyond three years "from the date the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered."[103] The statute further states that a continuing misappropriation constitutes a single claim for the purposes of the statute of limitations. [104]

Connecticut law espouses the principle of an implied duty to not disclose confidential information to other parties, even in the absence of a non-compete agreement. Courts routinely uphold this implied duty related to employment law and the Supreme Court of Connecticut has stated that "even after employment has ceased, a former 'employee' remains subject to a duty not to use trade secrets, or other confidential information, which he has acquired in the course of his employment for his own benefit or that of a competitor, to the detriment of his former employer."[105] As with most rules, however, there are some limited exceptions. Business-client relationships and corresponding information that predate employment with the employer are not protected by the implied duty not to disclose. "[I]n the absence of a covenant not to compete, an employee who possessed the relevant customer information prior to the former employment is free to use the information in competition with the employer after termination of the employment relationship."[106]

In some cases, the act of merely retaining confidential information can constitute a breach of a non-compete agreement, and the employee need not actually exploit the knowledge for the court to grant injunctive relief. In one such case, *TyMetrix, Inc. v. Szymonik,*[107] an employee retained physical possession of confidential information, claiming he kept it in order to assist in the litigation with his former employer.[108] This act, regardless of the employee's reasons, nonetheless violated the non-compete agreement between the employer and employee . The court specifically held that "whether Szymonik [the former employee of plaintiff employer] has used the information on the DVDs is not, at this point in the proceedings, the relevant consideration. His possession and retention of the DVDs [that contained confidential information] is in violation of the terms of the employment agreement."[109]

Non-compete agreements often contain a clause regarding non-disclosure of confidential information acquired or to which the employee is exposed during the employment relationship. However, some employee-employer contracts separate these restrictions into two separate agreements. Historically, Connecticut courts have favored the enforcement of non-disclosure/confidentiality agreements compared to covenants not to compete,[110] since the protection of a company's proprietary and confidential information is far more clear-cut than granting an injunction that results in the restraint of trade or potential employment. Time and geographical restrictions are not necessary for the enforcement of a non-disclosure agreement, and courts have the discretion to apply the "reasonableness" test or a relaxed version of the test.[111]

VII. FORMS OF RELIEF

When a party commences an action against another, it can request from the court two types of relief: legal and equitable. Legal relief typically manifests itself in the form of damages, a judgment that uses money to try to right the wrong. Equitable relief usually involves an order from the court instructing a party to perform or refrain from performing a specified activity. In cases of restrictive covenants, the employer will typically request a court order (equitable relief) seeking to enforce the provisions of the agreement and order the former employee to cease engaging in activities that violate the agreement. In cases involving alleged breach of a non-compete agreement, equitable relief is the preferred and most common form of relief because the plaintiff employer claims that it has experienced irreparable harm that cannot be measured in monetary terms. In addition, equitable relief enjoins the other party from further violations of the agreement. Thus, the court order addresses both past and possible future breaches.

Equitable relief is the standard for non-compete agreement cases, but Connecticut courts have, on rare occasion, awarded money damages to plaintiffs as a supplement to equitable relief. For example, in *National Truck Emergency Road Service, Inc. v. Peloquin*, the court ordered a former employee to return documents that were used in illegal competition, and then awarded damages to the employer for losses directly connected to breach of the non-compete agreement.[112]

In a different case[113] the court awarded only damages, since equitable relief was not a viable option because the non-compete agreement expired by the time the plaintiff commenced the litigation. The court held that the "plaintiff's request for injunctive relief [had] become moot" due to the expiration, but it allowed the plaintiff to proceed with the action for money damages.[114] The enforcing party was permitted to introduce evidence and facts that enabled the court to calculate the lost profits *directly* associated with the breach of the non-compete agreement. The court ultimately concluded that the plaintiff was "entitled to recover damages from the defendant in that amount as to the proven breach of the covenant not to compete."[115] The court, unable to grant injunctive relief, awarded damages for the breach of a restrictive covenant to compensate for the loss suffered by the enforcing party.[116]

VIII. MODIFICATION AND "BLUE LINING"

Under Connecticut law, in cases involving an alleged breach of a non-compete agreement, it may be possible to modify the terms of the contract so as to make an otherwise unenforceable agreement reasonable and enforceable. This results when the parties specifically state in the contract that the court has the express authority to alter its terms in order to enforce it. As another possibility, the court can apply the "blue pencil doctrine," under which the court,

without the express permission of the parties, amends the terms of the agreement to render them reasonable. Connecticut recognizes the "blue pencil doctrine" but requires parties to submit evidence from which the court can conduct an informed analysis and establish appropriate geographic and/or time boundaries.[117] If the parties are open to court modification of unreasonable terms to facilitate a valid and enforceable agreement, the more straightforward approach is to include contractual language and clauses in the restrictive covenant itself permitting such court action. An example of such a contractual clause is:

> In the event that any provision of this Agreement is held, by a court of competent jurisdiction, to be invalid or unenforceable due to the scope, duration, subject matter or any other aspect of such provision, the court making such determination shall have power to modify or reduce the scope, duration, subject matter or other aspect of such provision to make such provision enforceable to the fullest extent permitted by law and the balance of this Agreement shall be unaffected by such validity or unenforceability.[118]

Under this scenario, both parties consent to giving the adjudicating court the express power to modify terms of the restrictive covenant in order to make the contract, as a whole, reasonable and fully enforceable under Connecticut law.

When determining whether to modify a geographical restriction, courts will generally subscribe to and apply either the "blue pencil rule" or the "Massachusetts rule."[119] These rules are divergent with respect to a court's ability to modify geographical terms based on whether the area is divisible according to the language of the contract. The "blue pencil doctrine" permits courts to modify geographical restrictions only when the contractual language creates several distinct areas; the "Massachusetts rule" is much more lenient and allows a court to modify the terms "even though the territory is not divisible in the wording of the contract."[120] Connecticut courts are more receptive to the application of the "blue pencil doctrine" and feel that the

"Massachusetts rule" gives the court expansive, broad powers that, when exercised, result in courts crafting new contracts between the parties. [121]

Connecticut follows the "line of authority which states that if the territory specified in the contract is by the phraseology of the contract so described as to be divisible, the contract is separable and may be enforced as to such portions of the territory so described as are reasonable."[122] One such case where the court applied the "blue pencil rule" was *EastCoast Guitar Center, Inc. v. Tedesco*[123], where the court held that the original "geographic area in the agreement [was] too broad and [was] not reasonable or necessary to protect the plaintiff's business."[124] The court dissected the contractual language pertaining to the geographical restriction and reduced it to certain enumerated counties (Fairfield, Litchfield, and New Haven) in order to make the agreement reasonable and enforceable.[125]

Modifications to contractual time restrictions can also occur based on a contractual provision or a court's application of the "blue pencil rule." Connecticut courts have asserted that they may "reduce the time limitation because of the 'blue-pencil rule' which states that under certain circumstances, a court may enforce parts of an agreement and not others."[126] In the absence of a contractual provision consenting to modifications, parties can demonstrate to the court that they are open to the possibility of the court modifying the restrictions during the litigation process. This provides the court with a certain degree of freedom to assess the current time restriction and reduce its length if the court finds it excessive and unreasonable. Courts can simply reduce the duration of the time restriction, and may instruct the parties to submit arguments regarding a potential extension to the full contractual period of time prior to expiration of the new restriction. In the latter situation, the court will consider the specific facts

of the case in determining whether it is necessary to enforce the original provision of the agreement. [127]

IX. CONCLUSION

The combination of the greatest recession since the Great Depression and the weakest job market in a generation has created for employers a "buyer's market," where non-competition covenants are flourishing. These covenants have become an employer's weapon of choice for maximizing employee value: by reducing job mobility they increase employee "loyalty," and should an employee be let go, they minimize the competitive damage that he can inflict in the marketplace. For at least the short term, we can expect employers to require post-employment restrictive covenants (most significantly, non-compete clauses) where they historically were not required or where market conditions have created employer leverage for their imposition. Simply put, non-compete agreements will, for the foreseeable future, be a regular fixture in the workplace. It is not too strong a statement to say that their enforcement can have life-changing consequences as a result of being foreclosed from one's chosen profession, even for a relatively short period of time.

The attorneys here at Maya Murphy, P.C. regularly deal with restrictive covenants. Ideally, we can become involved when such covenants are being negotiated and drafted to ensure that our clients retain maximum flexibility with regard to employment. Our litigators have also argued successfully for such covenants read narrowly, or declared null and void, because of their legal infirmities. Often, an aggressive approach to litigation results in employer concessions that might not otherwise be offered. Each case is unique, as no two employees or positions are exactly the same. Whether it is negotiation or litigation, the attorneys at Maya Murphy, P.C.

stand ready to take whatever steps may be necessary or appropriate to protect your interests in either retaining existing employment or obtaining alternative employment of your choice.

[1] Conn. Gen. Stat. Ann. §35-26.

[2] *Beit v. Beit*, 135 Conn. 195, 199-200, 557 A.2d 151 (1948).

[3] Black's Legal Dictionary (2nd ed. 1910).

[4] *State Nat'l Bank v. Dick*, 164 Conn. 523, 529, 325 A.2d 235 (1973).

[5] *Id*.

[6] *Command System, Inc. v. Wilson*, No. CV 91-0702529S, 1995 Conn. Super. LEXIS 406, at 9 (Conn. Super. Ct. Feb. 8, 1995).

[7] *Thibodeau v. Design Group One Architects, LLC*, 64 Conn. App. 573, 577, 781 A.2d 363 (2001).

[8] *Carter v. Bartek*, 142 Conn. 448, 450, 114 A.2d 923 (1955); *Fisher v. Jackson*, 142 Conn. 734, 736, 118 A.2d 316 (1955); *Somers v. Cooley Chevrolet Co.*, 146 Conn. 627, 629, 153 A.2d 426 (1959).

[9] *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 474, 427 A.2d 385 (1980).

[10] *J.M. Layton & Co. v. Millar*, No. CV040084446S, 2004 Conn. Super. LEXIS 2226, at 13, 16 (Conn. Super. Ct. Aug. 9, 2004).

[11] *Cost Management Incentives, Inc. v. London-Osborne*, No. CV020463081, 2002 Conn. Super. LEXIS 3967, at 19 (Conn. Super. Ct. Dec. 5, 2002).

[12] *Van Dyck Printing Co. v. DiNicola*, 43 Conn. Supp. 191, 195-6, 648 A.2d 898 (1993).

[13] *Fairfaxx Corp. v. Nickelson*, No. CV 990363873S, 2000 Conn. Super. LEXIS 2340, at 20 (Conn. Super. Ct. Sept. 14, 2000).

[14] *J.M. Layton & Co. v. Millar*, No. CV 040084446S, 2004 Conn. Super. LEXIS 2226, at 16 (Conn. Super. Ct. Aug. 9, 2004).

[15] *Sartor v. Town of Manchester*, 312 F. Supp.2d 238, 245 (D. Conn. 2004).

[16] *Roessler v. Burwell*, 119 Conn. 289, 293, 176 A. 126 (1934); *Home Funding Group, LLC v. Kochmann*, Civ. No. 3:06CV1234, 2007 U.S. Dist. LEXIS 41376, at 8 (D. Conn June 7, 2007).

[17] *Fairfaxx Corp. v. Nickelson*, No. CV 990363873S, 2000 Conn. Super. LEXIS 2340, at 17 (Conn. Super. Ct. Sept. 14, 2000).

[18] *Id*.; *North American Outdoor Products, Inc. v. Dawson*, No. CV040490177S, 2004 Conn. Super. LEXIS 2677, at 7 (Conn. Super. Ct. Sept. 21, 2004).

[19] *Fairfaxx Corp. v. Nickelson*, No. CV 990363873S, 2000 Conn. Super. LEXIS 2340, at 17 (Conn. Super. Ct. Sept. 14, 2000).

[20] *Stay Alert Safety Services, Inc. v. Fletcher*, No. CV054007660S, 2005 Conn. Super. LEXIS 1915, at 2 (Conn. Super. Ct. July 11, 2005).

[21] *Krondes v. O'Boy*, 37 Conn. App. 430, 434, 656 A.2d 692 (1995).

[22] 17 A Am Jur 2d Contracts 31.

[23] *Niehaus v. Cowles Business Media, Inc.*, 263 Conn. 178, 188-9, 819 A.2d 765 (2003)

[24] *Id*.

[25] *North American Outdoor Products, Inc. v. Dawson*, No. CV040490177S, 2004 Conn. Super. LEXIS 2677, at 8-9 (Conn. Super. Ct. Sept. 21, 2004).

[26] *Luongo Construction & Development, LLC v. Keim*, No. CV084008959S, 2008 Conn. Super. LEXIS 1182, at 9-10 (Conn. Super. Ct. May 15, 2008).

[27] *Id*. at 9.

[28] *Batter Building Materials Co. v. Kirschner*, 142 Conn. 1, 7, 110 A.2d 464 (1954).

[29] *Aladdin Capital Holdings, LLC v. Donoyan*, No. 3:11cv655, 2011 U.S. Dist. LEXIS 61095, at 7-8 (D. Conn. June 8, 2011).

[30] *Capelouto v. Orkin Exterminating Co.*, 183 So. 2d 532 (Fla. 1966).

[31] *Aladdin Capital Holdings, LLC v. Donoyan*, No. 3:11cv655, 2011 U.S. Dist. LEXIS 61095, at 10 (D. Conn. June 8, 2011).

[32] *Id*.

[33] *Robert S. Weiss & Associates, Inc. v. Wiederlight*, 208 Conn. 525, 532 (1988).

[34] *Id*.

[35] *Pena v. Brattleboro*, 702 F.2d 322, 325 (2d Cir. 1983).

[36] *Drummond American LLC v. Share Corporation*, No. 3:08CV1665, 2009 U.S. Dist. LEXIS 105965, at 16 (D. Conn. Nov. 12, 2009).

[37] *Booth Waltz Enter. v. Pierson*, No. CV094008249S, 2009 Conn. Super. LEXIS 1912, at 7 (Conn. Super. Ct. July 8, 2009).

[38] *Lampson Lumber Co. v. Caporale*, 140 Conn. 679, 685, 102 A.2d 875 (1954).

[39] *Opticare, P.C. v. Zimmerman*, No. UWYCV075003365S, 2008 Conn. Super. LEXIS 759, at 10 (Conn. Super. Ct. Mar. 27, 2008).

[40] *New England Eyecare of Waterbury v. New England Eyecare*, No. 099465, 1991 Conn. Super. LEXIS 135, at 12 (Conn. Super. Ct. Jan 18, 1991).

[41] *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S. Ct. 2561 (1975).

[42] *Id*. at 931.

[43] *Express Scripts, Inc. v. Sirowich*, No. CV020077109S, 2002 Conn. Super. LEXIS 3444, at 8 (Conn. Super. Ct. Oct. 24, 2002).

[44] *Id*. at 12-2

[45] *Century 21 Access America v. McGregor-McLean*, No. CV044000764S, 2004 Conn. Super. LEXIS 3239, at 1-2 (Conn. Super. Ct. Nov. 4, 2004).

[46] *Id*.

[47] *Tyco Healthcare Group v. Ross*, CIVIL ACTION NO. 3:11-cv-373, 2011 U.S. Dist. LEXIS 49867, 12-3 (D. Conn. May 10, 2011).

[48] *Id*. at 13-4.

[49] *Innovative Financial Services, LLC v. Urban*, No. CV040832322S, 2005 Conn. Super. LEXIS 775, at 9 (Conn. Super. Ct. Feb. 23, 2005).

[50] *Id*.

[51] *Id*.

[52] *Hood v. Aerotek, Inc.*, No. 3:98 CV 1524, 2002 U.S. Dist. LEXIS 3513, at 3 (D. Conn. Feb. 20, 2002).

[53] *United Rentals, Inc. v. Bastanzi*, No. 3:05CV596, 2005 U.S. Dist. LEXIS 45268, at 20 (D. Conn. Dec. 22, 2005).

[54] *New Haven Tobacco Co. v. Perrelli*, 11 Conn. App. 636, 641, 528 A.2d 865 (1987).

[55] *Scott v. General Iron & Welding Co.*, 171 Conn. 132, 137 (1976).

[56] *New Haven Tobacco Co. v. Perrelli*, 18 Conn. App. 531, 534 (1989).

[57] *Braman Chemical Enterprises, Inc. v. Barnes*, No. CV064020633S, 2006 Conn. Super. LEXIS 3753, at 27 (Conn. Super. Ct. Dec. 11, 2006).

[58] *Sagarino v. SCI State Funeral Services, Inc.*, No. CV 000499737, 2000 Conn. Super. LEXIS 1384, at 15-7 (Conn. Super. Ct. May 22, 2000).

[59] *Id*.

[60] *Weseley Software Dev. Corp. v. Burdette*, 977 F. Supp. 137, 147 (D. Conn. 1996).

[61] *Van Dyck Printing Co. v. DiNicola*, 43 Conn. Supp. 191, 197, 648 A.2d 989 (1993).

[62] *Kx Indus., L.P. v. Saaski*, No. CV 960386806S, 1997 Conn. Super. LEXIS 2444, at 22 (Conn. Super. Ct. Aug. 29,1997).

[63] *Scott v. General Iron & Welding*, 171 Conn. 132, 138 368 A.2d 111 (1976).

[64] *Mattis v. Lally*, 138 Conn. 51, 56 (1951).

[65] *Connecticut Stone Supplies, Inc. v. Fresa*, No. CV020470204S, 2002 Conn. Super. LEXIS 4141, at 5 (Conn. Super. Ct. Dec. 20, 2002).

[66] *Id*.

[67] *Braman Chem. Enters. v. Barnes*, No. CV064020633S, 2006 Conn. Super. LEXIS 3753, at 15 (Conn. Super. Ct. Dec. 11, 2006).

[68] Conn. Gen. Stat. Ann. §35-26.

[69] *Braman Chem. Enters. v. Barnes*, No. CV064020633S, 2006 Conn. Super. LEXIS 3753, at 16 (Conn. Super. Ct. Dec. 11, 2006).

[70] *Sabatasso v. Bruno*, No. CV 030284486S, 2004 Conn. Super. LEXIS 899, at 12-3 (Conn. Super. Ct. Apr. 8, 2004).

[71] *Express Courier System, Inc. v. Brown*, No. CV064023011S, 2006 Conn. Super. LEXIS 3784 (Conn. Super. Ct. Dec. 18, 2006).

[72] *Id*. at 5.

[73] http://2010.census.gov/2010census/data/apportionment-pop-text.php

[74] *Express Courier Systems, Inc. v. Brown*, No. CV064023011S, 2006 Conn. Super. LEXIS 3784, at 10 (Conn. Super. Ct. Dec. 18, 2006).

[75] *United Rentals, Inc. v. Frey*, CIV. NO. 3:10CV1628, 2011 U.S. Dist. LEXIS 16375, at 15-6 (D. Conn. Feb. 17, 2011).

[76] *Scott v. General Iron & Welding Co.*, 171 Conn. 132, 139, 368 A.2d 111 (1976).

[77] *Torrington Creamery, Inc. v. Davenport*, 126 Conn. 515, 521, 12 A.2d 780 (1940).

[78] *Cook v. Johnson*, 47 Conn. 175, 176 (1879).

[79] *Castonguay v. Plourde*, 46 Conn. App. 251, 267, 699 A.2d (1997).

[80] *Braman Chemical Enterprises, Inc. v. Barnes*, No. CV064020633S, 2006 Conn. Super. LEXIS 3753, at 19 (Conn. Super. Ct. Dec. 11, 2006).

[81] *Scott v. General Iron & Welding Co.*, 171 Conn. 132, 137, 368 A.2d 111 (1976).

[82] *Consolidated Brands, Inc. v. Mondi*, 638 F. Supp. 152, 156 (E.D.N.Y. 1986); See also, *Elida, Inc. v. Harmor Realty Corp.*, 117 Conn. 218, 225 (1979).

[83] *Domurat v. Mazzaccoli*, 138 Conn. 327, 330, 84 A.2d 271 (1951); *Hayes v. Parklane Hosiery Co.*, 24 Conn. Supp. 218, 220 (1963).

[84] *New Haven Tobacco Co. v. Perrelli*, 11 Conn. App. 636, 639, 528 A.2d 865 (1987).

[85] *Id*.

[86] *Id*. at 641.

[87] *Deming v. Nationwide Mutual Insurance Co.*, 279 Conn. 745, 761, 905 A.2d 623 (2006).

[88] *Ranciato v. Nolan*, No. CV970401729S, 2002 Conn. Super. LEXIS 489, at 12-3 (Conn. Super. Ct. Feb. 7, 2002).

[89] *PCRE v. Unger*, No. HHDCV106008981S, 2010 Conn. Super. LEXIS 1129, 3-4 (Conn. Super. Ct. Apr. 30, 2010).

[90] *Id*. at 4-5.

[91] *New Haven Tobacco Co. v. Perrelli*, 18 Conn. App. 531, 534-5, 559 A.2d 715 (1989).

[92] *Webster Financial Corp. v. MacDonald*, No. CV084016026S, 2009 Conn. Super. LEXIS 169, at 12 (Conn. Super. Ct. Jan. 27, 2009).

[93] *Hoffnagle v. Henderson*, No. CV020813972S, 2002 Conn. Super. LEXIS 901, at 17 (Conn. Super. Ct. Mar. 21, 2002).

[94] *Id*.

[95] *Allen Mfg. Co. v. Loika*, 145 Conn. 509, 514, 144 A.2d 306 (1958).

[96] *Town & Country House & Homes Service, Inc. v. Evans*, 150 Conn. 314, 319, 189 A.2d 390 (1963).

[97] *FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 63 (2d Cir. 1984).

[98] *Town & Country House & Home Service, Inc. v. Evans*, 150 Conn. 314, 319, 189 A.2d 390 (1963).

[99] Restatement of Torts, §757, cmt. b.

[100] *Id*.

[101] *Id*.

[102] Conn. Gen. Stat. Ann. §35-51(a).

[103] Conn. Gen. Stat. Ann. §35-56.

[104] *Id*.

[105] *Elm City Cheese Company, Inc. v. Federico*, 251 Conn. 59, 69 (1999); *Booth Waltz Enterprises v. Kimlingen*, No. CV040072045S, 2004 Conn. Super. LEXIS 2682, at 8 (Conn. Super. Ct. Sept. 14, 2004).

[106] Restatement (Third) of Unfair Competition §42, cmt. f.

[107] *TyMetrix, Inc. v. Szymonik*, No. CV064019412S, 2006 Conn. Super. LEXIS 3865 (Conn. Super. Ct. Dec. 28, 2006).

[108] *Id*. at 6.

[109] *Id*. at 7.

[110] *Newinno, Inc. v. Peregrim Development, Inc.*, No. CV020390074S, 2003 Conn. Super. LEXIS 1160, at 10 (Conn. Super. Ct. June 3, 2003).

[111] *Id*. at 7, 8-9.

[112] *National Truck Emergency Road Service, Inc. v. Peloquin*, No. CV96025959S, 2001 Conn. Super. LEXIS 2393, at 11, 14 (Conn. Super. Ct. Aug 14, 2001).

[113] *Van Dyck Printing Co. v. DiNicola*, 43 Conn. Supp. 191, 648 A.2d 898 (1993).

[114] *Id*. at 191.

[115] *Id*. at 201.

[116] *Id*. at 200.

[117] *Beit v. Beit*, 135 Conn. 195, 204-5, 63 A.2d 161 (1948); *Ranciato v. Nolan*, No. CV970401729S, 2002 Conn. Super. LEXIS 489, at 13-4 (Conn. Super. Ct. Feb. 7, 2002).

[118] *Weseley Software Dev. Corp. v. Burdette*, 977 F. Supp. 137, 142 (D. Conn. 1996); See also, *Ranciato v. Nolan*, No. CV970401729S, 2002 Conn. Super. LEXIS 489, at 3 (Conn. Super. Ct. Feb. 7, 2002); *United Rentals, Inc. v. Frey*, CIV. NO. 3:10CV1628, 2011 U.S. Dist. LEXIS 16375, at 16-7 (D. Conn. Feb. 17, 2011).

[119] *Timenterial, Inc. v. Dagata*, 29 Conn. Supp. 180, 184-5 (1971).

[120] *Id*.

[121] *Id*. at 185.

[122] *Id*. at 184.

[123] *East Coast Guitar Center, Inc. v. Tedesco*, No. CV 990337066S, 2000 Conn. Super. LEXIS 320 (Conn. Super. Ct. Feb. 7, 2000).

[124] *Id*. at 4.

[125] *Id*.

[126] *Access America, LLC v. Mazzotta*, No. CV054001863, 2005 Conn. Super. LEXIS 2579, at 11-2 (Conn. Super. Ct. Sept. 29, 2005).

[127] *Maintenance Technologies International, LLC v. Vega*, No. CV054005177S, 2006 Conn. Super. LEXIS 136, at 13 (Conn. Super. Ct. Jan. 12, 2006).