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Contract Law: Restrictive Covenants Lacking Territorial Limits

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I. Introduction

There are a variety of issues that arise in the course of employment relationships. In *Dynamic Air, Inc. v. Bloch*, the Minnesota Court of Appeals considered whether Minnesota law will prohibit the enforcement of a restrictive covenant in an employment contract that lacks geographic limits. The court held that a restrictive covenant so lacking geographically is not per se invalid. The central issue in *Dynamic Air* was whether an employee, who has entered into an otherwise valid employment contract, may be enjoined from working for a competitor by the operation of a restrictive covenant which contains a reasonable time element but is entirely lacking in geographic bounds. In *Dynamic Air*, the court held that if the contract is otherwise enforceable, a lack of geographic limits will not render the contract per se unenforceable. In reaching this decision, the court complemented a previous decision of the Minnesota Supreme Court which held that a restrictive covenant with reasonable geographic limits but unlimited as to time is enforceable.

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3. *Id.* at 799-800.
4. *Id.* The temporal restriction imposed on Mr. Bloch by the employment covenant was two years. *Id.* at 797-98.
5. *Id.* The court stated that the "reasonableness of a covenant is based on several factors, not on the presence or absence of any one of them." *Id.*
6. *Id.* at 800.
This Note examines restrictive covenants in employment contracts as they exist in Minnesota. This Note supports the *Dynamic Air* court's conclusion that a per se rule emasculating restrictive covenants lacking geographic bounds is unnecessary. This Note's support for the court's decision is, however, tempered by the court's own caveat that rulings on the enforceability of restrictive covenants bereft of geographic limits must necessarily be fact driven, and therefore arrived at only on a case-by-case basis.

II. General Background

A. Historical Background of Restrictive Covenants

As early as the seventeenth century, restrictive covenants in the employment arena were viewed with skepticism and were commonly held unenforceable. The chief point of contention for judges who struck down restrictive covenants was that they operated in restraint of trade, and thus were contrary to the interests of a free market. In an important early English case in which a baker was restrained by a restrictive covenant ancillary to the sale of his business, the court acknowledged the harm potentially inflicted not only on the covenantor who lost his trade, but also on the public whose choice of products

8. *Dynamic Air*, 502 N.W.2d at 800.
9. The court stated:
   There may very well be instances in which a restrictive covenant unlimited as
to territory is reasonably necessary to protect the employer's interests, for
example, in employment with multinational corporations. We therefore must
leave determination of the reasonableness of restrictive covenants lacking
territorial limits to trial courts; they have the means to consider this issue in
individual cases by hearing evidence from the Parties.
   *Id.*
10. *Id.*
12. *Id.* at 319.
15. For a general discussion of restrictive covenants, see 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 1385-94 (1962). The issue of enforceability of restrictive covenants comes into play in two different areas. First, an individual selling a business covenants with the purchaser not to compete. *Id.* § 1385, at 45. This is largely in response to the purchaser's desire to get the full value of whatever good will comes with the business. *Id.* at 46. Second, and central for present purposes, an employee covenants with an employer not to compete after the employment relationship is terminated. *Id.* § 1394, at 89. Common elements employers seek to protect are customer lists, trade secrets or virtually anything peculiar to an individual business which might give its competitors an unearned edge. *Id.* at 97.
and services had been limited by the covenant.\textsuperscript{16} Thus, courts have long recognized that the effects of a covenant not to compete can have undesirable ramifications extending well beyond the parties to the agreement.\textsuperscript{17}

The advent of the Industrial Revolution altered the relationship between employees and employers and thus catalyzed the evolution of restrictive covenants.\textsuperscript{18} Society had become more mobile, and the traditional apprenticeship system was inexorably giving way to increasingly modern training procedures.\textsuperscript{19} Thus, an employee was less likely to be tied to a specific area or employer such that the effects of a restrictive covenant encompassing only the immediate geographic area were less drastic.\textsuperscript{20}

Despite this ostensible emancipation, however, in many respects the employee found a greater dependence on his vocation for a livelihood.\textsuperscript{21} Larger and fewer employers dominated the market place and the relationship between the master and servant became more distant than it had been under the earlier apprenticeship system.\textsuperscript{22} Thus, there remained tangible threats to the employee confronted by a restrictive covenant. At the same time, employers found an increasing need to protect their ever expanding business interests from competitors willing to lure the valuable employee away.\textsuperscript{23} These opposing interests required a new, more flexible approach to the issue of enforcement of restrictive covenants.\textsuperscript{24}

Recognizing the need for flexibility, courts began to soften their position when presented with restrictive covenants.\textsuperscript{25} This recognition subsequently evolved into the modern standard for making a

\begin{itemize}
  \item \textsuperscript{16} Guest, \textit{supra} note 11, at 319.
  \item \textsuperscript{17} Blake, \textit{supra} note 13, at 627.
  \item \textsuperscript{18} \textit{Id.} at 638.
  \item \textsuperscript{19} \textit{Id.}
  \item \textsuperscript{20} \textit{Id.} Professor Blake states that long apprenticeships were no longer necessary since job training could take place for the average factory job in less than a month. \textit{Id.}
  \item \textsuperscript{21} \textit{Id.}
  \item \textsuperscript{22} \textit{Id.; see also} P.S. Atiyah, \textit{The Rise and Fall of Freedom of Contract} 698-703 (1979) (discussing the growing acceptance of restrictive covenants in the early twentieth century).
  \item \textsuperscript{23} Blake, \textit{supra} note 13, at 638.
  \item \textsuperscript{24} \textit{Id.}
  \item \textsuperscript{25} \textit{See, e.g.,} United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898), \textit{aff'd as modified}, 175 U.S. 211 (1899) (stating that while a covenant not to compete may be in restraint of trade, it may also be upheld where ancillary to an employment contract or to the sale of a business). \textit{See generally} P.S. Atiyah, \textit{An Introduction to the Law of Contract} 337-42 (4th ed. 1989) (discussing contemporary acceptance of restrictive covenants in the English employment context).
\end{itemize}
judicial determination of enforceability. This standard entails a determination of whether the restrictive covenant is "reasonable in light of the circumstances" surrounding its existence. The Restatement (Second) of Contracts sets out two factors for determining the requisite levels of reasonableness. First, the covenant must be no broader than necessary to protect the employer. Second, the hardship imposed on the employee must not outweigh the protection afforded the employer. Additionally, some courts require that the covenant not be injurious to the public.

In determining whether the burden placed on the employee is unreasonable, courts have looked to both the temporal and geographic elements of the covenant. While there are no absolute rules for determining whether a restrictive covenant is temporally too long or geographically too broad, courts will generally look first to

26. See generally ATIYAH, supra note 25, at 337-42.
28. Id.
29. RESTATMENT (SECOND) OF CONTRACTS § 188 (1979). For a lucid explanation of the determination of reasonableness, see the comments accompanying the Restatement.
30. Id. See also Purchasing Assocs. v. Weitz, 196 N.E.2d 245, 249 (N.Y. 1963) (holding that a geographic restriction consisting of a 300 mile radius around New York City was overly broad given an absence of proof as to the uniqueness of the employee's skills).
31. RESTATMENT (SECOND) OF CONTRACTS § 188 (1979). See also Smith, Batchelder & Rugg v. Foster, 406 A.2d 1310, 1313 (N.H. 1979) (holding that covenant not to compete imposed unnecessary hardship on employee).
32. See, e.g., Unishops, Inc. v. May's Family Centers, Inc., 399 N.E.2d 760, 764 (Ind. Ct. App. 1980) (holding a restrictive covenant to conform to public policy where the covenantor was prevented from opening a competing business within a five mile radius). Cf. Pemco Corp. v. Rose, 257 S.E.2d 885, 891-92 (W. Va. 1979) (striking down a restrictive covenant that prevented the employee from competing with the covenantor within a 150 mile radius of covenantor's business as violative of public policy since it prohibited the employee from utilizing personal talents).
34. See Kinsey, supra note 33, at 439-42 (stating that the same general analysis of reasonableness applies to temporal duration; that is, the amount of time involved must be appropriate to protect a legitimate interest).
35. Id. at 439. See also Bennett, 270 Minn. at 535, 134 N.W.2d at 899 (citing to numerous authorities relating to restrictive covenants, and concluding that the necessity of the restriction is dependent on the circumstances for each case).
the interest the employer seeks to protect in deciding the appropriate duration and scope of the restrictions.  

The geographic scope of the interest the employer seeks to protect will depend largely on the nature of the business. For example, one court has held that a radius of one hundred miles went beyond the interest the employer sought to protect (it's prosthetics business) and was therefore overly broad. In that case, the one hundred mile radius was in effect for each of the employer's branch offices around the state of Iowa such that the practical effect was to bar the employee from working anywhere in the state. Another court upheld a worldwide restriction on competition where the employer, a manufacturer of oil drilling platforms, conducted business on a global scale.

Thus the presence or absence of a specific geographic limit is not dispositive of the issue of enforceability. Provided that the covenant is well tailored to protect a legitimate interest of the employer, some courts have concluded that a lack of geographic bounds will not render a covenant unreasonable. Similarly, where a geographic limit is lacking, and the court determines one is necessary, many courts are willing to simply provide a limit and uphold the covenant

36. For examples of protectable interests, see Raymundo v. Hammond Clinic Ass'n, 405 N.E.2d 65, 69 (Ind. Ct. App. 1980) (finding clinic has protectable interest precluding doctor from working within reasonable territorial limits); Snelling and Snelling, Inc. v. Dupay Enterprises, Inc., 609 F.2d 1062, 1064-65 (Ariz. Ct. App. 1980) (finding legitimate interest in precluding licensee from competing with licensor); Marcoin, Inc. v. Waldron, 259 S.E.2d 433, 435 (Ga. 1979) (finding a legitimate interest in preventing employee from diverting customers, considering employee was the only one available in 14 county area with his skills); Renwood Food Products, Inc. v. Schaefer, 223 S.W.2d 144, 152 (Mo. Ct. App. 1949) (finding a legitimate interest in protecting employer's trade connections).

37. 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1386 (1962).


39. Id. at 910.


as modified.\textsuperscript{42} This practice, known as blue penciling,\textsuperscript{43} while not universal,\textsuperscript{44} is quite common.\textsuperscript{45}

\textbf{B. Minnesota Law}

Minnesota courts have long recognized and upheld restrictive covenants in the employment context.\textsuperscript{46} In \textit{Bennett v. Storz Broadcasting Co.},\textsuperscript{47} however, the Minnesota Supreme Court stated that restrictive covenants are commonly considered to be at least partially in restraint of trade, and therefore are to receive close judicial scrutiny.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{43} The blue pencil rule is an outgrowth of the doctrine of contract divisibility. In other words, if the illegal or unreasonable aspects of a contract are divisible from its acceptable elements, those illegal or unreasonable elements may be crossed out so as to allow the contract to survive. 6A ARTHUR L. CORBIN, \textit{CORBIN ON CONTRACTS} \S 1390, at 67-69 (1962). For an excellent, albeit somewhat remedial, discussion of the blue pencil doctrine see ALFRED G. FELIU, \textit{PRIMER ON INDIVIDUAL EMPLOYEE RIGHTS} 61 (1992).
\item \textsuperscript{44} See Bess v. Bothman, 257 N.W.2d 791, 794 (Minn. 1977). The \textit{Bess} court held that courts can modify unreasonable aspects of a contract, whether or not such aspects are formally divisible from the rest of the contract. \textit{Id.} This is distinguishable from blue penciling since the unreasonable aspects of the contract are not deleted, but instead altered so as to be reasonable in the given situation. \textit{Id.}
\item \textsuperscript{46} See, e.g., Bennett v. Storz Broadcasting Co., 270 Minn. 525, 533 n.2, 134 N.W.2d 892, 898 n.2 (1965) (providing a comprehensive list of Minnesota cases dealing with restrictive covenants); Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230, 234, 91 N.W. 892, 893 (1902) (determining that testing the reasonableness of the restriction is appropriate); National Benefit Co. v. Union Hosp. Co., 45 Minn. 272, 276, 47 N.W. 806, 807 (1891) (upholding a restrictive covenant in the context of the sale of a business).
\item \textsuperscript{47} 270 Minn. 525, 134 N.W.2d 892 (1965). The \textit{Bennett} court described the general approach to restrictive covenants as follows:
\begin{quote}
In considering the record as it relates to the issue of justification for the action taken by defendant, it seems to us that the first inquiry should be whether or not the contract upon which defendant relies creates an interest which the law will protect. In this connection it should be immediately recognized that the agreement is one in partial restraint of trade, limiting as it does the right of a party to work and earn a livelihood. Such contracts are looked upon with disfavor, cautiously considered, and carefully scrutinized.
\end{quote}
\textit{Id.} at 533, 134 N.W.2d at 898 (citing Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685, 693 (Ct. C.P. Cuyahoga County, Ohio 1952)).
\item \textsuperscript{48} \textit{Bennett}, 270 Minn. at 533, 134 N.W.2d at 898. \textit{See also} Freeman v. Duluth Clinic, Ltd., 334 N.W.2d 626, 630 (Minn. 1983). The \textit{Freeman} court stated that "covenants not to compete are agreements in partial restraint of trade, limiting as they do the right of a party to work and earn a livelihood." \textit{Id.} (citing Bennett v. Storz Broadcasting Co., 270 Minn. 525, 533, 134 N.W.2d 892, 898 (1965)). The court went on to note that "courts, including this one, look upon such contracts with disfavor and scrutinize them with care." \textit{Freeman}, 334 N.W.2d at 650 (citing National Recruiters, Inc.
\end{itemize}
Despite this scrutiny, however, restrictive covenants have been upheld in Minnesota provided they have met the accepted standard of reasonableness. The reasonableness test has been well announced in Minnesota. To establish that a restrictive covenant is reasonable, an employer must show that the covenant is necessary for the protection of the business, and that any burden placed on the employee is not greater than necessary to protect the interest of the employer. Where the restriction is broader than necessary, either temporally or geographically, Minnesota courts will generally see it as invalid.

Finally, Minnesota courts do recognize the blue pencil doctrine. For example, in Bess v. Bothman the Minnesota Supreme Court affirmed a trial court's enforcement of only the reasonable elements of a restrictive covenant. In Bess the court modified a covenant contained in the sale of a towing business so as to reduce both its temporal and geographic elements, thus bringing the covenants within the bounds of reasonableness.

v. Cashman 323 N.W.2d 736, 740 (Minn. 1982).

49. Holliston v. Erston, 124 Minn. 49, 144 N.W. 415 (1913). The Holliston court stated as follows: "This court . . . adopted the doctrine of reasonableness of restraint as controlling when neither monopolistic nor within the inhibition of antitrust laws. Arbitrary rules theretofore applied in some jurisdictions were discarded and the modern doctrine [i.e., reasonableness] has since been consistently followed and must be considered established." Id. at 51, 144 N.W. at 415-16.


51. See, e.g., Klick v. Crosstown State Bank of Ham Lake, Inc., 372 N.W.2d 85, 87 (Minn. Ct. App. 1985) (considering whether an employer's reasonable interest justified the restrictive covenant in an employment contract); Eutectic Welding Alloys Corp. v. West, 281 Minn. 13, 20, 160 N.W.2d 556, 571 (1968) (holding two restrictive covenants unenforceable, unreasonable, and beyond the scope of employer's protectable interest).


53. See, e.g., Jim W. Miller Constr., Inc. v. Schaefer, 298 N.W.2d 455, 458 (Minn. 1980); Davies & Davies Agency, Inc., v. Davies, 298 N.W.2d 127, 131 (Minn. 1980). While this notion of reasonableness does offer at least an assumption of objectivity, pursuant to Minnesota law these issues are decided on a case by case basis. See Medtronic, Inc. v. Gibbons, 527 F. Supp. 1085, 1094 (D. Minn. 1981), aff'd 684 F.2d 565, 569 (8th Cir. 1982).

54. See, e.g., Davies, 298 N.W.2d at 131; see supra note 48; see also Bess v. Bothman, 257 N.W.2d 791, 794-95 (Minn. 1977). For a general discussion of the blue pencil doctrine, see Note, Catherine Bergin Yalung, Redefining The Blue Pencil Rule: Phoenix Orthopaedic Surgeons, Ltd. v. Pears, 23 ARIZ. ST. L.J. 859 (1991).

55. 257 N.W.2d 791 (Minn. 1977).


57. Id.
III. Dynamic Air, Inc. v. Bloch

A. The Facts

Dynamic Air Incorporated ("Dynamic Air") is a Minnesota corporation, with its headquarters in St. Paul, which custom designs bulk moving systems for industrial clients. Mr. Bloch worked at Dynamic Air as an intern while pursuing an undergraduate degree in industrial technology. When he graduated, Mr. Bloch became a full time sales engineer.

Upon becoming a full-time employee, Mr. Bloch signed an employment contract with Dynamic Air. This contract contained covenants that, in the event his employment with Dynamic Air was terminated, restricted him from disclosing confidential information pertaining to Dynamic Air, from soliciting their customers, and from working for a competitor. The covenants against solicitation and employment were both limited to two years in length, though there was no provision for geographic limits.

In August of 1991, Mr. Bloch received a promotion and became a sales manager for a region in the southern United States. Given this position of authority, Bloch was privy to several sensitive aspects of Dynamic Air’s business practices. Despite this promotion,

59. Id. at 797.
60. Id. Bloch was hired in August of 1989. Id.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id. at 797-98.
67. Id. at 798. Thus the covenants lacked the traditional reasonable time and space elements. See Bennett v. Storz Broadcasting Co., 270 Minn. 525, 535, 134 N.W.2d 892, 899 (1965). Bloch was to be compensated by Dynamic Air after any termination in the event he was unable to secure similar employment elsewhere at the same salary level. Dynamic Air, 502 N.W.2d at 798. There is no explanation of how Bloch was to find “similar employment elsewhere” when he was subject to a restrictive covenant that had no geographic limits. Id.
68. Dynamic Air, 502 N.W.2d at 798. By August 1991, Mr. Bloch had been employed by Dynamic Air for two years. Id.
69. Id. This southern region included the states of Texas, Oklahoma and Arkansas. Id.
70. Id. For instance, James Steele, Dynamic Air’s president, said that Bloch had “direct responsibility” for bidding on new projects. Id. Bloch was also familiar with pricing strategies, testing methods and engineering practices. Id.
however, Mr. Bloch began seeking a new employer in October of 1992, and eventually, in March of 1993, took a position with Whirl-Air, Incorporated ("Whirl-Air").

Whirl-Air is also a Minnesota corporation and is involved in largely the same business as is Dynamic Air. Dynamic Air considered Bloch's employment at Whirl-Air to be violative of the restrictive covenants to which Bloch had agreed. Dynamic Air was concerned that Whirl-Air would achieve an unfair advantage as a result of Bloch's understanding of Dynamic Air's bidding strategy and currently open proposals.

Dynamic Air sought to enjoin Bloch from working at Whirl-Air. Dynamic Air also sought a temporary injunction enforcing the restrictive covenants in his original agreement. The district court, in a somewhat incongruous holding, denied the temporary injunction on the assumption that restrictive covenants lacking geographic restraints are not enforceable in Minnesota.

71. Id. The appellate court's decision offers no reason why Mr. Bloch decided to pursue a different employer. Id.
72. Id.
73. Id. The court states that Whirl-Air "designs and manufactures custom-made 'systems' for moving bulk materials." Id.
74. Id. In March, 1993, Dynamic Air president, James Steele, told Mr. Bloch that working for Whirl-Air would be a breach of the restrictive covenants. Id.
75. Id. Whirl-Air obviously disputes this position. Id. Gregg Hedtke, sales manager for Whirl-Air, stated that "the nature of sales in this business is different from that in other businesses." Id. This is apparently due to the fact that sales are not dependant on the accumulation of customer lists which represent repeat business. Id.
76. Id.
77. Id. The restrictive covenants in Mr. Bloch's agreement prohibited him from "(1) disclosing confidential information about Dynamic Air; (2) soliciting Dynamic Air customers with whom he had worked; and (3) working for a competitor of Dynamic Air selling 'conflicting products.'" Id. at 797.
78. Id. 799. As stated in the appellate court's decision, the district court found as follows:
1. Dynamic Air would suffer immediate, irreparable harm from disclosure of confidential information.
2. The terms of the restrictive agreement were reasonable and necessary to protect Dynamic Air's legitimate commercial interests.
4. The harm to Dynamic Air from denial of its motion would be greater than the harm to Bloch from granting of the motion.
Id. Nonetheless, the district court proceeded to deny the temporary injunction citing an unpublished case. Id. The appellate court, in reversing, pointed out that under Minnesota Statutes section 480A.08, subd. 3(c) such unpublished opinions are, at best, persuasive. Id. at 800.
79. Id. at 799.
B. The Court's Holding and Reasoning

The Minnesota Court of Appeals, in the process of reversing the trial court's denial of Dynamic Air's motion for temporary injunction, held that restrictive covenants lacking geographic limits are not per se invalid. Moreover, the appellate court concluded that the reasonableness of the nonsolicitation and confidentiality covenants may be judged without regard to the lack of geographic restraints. The court also expressly cautioned the trial court to carefully scrutinize the nonemployment covenant. In reaching these conclusions, the appellate court adhered to the doctrine of reasonableness, suggesting that this determination is best left to the trial courts. The appellate court then remanded the matter to the trial court for a more inclusive consideration of the facts.

IV. Analysis

The Dynamic Air court correctly held that restrictive covenants lacking geographic limits are not per se unenforceable. To have held otherwise would have posed severe problems for corporations conducting business on a global scale.

Dynamic Air sought, through the restrictive covenants it entered into with Mr. Bloch, to protect a legitimate business interest. Mr.

80. Id. at 800. This was not an entirely audacious holding; the court stated as follows: "The covenant must be scrutinized as a whole to determine whether it is reasonable. A restrictive covenant lacking a territorial limit perhaps will often be held to be unreasonable. Nonetheless, we are reluctant to enunciate a per se rule barring enforceability of all restrictive covenants lacking such a limit." Id.

81. The court stated that "[c]ommon sense" might lead them to the conclusion that a geographic limit in a confidentiality or nonsolicitation covenant could often be irrelevant. Id. (citing Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton, 304 N.W.2d 752 (Wis. 1981)).

82. *Dynamic Air*, 502 N.W.2d at 800.

83. Id. at 799.

84. Id. at 800; see also *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 535-36, 134 N.W.2d 892, 899-900 (1965).

85. *Dynamic Air*, 502 N.W.2d at 800.

86. Id.

87. For instance, a multinational corporation would have no predetermined legal standard from which to draft a restrictive covenant. Moreover, had the Dynamic Air court ruled that covenants without geographic bounds were per se unenforceable, the entire standard of reasonableness would have been threatened. Lacking such a standard, multinational corporations could conceivably face a greater threat of litigation.

88. *Dynamic Air*, Inc. v. *Bloch*, 502 N.W.2d 796, 798 (Minn. Ct. App. 1993). Dynamic Air president, James Steele, stated that Mr. Bloch had knowledge of Dynamic Air's then open proposals and bidding strategies. Id. The district court also found that Dynamic Air had a legitimate commercial interest to protect through enforcement of
Bloch, after his promotion of August of 1991, had “direct responsibility for developing Dynamic Air’s bids for new projects.” This responsibility put him in a position where he had access to sensitive information, which could harm Dynamic Air in the event a competitor became privy to this information. For example, Mr. Bloch had access to vendor lists as well as engineering information, either of which could be used contrary to Dynamic Air’s interests, regardless of where Mr. Bloch was employed. Given the sensitivity of the information involved, the appellate court correctly determined that geographic bounds are irrelevant as they relate to the confidentiality and nonsolicitation covenants.

The burden the restrictions placed on Mr. Bloch was not greater than the threat to Dynamic Air’s interests. The covenants restricted Mr. Bloch from soliciting Dynamic Air’s customers and from competing with Dynamic Air for two years. Two years is not an unreasonable amount of time given existing case law. Equally as important is the fact that Mr. Bloch was to be paid by Dynamic Air during any portion of this two year period that he was unable to secure suitable employment the restrictive covenants. Id. at 799. But cf. Jim W. Miller Constr., Inc. v. Schaefer, 298 N.W.2d 455, 458 (Minn. 1980) (finding no protectable interest where the employee was, by a restrictive covenant, precluded from operating solely as a real estate broker but was allowed to take a position with a real estate broker, though the activities carried out by the employee were identical).

89. Id. at 798.
90. Id.
91. Id. Mr. Bloch, an engineer, had access to Dynamic Air’s “designs, formulas, confidential price lists, engineering drawings, and testing methods.” Id. It is not, however, always necessary for the employee to have unique talents in order to be subject to the enforcement of a restrictive covenant. See Eutectic Corp. v. Astralloy-Vulcan Corp., 510 F.2d 1111, 1115 (5th Cir. 1975) (holding that in New York a covenant with reasonable time and geographic limits is enforceable regardless of whether the employee has unique skills).

92. Dynamic Air, 502 N.W.2d at 798.
93. Id. The actual economic damage Mr. Bloch might have been able to inflict on Dynamic Air is, of course, impossible to evaluate. It should be noted, however, that the district court did make a finding that Dynamic Air would “suffer immediate, irreparable harm from disclosure” of the confidential information in Mr. Bloch’s possession. Id. at 799.

94. See Bennett v. Storz Broadcasting Co., 270 Minn. 525, 534, 184 N.W.2d 892, 899 (1965) (holding that restrictions that are broader than necessary to protect the employers interest are invalid).
95. Dynamic Air, 502 N.W.2d at 797.
96. Although each case is determined on its own factual basis, precedent may still be used for support. See, e.g., B & Y Metal Painting, Inc. v. Ball, 279 N.W.2d 813, 815 (Minn. 1979) (finding a three year restriction reasonable); Cherne Indus., Inc. v. Grounds & Assoc., Inc., 278 N.W.2d 81, 93 (Minn. 1979) (finding a two year restriction reasonable).
employment. 97 While not dispositive, 98 this fact goes far toward establishing that any burden on an employee under contract is less than the danger to the employer of non-enforcement. 99 Though the appellate court did not disagree with the district court's finding that the burden of enforcement of the employment covenant on Mr. Bloch was less than the danger of disclosure, the court did wisely caution the district court, on remand, to scrutinize the employment covenant carefully. 100

Having recognized that the rule of reasonableness is flexible enough to allow trial courts to determine the enforceability of restrictive covenants, 101 the Dynamic Air court correctly concluded that a per se rule of invalidity based on a lack of geographic restraints is simply not necessary. 102 Whether the geographic scope of the restrictive covenant is reasonable will necessarily depend on the particular facts of each case. 103 What may work in one situation may be entirely inappropriate for another. For instance, in Davies & Davies Agency, Inc. v. Davies, 104 the Minnesota Supreme Court held that a restrictive covenant, operating against an insurance agent, would only be enforceable in Hennepin county. 105 As originally drafted, the

97. Dynamic Air, Inc. v. Bloch, 502 N.W.2d 796, 798 (Minn. Ct. App. 1993). An analysis of the burden on the employee might very well be different were it not for the fact that Dynamic Air was to pay Mr. Bloch in the event that he was not able to find suitable employment.

98. Receiving compensation of this sort would seem to lessen the burden on the employee, but it must be seen as a palliative at best. For instance, during the two year period that Mr. Bloch would be forced to put his career on hold he would be losing the opportunity to gain seniority in a new company. He could be losing the chance to establish retirement benefits, and it would seem almost certain that, in the event he was not allowed to work in his chosen career for two years, he would be passing up valuable opportunities that could earn him a promotion.

99. See Kinsey, supra note 33, at 439-42.

100. Dynamic Air, 502 N.W.2d at 800.

101. Id. See also Bennett v. Storz Broadcasting Co., 270 Minn. 525, 533, 134 N.W.2d 892, 898 (1965).

102. Aside from being unnecessary, it would, in many respects, be unworkable. For instance, General Motors operates all over the world. The competitive effect is the same to the corporation regardless of whether a former employee competes with General Motors in the far east or in Detroit. A per se rule invalidating restrictive covenants without geographic bounds would fail to recognize this economic reality. See Mixing Equip. Co. v. Philadelphia Gear, Inc., 436 F.2d 1508, 1514 (3d. Cir. 1971) (stating that covenants without spatial limits are not necessarily unreasonable).

103. See Kinsey, supra note 33, at 439. "The reasonableness of territorial restrictions appears to depend more on the reasonableness of the particular restriction in view of the facts and circumstances of each individual case, rather than on actual geographical scope." Id.

104. 298 N.W.2d 127, 132 (Minn. 1980) (amending a covenant so as to make it reasonable).

105. Id. at 131.
covenant was designed to prevent the employee from competing with the employer within a fifty mile radius of Minneapolis, St. Paul or Duluth. In *Continental Group, Inc. v. Kinsley*, however, the court upheld a covenant touching three continents. In that case, the court reasoned that the technology involved in the manufacture of plastic soft drink containers was competitive enough to render the geographic scope of this covenant reasonable.

Had the court held that restrictive covenants lacking geographic limits were per se invalid, it would not only have been behaving contrary to accepted principles, it would have left employers with no guidance or standards for drafting restrictive covenants, other than the necessity of some geographic limitation. Moreover, given the fact that Minnesota courts are free to blue pencil restrictive covenants, a per se rule disallowing the enforcement of covenants lacking geographic limits seems largely unnecessary. For instance, in *Bess v. Bothman*, the trial court took a restrictive covenant containing no geographic limits and reduced it to an area suitable to protect the employer's interest.

This is not to advocate that Minnesota courts ignore the geographic element of restrictive covenants, nor should Minnesota courts use the *Dynamic Air* decision to support the position that restrictive covenants lacking temporal and geographic elements are enforceable. The *Dynamic Air* holding should be taken to reaffirm the position that the reasonableness of the geographic limits in restrictive covenants must be decided on the facts and circumstances of each case. Whether the scope of a restrictive covenant is reasonable must depend on the nature of the business, the interest it seeks to protect and the danger

106. *Id.* at 129.
109. *Id.* at 844.
110. *See, e.g.*, Mixing Equip. Co. v. Philadelphia Gear, Inc., 496 F.2d 1308, 1314 (3d Cir. 1971) (holding that geographic limits are not necessary to the enforcement of restrictive covenants). *See also Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton*, 304 N.W.2d 752, 755 (Wis. 1981) (stating that "the absence of a geographical limitation is not necessarily fatal.").
111. Employers attempting to draft effective restrictive covenants would thus have no legitimate parameters by which to draw a territorial barrier. *See, e.g.*, Bennett v. Storz Broadcasting Co., 270 Minn. 525, 535-36, 134 N.W.2d 892, 899-900 (1965).
112. *See supra* note 43. It must also be kept in mind that in the event restrictive covenants lacking territorial limits were declared per se unenforceable, the blue pencil doctrine would, in effect, be taken away from the trial courts. They would no longer have the ability to redraw geographic limits into covenants that do not have them. *See, e.g.*, *Bess v. Bothman*, 257 N.W.2d 791, 795 (Minn. 1977).
113. 257 N.W.2d 791 (Minn. 1977).
114. *Id.* at 795.
nonenforcement poses to the company.\textsuperscript{115} The \textit{Dynamic Air} court wisely recognized this need for flexibility.

V. Conclusion

\textit{Dynamic Air} established that restrictive covenants in employment agreements, limited in time but not in geography, are not \textit{per se} unenforceable in Minnesota.\textsuperscript{116} This note supports the \textit{Dynamic Air} decision for two reasons. First, it is entirely in line with established case law. Second, the decision allows for an \textit{ad hoc} judicial determination of the validity of restrictive covenants based on the rule of reasonableness.

\textit{Adam Dowd}

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\textsuperscript{115} \textit{Id.} Another excellent example of the reasonableness of restrictive covenants is \textit{Continental Group, Inc. v. Kinsley}. 422 F.Supp. 838, 844-45 (D. Conn. 1976). The employer was in the incipient and highly competitive business of producing plastic bottles. \textit{Id.} The court found that the employee potentially posed a legitimate threat to the employer's business in the event he went to work for a competitor; thus a covenant with a seemingly expansive reach was upheld as reasonable. \textit{Id.}

\textsuperscript{116} \textit{Id. at} 800.