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Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.: The Effect of Involuntary Termination on Post-Employment Non-Compete Agreements

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***WRIGG V. JUNKERMIER, CLARK, CAMPANELLA,
STEVENS, P.C.: THE EFFECT OF INVOLUNTARY
TERMINATION ON POST-EMPLOYMENT
NON-COMPETE AGREEMENTS***

Michelle H. Vanisko*

I. INTRODUCTION

When an employee gets fired, her future employment prospects are likely among her first concerns. Regardless of the circumstances of her departure, her options may be limited by a post-employment, non-competition agreement. When such an agreement becomes the subject of litigation, the court's primary role is to balance the employer's need to protect its legitimate business interests (which may include anything from customer lists to trade secrets) with the employee's rights to be mobile and secure future employment.¹ In *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*,² the Montana Supreme Court addressed for the first time the enforceability of non-compete agreements in the context of an employee's involuntary dismissal from employment.³ The Court concluded that an employer "assumes the risk of competition" when it ends the employment relationship.⁴ Accordingly, after *Junkermier, Clark, Campanella, Stevens, P.C.* ("JCCS") terminated Dawn Wrigg ("Wrigg"), the Court held that JCCS's non-compete agreement with Wrigg was unenforceable.⁵

This note analyzes *Wrigg* in light of the problems with JCCS's non-compete agreement under basic contract rules as well as the psychological employment contract currently characterizing contemporary employment relationships. Section II provides a general background of the *Wrigg* case. Section III provides an overview of the legal background relating to non-compete agreements, focusing on both the most common methods used in reviewing such agreements and the public policies advanced by the courts in making these decisions. Section IV analyzes (1) whether the non-com-

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1. See Kenneth J. Vanko, "You're Fired! And Don't Forget Your Non-Compete . . .": *The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DePaul Bus. & Comm. L.J. 1 (Fall 2002).

2. *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 265 P.3d 646 (Mont. 2011).

3. *Id.* at 654.

4. *Id.* at 653.

5. *Id.* at 654.

pete agreement in *Wrigg* is an enforceable contract; (2) how the current psychological contract, the perception of mutual obligations that exist between an employee and employer,⁶ should have impacted the decision; and (3) whether the manner of departure matters. Finally, the note concludes with a recommendation of how the Court should have reviewed the decision in such a way as to provide guidance for district courts deciding similar cases in the future.

II. *WRIGG V. JUNKERMIER, CLARK, CAMPANELLA, STEVENS, P.C.*

A. *Factual Background*

Dawn Wrigg began working for JCCS in 1987 as a staff accountant.⁷ She became a shareholder in 2003 and signed a shareholder agreement in January 2004.⁸ She signed renewed shareholder agreements in 2005 and 2007.⁹ The 2007 shareholder agreement expired on June 30, 2009.¹⁰ Each of the shareholder agreements contained a non-compete clause that restricted Wrigg from providing accounting services to anyone to whom JCCS provided services. The non-compete clause (“Agreement”) in each of the shareholder agreements was triggered if Wrigg’s employment was “terminated for any reason.”¹¹

In 2009, after more than 20 years working at JCCS, Wrigg was advised by letter that her employment would end immediately.¹² However, JCCS agreed to pay Wrigg through the end of her contract term.¹³ When she was terminated, Wrigg was earning \$154,000 per year.¹⁴ Wrigg struggled to find new employment.¹⁵ She was eventually hired by an accounting firm in Great Falls where she earned \$87,000 per year.¹⁶ After receiving a demand from JCCS for performance under the Agreement, Wrigg filed a Petition for Declaratory Judgment to determine whether the Agreement was enforceable.¹⁷

6. Robert C. Bird, *Employment as a Relational Contract*, 8 U. Pa. J. Lab. & Emp. L. 149, 165 (Fall 2005).

7. *Wrigg*, 265 P.3d at 648.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Wrigg*, 265 P.3d at 648.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

B. Trial Court's Decision

The district court used the factors set forth in *Dobbins, De Guire & Tucker, P.C. v. Rutherford, MacDonald & Olson*¹⁸ to determine if the Agreement was enforceable. In *Dobbins*, the Montana Supreme Court stated that a legal non-compete agreement must meet the following requirements: (1) it must be partial or restricted as to time and place; (2) it must be on some good consideration; and (3) it must be reasonable.¹⁹ The district court concluded the first requirement was met because the Agreement was limited to one year (time) and restricted to Lewis and Clark County and contiguous counties (place).²⁰ The second requirement was met because Wrigg received consideration in the form of continued employment when each new Agreement was signed.²¹ The third requirement was met because the Agreement did not prevent Wrigg from providing services to new clients regardless of where she was located.²²

C. The Parties' Arguments on Appeal

1. Wrigg's Argument

On appeal, Wrigg argued that enforcing the Agreement would only serve to punish her because there was no legitimate business interest to be protected and the Agreement unreasonably deprived her of her livelihood.²³ Wrigg maintained that termination without cause automatically voids non-compete agreements and suggested this idea was one of first impression for Montana, thus making it necessary to review how other jurisdictions have handled the same question.²⁴ Wrigg further argued that both *Dobbins* and *Mungas v. Great Falls Clinic, LLP*,²⁵ heavily relied on by JCCS, were inapplicable because in those cases the employees left voluntarily.²⁶ Finally, Wrigg argued that “a significant central issue” was “whether it [was] rea-

18. *Dobbins, DeGuire & Tucker, P.C. v. Rutherford, MacDonald & Olson*, 708 P.2d 577 (Mont. 1985).

19. *Dobbins*, 708 P.2d at 580.

20. Dec. & Or. on Mot. for Declaratory Judm., *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, at Conclusion of Law (hereinafter “COL”) ¶ 3 (Mont. 1st Jud. Dist. Ct. Lewis & Clark Co. Apr. 20, 2010) (Cause No. ADV-2009632) (hereinafter “Decision”).

21. *Id.* at COL ¶ 4.

22. *Id.* at COL ¶ 5.

23. Appellant's Opening Br., *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 2011 WL 3464851 at **9–10 (Mont. May 23, 2011) (No. DA 11-0147).

24. *Id.* at *10.

25. *Mungas v. Great Falls Clinic, LLP*, 221 P.3d 1230 (Mont. 2009).

26. Appellant's Opening Br., *supra* n. 23, at **10–11.

sonable to enforce a restrictive covenant when the employer terminate[d] the employment relationship without cause.”²⁷

Wrigg relied heavily on cases from New York and Illinois. Wrigg maintained that Montana should follow the reasoning set forth first in *Post v. Merrill Lynch, Pierce, Fenner & Smith*²⁸ and subsequently in both *Rao v. Rao*²⁹ and *Bishop v. Lakeland Animal Hospital, P.C.*³⁰ that there is no legitimate business interest in enforcing a non-compete agreement when the employer terminates the employment relationship without cause.³¹ In *Post*, the Court held that “where an employee is involuntarily discharged by his employer without cause and thereafter [competes] with his former employer . . . [a non-compete agreement] is unreasonable as a matter of law.”³² Subsequently, in dicta, the *Rao* court said that “the best way for an employer to protect its goodwill is to . . . retain the services of the employee.”³³ Building on *Rao*, the *Bishop* court reasoned that “the implied promise of good faith inherent in every contract precludes the enforcement of a noncompetition clause when the employee is dismissed without cause.”³⁴ Wrigg urged the Court to adopt the reasoning from *Post*, *Rao*, and *Bishop* as its own and hold the Agreement unenforceable.³⁵

Wrigg also claimed the contract was unenforceable on its face. Wrigg argued that there was no consideration for the Agreement.³⁶ Specifically, Wrigg argued that under *Access Organics, Inc. v. Hernandez*,³⁷ she was not provided any additional compensation at the time she signed the Agreement because it was not provided to her until after she became a shareholder; thus, the Agreement lacked consideration.³⁸ In *Access Organics*, the Court held that a non-compete agreement, signed after employment began, requires more than continued employment as consideration.³⁹ Like Wrigg, the plaintiff in *Access Organics* signed a non-compete agreement more than four months after he was hired and several weeks after he was given a promotion.⁴⁰ The plaintiff was laid off, rehired as a part-time employee a

27. *Id.* at *10.

28. *Post v. Merrill Lynch, Pierce, Fenner & Smith*, 397 N.E.2d 358 (N.Y. 1979), rehearing denied, 401 N.E.2d 219 (1979).

29. *Rao v. Rao*, 718 F.2d 219 (7th Cir. 1983).

30. *Bishop v. Lakeland Animal Hosp., P.C.*, 644 N.E.2d 33 (Ill. App. 2d Dist. 1994).

31. Appellant’s Opening Br., *supra* n. 23, at **12–20.

32. *Post*, 397 N.E.2d at 361.

33. *Rao*, 718 F.2d at 224.

34. *Bishop*, 644 N.E.2d at 36.

35. Appellant’s Opening Br., *supra* n. 23, at **12–17.

36. *Id.* at **20–23.

37. *Access Organics, Inc. v. Hernandez*, 175 P.3d 899 (Mont. 2008).

38. Appellant’s Opening Br., *supra* n. 23, at **21–23.

39. *Access Organics*, 175 P.3d at 903–904.

40. *Id.* at 901.

few months later, and then resigned from his part-time position to start his own competing company.⁴¹ The *Access Organics* Court held that there is insufficient consideration to support a non-compete agreement when an employee does not receive any benefit at the time the non-compete agreement is signed and the employer does not incur any obligation or detriment that did not already exist.⁴² Wrigg argued that she did not receive consideration because she did not sign the original agreement until after she made partner and that continued employment was not sufficient consideration for the subsequently executed agreements under *Access Organics*.⁴³

2. *JCCS's Argument*

JCCS argued that Wrigg was not terminated because the Agreement expired by its own terms and that Wrigg received adequate consideration for the Agreement.⁴⁴ JCCS relied almost exclusively on Montana law and argued that it was unnecessary and inappropriate to look outside Montana for legal authority.⁴⁵

First, citing several cases, JCCS noted that Montana law did not limit the enforceability of a non-compete agreement to those employees who were terminated with cause.⁴⁶ Accordingly, JCCS maintained that the trial court's failure to address the "good cause" question did not constitute legal error.⁴⁷ Similarly, relying heavily on *Mungas*, JCCS argued that the actual manner of departure was irrelevant and that the terms of the Agreement control.⁴⁸ The plaintiffs in *Mungas* (former physician partners) filed a declaratory judgment action against the Great Falls Clinic, LLP requesting that the non-compete clause of the Clinic's partnership agreement be declared void as a matter of law.⁴⁹ The *Mungas* Court remanded the case to the trial court, holding that the non-compete agreement was not an absolute prohibition on the partners' rights to engage in their chosen profession, and therefore it *may* be enforceable.⁵⁰ Based on this holding, JCCS maintained that *Mungas* stood for the proposition that the non-compete agreement is *per se* enforceable when a non-compete agreement specifies that the manner

41. *Id.*

42. *Id.* at 904.

43. Appellant's Opening Br., *supra* n. 23, at **20–22.

44. Appellee's Opening Br., *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 2011 WL 3487384 at *7 (Mont. July 18, 2011) (No. DA 11-0147).

45. *Id.* at **8–15.

46. *Id.* at **8–11; *see e.g. Mungas*, 221 P.3d at 1238; *Mont. Mt. Prods. v. Curl*, 112 P.3d 979 (Mont. 2005) (where the manner of termination did not merit attention by the Court).

47. Appellee's Opening Br., *supra* n. 44, at *12.

48. *Id.* at **9–10.

49. *Mungas*, 221 P.3d at 1234.

50. *Id.* at 1238.

of departure is irrelevant.⁵¹ Of significance, *Mungas* was remanded to the district court for a determination of whether the non-compete clause was reasonable,⁵² which was the exact question at issue in *Wrigg*.

JCCS relied on *Access Organics* to support its argument that Wrigg received consideration in exchange for signing the Agreement.⁵³ In dicta,⁵⁴ the *Access Organics* Court stated that consideration exists if the agreement is signed at the time of hiring because “the employee and the employer engage in a bargained-for exchange: the employer obtains the desired non-compete agreement, and, in return, the employee receives employment.”⁵⁵ JCCS maintained that Wrigg signed a new Agreement in exchange for a new guaranteed term of employment at the end of each term of the shareholder agreement.⁵⁶ Thus, *Access Organics* was distinguishable from *Wrigg*. According to JCCS, Wrigg signed the Agreement in exchange for a specified term of employment, whereas the agreements in *Access Organics* were afterthought agreements—agreements signed after the date of hire.⁵⁷ Under JCCS’s interpretation of *Access Organics*, Wrigg received consideration for the Agreement in the form of a set term of employment. Furthermore, JCCS pointed out that Wrigg was paid for the full contract period.⁵⁸

D. Montana Supreme Court Decision

The Montana Supreme Court, in a unanimous decision by a five-justice panel, reversed the trial court. The Court focused on the manner in which Wrigg’s employment relationship ended.⁵⁹ The Court clarified that an employer must first establish a legitimate business interest as a threshold step to any analysis of the reasonableness of a non-compete agreement.⁶⁰ For the first time, the Court considered whether an employer could have a legitimate business interest if it terminated the employer-employee relation-

51. Appellee’s Opening Br., *supra* n. 44, at **9–10.

52. *Mungas*, 221 P.3d at 1238.

53. Appellee’s Opening Br., *supra* n. 44, at **21–22.

54. The question in *Access Organics* was whether a non-compete agreement signed four months after employment started was enforceable. *Access Organics*, 175 P.3d at 903. Although the discussion of what constitutes consideration when a non-compete agreement is signed concurrently with the start of employment is helpful to the general understanding of what forms sufficient consideration under the *Dobbins* test, it did not provide the basis for the ultimate holding in *Access Organics*. *Id.* at 904.

55. *Id.* at 903.

56. Appellee’s Opening Br., *supra* n. 44, at *20.

57. *Id.* at **21–22.

58. *Id.* at *24.

59. *Wrigg*, 265 P.3d at 654.

60. *Id.* at 650.

ship.⁶¹ Accordingly, the Court reviewed how other jurisdictions have resolved the same issue.⁶²

The Court reviewed several cases from several different jurisdictions, particularly focusing on *Rao*.⁶³ C.R. Mohan Rao, M.D., S.C. (“Mohan”) was a medical service corporation based in Chicago, Illinois, and M. Hari Kishan Rao (“Hari”) was a thoracic and cardiovascular surgeon.⁶⁴ Hari began working for Mohan in the spring of 1976.⁶⁵ In December of 1977, he signed an employment agreement effective as of the date he was hired.⁶⁶ The agreement included a non-compete clause prohibiting Hari from practicing in Holy Cross Hospital upon his departure from employment unless Hari was a 50% shareholder in Mohan at that time.⁶⁷ So long as Hari was not a 50% shareholder, the non-compete clause was triggered when Hari’s employment ended “for any reason.”⁶⁸ In 1979, on the eve of Hari’s shareholder eligibility date, Mohan exercised its right not to renew the contract under the agreement.⁶⁹ The notice included an offer to negotiate a new employment agreement.⁷⁰ After his departure from Mohan, Hari continued working at Holy Cross Hospital.⁷¹ Mohan filed suit to enforce the agreement.⁷²

In *Rao*, the court held that the non-compete agreement was unenforceable because Mohan did not act in good faith in terminating Hari, and therefore Mohan did not have a legitimate business interest.⁷³ The court also held that the non-compete clause was unreasonably oppressive.⁷⁴ The *Rao* court echoed existing Illinois case law that employees are allowed to take the skills and knowledge gained during employment with them.⁷⁵ While the *Rao* court said that a company’s goodwill is a legitimate business interest, it also stated that “the best way for an employer to protect its goodwill is to continue to retain the services of the employee.”⁷⁶ Hari was dismissed only ten days prior to the maturation of his option to purchase shares in the

61. *Id.* at 652.

62. *Id.* at 652–654.

63. *Id.* at 653–654.

64. *Rao*, 718 F.2d at 221.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Rao*, 718 F.2d at 221.

71. *Id.*

72. *Id.*

73. *Id.* at 222–223.

74. *Id.* at 223.

75. *Id.* at 223–224.

76. *Rao*, 718 F.2d at 224.

company.⁷⁷ The court found that under these circumstances a restrictive covenant “is not reasonably necessary to protect an employer’s goodwill.”⁷⁸ Moreover, the court reasoned that in such cases the only purpose for imposing a restrictive covenant is to prevent competition—“an insufficient justification for enforceability.”⁷⁹

The *Wrigg* Court concluded that when an employer terminates the employer-employee relationship without cause, it “lacks a legitimate business interest in a covenant” and therefore the Agreement should not be enforced.⁸⁰ In dicta, however, the Court asserted that there may be circumstances in which an employer can terminate an employee for cause and retain the right to enforce the non-compete agreement.⁸¹ The Court made no determination regarding what those circumstances may be, maintaining that “[t]he employer . . . would have to establish the legitimacy of the business interest and the nature of the risk posed by the former employee’s competition.”⁸²

III. LEGAL BACKGROUND

Generally, non-compete agreements are contracts between employers and employees that prevent post-employment competition by a former employee. Non-compete agreements are intended to protect the employer from an employee’s unauthorized use of protected information gained while employed by the former employer or prevent an employee from soliciting business clients for the employee’s personal gain at a new position.⁸³ Because of the significant restraints they impose on an employee, such agreements are generally disfavored throughout the United States.⁸⁴ Nonetheless, they are common and often found to be enforceable.⁸⁵

The enforceability of a non-compete agreement depends on many factors. To be enforceable, an agreement needs to be based on good consideration, be reasonable as to time and place, and should not be against public policy.⁸⁶ Public policy concerns include, among others, that the covenant is not intended to prevent ordinary competition but is meant to protect a legiti-

77. *Id.* at 221.

78. *Id.* at 224.

79. *Id.*

80. *Wrigg*, 265 P.3d at 653.

81. *Id.*

82. *Id.*

83. Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 Am. Bus. L.J. 107, 116 (Spring 2008).

84. Vanko, *supra* n. 1, at 1; Garrison & Wendt, *supra* n. 83, at 164–165.

85. Vanko, *supra* n. 1, at 12–13; Garrison & Wendt, *supra* n. 83, at 121–123.

86. *See e.g. A.E.P. Indus., Inc. v. McClure*, 302 S.E.2d 754, 760–761 (N.C. 1983).

mate business interest.⁸⁷ In addition to the basic requirements of a non-compete agreement, whether the employment relationship ends at the behest of the employer or employee, and under what specific circumstances the relationship ends, may also impact the enforceability of a non-compete agreement.⁸⁸

There are varying methods to adjudicate non-compete agreements. Historically, courts have used three distinct but wide-ranging approaches for determining the validity of non-compete agreements when an employee is involuntarily terminated.⁸⁹ In some jurisdictions, including New York, non-compete agreements are *per se* invalid when an employee is involuntarily terminated.⁹⁰ In others, including Florida, the nature of termination is not considered at all.⁹¹ But, the majority of courts fall in the middle of the spectrum and have found that the validity of non-compete agreements turns on the nature of the employer's conduct in effectuating the termination.⁹² Thus, in these jurisdictions, non-compete agreements are invalid when: (1) the employee is involuntarily terminated; (2) the employer shows bad faith in the termination; *or* (3) equitable considerations militate against enforcement.⁹³

Regardless of which approach is used, the competing interests of the employer and the employee are considered to some extent. Each jurisdiction is different, and there are numerous factors used to assess the validity of covenants not to compete. However, two factors frequently considered by the courts are the employee's interest in working in her chosen profession and the employer's legitimate business interest in preventing her from competing.⁹⁴ Moreover, courts favor non-compete agreements that are limited in duration, geographical area, and the scope of activity restricted. As previously stated, the general rule is that a covenant not to compete should be no more restrictive than necessary to protect the employer's interests.⁹⁵ Thus, because the employee has a right to continue in her chosen profes-

87. See e.g. *Frieburger v. J-U-B Engs., Inc.*, 111 P.3d 100, 104–105 (Idaho 2005).

88. See e.g. *Rao*, 718 F.2d 219.

89. Vanko, *supra* n. 1, at 9.

90. *Eastman Kodak Co. v. Carmosino*, 77 A.D.3d 1434, 1436 (N.Y. App. Div. 2010); *Post*, 397 N.E.2d at 361; Vanko, *supra* n. 1, at 10.

91. See e.g. *Henao v. Prof. Shoe Repair, Inc.*, 929 So. 2d 723, 726–727 (Fla. 5th Dist. App. 2006); *Twenty Four Collection, Inc. v. Keller*, 389 So. 2d 1062, 1063–1064 (Fla. 3d Dist. App. 1980); Vanko, *supra* n. 1, at 9.

92. *Insulation Corp. of Am. v. Brobston*, 667 A.2d 729, 733 (Pa. 1995); *Pulse Tech., Inc. v. Dodrill*, 2007 WL 789434 at **8–9 (D. Or. Mar. 14, 2007); *PharMethod, Inc. v. Caserta*, 382 Fed. Appx. 214, 221 (3d Cir. 2010); *Rao*, 718 F.2d at 224; Vanko, *supra* n. 1, at 9.

93. Vanko, *supra* n. 1, at 11.

94. *Dobbins*, 708 P.2d at 580.

95. *Mont. Mt. Prods*, 112 P.3d at 981; *Daniels v. Thomas, Dean & Hoskins, Inc.*, 804 P.2d 359, 371 (Mont. 1990); *Rao*, 715 F.2d at 224; *Shapiro v. Regent Printing Co.*, 549 N.E.2d 793, 799 (Ill. 1999) (Jiganti, J., dissenting).

sion, a non-compete agreement is not enforced unless a business's protectable interests are at risk.⁹⁶ Courts usually⁹⁷ recognize an employer's legitimate interest in protecting its trade secrets and goodwill.⁹⁸ But many courts have held that the skills, experience, and knowledge gained during employment are the employee's assets and are not protectable business interests of the former employer.⁹⁹

Montana, like many other states, balances the equities of the employer and employee. In Montana, non-compete agreements are generally disfavored.¹⁰⁰ Montana Code Annotated § 28–2–703, which provides that any contract in restraint of trade is generally void, is an embodiment of Montana's common law.¹⁰¹ Specifically, the statute declares that “[a]ny contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided for by § 28–2–704 [excepting the sale of goodwill of a business] or § 28–2–705 [excepting dissolution of partnerships], is to that extent void.”¹⁰² The Montana Supreme Court has found that § 28–2–703 applies to all forms of restrictive covenants, whether or not they are directly related to employment.¹⁰³ Although § 28–2–703 would seem to prohibit the type of covenant at issue in *Wrigg* on its face, that is not the case. The statute only prohibits a total restraint of trade (i.e., the inability to practice one's chosen profession in any capacity), not a partial restraint. Where a restraint is only partial, it may be allowed depending on the reasonableness of the restraint.¹⁰⁴ Thus, when a non-compete agreement is not a total restraint on

96. John Dwight Ingram, *Covenants Not to Compete*, 36 Akron L. Rev. 49, 51 (2002).

97. Except for a few very narrow exceptions, California does not recognize employee non-compete agreements at all. Cal. Bus. & Professions Code Ann., §§ 16600–16602 (West 2012) (first enacted in 1872). California common law provides questionable applicability of the “trade secret exception” to non-compete clauses under contract law theory; however, such violations are a clearly identified cause of action under California tort law. Thus, trade secrets are generally protected under the Uniform Trade Secret Act. See e.g. *Ret. Group v. Galante*, 98 Cal. Rptr. 3d 585, 592–593 (Cal. App. 4th Dist. 2009) (distinguishing lists that are the product of directed effort, are not readily available/identifiable by other means, and are used by former employees to directly solicit a former employer's customers from mere identities and locations of customers where anyone could easily identify the entities as potential customers as worthy of trade secret protection); *Dowell v. Biosense Webster, Inc.*, 102 Cal. Rptr. 3d (Cal. App. 2d Dist. 2009).

98. Garrison & Wendt, *supra* n. 83, at 116.

99. *Pathfinder Commun. Corp. v. Macy*, 795 N.E.2d 1103, 1110 (Ind. App. 2003); *Donahue v. Permacel Tape Corp.*, 127 N.E.2d 235, 240 (Ind. 1955); Ingram, *supra* n. 96, at 51.

100. Mont. Code Ann. § 28–2–703 (2011); *Access Organics*, 175 P.3d at 902; *Dumont v. Tucker*, 822 P.2d 96, 98 (Mont. 1991).

101. See *Schwaneckamp v. Modern Woodmen of Am.*, 120 P. 806, 807 (Mont. 1912).

102. Mont. Code Ann. § 28–2–703.

103. See *St. Med. Oxygen & Supply v. Am. Med. Oxygen Co.*, 782 P.2d 1272, 1274–1275 (Mont. 1989) (involving a prohibition on disclosure of customer lists and trade secrets); *Haggerty v. Gallatin Co.*, 717 P.2d 550, 556–557 (Mont. 1986) (involving a commercial use restriction in the context of a negative easement).

104. *Mont. Mt. Prods.*, 112 P.3d at 982.

trade, the courts look to factors such as limitations on time and geographic scope to determine whether the restrictions violate § 28-2-703.¹⁰⁵

IV. ANALYSIS

When a Montana court determines the validity of a non-compete agreement, it follows a two-step process. First, it looks to see if the agreement is a full restraint on trade and then, when appropriate, looks to see if the agreement meets the necessary elements to be considered reasonable.¹⁰⁶ A full restraint on trade is *per se* unreasonable.¹⁰⁷ A partial restraint on trade is reasonable when: (1) it is limited in time or place; (2) it is based on good consideration; and (3) it affords “reasonable protection for and does not impose an unreasonable burden upon the employer, the employee or the public.”¹⁰⁸

The *Wrigg* Court did not adhere to the two-step process it announced. Prior to *Wrigg*, Montana had not addressed the validity of non-compete agreements when an employee was involuntarily terminated from her employment.¹⁰⁹ This question was narrowly addressed in *Wrigg*. The Court specifically addressed only whether JCCS had a legitimate business interest in enforcing the Agreement when it terminated *Wrigg*’s employment without cause.¹¹⁰ Although JCCS argued that the manner in which the relationship ended was irrelevant to determining the enforceability of the Agreement, the Court focused exclusively on this issue.¹¹¹

While this author agrees with the Court’s ultimate decision, she argues that the Court’s discussion of the issues was incomplete. The Court first should have evaluated whether the Agreement was generally an enforceable contract. In so doing, the Court could have provided additional guidance for future cases. Furthermore, the psychological contract, discussed below, is critical in today’s employer-employee relationship because of the employee’s perceived promises from the employer. Thus, in discussing whether an employer choosing to end an employment relationship can enforce a non-compete clause, the Court’s analysis would have benefitted from a discussion of the psychological contract. Finally, the Court should have established a rebuttable presumption of invalidity of non-compete agreements when the employee is involuntarily terminated.

105. *St. Med. Oxygen & Supply*, 782 P.2d at 1275.

106. *Wrigg*, 265 P.3d at 649.

107. *Id.*

108. *Id.*

109. *Id.* at 654.

110. *Id.*

111. *Id.* at 653–654.

A. *The Agreement*

Any assessment of a non-compete agreement should address the validity of the underlying contract. This is especially true in Montana where non-probationary employees may only be terminated for good cause.¹¹² Because Montana's statutory scheme prohibits at-will employment, the only way an employer can legally let someone go without cause is if the employment contract provides for it. Such an agreement allows an employer to contractually circumvent many of the protections Montana's statutory scheme provides to employees. Accordingly, it makes sense that courts should first address whether the underlying contract is even valid. If the contract is invalid, determining whether a non-compete clause is enforceable would be superfluous. Yet, the *Wrigg* Court failed to address any of the contract questions argued by the parties and found that the involuntary termination issue was dispositive.¹¹³ Addressing the contract issues would have provided district courts with guidance on how to resolve similar matters in the future and, by providing more meaningful precedent, could have potentially prevented legal disputes entirely.¹¹⁴ In particular, the Court should have addressed whether there was any consideration for the Agreement and whether the contractual provisions were enforceable on their face.

1. *Consideration*

Consideration is only one of the basic elements of contracts. In Montana, there are four basic elements—capacity to contract, offer, acceptance, and consideration—and all four elements must exist for a contract to be enforceable.¹¹⁵ As such, courts require adequate consideration to support a covenant not to compete.¹¹⁶ Because of the potential impact on employees, if the non-compete agreement is signed after the employee starts her job, the agreement must be supported by new or additional consideration.¹¹⁷

Yet the Court in *Wrigg* failed to address whether JCCS provided any consideration in exchange for *Wrigg* signing the Agreement. *Wrigg* argued that she did not receive any consideration for the non-compete clause because she did not receive the Agreement until several months after she ac-

112. Mont. Code Ann. § 39-2-904; *see generally* Mont. Code Ann. §§ 39-2-901 et seq. (Wrongful Discharge from Employment Act).

113. *Wrigg*, 265 P.3d at 648.

114. This case presented a unique opportunity for the Court to elucidate Montana law regarding what is (or is not) a legitimate business interest as required under *Dobbins*. Thus, it is possible that the Court intentionally left the remaining contract issues alone so that the rule of law set forth in *Wrigg* is not diluted by the discussion of other issues.

115. Mont. Code Ann. § 29-2-102.

116. *Ingram*, *supra* n. 96, at 54.

117. *Access Organics*, 175 P.3d at 903.

cepted the position as shareholder.¹¹⁸ In response, JCCS argued that Wrigg was guaranteed employment for a set term and that this guarantee was sufficient to meet the consideration requirement necessary for the Agreement to be enforceable.¹¹⁹ Good consideration is a bargained-for benefit received by the promisor that she was not already entitled to at the time the agreement was made.¹²⁰ Therefore, *continued* employment by itself cannot be sufficient consideration.¹²¹ JCCS, relying on *Access Organics*, contended that Wrigg was guaranteed a specified term of employment to which she was not entitled at the time of contracting.¹²² The Court should have evaluated the consideration question, thus clarifying the *Access Organics* decision.

While a holding that Wrigg did (or did not) have adequate consideration would not have altered the *Wrigg* decision,¹²³ any such holding likely would have helped district courts resolve this same question for later litigants. Both Wrigg and JCCS used *Access Organics* in support of their respective arguments concerning consideration, and they both accurately restated the holding of that case. Past consideration will not suffice to make a non-compete agreement enforceable,¹²⁴ but a guaranteed span of employment might rise to the level of adequate consideration.¹²⁵ In Montana, “clear evidence [is needed to show] that the employee received good consideration in exchange for [executing a non-compete agreement].”¹²⁶ *This* is the question that further analysis on this issue would have resolved. Or, if not actually resolving the issue, further analysis of this question could have provided district courts with the necessary guidance to resolve future disputes.¹²⁷

If the Court had reviewed whether there was consideration, it could have determined that there was insufficient consideration to uphold the Agreement. Independent consideration exists when a non-compete agreement is signed ancillary to new employment,¹²⁸ when an employee is given

118. Appellant’s Opening Br., *supra* n. 23, at **20–23.

119. Appellee’s Opening Br., *supra* n. 44, at **21–22.

120. *Restatement (Second) of Contracts* § 71 (1981); Mont. Code Ann. § 28–2–801.

121. *Access Organics*, 175 P.3d at 903.

122. Appellee’s Opening Br., *supra* n. 44, at **13, 21.

123. It is clear that the *Wrigg* Court assumed the Agreement was a legal contract, albeit unenforceable on other grounds. A finding that consideration existed would not have altered the outcome of this case.

124. *Access Organics*, 175 P.3d at 903.

125. *Id.* at 904.

126. *Id.*

127. It is possible that the Court intentionally analyzed the limited question of whether the Agreement was enforceable when Wrigg was involuntarily terminated to provide a succinct answer to that question. If that was the case, this author believes that such an approach was shortsighted because the Court will likely see this question again in the near future.

128. *Access Organics*, 175 P.3d at 903.

a raise or promotion,¹²⁹ or when an employee is given access to confidential information.¹³⁰ Even when independent consideration is provided, the agreement is enforceable only if it is signed by the employee at the time the consideration is actually received.¹³¹ In *Wrigg*, the original non-compete was signed two months after Wrigg became partner. Thus, as to the first agreement, there likely was no consideration. The second and third agreements provided no raise or promotion. At most, Wrigg was provided “guaranteed” employment. Yet in Montana, where employees are not subject to at-will employment, a term contract does not provide guaranteed employment. On the contrary, by signing the shareholder agreement, Wrigg went from having job security (to the extent that good cause was required to terminate her) to having no job security (to the extent that JCCS was not required to renew the contract at any time). Thus, as to the second and third agreements, there likely was no consideration.

2. *Contract Provisions*

In Montana, term employment agreements may be a means by which employers can legally get around Montana’s prohibition against at-will employment. Upon expiration of the term, an employer may terminate a long- (or short-) time employee for a good reason, a bad reason, or no reason at all. In other words, upon expiration of the term, a Montana employer no longer has to have good cause to terminate the employee. As such, term contracts should be viewed with suspicion and in favor of the employee. This is especially true when the employment agreement includes a non-compete clause that will limit an ex-employee’s ability to practice her trade elsewhere.

The state of Virginia determined that non-compete agreements are unenforceable in conjunction with term employment contracts. For example, in *Clinch Valley Physicians, Inc. v. Garcia*,¹³² the Court held that the non-compete clause in a term employment contract was unenforceable as a matter of law.¹³³ Luis Garcia (“Garcia”) was a shareholder-employee of Clinch Valley Physicians, Inc. (“CVP”) who, subsequent to his original hire, agreed to a proposed amendment to his employment agreement with CVP.¹³⁴ The amended contract was a one-year term contract¹³⁵ that included provisions for termination and a non-compete clause (nearly identi-

129. *Id.*

130. *Daniels*, 804 P.2d at 371.

131. *Access Organics*, 175 P.3d at 903–904.

132. *Clinch Valley Phys., Inc. v. Garcia*, 414 S.E.2d 599 (Va. 1992).

133. *Id.* at 601.

134. *Id.* at 600.

135. *Id.*

cal to that signed by Wrigg) that was triggered when Garcia left “for any reason.”¹³⁶ Upon expiration of the contract in 1990, Garcia filed suit for declaratory judgment to determine whether the non-compete provision of the employment agreement was enforceable.¹³⁷ Garcia argued that the non-compete agreement was not enforceable because he did not voluntarily leave—his employer had provided notice of its intent not to renew the contract, and the contract expired.¹³⁸

Although the result was the same for the employees in *Clinch Valley Physicians* and *Wrigg*, the respective Courts’ reasoning differed. The *Clinch Valley Physicians* Court determined whether the non-compete clause was enforceable based on a strict interpretation of the terms of the employment agreement;¹³⁹ *Wrigg*, rather, hinged on whether JCCS had a legitimate protectable business interest when it initiated termination of the employment relationship.¹⁴⁰ In *Wrigg*, the Court recognized but then declined to address JCCS’s question of whether *terminating* the Agreement is the same as allowing it to *expire*¹⁴¹—both terms being fundamental to the Agreement. JCCS maintained that a discussion of reasonableness concerning “involuntarily terminated” employees was immaterial because *Wrigg* was not terminated; her contract expired.¹⁴² The non-compete clause underlying *Wrigg* contains the following provisions:

7. POST-EMPLOYMENT REPRESENTATION OF CLIENTS. If this Agreement is TERMINATED for any reason
-
12. TERMINATION. [Wrigg] shall be TERMINATED automatically and immediately upon the happening of any of the following events:
-
- d. For any reason as determined by a 75% vote of the Board of Directors of JCCS.¹⁴³

Termination is not defined outside this context anywhere in the shareholder agreement, although the agreement expired on June 30, 2009.¹⁴⁴ The expiration date is relevant because, under JCCS’s argument, *Wrigg* was not terminated but rather her contract expired. And even though *Wrigg* was asked to leave before the end of her term, she was paid through the expiration date of the shareholder agreement.¹⁴⁵ Under the terms of the shareholder agree-

136. *Id.* at 601.

137. *Id.* at 600–601.

138. *Clinch Valley Phys.*, 414 S.E.2d at 600–601.

139. *Id.* at 601.

140. *Wrigg*, 265 P.3d at 654.

141. *Id.*

142. *Id.*

143. Appellant’s Opening Br., *supra* n. 23, at Ex. 2.

144. *Wrigg*, 265 P.3d at 648.

145. *Id.* at 654.

ment, is expiration the equivalent of termination? If the expressions are not the same, does the Agreement come into play if the contract is in all respects complied with but not renewed by the parties? These questions concerning the actual terms of the shareholder agreement are questions the Court should have addressed.

B. *The Psychological Contract*

Employment relationships have always existed between employees and employers with underlying mutual expectations on the part of each. These expectations, or obligations, emerge when the employee perceives that her contributions as an employee create a reciprocal obligation by her employer.¹⁴⁶ These mutual obligations become the psychological contract. A psychological contract can emerge from actual promises made, company recruitment material, employee personnel or policy handbooks, and even through the general knowledge of coworkers passed through idle chit-chat at work.¹⁴⁷ Beginning in the 1980s, the focus of employment relationships began to change.¹⁴⁸ They are no longer characterized by steady, long-term employment.¹⁴⁹ Instead, today's relationships are characterized by advancing in the job market through employer-shuffling—taking to each new employer the knowledge acquired in past employment.¹⁵⁰ Because of this shift, a new, implied contract has developed. Instead of committing to long-term employer-employee relationships, employers are impliedly offering marketability to their employees.¹⁵¹ This change of focus has affected the perceived value of employees to their employers¹⁵² and hence should also affect how courts analyze legitimate business interests in the post-termination limits of mobility and employability imposed by non-compete agreements.¹⁵³

146. Bird, *supra* n. 6, at 165.

147. Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. Rev. 519, 539 (Feb. 2001).

148. Garrison & Wendt, *supra* n. 83, at 165.

149. *Id.*

150. *Id.* at 166–167.

151. *Id.*

152. Katherine V.W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 Conn. L. Rev. 721, 737 (Spring 2002).

153. In order to adequately address legitimate business interests, application of the psychological theory needs to be limited. Like any other social contract theory, the psychological contract theory is not boundless. That is to say, it would be impossible for the psychological contract theory to address every employment scenario. What happens when the employer and employee's expectations are diametrically in conflict with each other? How is an employer supposed to know exactly what obligations are expected of him? How does an employer know when the "perceived" obligations even start? These types of questions can be adequately addressed only if any alleged breach in the psychological contract is based in the reasonable expectations of the employee.

The psychological contract is analogous to an implied contract. Thus, using the psychological contract in analyzing the reasonableness of a non-compete agreement is rational. Similar to the psychological contract, an employee's understanding of an implied contract is derived from her experience at the work place. For example, when an employee is provided with the company's personnel policy, her expectations concerning her rights and obligations change, presumably enhancing the employment relationship¹⁵⁴ or at least clarifying it. When an employer chooses to establish particular policies and applies them equally to all the employees, the employer establishes a continuing obligation to his employees.¹⁵⁵ At least as applied to personnel policies, there does not need to be a mutual understanding between employer and employee, nor does the employee need to know the specifics of the company's policies to create an enforceable implied contract.¹⁵⁶ Under these circumstances, "[t]he employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly."¹⁵⁷ Even though this example of an implied contract is phrased in terms of the older psychological contract model, the concept of unspoken mutual obligations that are the basis of implied contracts is the crux of the psychological concept theory.

The current psychological contract concept tends to impact the employee more than the employer. Psychological contracts are only the employee's beliefs about her employer's obligations and are not enforceable contracts *per se*.¹⁵⁸ Based on past action or outright promises, an employee has specific expectations about what the employer "owes" her by way of position, wages, or long-term job security.¹⁵⁹ For example, if an employee has worked for a company for several years and has watched coworkers promoted at regular intervals, that employee would likely expect to be promoted at similar intervals in her own career. All other things being equal, if, instead, the employee becomes stagnant in the company or, even worse, is demoted or receives a pay cut, the employee may find the employer breached the psychological employment contract. Although these "breaches" may not be legally actionable claims, they could impact the employee's attitude and performance, potentially leading to either the employee or employer terminating the relationship.¹⁶⁰

154. *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 892 (Mich. 1980).

155. *Id.*

156. *Id.*

157. *Id.*

158. Bird, *supra* n. 6, at 165.

159. *Id.* at 167.

160. *Id.* at 165–166.

In the employment context, it is reasonable that the perception of mutual obligations that exist between an employee and employer evolve as economic and social conditions change. Prior to the “computer age,”¹⁶¹ the standard employment arrangement had the employer promising the employee an opportunity for continued employment and advancement in exchange for employee loyalty.¹⁶² As a result, businesses were able to engage in long-term planning and invest in their employees,¹⁶³ while the employees were not burdened with uncertainty. As the American workforce in white-collar industries increased, a new employment relationship evolved that de-emphasized stability and emphasized mobility for employees.¹⁶⁴ Instead of promising long-term employment, employers now provide the tools for continued employability, which makes employees more marketable in their chosen fields.¹⁶⁵ As a result, non-compete agreements have become more provocative and contentious in an era when employees are becoming more mobile and more dependent on access to external job markets while employers offer less long-term employment and become “more aggressive in their use of non-compete agreements.”¹⁶⁶ As the use of non-compete agreements increases because our economic and social conditions change, it becomes more important to understand the changing perception of the mutual obligations between employers and employees.

The psychological contract demands that employers and employees interact with each other in good faith. It is a basic premise of a non-compete agreement that a departing employee is restricted from practicing her trade under certain conditions. Thus, when a non-compete agreement is enforced, the employer’s ability to act in good faith and fulfill its implicit promise to ensure the employee is competitive and employable in his chosen field is more difficult. The facts in *Rao*, discussed above, are illustrative of this point. When Mohan terminated Hari, he acted in bad faith.¹⁶⁷ If Mohan were successful in his bid to enforce the restrictive covenant, Hari would have been unable to practice his chosen profession in the Chicago area—decreasing his marketability in direct contrast to the implied promises made to him under the psychological contract. Hari clearly expected that he could take the skills and knowledge he gained while working

161. The computer age is characterized by the idea that current industry is embodied with the ability of individuals to freely transfer information while simultaneously having instant access to information that previously would have been difficult to find.

162. Garrison & Wendt, *supra* n. 83, at 165.

163. *Id.*

164. *Id.* at 166.

165. *Id.* at 166–167.

166. Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. Pa. L. Rev. 379, 415 (Dec. 2006).

167. *Rao*, 718 F.2d at 223.

for Mohan with him to the hospital at which he practiced.¹⁶⁸ Moreover, under Illinois law, Hari was entitled to take those skills upon his departure from Mohan.¹⁶⁹ The *Rao* court's decision was largely based on Mohan's bad faith action in terminating Hari. If Mohan had instead waited for Hari to try and expand his practice to other local hospitals before trying to enforce the restrictive covenant, it may have succeeded in its attempt to enforce the non-compete agreement while simultaneously fulfilling any obligation under the psychological contract.

C. *Involuntary Termination*¹⁷⁰

In our current economic environment, an involuntarily terminated employee finds herself in dire employment circumstances that can only be exacerbated by a potentially enforceable non-compete agreement. She is unexpectedly without an income and, unless she was already looking, the possibility of finding a job in her chosen field is unknown. In such a situation, the added restraint of a non-compete agreement appears to lose its value as a business tool and instead becomes a method of punishment.¹⁷¹ Unfortunately, the Court's holding in *Wrigg* is not completely clear on the value of non-compete agreements when the employee is involuntarily terminated. The Court recognized that "circumstances may exist in which the employer chooses to end the employment relationship . . . [for cause] . . . [providing] the employer with a legitimate business reason to seek to enforce the covenant."¹⁷² Yet the Court held that "JCCS elected to terminate its employment relationship with Wrigg, and, accordingly, [could not] enforce its covenant under these circumstances."¹⁷³ The ambiguity in the phrase "under these circumstances" may give rise to multiple interpretations, including both the implication that when an employee is fired for cause there could be a legitimate business interest to protect¹⁷⁴ as well as the inference that *whenever* an employer terminates the employment relationship there is no

168. *Id.* at 221.

169. *Id.* at 223 (citing *MBL (USA) Corp. v. Diekman*, 445 N.E.2d 418, 424 (Ill. App. 1st Dist. 1983)).

170. "Involuntary termination" includes employees who are fired, laid off, under contracts that expire, etc. Because there was a dispute about whether Wrigg was terminated or whether her contract merely expired, the inclusive meaning of the phrase is more relevant.

171. *See Post*, 397 N.E.2d at 360–361.

172. *Wrigg*, 265 P.3d at 653.

173. *Id.* at 654.

174. For example, an employee fired for stealing confidential company information or embezzling company funds has imbued such a level of distrust that it is hard to imagine an employer not firing her. Under such circumstances, provided the non-compete terms are otherwise reasonable under state law, there likely is no reason the agreement would not be enforced. While this is only one example, it aptly demonstrates that there could be valid reasons to enforce non-compete agreements when an employee is terminated for cause.

legitimate business interest to protect. The Court essentially provided for both a presumption against enforcement as well as a *per se* rule of invalidity.

As non-compete agreements become more commonplace in the work force, more and more courts are looking to the facts and circumstances surrounding termination to see if they are enforceable.¹⁷⁵ Thus, it is important to note the two approaches in other jurisdictions. Several states provide guidance for why non-compete agreements should not be enforced when an employee is involuntarily terminated, with or without cause. For example, California is frequently cited by opponents of non-compete agreements as an example of how such agreements hinder job growth and advancement.¹⁷⁶ These same commentators credit the quick growth of the Silicon Valley to California's public policy promoting the free mobility of its labor market, claiming that those workers were not hampered by the constraints of a non-compete agreement.¹⁷⁷ In fact, California courts have found the public policy against non-compete agreements so compelling that an otherwise at-will employee can bring a wrongful discharge claim against an employer who terminates employment when the employee refuses to sign a non-compete agreement.¹⁷⁸ As the California courts have observed, the law against non-compete agreements protects its residents and confirms that all citizens shall retain the legal right to engage in businesses and occupations of their choosing.¹⁷⁹ California's jurisprudence has shown that its underlying reasoning against non-compete agreements in employment contracts is a fundamental policy of the state.¹⁸⁰ Such a policy is most important when an employee is involuntarily terminated, whether the termination is with or without cause.

Similarly, New York's employee-friendly policy concerning non-competes may explain its status as one of the world's leading economic cities.

175. *Brobston*, 667 A.2d at 733; *Pulse Tech., Inc. v. Dodrill*, 2007 WL 789434 at **9–10 (D. Or. Mar. 14, 2007); *PharMethod, Inc. v. Caserta*, 382 Fed. Appx. 214, 221 (3d Cir. 2010); *Rao*, 718 F.2d at 224–225; *Vanko*, *supra* n. 1, at 9.

176. *Ingram*, *supra* n. 96, at 79.

177. *Id.*

178. *See Silguero v. Creteguard, Inc.*, 113 Cal. Rptr. 3d 653 (Cal. App. 2d Dist. 2011); Cal. Bus. & Professions Code Ann. § 16600.

179. *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573 (Cal. App. 2d Dist. 1994).

180. *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290 (Cal. 2008) (affirming the long-standing legislative policy that its citizens had the right to pursue the career of their choice); *Application Group, Inc. v. Hunter Group, Inc.*, 72 Cal. Rptr. 2d 73, 85–86 (Cal. App. 1st Dist. 1998) (applying California law to an out-of-state employment contract to advance California's fundamental policy of protecting an employee's right to pursue the occupation of their choice); *but see Brown & Brown, Inc. v. Mudron*, 887 N.E.2d 437, 440 (Ill. App. 3d Dist. 2008) (applying Illinois law to out-of-state employment contract to advance Illinois' public policy of providing its workers greater protection from the negative effects of restrictive covenants than Florida law would provide).

Its rapidly-growing market¹⁸¹ had to be served by those who could adjust to the expanding needs more easily. New York has “powerful considerations of public policy which militate against sanctioning the loss of a man’s livelihood.”¹⁸² New York does not have a near-absolute ban on non-complete agreements like California, but it goes beyond protecting employees who are involuntarily terminated without cause. And like California, New York’s policy of protecting its employees might explain why its workforce has been able to meet the employment needs of its historic expanding economy. The New York courts have developed a *per se* rule against enforcing non-compete agreements when an employee has been involuntarily terminated without cause¹⁸³ as Montana seemed to in *Wrigg*. However, New York took it one step further and provided protection for employees under personal service contracts, stating that such contracts will only be enforced, regardless of the termination circumstances, if an employer can show that the services provided by the departing employee are unique, special, or extraordinary to the specific departing employee.¹⁸⁴ When an employer terminates the employee, “[the employer] should not be permitted to use offensively [a non-competition] clause . . . to economically cripple a former employee and simultaneously deny other potential employers [her] services.”¹⁸⁵ This is true even when the termination would fall within the guidelines of a legitimate business interest due to the company closing its facility.¹⁸⁶

Although California and New York laws concerning non-compete agreements are very protective of employees’ rights, they are a minority. Most of the states stay in the middle of the continuum while protecting their respective labor markets.¹⁸⁷ These middle ground jurisdictions have held that non-compete clauses are: (1) presumptively invalid when the employee is involuntarily discharged;¹⁸⁸ (2) invalid when there is an element of bad faith involved in the termination;¹⁸⁹ or (3) invalid if the equities weigh in

181. Greg Clark, *London and New York in the 21st Century. New Competition and New Opportunities: Can London and New York Still Be the Leading World Cities in 2100?* The London New York Dialogue Background Report 7–8 (July 2008) (providing a historical summary of New York’s economic growth from 1900 to 2000) (available at <http://www.london-ny.com/reports>).

182. *Michael I. Weintraub, M. D., P. C. v. Schwartz*, 516 N.Y.S.2d 946, 948 (N.Y. App. Div. 2d Dept. 1987).

183. *Post*, 397 N.E.2d at 360.

184. *Weintraub*, 516 N.Y.S.2d at 948.

185. *Post*, 397 N.E.2d at 361.

186. *SIFCO Indus. v. Adv. Plating Techs.*, 867 F. Supp. 155, 158 (S.D.N.Y. 1994).

187. Vanko, *supra* n. 1, at 11.

188. *See e.g. Brobston*, 667 A.2d at 735.

189. *See e.g. Rao*, 718 F.2d at 224. Discussed at length *supra* sec. II.

favor of the employee.¹⁹⁰ Invalidating non-compete agreements in these jurisdictions tends to focus on the manner of discharge. Moreover, this author suggests that in these jurisdictions, when courts balance the equities they should resolve the matters in favor of the employees, thus allowing those employees to continue working in their chosen profession.

States that have a presumption against enforcement, such as Pennsylvania, generally have articulated the pro-employee rule that non-compete agreements are not valid in termination cases. In *Insulation Corporation of America v. Brobston*,¹⁹¹ the Court stated that when an employee is terminated because he is not performing in a manner that promotes the employer's business interests (in other words, "for cause"), the employer "deems [that] employee worthless."¹⁹² Brobston, the employee, was terminated by Insulation Corporation of America ("ICA") for poor performance.¹⁹³ Shortly thereafter, he found employment with an ICA competitor.¹⁹⁴ The *Brobston* Court found that because ICA concluded that Brobston was not a valuable employee and his worth to the corporation was presumably insignificant, the need to protect itself from Brobston's competition had diminished.¹⁹⁵ In other words, when an employee is of so little value to the employer that continued employment does not benefit the employer's business interests, the employee can no longer be a threat to the employer's livelihood. Thus, the employer no longer has a legitimate business interest in enforcing a non-compete agreement.¹⁹⁶ *Brobston* suggests that a non-compete clause is presumptively invalid when an employer terminates the employee for cause.¹⁹⁷ In *Wrigg*, the Court dealt with this issue only in the abstract. It stated that as an employer, JCCS was in the best position to prevent competition from Wrigg.¹⁹⁸ Thus, because JCCS elected to terminate the employee relationship, it could not enforce the Agreement under those circumstances.¹⁹⁹ The *Wrigg* Court should have taken its decision one step further, synthesized the rules articulated in Cali-

190. See e.g. *Econ. Grocery Stores Corp. v. McMenemy*, 195 N.E. 747, 749 (Mass. 1935); *Sec. Servs., Inc. v. Priest*, 507 S.W.2d 592, 595 (Tex. Civ. App. 1974); *Kroeger v. Stop & Shop Cos., Inc.*, 432 N.E.2d 566, 572 (Mass. App. Ct. 1982) (tying the inequity analysis to the means of discharge).

191. *Brobston*, 667 A.2d 729.

192. *Id.* at 735.

193. *Id.* at 731–732.

194. *Id.* at 732.

195. *Id.* at 735.

196. *Id.*

197. Although *Brobston* suggests that a non-compete clause is presumptively invalid when an employee is terminated for cause, the Court was clear that non-compete cases are to be determined on a case-by-case basis. *Brobston*, 667 A.2d at 735. The Pennsylvania Court does not apply a strict rule to cases involving post-employment restrictive covenants, even when the employee is terminated. *Id.* at 733–734.

198. *Wrigg*, 265 P.3d at 653.

199. *Id.* at 654.

fornia, New York, and Pennsylvania, and concluded that when termination is involuntary, there is a rebuttable presumption that non-compete agreements are invalid regardless of the circumstances of the employee's departure. Unfortunately, the Court did not make a decisive connection between controlling the employment relationship, for-cause termination, and precluding the enforcement of a non-compete agreement.

V. CONCLUSION

While this author agrees with the *Wrigg* Court's ultimate decision, the Court's overall discussion was lacking on three points. First, before determining whether an agreement has the requirements of an enforceable non-compete clause, the Court should have addressed the contract issues involved in *Wrigg*. In particular, the Court should have addressed the question of consideration and the potential ambiguity surrounding the terms of the shareholder agreement. If the agreement is an unenforceable contract, enforceability of the non-compete clause becomes irrelevant. Next, even if a contract is enforceable, a non-compete clause within it is not automatically enforceable. As a general rule, post-employment, non-competes are allowed if they fall within certain parameters, one of which is the reasonableness of the clause. Although an inexact science, such a determination usually depends upon the use of a balancing test. As part of that balance, courts should consider the evolving psychological contract. The modern employer-employee relationship is based on an unspoken promise by the employer to ensure the employee is competitive in the job market, and courts should examine whether it makes sense to enforce a non-compete agreement under such circumstances. This is especially true in Montana, where an employer can impede the employee's strong statutory protections against wrongful discharge by asking her to sign a term employment agreement—effectively turning her into a quasi at-will employee. Finally, the Court's unclear position regarding how “for-cause termination” may affect the enforceability of non-compete agreements provides little guidance to district courts on how they should decide future cases. As such, it is likely that some trial courts will see *Wrigg* as a *per se* prohibition against non-compete agreements when the employee is involuntarily terminated; while other courts may interpret *Wrigg* in such a way that allows them to look to the circumstances of termination prior to determining the enforceability of the non-compete agreements. In failing to adequately address this critical issue, the *Wrigg* Court has invited inconsistent application among Montana's district courts and an inevitable revisiting of the issue for a more definitive clarification.

