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Cover: A corner in the former Lowell District Court building. Photo by Hon. David S. Ross.

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# EMPLOYEE NONCOMPETITION LAWS AND PRACTICES: A MASSACHUSETTS PARADIGM SHIFT GOES NATIONAL

By Jerry Cohen, Karen Breda and Thomas J. Carey Jr.

## INTRODUCTION

After 10 years of legislative gestation, the Great and General Court passed, and Governor Charlie Baker signed, the Massachusetts Noncompetition Agreement Act (“MNAA” or “Act”), G.L. c. 149, § 24L added by St. 2018, c. 228, § 21, effective prospectively only (§ 71) for agreements entered into on or after Oct. 1, 2018.<sup>1</sup> The Act dramatically reduces the number of Massachusetts employees who can be subjected to an enforceable noncompetition agreement, and even when such agreements are permitted, employees are afforded stronger substantive and procedural protections than in the past, while employers are limited to substantially reduced post-employment restrictions. The Act represents a paradigm shift in favor of employees, particularly hourly workers, but employers retain many options and may benefit from a perhaps greater clarity and certainty in drafting valid and enforceable noncompetition agreements.

The common law will continue to have vitality, however, because the legislature chose to address only employee noncompetition agreements, and even as to those agreements, it left many related restrictions in place and codified aspects of the common law that will continue to require case-by-case exposition. Thus, an understanding of the common law background assumed to continue to govern unless changed by the Act (or later amendments),<sup>2</sup> is necessary to a full understanding of the Act.

Following a preamble statement of General Background, Part I traces the development of the common law for those who may be unfamiliar with it or wish for a refresher as they turn to an analysis of the new statute.<sup>3</sup>

Part II describes and analyzes the Act’s provisions. The MNAA packs a lot of legal change into about 1,500 words, relatively short considering its impact, but it still requires careful reading to determine what has and has not been changed.



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1. Minor typographical corrections were made by St. 2018, c. 260, §1 and St. 2020, c. 358 § 76. See the Addendum to this article for a detailed recitation of the Act’s legislative history, an exercise in persistence, compromise, and a feasible *good*, prevailing over diverse unattainable *perfection*. See Ed Batista, “Voltaire and Patton on Perfection,” ED BATISTA EXEC. COACHING (Apr. 29, 2009), <https://www.edbatista.com/2009/04/voltaire-patton-perfection.html>.

2. See *Commonwealth v. G. F.*, 479 Mass. 180, 202 (2018) (“Statutes are to be construed in the light of the preexisting common and statutory law . . . It is not to be lightly supposed that radical changes in the law were intended where not plainly expressed”) (quoting *Ferullo’s Case*, 331 Mass. 635, 637 (1954)); *Sherman v. Pfefferkorn*, 241 Mass. 468, 474-76 (1922) (reliance on common law cases of England and Massachusetts for employee’s individual liberty and public interest in free trade balanced against reasonable protection of employer

interests); *Taylor v. Blanchard*, 95 Mass. 370, 373 (1866) (Supreme Judicial Court has adopted English doctrines regarding restrictive covenants).

3. The *Massachusetts Law Review* has also addressed the subject in the past. See, e.g., Matthew A. Kane, “Civil Law: SJC Contextualizes Anti-Raiding Provisions: *Automobile Holdings LLC v. McGovern*, 483 Mass. 797 (2020),” 102 MASS. L. REV. 48 (2021) (nonsolicitation issue analogous to noncompetition issues); Laurence H. Reece II., “Employee Non-Competition Agreements and Related Restrictive Covenants: A Review and Analysis of Massachusetts Law,” 76 MASS. L. REV. 2 (1991); James M. Hughes, “Employee Non-Competition Covenants: A Review of Massachusetts Law,” 63 MASS. L. REV. 27 (1978) (analyzing Massachusetts common law of noncompetition agreements from both a litigator’s and contract drafter’s perspectives).

Part III discusses surviving noncompetition restrictions not covered by the Act and other means of deterrence of post-termination competition as proxies for or complements to a noncompetition agreement.

Part IV raises some of the interpretive questions and practical concerns that the Act creates for practitioners.

Part V addresses the prospects for adoption of similar reforms by other states and/or at the federal level. Enactment of the MNAA put Massachusetts in the forefront of a widely spreading reform movement. It is impossible to predict with any certainty what will become of the various other reform proposals, but some outcomes could have an impact on the MNAA and practitioners should therefore keep a close eye on developments.

In the midst of this legal turmoil, and in discussing a statute for which the interpretive process of court decisions has barely begun, the authors necessarily venture few definitive conclusions about the MNAA. Instead, we attempt to describe the Act's most important features and focus on some questions that remain to be resolved, in the belief that at this stage of the legal process most practitioners are attempting to do the same in order to guide and protect their employer and employee clients. We begin with some general background that sets the stage for the Massachusetts legislation.

## GENERAL BACKGROUND

The practice of employers seeking to protect themselves from competition by inserting covenants not to compete in their employment agreements has a long history. In the beginnings of the American version of the Industrial Revolution, one Samuel Slater defected from England and his English employer and, after arrival in America, helped a New England entrepreneur (Moses Brown) to establish in Pawtucket, Rhode Island, and environs, several clones of the England employer's proprietary cotton spinning mill.<sup>4</sup> This violated English law and Mr. Slater's contract with his former employer. Violations of noncompetition expectations of employers go back even earlier. A glassmakers' guild flourished on the island of Murano in Venice in the Middle Ages and the Renaissance era. The craft was passed down through generations, but an artisan who escaped to reach a better working life elsewhere would be tracked

down by the guild's assassins.<sup>5</sup>

A more civilized form of competition prevention was practiced in the 19th and 20th centuries. In New England and much of the United States, agreements by employees not to compete during employment or for a post-employment period became customary, as common law decisions moved in favor of employers after a long period of prohibiting such restraints on trade. These employee covenants not to compete were often accompanied by a covenant of the employee not to solicit fellow employees and/or customers of the employer prior to or after defecting to join a competitor or to found a competitive new company. The covenants were generally enforced in Massachusetts and elsewhere in the United States with notable exceptions and limits. The notable exceptions were total bans on post-employment noncompetition provisions in California, Oklahoma, and North Dakota as legacies of pioneer spirit origins and procedural developments like the Field Code.<sup>6</sup> Legislative and judge-made limits in Massachusetts and many other states included scrutiny as to calibration of the ban in relation to the reasonable employer interests, including limits on time, geography and scope, and proper contract practices including consideration; but initial employment or continuation of employment was usually accepted as adequate consideration.<sup>7</sup>

Noncompetition covenants have also been interwoven with and used to protect goodwill, as well as trade secrets of the employer.<sup>8</sup> Trade secrets law was first articulated in Massachusetts as sounding in tort, and in some cases, express or implied contract. Property protection was a problematic association early in the 20<sup>th</sup> century<sup>9</sup> but not now.<sup>10</sup> Express and implied noncompetition agreements and, in some cases, obligations even in the absence of a written agreement, also appear in the sale of business ownership interests, shopping center exclusivity rights, fiduciary obligations of company directors and officers (including corporate opportunity doctrines), and franchise agreements.

The law of Massachusetts governing covenants not to compete has been predominantly judge-made common law, drawn in part from English common law, and reflecting judicial response to changes in society. Much of the law developed in the courts of equity as employers sought specific performance of the agreements

4. Belper North Mill, "Samuel Slater, Trade Secrets and the American Industrial Revolution," available at [BelperNorthMill.wordpress.com/Samuel-slater-trade-secrets-and-the-american-industrial-revolution](http://BelperNorthMill.wordpress.com/Samuel-slater-trade-secrets-and-the-american-industrial-revolution) ("Perhaps we should look to Slater as demonstrating the universal economic value of labor mobility"); IP Watchdog (July 5, 2017), available at [pooley.com/was-americas-industrial-revolution-based-on-trade-secret-theft](http://pooley.com/was-americas-industrial-revolution-based-on-trade-secret-theft).

5. Murano glassmaking continues to modern times albeit *sans* assassins. <http://www.beadinggem.com/2007/02/murano-glass-makers-assassins.html>; [theantiquesalmanac.com/glassmakinginvenice.htm](http://theantiquesalmanac.com/glassmakinginvenice.htm).

6. The Code of Civil Procedure and pleadings, merging law and equity constraints, was established for New York in 1848 by attorney David Dudley Field and copied in other states. The Code specified *inter alia* procedural requirements for a valid common law complaint ("Code Pleading"). Stephen N. Subrin, "David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision," 6 LAW AND HISTORY REVIEW 2, pp. 311-73 (Fall 1988), available at <https://doi.org/10.2307/743686>.

7. Emp. Rts. and Resps. Comm., Am. Bar Ass'n., "Covenants not to compete: a state-by-state survey," (Brian M. Malsberger, et al. eds., 13<sup>th</sup> ed. 2020)

(updated biennially by the Employment Rights and Responsibilities Committee within the American Bar Association Section of Labor and Employment Law). A real-time blog asset called [faircompetitionlaw.com](http://faircompetitionlaw.com) (as opposed to unfair competition), reviewing and updating current legislative and case law status of trade secrets and noncompetes nationwide, is provided by the Boston law firm Beck, Reed & Riden LLP.

8. *Marine Contractors v. Hurley*, 365 Mass. 280, 287-89 (1974). The Massachusetts Noncompetition Agreement Act (MNAA) was passed in the same Act that concurrently adopted the Uniform Trade Secrets Act (described below). St. 2018, c. 228 § 19.

9. In *E.I. DuPont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917), Justice Oliver W. Holmes Jr., arguing for a tort rather than a property analysis, famously said, "[w]hether the plaintiffs have any valuable secrets or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be."

10. See Miguel Deutch, "The Property Concept of Trade Secrets in Anglo-American Law: An Ongoing Debate," 31 U. RICH. L. REV. 313, *passim* (1997) (transition to property recognition).

and injunctions to enforce them. To a greater degree than in many other fields, legislative intrusion into this area of the common law was minimal. To be sure, the legislature enacted bans on noncompetition covenants for physicians, psychologists, social workers and broadcasting industry on-air personalities, and rules of legal ethics prevent such agreements as to lawyers.<sup>11</sup> The Supreme Judicial Court (SJC) thereafter invalidated liquidated damage clauses for competition by such professional employees as proxies for banned noncompetition covenants.<sup>12</sup> But Massachusetts had enacted no general statute addressing the subject of employee covenants not to compete until the MNAA.

Although noncompetition agreements have been legitimately and widely used in various business contexts,<sup>13</sup> their use in employment agreements has been viewed in many quarters as particularly problematic.<sup>14</sup> In the early years of the 21<sup>st</sup> century, the adverse impacts of such agreements on workers and the economy, together with expansion of the use of such covenants to extreme and unreasonable lengths, precipitated cries for reform.<sup>15</sup> There was major discomfort with adhesion contracts of noncompetition going far beyond valid employer interests.<sup>16</sup> Widespread discontent existed over pre-reform realities such as inappropriate application to low wage workers whose mobility was unfairly limited; insufficient notice to employees; overbroad provisions for duration and geographic or technical scope; pretextual protection of non-secret alleged trade secrets; and antitrust violations.<sup>17</sup> The MNAA and similar statutes in other states are the legislative responses to many of these concerns.

11. See e.g., MASS. GEN. LAWS c. 112, § 12X (physicians); c. 112, § 74D (nurses); c. 112, § 129B (radiologists); c. 112, § 135C (social workers); c. 149, § 186 (radio/tv personalities); Mass. Rules Prof. Conduct, Rule 5.6 (lawyers); see also Ohio Rules of Prof. Conduct, Op. 2020-01 (Feb. 7, 2020) (in-house lawyer may not agree to a noncompetition agreement as to law practice).

12. *Falmouth Ob-Gyn Assocs. v. Abisla*, 417 Mass. 176, 182 (1994).

13. Noncompetition agreements are ubiquitous, except in the states where banned (California, Oklahoma and North Dakota), and have been reflexively enforced nationwide without running afoul of the Sherman Act or Federal Trade Commission Act. The Department of Justice and Federal Trade Commission (FTC) Joint Antitrust Guidance for Human Resource Professionals does not attack commonplace noncompete agreements. See Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (2016). It does report that the antitrust agencies have attacked no-poach agreements among employers not to solicit or hire each other's employees or fix wages analogous to consumer price fixing. *Id.* at 3-4.

14. See Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (President Joe Biden's July 9, 2021, executive order on producing greater competition in the American economy included direction to the FTC to find ways to restrict noncompete agreements).

15. There are several grievances, but one that went viral was the news of Jimmy John's franchised sandwich shops requiring noncompetes by teenage "sandwich artists." The practice was discontinued after pressure by antitrust authorities.

16. See Evan Starr, et al., "Noncompete Agreements in the U.S. Labor Force," 64 J.L. & ECON. 53, *passim* (2021) (flaws of noncompetition agreements; competing theories of economic value; results of survey of 11,505 labor participants).

## PART I

### *Development of Massachusetts Common Law Concerning Employee Noncompetition Agreements*

From its earliest case on a restrictive covenant,<sup>18</sup> the Massachusetts SJC has looked to English common law.<sup>19</sup> As recently as 2004, it continued to cite to and to rely upon historic English case law when ruling upon the enforceability of noncompetition clauses.<sup>20</sup> Because the SJC built the Massachusetts law of employee noncompetition agreements upon the foundation of English common law doctrines, understanding the history of Massachusetts law on employee noncompetition agreements necessarily requires a close look at how the courts of England fashioned the common law on the topic.

### *The History of English Common Law on Restrictive Covenants*

Anglo-American law on restrictive covenants began in the 15<sup>th</sup> century with *Dyer's Case*.<sup>21</sup> In that case, John Dyer had promised not to work in his trade in the same town as the plaintiff for six months after leaving plaintiff's employ. Judge Hull declared that the promise was unenforceable for lack of consideration, but went on to opine that the covenant was void in any event.<sup>22</sup> Judge Hull was so outraged by the plaintiff's attempted restraint on Dyer's ability to work that he famously swore in bad French, with more fervor than decency:

'A ma intent vous purrez avoir demurre sur luy que obligation est void eo que le condition est encounter common ley, et per Dieu, si le plaintiff fut icy, il irra al prison tang il ul fait fine al Roy.<sup>23</sup>

17. Momentum has been growing for several years for federal legislation to effect reforms in noncompetition agreements. That momentum may be slowed by sufficient reform achieved by the MNAA and several similar acts of other states and also the proposed Uniform Restrictive Employment Agreement (UREA) Act. See Part V *infra*.

18. The first case in Massachusetts concerning a restrictive covenant is also recognized as the first such case in the United States. *Pierce v. Fuller*, 8 Mass. 223 (1811); see also *Hess v. Gebhard & Co., Inc.*, 570 Pa. 148, 159 n.2 (2002) ("The earliest known American case involving a restrictive covenant is *Pierce v. Fuller*").

19. *Taylor v. Blanchard*, 95 Mass. 370, 373 (1866) (explicitly stating that the Supreme Judicial Court (SJC) "has adopted the English doctrines [concerning restrictive covenants], so far as it has had occasion to consider them").

20. See, e.g., *Boulanger v. Dunkin' Donuts, Inc.*, 442 Mass. 635, 646 (2004) (citing to English common law in a case involving noncompetition clause in franchise agreement).

21. *Dyer's Case*, [1414] Y.B. 2 Hen. V, fol. 5, pl. 26. *Dyer's Case* is frequently cited as the earliest reported case concerning an agreement not to compete. See, e.g., *Ineo, LLC v. Lenehan*, No. MMXCV186019598S, 2018 Conn. Super. LEXIS 335, at \*15 (Super. Ct. Feb. 20, 2018) (Pierson, J.).

22. *Dyer's Case*, Y.B. 2 Hen. V, fol. 5, pl. 26 (1414); see also, *Ineo, LLC*, No. MMXCV186019598S, 2018 Conn. Super. LEXIS 335, at \*15 (quoting a modern English translation of Judge Hull's opinion that was reported in the Year Books of Henry V in archaic Norman French).

23. *Lange v. Werk*, 2 Ohio St. 519, 526-27 (1853).

Judge Hull's statement has been translated as:

In my opinion you might have demurred upon him that the obligation is void, inasmuch as the condition is against the common law; and (per Dieu) if the plaintiff were here he should go to prison till he paid a fine to the king.<sup>24</sup>

*Dyer's Case* has come to exemplify the common law's ancient blanket prohibition on all restraints of trade, regardless of whether the restraint is general or limited to a particular area or time.<sup>25</sup> When *Dyer's Case* was decided, England was in the midst of a series of Black Death pandemics that ravaged its population intermittently from 1348 until 1666, causing dire labor shortages. Laborers were in such demand by 1349, merely one year after the plague arrived in England, that Parliament passed the "Ordinance of Labourers," which made voluntary unemployment unlawful.<sup>26</sup> It was in this context that Judge Hull, when faced with a private contract seeking to deprive a town of an able-bodied laborer, expressed such frustration. Additionally, the guild system of the time permitted laborers to work only in the trade in which they were apprenticed. If a man were prevented from working his trade in his town or area, he risked becoming a pauper,<sup>27</sup> and likely a public charge.

For the next three centuries, *Dyer's Case* remained the law, and English courts refused to enforce almost all covenants in restraint of trade. It wasn't until 1711, almost 50 years after England's last bubonic plague outbreak, that Chief Judge Parker, in *Mitchel v. Reynolds*, took a fresh look at the law and announced a more relaxed "rule of reason" for covenants not to compete, which took into account changing business needs of society.<sup>28</sup> In *Mitchel*, the defendant had assigned his lease of a bakehouse to the plaintiff for five years and had agreed not to work as a baker within the Parish of St. Andrew's Holborn for a term of five years. The covenant included defendant's agreement to pay the sum of 50 pounds as liquidated damages for violation of the covenant.

Chief Judge Parker first distinguished general restraints of trade (those unlimited in terms of time and space) from partial restraints limited to a particular place and time period. He ruled that all general restraints "are void, being of no benefit to either party, and only oppressive."<sup>29</sup> He went on to rule that partial restraints are presumed to be void and against public policy; but the presumption can be overcome when i) circumstances are shown which make the covenant reasonable and ii) the covenant is supported by consideration.<sup>30</sup>

In so ruling, Chief Judge Parker outlined policy considerations, including freedom of contract, public policies against depriving a party of his livelihood and means of supporting his family, public policies against depriving society of an individual's work, prevention of monopolies, and protecting an employer's legitimate interests.<sup>31</sup> Applying the policy considerations to the circumstances where the restraint was limited to five years in one neighborhood and was supported by "proportionate" consideration, Chief Judge Parker found the contract to be a just and honest one, and ruled in favor of the plaintiff.<sup>32</sup>

In 1831, Chief Judge Tindal in *Horner v. Graves* announced the test for determining whether a covenant not to compete is reasonable:

And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. *Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable.*<sup>33</sup>

In that case, the plaintiff surgeon-dentist hired the defendant, a moderately skilled dentist. The employment agreement contemplated a term of five years, but included a three-month notice clause. Plaintiff agreed to pay a high salary to the defendant and to teach him the profession of surgeon-dentistry. Defendant agreed to serve the plaintiff and further agreed that upon leaving plaintiff's employ, he would not practice dentistry within a 100-mile radius of the city of York and, if he did, to pay 1,000 pounds as liquidated damages.<sup>34</sup> Chief Judge Tindal first remarked that, under the terms of the contract, plaintiff could conceivably discharge defendant after three months, with defendant earning no more than 30 pounds, and then prevent him from carrying on his business and earning his livelihood within the large space of 100 miles from York. Chief Judge Tindal concluded that the consideration was clearly inadequate for the sacrifice exacted. He went on to state that the greater question was whether the contract was a reasonable restraint of trade.<sup>35</sup> Applying the reasonableness test quoted above to the contract and circumstances at hand, Tindal opined that the restraint of trade was unreasonable and thus unenforceable:

24. Arthur Linton Corbin, *Cases on the Law of Contracts: Selected from Decisions of English and American Courts*, 1233 (1921); see also *Ineo, LLC*, No. MMXCV186019598S, 2018 Conn. Super. LEXIS 335, at 15; *Seach v. Richards, Dieterle & Co.*, 439 N.E.2d 208, 212 (Ind. App. 1982); *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685, 691 (Ohio Ct. Com. Pl. 1952).

25. See, e.g., *Colgate v. Bacher* [1602] 78 Eng. Rep. 1097-98 (bond conditioned upon payment of 20 pounds if employee used the trade of a haberdasher within a limited place and time is void, citing *Dyer's Case*). This is roughly concurrent with the 1623 Statute of Monopolies (aka Statute of James) (21 Jac 1 c 3) forbidding all monopolies but with an exception for patented inventions.

26. Ordinance of Labourers, 23 Edw. 3, cap. 1 (1349). The ordinance provided that any able-bodied man or woman, under the age of 65 years, who failed to serve when offered employment "shall be taken and sent to the next jail, and

there he shall remain in strict custody until he shall find surety for serving." *Id.*

27. See generally, *Witter*, 105 N.E.2d at 691 (describing the guild system's restrictions upon workers in 15<sup>th</sup> century England).

28. *Mitchel v. Reynolds* [1711] 1 P. Wms. 181, 24 Eng. Rep. 347.

29. *Id.* at 348.

30. *Id.* at 352.

31. *Id.* at 350.

32. *Id.* at 352.

33. *Horner v. Graves* [1831] 7 Bing. 735, 743, 131 Eng. Rep. 284, 287 (emphasis supplied).

34. *Id.* at 284-85.

35. *Id.* at 287.

it must strike the mind of every man that a circle round York, traced with the distance of 100 miles, encloses a much larger space than can be necessary for the Plaintiff's protection. The nature of the occupation, which is one that requires the personal presence of the practiser and the patient together at the same place, shews at once that the Plaintiff has shut out the Defendant from a much wider field than can by possibility be occupied beneficially by himself. There is, therefore, on the one hand, no reason why the Defendant should not gain his livelihood; nor, on the other, why the public should not receive the benefit of his skill and industry through so wide a space. . . the contract is one which contains a restraint of the Defendant to carry on his trade, far larger than is necessary for the protection of the Plaintiff in the enjoyment of his trade; and consequently, that the covenant creating such restraint cannot form the subject of an action.<sup>36</sup>

Following the Industrial Revolution, technological developments greatly improved the ease and speed of transportation and communication, not only in Great Britain, but throughout Europe and much of the rest of the world. As a result, global commerce became a reality. Once again, the common law evolved to take into consideration the changing conditions of commerce and the changing interests of society. *Nordenfelt v. The Maxim Nordenfelt Guns & Ammunition Co., Ltd.*,<sup>37</sup> a case decided by the House of Lords in 1894, concerned a noncompetition clause in the sale of a defense contractor's global business. Thorsten Nordenfelt was a manufacturer of military machine guns. In the words of Lord MacNaughten, "his customers were comparatively few in number, but his trade was world-wide in extent. He had upon his books . . . almost every State of any note in the habitable globe."<sup>38</sup> Nordenfelt sold his business to a limited company, which then proceeded to merge with a similar business founded by a Mr. Maxim. The merger transaction was made with Mr. Nordenfelt's cooperation, and he entered into a restrictive covenant with the resulting Maxim Nordenfelt Guns & Ammunition Company whereby he agreed not to compete with the company for the term of 25 years from the date of the company's incorporation. However, Mr. Nordenfelt's restrictive covenant was unlimited in terms of space.<sup>39</sup> The issue before the House of Lords in the *Nordenfelt* case was thus whether a covenant in general restraint of trade must be held void regardless of whether the restraint

is reasonable under the circumstances.<sup>40</sup>

Lord MacNaughten addressed the distinction between general and partial restraints of trade laid out in *Mitchel v. Reynolds*<sup>41</sup> that all general restraints are void as against public policy but that partial restraints are valid so long as they are reasonable and supported by consideration:

Why was the relaxation [of the rule that all restraints of trade are void] supposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any inherent or essential distinction between the two cases.<sup>42</sup>

He then went on to announce that the rule of reason applies to all restraints of trade, not just partial restraints:

The true view . . . is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public . . . I think the only true test in all cases, whether of partial or general restraint, is . . . What is a reasonable restraint with reference to a particular case?<sup>43</sup>

The expansion of the rule of reason to all restraints of trade, both general and partial, was required by the political and commercial changes brought about by the great progress made in science, technology, transportation, and communication since the Elizabethan Era when the rule in *Mitchel v. Reynolds* was first announced.<sup>44</sup>

In 1916, the House of Lords in *Herbert Morris, Ltd. v. Saxelby*<sup>45</sup> made clear two important points of law concerning the application of the rule of reason: i) that an employer cannot restrain an

36. *Id.* at 287-88.

37. *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., Ltd.* [1894] A.C. (HL) 535 (appeal taken from Eng.).

38. *Id.* at 559.

39. *Id.* at 560.

40. *Id.* at 556.

41. *See* 1 P. Wms. 181, 24 Eng. Rep. 347 (1711).

42. *Nordenfelt*, AC (HL) 535 at 564.

43. *Id.* at 565, 574. The House of Lords later adopted MacNaughten's test as the correct statement of the common law in *Mason v. Provident Clothing & Supply Co., Ltd.* [1913] AC (HL) 724, 733, 1 KB 65.

44. Several of the members of the House of Lords commented upon the need to revise the common law rule due to the march of progress, including Lord Herschell (" . . . regard must be had to the changed conditions of commerce and the means of communication which have been developed in recent years. To disregard these would be to miss the substance of the rule in a blind adherence to its letter"), *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [1894] AC (HL) 535, 547, Lord Ashborne ("bear in mind the vast advances that have since the reign of Queen Elizabeth taken place in science, inventions, political institutions, commerce, and the intercourse of nations"), *id.* at 556, and Lord Morris ("we have now reached a period when it may be said that science and invention have almost annihilated both time and space"), *id.* at 575.

45. *Herbert Morris, Ltd. v. Saxelby* [1916] AC 1 (HL) 688 (appeal taken from Scot.).



employee from using his general skill and knowledge of a trade and ii) that a noncompetition covenant in an employment agreement stands on different footing from a noncompetition covenant in the sale of a business.

In that case, Herbert Morris, Ltd. was a manufacturer of pulleys, hoisting equipment, overhead runways, and overhead cranes, doing business in England, Wales, Scotland, and Ireland. Saxelby started employment at the firm at age 15 as a junior draftsman and, over a 10-year period, rose to engineer and then to head of sales. In his 10th year with Herbert Morris, Ltd., he entered into a two-year employment contract that contained a restrictive covenant not to compete in the sale or manufacture of pulleys, overhead runways, or overhead traveling cranes within the United Kingdom or Ireland for a period of seven years following the end of his employment. In his final six months with Herbert Morris, Ltd., Saxelby looked for employment without success with various engineering firms not involved in the manufacture of hoisting equipment. Saxelby then tried working for a manufacturer of lifting equipment in France, but after one year, he returned home to Manchester and started work with competitors of his old employer. Herbert Morris, Ltd. then brought suit to enforce the restrictive covenant.

After noting the untenable position in which the employer had placed Saxelby (i.e. that he would have to “begin life afresh”<sup>46</sup> or must “for seven years of his life, become an exile”<sup>47</sup>), the House of Lords ruled that the general skill and knowledge of a trade acquired by an employee through his own ingenuity and talent belongs to the employee alone and is not a legitimate interest of the employer, such as trade secrets would be. To restrain an employee from using his general skill and knowledge would be a restraint upon competition *per se*, which is unreasonable.<sup>48</sup> In addition, such a restraint would be unreasonable from a public policy standpoint because “public policy requires that every man shall be at liberty to work and shall not be at liberty to deprive himself or the State of his labour, skill or talent, by any contract he enters into.”<sup>49</sup>

The House of Lords went on to rule that restrictive covenants in employment agreements are different from restrictive covenants in the sale of a business. A sale of a business is hardly worthwhile unless the purchaser takes over the goodwill of the business. Thus, exacting a noncompetition agreement from the seller is reasonable in order to ensure that the purchaser gets the benefit of his bargain. In contrast, the case of an employer exacting a covenant not to compete from his employee is entirely different. The goodwill of his business is necessarily subject to competition from all persons who choose to engage in the same or similar trade. An employer seeking to restrain an employee from competition *per se* is not trying to protect what he already has, but is trying to gain a special advantage that he could not otherwise secure.<sup>50</sup> Thus, a restriction on competition in the employment context may very well be unreasonable and against public policy, while the same terms in the context of the sale of a business

would be reasonable and enforceable.<sup>51</sup>

Following *Herbert Morris, Ltd.*, a restrictive covenant against an employee must be tested in reference to the character of the work done by the employee while in the employer’s service for “whether in that view the covenant taken from him goes further than is reasonably necessary for the protection of the proprietary rights of the covenantee.”<sup>52</sup>

The next and final historic English common law case that went on to shape the Massachusetts common law of noncompetition agreements in employment is *Attwood v. Lamont* concerning reformation or “blue penciling” of overbroad restrictive covenants.<sup>53</sup> In that case, Attwood owned a department store at Kidderminster. Lamont sought employment as the head of Attwood’s tailoring department. Attwood insisted that Lamont sign a form noncompetition agreement (which it required of all of its department heads) that he not trade in opposition to Attwood either directly or indirectly as a tailor, dressmaker, general draper, milliner, hatter, haberdasher, or as a gentleman’s, ladies’, or children’s outfitter within 10 miles of Kidderminster. The restrictive covenant had no time limit, thus binding Lamont for life. Lamont set up his own tailoring business outside of the 10-mile radius, but he took orders from clientele located within the 10-mile radius. Attwood sued for an injunction. The trial court held that the covenant was wider than reasonably necessary and sought to strike out or “blue pencil” the excessive and overbroad portions of the covenant and enforce the remainder to enjoin Lamont from competing as a tailor within 10 miles of his old employer’s business.<sup>54</sup> Lord Sterndale reiterated the common law rule of blue penciling:

A contract can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining. This is sometimes expressed . . . by saying that the severance can be effected when the part severed can be removed by running a blue pencil through it.<sup>55</sup>

The Court of Appeals unanimously agreed that the restrictive covenant at hand could not be blue penciled because it was one, unseverable covenant not to compete with the employer’s business. In the words of Lord Younger:

The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word, it is permissible. . . The respondent is, on the evidence, not carrying on several businesses but one business, and, in my opinion, this covenant must stand or fall in its unaltered form.<sup>56</sup>

46. *Id.* at 699.

47. *Id.* at 718.

48. *See generally, id.* at 699-702 (“But freedom from all competition *per se* apart from [divulging trade secrets or soliciting old customers] . . . he is not entitled to be protected against”).

49. *Id.* at 701.

50. *Id.* at 708-09.

51. *See Id.* at 709 (pointing out that the case of an employer taking a covenant

not to compete from an employee or apprentice is different from a purchaser of a business taking such a covenant from the vendor — the former is seeking special advantage that he could not otherwise secure, while the latter is seeking to protect his purchase of goodwill).

52. *Attwood v. Lamont* [1920] 3 KB 571, 590.

53. *Id.* at 577-80.

54. *Id.* at 571-574.

55. *Id.* at 578.

56. *Id.* at 593.

Lord Younger went on to quote Lord Moulton in *Mason v. Provident Clothing & Supply Co., Ltd.* on the moral hazard inherent in liberal application of the figurative blue pencil to reform overbroad restrictive covenants:

It would in my opinion be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master. . . the hardship imposed by the exaction of unreasonable covenants by employers would be greatly increased if they could continue the practice with the expectation that, having exposed the servant to the anxiety and expense of litigation, the Court would in the end enable them to obtain everything which they could have obtained by acting reasonably.<sup>57</sup>

### ***The Development of Massachusetts Common Law on Restrictive Covenants in Employment Agreements***

The first case decided by the Massachusetts SJC concerning an employee's restrictive covenant was *Sherman v. Pfefferkorn*<sup>58</sup> in 1922. In that case, Pfefferkorn was a deliveryman for the Plaintiff Sherman's laundry business that served Weymouth, Hingham, and Braintree. Pfefferkorn executed a contract, agreeing 1) to keep secret the names, addresses and other information concerning Sherman's customers during his employment and for three years thereafter, 2) that he would not do anything prejudicial or injurious to Sherman's business or goodwill during his employment and for three years thereafter and 3) that he would not engage in any branch of the laundry business in Weymouth, Hingham and Braintree for three years after the termination of his employment. Within a few months of being discharged, Pfefferkorn and some others incorporated South Shore Laundry. He then shared the names and addresses of all of Sherman's customers on the routes he had handled with his new competing business. He also participated in soliciting substantially

all of Sherman's customers for his new business. Sherman sought injunctive relief to enforce the contract.<sup>59</sup> The SJC first ruled that an employer's promise of employment is adequate consideration for an employee's covenant not to compete.<sup>60</sup> The court then went on to address the validity and enforceability of Pfefferkorn's covenant not to compete. The court announced the rule of reason derived from English common law:

It has long been settled that contracts restraining freedom of employment can be enforced only when they are reasonable and not wider than is necessary for the protection to which the employer is entitled and when not injurious to the public interest.<sup>61</sup>

In its discussion of the rule of reason and how it should be applied, the SJC referred to three different lines of authority: 1) English common law cases concerning restrictive covenants,<sup>62</sup> 2) the SJC's own cases on restrictive covenants given in contracts for the sale of an existing business,<sup>63</sup> and 3) the SJC's own cases concerning an employee's fiduciary duty not to disclose trade secrets or use confidential information against the employer.<sup>64</sup>

In citing cases concerning restrictive covenants given in business sale contracts, the SJC stressed that while the principle of restrictive covenants in business sale contracts is similar to those in employment agreements, the contours of enforcement are not co-extensive:

A similar principle applies to contracts for the sale of an existing business, and the seller is not permitted to impair or to destroy the good will sold by him . . . Obviously, a greater measure of relief is ordinarily required in such cases than in those involved in a contract of employment for a limited purpose and not so broad as the business to which it relates.<sup>65</sup>

The court went on to hold that the limitations as to time and space were reasonable, but that the term of the restrictive covenant forbidding Pfefferkorn from engaging in any branch of the laundry business was overbroad and went beyond what was reasonably necessary to protect Sherman's goodwill. The court upheld enforcement of the confidentiality, non-solicitation, and protection of goodwill clauses of the restrictive covenant, but refused to enforce the clause prohibiting Pfefferkorn from engaging in any aspect of the laundry business in the specified towns:

57. *Id.* at 594 (quoting *Mason v. Provident Clothing & Supply Co., Ltd.* [1913] AC (HL) 724, 745-46).

58. 241 Mass. 468 (1922).

59. *Id.* at 476.

60. *Id.* at 473.

61. *Id.* at 569 (citing *Taylor v. Blanchard*, 95 Mass. 370, 373, 13 Allen 370 (1866), which in turn cited the old English case of *Mitchel v. Reynolds* [1711] 1 P. Wms. 181, 24 Eng. Rep. 347, for the rule of reason, and went on to acknowledge that the SJC had adopted the English doctrine).

62. The SJC cited to the following six English common law cases: *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. Ltd.* [1894] AC (HL) 535, 365 (appeal taken from Eng.); *Herbert Morris, Ltd. v. Saxelby* [1916] AC 1 (HL) 688 (appeal taken from Scot.); *Mason v. Provident Clothing & Supply Co. Ltd.* [1913] AC (HL) 724, 1 KB 65; *Hepworth Mfg. Co., Ltd. v. Ryott* [1920] 1 Ch. 1, 36 TLR 10; *Dewes v. Fitch* [1920] 2 Ch. 159, 36 TLR. 585; *Attwood v. Lamont* [1920] 3 KB 571, 590. See *Sherman*, 241 Mass. at 570-571.

63. The SJC cited to 11 of its own cases that applied the rule of reason in regard

to restrictive covenants given in contracts for the sale of a business or dissolution of a partnership: *Taylor v. Blanchard*, 95 Mass. 370, 373, 13 Allen 370 (1866); *Anchor Elec. Co. v. Hawkes*, 171 Mass. 101, 106 (1898); *New York Bank Note Co. v. Kidder Press Mfg. Co.*, 192 Mass. 391, 403 (1906); *Foss v. Roby*, 195 Mass. 292, 298 (1907); *Dwight v. Hamilton*, 113 Mass. 175 (1873); *Gamewell Fire Alarm Tel. Co. v. Crane*, 160 Mass. 50 (1893); *United Shoe Machinery Co. v. Kimball*, 193 Mass. 351 (1907); *Old Corner Bookstore v. Upham*, 194 Mass. 101 (1907); *Marshall Engine Co. v. New Marshall Engine Co.*, 203 Mass. 410 (1909); *Dean v. Emerson*, 102 Mass. 480 (1869); *Bishop v. Palmer*, 146 Mass. 469 (1888). See *Sherman*, 241 Mass. at 570-71.

64. The SJC cited to four of its own cases, not involving a restrictive covenant, but concerning the analogous situation of an employee's alleged breach of fiduciary duty not to disclose trade secrets or to use confidential information against the employer's interest: *American Stay Co. v. Delaney*, 211 Mass. 229 (1912); *Essex Trust Co. v. Enwright*, 214 Mass. 507 (1913); *Aronson v. Orlov*, 228 Mass. 1 (1913); and *Wireless Specialty Apparatus Co. v. Mica Condensing Co.*, 239 Mass. 158 (1921). See *Sherman*, 241 Mass. at 570.

65. *Id.* at 570.

Notwithstanding his contract, the employee had the right to engage in the same line of business or to be interested therein, but not beyond the bounds defined.<sup>66</sup>

In so holding, the court distinguished Pfefferkorn's restrictive covenant from those given in regard to a business sale where good will is sold, and the setting up of a competing business would tend to destroy the very thing that had been sold, citing the English case of *Herbert Morris, Ltd. v. Saxelby* discussed above.<sup>67</sup> In short, covenants restricting ordinary competition in business sale contracts are reasonable, while covenants restricting ordinary competition in the context of post-employment are unreasonable.<sup>68</sup>

In the 100 years that have passed since *Sherman v. Pfefferkorn* was decided, the courts of the commonwealth have struggled to apply the rule of reason to post-employment restrictive covenants, at times stressing that employees should be held to their contracts,<sup>69</sup> at times treating post-employment restrictive covenants the same as those given in a business sale,<sup>70</sup> at times stressing the unequal bargaining power of employees,<sup>71</sup> and at times stressing the economic conditions of the time.<sup>72</sup> Practitioners, scholars, and the courts themselves have bemoaned the inconsistencies, both in how legal principles are applied and in the end results.<sup>73</sup> To demonstrate the inconsistencies in application of the rule of reason, focus on the court's varying treatment of whether an employer has a legitimate interest in restricting his former employee from engaging in ordinary competition in an otherwise reasonably limited territory for a reasonable time. As discussed above, *Sherman* prohibited restraint of

ordinary competition.<sup>74</sup> Just three years later, in *Boston & Suburban Laundry Co., Inc. v. O'Reilly*,<sup>75</sup> the SJC reversed the trial court's reformation of a restrictive covenant to permit the employee's engaging in what the trial court found to be ordinary competition in laundry (the same industry involved in *Sherman*). The *O'Reilly* court noted that in the laundry industry, by employing a driver, the employer necessarily introduces the driver to potential future customers he might otherwise have never known and went on to point out:

[t]he difficulty of proving improper use of knowledge acquired and of connections established is very great. A provision for freedom from competition within that vicinity immediately on the termination of the employment is recognized as a reasonable requirement to make of an applicant for employment. . .<sup>76</sup>

Thus, the court applied the same rule to almost identical facts in the same industry in two cases just three years apart with different results — one that enjoined the use of confidential customer information but permitted ordinary competition and the other that enjoined any and all competition in the specified towns.

By 1928, the SJC returned to its prior position that employers have no legitimate interest in restraining an employee from engaging in ordinary competition.<sup>77</sup> Then, in a line of cases spanning almost 40 years, starting with *Becker College of Business Administration and Secretarial Science v. Gross* in 1933, the court swung toward a pro-employer trend to enforce restrictive covenants prohibiting ordinary competition in the name of protecting goodwill.<sup>78</sup> In 1970,

66. *Id.*

67. *Id.* at 570-571.

68. It is worth noting that Massachusetts law concerning restrictive covenants in the sale of a business veered away from the English common law at the turn of the 20th century in *Hutchinson v. Nay*, 187 Mass. 262 (1905) and *Marshall Engine Co. v. New Marshall Engine Co.*, 203 Mass. 410 (1909). Those cases recognized that in England, a vendor of a business who sells goodwill and gives a restrictive covenant can always set up a competing business, so long as he refrains from soliciting the customers of his old business; whereas in Massachusetts, no business can be set up if it derogates from the grant of goodwill of the old business. Thus, the SJC's citation to and application of *Herbert Morris, Ltd. v. Saxelby* [1916] AC 1 (HL) 688 (appeal taken from Scot.), in 1922 in *Sherman*, 241 Mass. 468, is a remarkable step in distinguishing post-employment restrictive covenants from business sale restrictive covenants.

69. See, e.g., *Becker Coll. of Bus. Admin. and Secretarial Sci. v. Gross*, 281 Mass. 355 (1933) (noting that the defendant was a "man of full age, married and a father" who was not led to sign the covenant restraining competition by fraud or duress).

70. See *Edgecomb v. Edmonston*, 257 Mass. 12, 19 (1926) (ironically announcing that "the rule as to the enforcement of negative covenants in agreements of sales is equally applicable in suits where an injunction is sought against the breach of a negative covenant not to engage in a certain trade or business" a mere four years after taking such pains to distinguish post-employment restrictive covenants from those given in a business sale in *Sherman*).

71. See *Alexander & Alexander, Inc. v. Danahy*, 21 Mass. App. Ct. 488, 496 (1986) (noting how employees often do not have the power to negotiate with their employer).

72. One notable case where economic conditions clearly influenced the court's decision is *Economy Grocery Stores Corp. v. McMenemy*, 290 Mass. 549 (1935), where the court refused to grant injunctive relief for an otherwise reasonably limited, valid and enforceable restrictive covenant on a theory of unclear hands where the employer wrongfully discharged an employee during the Great Depression and then sought to prevent him from working in his brother's nearby store.

73. See *Nat'l Hearing Aid Centers, Inc. v. Avers*, 2 Mass. App. Ct. 285, 288-89 (1974) (Justice Goodman's characterization of the SJC's decisions concerning post-employment restrictive covenants as "the welter of cases, many of which cannot be easily (if at all) related to one another"); Ronald J. Gilson, "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete," 74 N.Y.U. L. REV. 575, 605 (1999) (noting that Massachusetts case law on the subject "is large, somewhat inconsistent, and uses the language of trade secret law quite loosely").

74. See notes 58-73 for analysis of *Sherman v. Pfefferkorn*. As will be seen, at notes 79-80, the SJC ultimately swung back to its rule in *Sherman* that post-employment covenants restricting ordinary competition are unreasonable in *Marine Contractors, Inc. v. Hurley*.

75. *Boston & Suburban Laundry Co., Inc. v. O'Reilly*, 253 Mass. 94, 98 (1925).

76. *Id.*

77. See *Club Aluminum Co. v. Young*, 263 Mass. 223, 228 (1928); see also *Horn Pond Ice Co. v. Pearson*, 267 Mass. 256, 259 (1929); *Padover v. Axelson*, 268 Mass. 148, 151-52 (1929).

78. See *Becker Coll. of Bus. Admin. and Secretarial Sci. v. Gross*, 281 Mass. 355, 359-60 (1933) (finding no public policy limiting the court from enforcing a restrictive covenant when it has been intelligently executed without compulsion and is reasonably limited in space and time); *New Eng. Tree Expert Co., Inc. v. Russell*, 306 Mass. 504, 509-10 (1940) (defendant employee argued that Massachusetts post-employment restrictive covenant cases have invariably reformed overbroad territory to limit the restricted area to the territory defendant served while in plaintiff's employ, and acknowledged the precedents, but stated that they do not establish a principle of law in the commonwealth, citing at least two cases involving business sale restrictive covenants). By 1951, the trend of enforcing restrictions of ordinary competition in post-employment cases was so entrenched that the SJC began citing its post-employment restrictive covenant cases to justify the enforcement of business sale covenants restricting ordinary competition. See, e.g., *Thomas v. Paker*, 327 Mass. 339, 341 (1951) (citing *Becker College v. Gross* and *New Eng. Tree Expert Co., Inc. v. Russell*, among other post-employment restrictive covenant cases).



the court swung back once again to declare that restricting ordinary competition is not a legitimate interest of the employer in *Richmond Brothers, Inc. v. Westinghouse Broadcasting Co.*<sup>79</sup> The SJC finally settled the issue in 1974 in *Marine Contractors Co., Inc. v. Hurley* where it ruled:

Employee covenants not to compete generally are enforceable only to the extent that they are necessary to protect the legitimate business interests of the employer. . . Such legitimate business interests might include trade secrets, other confidential information, or, particularly relevant here, the good will [sic] the employer has acquired through dealings with his customers. . . *Protection of the employer from ordinary competition, however, is not a legitimate business interest, and a covenant not to compete designed solely for that purpose will not be enforced.*<sup>80</sup>

The SJC's return to prohibiting restriction of ordinary competition in employment agreements following a long period of cases with a pro-employer trend is described by one scholar as a "Corbinization" of Massachusetts law because Williston disagreed with the rule stated in *Herbert Morris, Ltd. v. Saxelby*, that restriction of ordinary competition in employment is unreasonable, while Corbin favored it.<sup>81</sup> Nevertheless, dissatisfaction with the treatment of noncompetition agreements in the employer-employee relationship remained, and led the Massachusetts legislature to enact the MNAA.

## PART II

### *Requirements of the Massachusetts Noncompetition Agreement Act*

The Massachusetts Noncompetition Agreement Act is only about 1,500 words, but it's not a quick read, nor an easy one. The definitions purport to tell you generally who is an employee, though obvious points of dispute remain to be resolved, but do not explicitly define the term "employer." As is often the case, the significance of several definitions is unclear until they are read in context in later subsections, and some important terms are never explicitly defined. The organization of the statute can be confusing. For example, one could wade laboriously through all eight subdivisions of subsection (b), which sets forth minimum requirements for noncompetition agreements, before realizing that it may well have been unnecessary if you had read subsection (c) first, which describes types of workers against whom noncompetition agreements are unenforceable. But hammering out legislation of this importance is never an easy task and substance prevails over style every time. We do not intend to

criticize the drafters who succeeded in getting this Act passed.

One thing about the title of the Act should be kept firmly in mind at all times: "Noncompetition Agreement" is not used as a generic term. It is specifically — and in some respects quite narrowly — defined in the Act. Many kinds of arrangements that can be viewed as noncompetitive are excluded from the statutory term "noncompetition agreement."<sup>82</sup> "Noncompetition agreements ... do not include" the litany of agreements described in clauses (a) (i) through (x). The Act also excludes from its reach a number of other agreements, which can affect an employee's mobility, and a whole host of non-employment contexts in which covenants not to compete are widely used.<sup>83</sup> So counsel may well find that the MNAA applies to only a limited aspect of a dispute and that other sources of law may apply as well.

Turning to specifics, the MNAA was inserted into the General Laws as Section 24L of Chapter 149, Labor and Industries.<sup>84</sup> Section 24L is divided into six subsections: (a) definitions; (b) (i) through (viii) setting forth minimum requirements for a valid and enforceable noncompetition agreement; (c) setting forth the types of workers against whom a noncompetition agreement will not be enforceable; (d) authorizing a court in its discretion to reform or otherwise revise a noncompetition agreement; (e) a choice of law provision; and (f) jurisdiction and venue provisions for civil actions relating to employee noncompetition agreements subject to section 24L.

As to noncompetition agreements that are included in the statutory definition, the coverage provisions in subsection (c) are a good place to start. The Act dramatically reduces the number of Massachusetts employees who can be subjected to enforceable noncompetition agreements by incorporating the provisions of the Fair Labor Standards Act distinguishing between hourly (non-exempt) employees and salaried (exempt) employees, and prohibiting enforcement of noncompetition agreements against the non-exempt employees, the vast number of regular hourly workers in the economy Section 24L(c)(i). The incorporation by reference of the Fair Labor Standards definitions was an effective mechanism to adopt already existing law that, for the most part, draws a line consistent with the goals of the drafters of 24L. But labeling as "non-exempt" the employees against whom statutorily defined noncompetition agreements are **unenforceable** does have an odd ring to it. Practitioners will presumably come up with some other term for informal use.

The Act also bans enforcement of noncompetition agreements against particularly vulnerable employees, such as undergraduate or graduate students in internships or other short-term employment, whether paid or unpaid (c)(ii); employees who have been terminated without cause or laid off (c)(iii); and employees who are age 18 or younger (c)(iv).

79. *Richmond Bros., Inc. v. Westinghouse Broad. Co.*, 357 Mass. 106, 111 (1970).

80. *Marine Contractors Co., Inc. v. Hurley*, 365 Mass. 280, 287-88 (emphasis added).

81. Gregory Scott Mertz, "Recent Developments Concerning Employee Covenants Not to Compete: A Quiet 'Corbinization' of Massachusetts Law," 12 *NEW ENG. L. REV.* 647 (1977). Co-author Cohen of this article also recalls a circa 1965 CLE session of New England Law Institute, a predecessor of

Massachusetts Continuing Legal Education, Inc. (MCLE), covering this non-competitor subject.

82. MASS. GEN. LAWS c. 149, § 24L.

83. Section 24L(a)(i-x) and (b)(i) (Noncompetition definition inclusions and exclusions limits).

84. Acts of 2018, Chapter 228, titled "An Act Relative to Economic Development in the Commonwealth," included the MNAA as Section 21.

Note however that under the second sentence of (c) all employees may nevertheless face exposure to court ordered competitive restrictions arising from sources other than the MNAA, a subject discussed in more detail, *infra*.

With respect to those “exempt” employees who **can** be subjected to a statutorily defined noncompetition agreement, the blueprint for a “valid and enforceable” agreement may be found in the eight subsections of 24L(b). The first two deal with formalities and procedural protections. If the agreement is entered into “in connection with the commencement of employment,” the Act requires that the agreement “must be in writing, signed by both the employer and employee” and must “expressly state that the employee has the right to consult with counsel prior to signing.”<sup>85</sup> An additional procedural requirement for notice is that the agreement “must be provided to the employee by the **earlier** of a formal offer of employment or 10 business days before the commencement of the employee’s employment.”<sup>86</sup>

Traditionally, the employment itself was sufficient consideration for the covenant not to compete, and subsection (b)(i) says nothing to the contrary. But (b)(vii) states that the noncompetition agreement “shall be supported by a garden leave clause or other mutually-agreed upon consideration between the employer and the employee, provided that such consideration is specified in the noncompetition agreement.” It may no longer be safe to simply assume that the act of hiring, *per se*, satisfies any consideration requirement.

If the agreement is entered into after commencement of employment (but not in connection with the separation from employment), “it must be supported by fair and reasonable consideration independent from the continuation of employment.”<sup>87</sup> The same procedural requirements applicable to agreements made at the commencement of employment — agreement in writing, signed by both parties, notice of right to consult with counsel, and notice 10 days before its effective date — must be satisfied.<sup>88</sup> The statutory definition of a noncompetition agreement does “not include ... noncompetition agreements made in connection with the cessation of or separation from employment if the employee is expressly given seven business days to rescind acceptance.”<sup>89</sup>

The importance of an employer complying with the various procedural requirements in (b) (i) and (ii) cannot be overemphasized. In an early case applying MNAA,<sup>90</sup> enforcement of a noncompetition covenant was denied for failure to notify the employee of the right to consult with counsel and failure to state a garden leave compensation

or adequate alternative in the employment agreement.

With the formalities taken care of in (b) (i) and (ii), the remainder of subsection (b) turns to the minimum requirements for substantive terms of a statutorily defined noncompetition agreement, to wit, an agreement between an employer and employee “under which the employee ... agrees that he or she will not engage in certain specified activities competitive with his or her employer after the employment relationship has ended.”<sup>91</sup>

The clearest term is the allowable “restricted period,”<sup>92</sup> Section 24L(b)(iv) caps the length of any such restriction period at one year, absent certain misconduct by the former employee.<sup>93</sup> Section 24L(b)(iv) states: “In no event may the stated restricted period exceed 12 months, unless...” A flat cap on the length of the restriction eliminates an issue that arose time and time again in the common law cases. What constituted an unreasonable length of time was often a critical and time-consuming issue at trial. The new statutory provision that a period of more than 12 months is unreasonable should shorten the length of many trials.<sup>94</sup> Even a cursory review of SJC cases shows that a 12-month restriction period is significantly shorter than the two, three, or more years previously found to be reasonable.<sup>95</sup>

Of course, there is an “unless,” but the “unless” clause is completely within the employee’s power to control. Twelve months is the maximum restriction period “unless the employee has breached a fiduciary duty to the employer or has “unlawfully taken, physically or electronically, property belonging to the employer....” In that case, the maximum duration of the restriction is two years.<sup>96</sup>

The agreement must be “no broader than necessary” to protect “one or more of the following legitimate business interests of the employer: (A) the employer’s trade secrets; (B) the employer’s confidential information that otherwise would not qualify as a trade secret; or (C) the employer’s goodwill.”<sup>97</sup> Subdivisions (A), (B), and (C) are taken almost verbatim from the SJC’s *Marine Contractors* case.<sup>98</sup>

In one of several legislative efforts to clarify acceptable terms or provide so-called safe harbors, the second sentence of (b) (iii) states that the noncompetition agreement “may be presumed necessary” where the legitimate business interest “cannot be adequately protected through an alternative restrictive covenant, including but not limited to a non-solicitation agreement or a non-disclosure or confidentiality agreement.” The specifically referenced alternatives had been expressly excluded from the definition of a noncompetition agreement in (a).

85. Section 24L(b)(i).

86. *Id.* (emphasis added).

87. Section 24L(b)(ii).

88. *Id.*

89. Section 24L(b)(ix).

90. *KPM Analytics No. Am. Corp. v. Blue Sun Scientific, LLC.*, (D. Mass. 2021) (CA 4:21-10572-TSH), (rulings on motions to dismiss).

91. Section 24L(a) (definition of Noncompetition Agreement).

92. The term is defined in § 24L(a) as “the period of time after the date of cessation of employment during which an employee is restricted by a noncompetition agreement from engaging in activities competitive with” the former employer.

93. Section 24L(b)(iv).

94. *Compare, e.g.*, 2018 Florida Statutes Title XXXIII, c. 542, § 335(d) (six months or less presumptively reasonable, over two years presumptively unreasonable). This range enacted in Florida and other states is meant to discourage

but not wholly prohibit longer durations, thus keeping the reasonableness issue alive at trial.

95. The SJC has commonly upheld two- and three-year restrictions. *See, e.g.*, *All Stainless, Inc. v. Colby*, 364 Mass. 773, 780-81 (1974) (two-year restriction enforceable); *Cedric G. Chase Photographic Lab. v. Hennessey*, 327 Mass. 137, 139-40 (1951) (two-year restriction enforceable); *New England Tree Expert Co., Inc. v. Russell*, 306 Mass. 504 (1940) (three-year restriction enforceable). The SJC has also, albeit less frequently, found much longer time restrictions to be reasonable. *See, e.g.*, *Chandler, Gardner & Williams, Inc. v. Reynolds*, 250 Mass. 309, 314 (1924) (10-year restriction of competition in the undertaking business was not unreasonable as a matter of law).

96. Section 24L(b)(iv). The employer is excused from making the payments during the extension period.

97. These will seem very familiar to anyone who has read the common law decisions on employee covenants not to compete.

98. *Marine Contractors v. Hurley*, 365 Mass. 280, 287-88 (1974).

In Section 24(b)(v) & (vi), the classic common law concept of reasonableness moves to the forefront. Under (b)(v) the agreement “must be reasonable in geographic reach in relation to the interests protected.” A reach limited to only “the geographic areas” in which at any time within the last two years of employment the employee provided services or had a material presence or influence “is presumptively reasonable.”

Section 24L(b)(vi) requires that the agreement “must be reasonable in the scope of proscribed activities in relation to the interests protected.” It also provides that a restriction on activities that “protects a legitimate business interest and is limited to only the specific types of services provided by the employee at any time during the last two years of employment is presumptively reasonable.”

Section 24L(b)(vii) talks about money and other compensation. It mandates that the noncompetition agreement “shall be supported by a garden leave clause or other mutually-agreed upon consideration,” provided that the consideration is specified in the agreement. Employment *per se* still seems to suffice as consideration for a noncompetition covenant at initial employment, but after promotion or other significant shift of status, a new contract or an amendment of the prior one with further consideration will be needed to maintain the noncompetition obligation.<sup>99</sup>

The agreement must be supported by (a) payment during the restricted period of 50% of the employee’s highest annualized base salary within the two years preceding termination (the “garden leave” safe harbor) or (b) other mutually agreeable alternate consideration.<sup>100</sup> The parties can negotiate for other consideration, which arguably might include such things as a greater than customary signing bonus, stock options, extended vacation, earlier vesting of options, tangible property given to the employee (luxury car, apartment, scientific instruments, etc.) and/or special training. Note, however, that the alternate consideration must be stated in the original employment agreement, or at the time of an amendment or new agreement during employment.<sup>101</sup> There appears to be some tension between the requirement in (b)(vii)(ii) that (except in the event of breach by the employee) the garden leave clause “not permit an employer to unilaterally discontinue or otherwise fail or refuse to make the payments,” and the provision in the definition of “garden leave

clause” that the clause “shall become effective upon termination of employment unless the restrictions upon post-employment activities are waived by the employer or ineffective under subsection (c) (iii).”<sup>102</sup>

The noncompetition agreement is not enforceable if the employment is terminated by the employer unless terminated for cause.<sup>103</sup> The statute does not specifically address what is known in employment law as a “constructive discharge,” an employee notice of termination necessitated by employer misconduct.<sup>104</sup>

In its final clause, Section 24L(b)(viii), imposes one last requirement: The agreement must be “consonant with public policy.” Don’t bother looking through the definitions section again. You won’t find it there. But you might get out that old tape measure, for it may be time to check the length of a modern Chancellor’s foot. The mention of public policy strongly suggests that the legislature intended Massachusetts courts to continue to exercise their traditional powers as they have in the past. This is reinforced by the broad language of the second sentence of subsection (c) authorizing the exercise of broad equitable powers to impose a noncompetition restriction against employees on grounds other than the Noncompetition Agreement Act.<sup>105</sup>

The clearest demonstration that the legislature expected the courts to continue to oversee these noncompetition agreements is the provision that a court may “in its discretion, reform or otherwise revise a noncompetition agreement so as to render it valid and enforceable to the extent necessary to protect the applicable legitimate business interests.”<sup>106</sup> This “blue pencil” rule (sometimes stated as a reformation rule) has been controversial and a proposed uniform law (for nation-wide adoption or nearly so) would limit it.<sup>107</sup> The legislative history Addendum to this article shows that a proposed amendment to remove judicial power to reform agreements was defeated.

Section 24L(e) is a choice of law provision designed to ensure that Massachusetts policy choices are carried out. If an employee was a resident of Massachusetts or employed there in the 30-day period immediately preceding cessation of employment, the requirements of the Act apply notwithstanding any contrary choice of law clause in the contract.<sup>108</sup>

99. *Id.* at § 24L(b)(ii).

100. *Id.* at § 24L(b)(iv-v).

101. Severance agreements are excluded from the scope of the Act. They often cover a range of issues and include confidentiality, nondisparagement, noncompetition, payments to the ex-employee, a non-hire component and (sometimes) silence about scandalous behavior. It may be hard to show (credibly) true allocations of benefits to the departing employee compliant with garden leave (or a valid alternative) and other requirements of the MNAA.

102. *Id.* at § 24L(a) (definition of garden leave). In the authors’ view, a belated waiver to avoid payment should be valid only if the employee has not previously changed positions in reliance on the garden leave clause. But the employee’s lawyer should get that into the employment agreement or amendment initially providing a garden leave clause.

103. *Id.* at § 24L(c)(iii).

104. *See* GTE Prods. Corp. v. Stewart, 421 Mass. 22, 33-34 (1995) (“constructive discharge occurs when the employer’s conduct effectively forces an employee to resign”) (quoting Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238, 1244-45 (1994)).

105. *Cf.* Essex Trust Co. v. Enwright, 214 Mass. 507, 509-513 (1913) (implied duty of employee loyalty not to use confidential information to appropriate the employer’s property).

106. MASS. GEN. LAWS c.149, § 24L(d). The rule has different names in various states, and even in a state’s various courts, including blue pencil (offending words/excessive limits deleted but remaining balance enforceable), red pencil (hold the contract invalid with no room for correction), or reformation (aka purple pencil as a compromise between blue and red), e.g., reducing a period of noncompetition or a scope of forbidden territory post-employment competition with revision/reformation if need be. The typical usages for Massachusetts expressed in pre-NCAA cases were substantively rules of reformation but sometimes otherwise stated.

107. *See* notes 181-94 *infra* Part IV (Questions). *See also* notes 213-225 and related main text, *infra* re a uniform state law governing noncompetition and other restrictive employment agreements adopted July 2021 by the Uniform Law Commission (ULC) aka National Conference of Commissioners on Uniform State Laws (NCCUSL) and particularly note 220 regarding section 16(A) and (B) of the UREA Act limiting judicial reformation.

108. MASS. GEN. LAWS c.149, § 24L(e). The U.S. Constitution’s full faith and credit clause would require other states to honor a final Massachusetts court judgment. But a foreign country’s court might not be so bound. Even in the U.S, the public policy of California can excuse non-enforcement of a Massachusetts contract restriction of a California employee. Oxford Glob. Res., LLC v. Hernandez, 480 Mass. 462, 463, 468-470 (2018) (contract choice of governing Mass. law not enforceable against a California employee).



Finally, section 24L(f) establishes venue and jurisdiction for “civil actions relating to employee noncompetition agreements subject to [Section 24L].”<sup>109</sup> They may be brought in the county of the employee’s residence or, if agreed to by both the employee and employer, in Suffolk County in the Superior Court or its Business Litigation Session.<sup>110</sup>

### PART III

#### *Remaining Sources of Noncompetition Restrictions*

Without denigrating or diminishing the significance of the MNAA’s reforms, we would be remiss if we failed to point out that many other employers’ options remain after MNAA. The Act itself preserves the basic system of such covenants for exempt (salaried) employees while excluding non-exempt (hourly wage) employees.<sup>111</sup> The MNAA also permits covenants not to solicit<sup>112</sup> the employer’s other employees, or customers/clients, or vendors; non-disclosure or confidentiality agreements; invention assignment agreements; garden leave clauses; and agreements not to reapply for employment (subject to seven days to rescind).<sup>113</sup> Noncompetition covenants remain viable in business sales and franchise agreements. The MNAA permits noncompetition agreements made in connection with sale of a business or substantially all its assets or as to partners (or partner equivalent) in connection with a business break-up or spin-off.<sup>114</sup>

Other adjustments that will need to be made include necessary efforts of lawyers for the (potential) employer and employee to address and resolve: (a) employment (or not) status in the restricted period and consequent tax and withholding issues; (b) dispute resolution procedures in court and/or by ADR,<sup>115</sup> including emergency

relief motions; and (c) partial or full clawbacks of garden leave payments in case of violation of the noncompetition restriction and other remedies possibly including liquidated damages.

Furthermore, the law of noncompetition agreements has always been only one component of the employer-employee relationship. Traditional fiduciary duties and obligations of officers, directors, owners, or other key personnel remain.<sup>116</sup> Employers can also institute or expand other systems of intellectual property (IP) protection including patents,<sup>117</sup> trademarks,<sup>118</sup> copyrights,<sup>119</sup> and robust trade secret protection under the “Uniform Trade Secrets Act<sup>120</sup> and Federal Defend Trade Secrets Act” and various adjunct IP forms, including the Computer Fraud and Abuse Act<sup>121</sup> and the Digital Millennium Copyright Act.<sup>122</sup> Several of these alternative IP forms have criminal law protection as well as civil action remedies. There are flaws in each of these alternative methods of IP protection. But in light of the MNAA’s tightening up on the use and scope of non-competition agreements, employers have an incentive to reconsider the utility of these alternative means of protection.

Other protections include incidental benefit to the employer of government protection of proprietary information obtained or used by or for the U.S. government in procurement and regulatory activity and maintained in confidence,<sup>123</sup> exclusive rights granted in Food and Drug Administration market approval for new chemical entity pharmaceuticals<sup>124</sup> and biologics,<sup>125</sup> government imposed patent application secrecy orders,<sup>126</sup> data export regulations,<sup>127</sup> limitations on foreign investment in American companies for gaining access to important technologies,<sup>128</sup> insider trading restrictions and sanctions of securities law,<sup>129</sup> regulation and protection of financial, health and

109. MASS. GEN. LAWS c.149, § 24L(f).

110. Section 24L(f). When Massachusetts employees flee for a new (competitive) job in California, there is an analysis of the time of full exit versus a timely filed Massachusetts suit (before the employee fully exited Massachusetts). A preliminary injunction was granted against such an employee, but later amended to let Donatelli work for EMC in a different tech area than the one EMC wanted to protect. *EMC Corp. v. Donatelli*, 25 Mass. L. Rep. 399 (2009). California policy and law can be a basis for declining enforcement of an agreement for Massachusetts or Delaware law.

111. MASS. GEN. LAWS c. 149 § 24L(b)(i).

112. *Id.* at § 24L(a) (definition of a noncompetition agreement and/or permitted other restraints).

113. *Id.* at § 24L(b)(iii-x).

114. MASS. GEN. LAWS c. 149 § 24L(a) (defining noncompetition to exclude business sales).

115. There is a growing resistance at state and federal levels to mandatory arbitration, but the Supreme Court and therefore all federal courts are “all in” on enforcing and strengthening arbitration under the Federal Arbitration Act. 9 U.S.C. §§ 1-16. Mandatory arbitration was recently banned for claims of sexual harassment and related abuses. H.R. 4445 amending the Federal Arbitration Act effective March 3, 2022, to prohibit employer-mandated arbitration of employees’ sexual assault and sexual harassment claims. A broader proposed act, H.R. 963-FAIR Act of 2022, 117th Congress (2021-2022), was passed by the House of Representatives, but has languished in the Senate. A similar failure occurred in the prior (116th) Congress.

116. *See, e.g.*, Nicholas Nesgos & Benjamin Greene, “Fiduciary Duties in Massachusetts and Delaware Closely Held Corporations,” *Bos. BAR J.* (Nov. 18, 2020) (duties of good faith including corporate opportunity).

117. 35 U.S.C. chapters 1-35 of the U.S. Patent Act of 1952 as amended-to-date.

118. 15 U.S.C. chapter 22, the U.S. Trademark Act of 1946 (aka the Lanham Act) as amended-to-date.

119. 17 U.S.C. chapters 1-8 with additional chapters 9-15 related to copyright practice but not part of the amended-to-date U.S. Copyright Act of 1976 *per se*.

120. Adopted in MASS. GEN. LAWS c. 93 §§ 42, 42A et seq.

121. 18 U.S.C. § 1030 provides civil and criminal remedies for gaining unauthorized access to a computer or its stored apps or data, but an authorized employee user who uses such access beyond the scope of his or her authority is not punishable. *Van Buren v. United States*, 141 S. Ct. 1648, 1652 (2021). Congress will likely close this loophole soon as it did with the No Electronic Theft Act overruling *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994) (amendment of the definition of commercial motive in 17 U.S.C. §§ 101 and the U.S. Copyright Act, 506(a)(1)(B)). It must be noted that in *Van Buren*, the access was by a present (not ex) employee (a police officer) within the scope of his authorization for access. Termination of an employee should be held to implicitly end his or her access even absent a contract or rules to such effect.

122. 17 U.S.C. chapter 12.

123. National Industrial Security Program Operating Manual, 32 C.F.R. 117 (Dec. 21, 2020).

124. 21 U.S.C. § 355.

125. 42 U.S.C. § 351(k)(7)(L) (Public Health Service Act as amended by the Biological Price Competition and Innovation Act).

126. 35 U.S.C. § 181 et seq.

127. U.S. Export Control Act of 2018 and regulations, 50 U.S.C. c. 58 and 15 C.F.R. § 730 et seq.; Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), 50 U.S.C. § 4565; Arms Export Control Act of 2018, 22 U.S.C. § 2778; International Traffic in Arms Regulation (ITAR), 22 C.F.R. subchapter M.

128. Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), 50 U.S.C. § 4565 (with implementing regulations at 31 C.F.R. pt. 802).

129. Securities Exchange Act, 15 U.S.C. Ch. 2B, § 78b (1934); SEC Rule 10b-5, 17 C.F.R., § 240.10b-5.

privacy information,<sup>130</sup> and last but not least, the professional confidentiality obligations of lawyers, accountants, doctors, financial advisors, trustees, clergy, and spouses together with related testimonial privileges.<sup>131</sup> These collateral protections are widespread.<sup>132</sup>

Further means designed to prevent, or at least to deter, exiting and competition are stock grant and option plans periodically vesting in increments over several years, sometimes being referred to as “golden handcuffs.” They are mostly transactional but sometimes include a spirit of altruism. These and other forms of altruism and morale boosting to establish *esprit de corps* can be part of a rational plan to show the employer’s voluntary loyalty to employees reciprocating the employee’s legal duty of loyalty. Both are consistent with an employment-at-will regimen unchanged by this reform act. The context is that absent a noncompetition covenant, employees, including officers and directors, are free to leave a company and compete with it so long as they honor fiduciary duties and do not misappropriate trade secrets or other tangible or intangible property.<sup>133</sup> Employees can even make preparations for a next chapter while working for the old employer so long as they are not shirking duties of loyalty and diligence.<sup>134</sup>

Along with legitimate means of restraining post-employment competition as stated above, there are some bad ones, such as no-poach agreements among employers, a magnet for U.S. Department of Justice and Federal Trade Commission (FTC) attention.<sup>135</sup> State attorneys general will join the melee along with class action private plaintiffs. Pretextual claims for alleged actual or potential misappropriation of trade secrets or other intellectual property violations will also be counterproductive.<sup>136</sup>

### Trade Secrets

Although the MNAA provides some protection for trade secrets by means of a statutorily defined noncompetition agreement, it is far from the only source of trade secrets protection. Some of the issues of prior (pre-reform) noncompetition covenant cases will now reappear as trade secret misappropriation disputes. This has been the case in California.<sup>137</sup> But that shift will be disciplined by the rigorous standards of defining trade secrets in the Uniform Trade Secrets Act (displacing general common law causes of action equivalent to

trade secret misappropriation) and the Federal Defend Trade Secrets Act (adding venue expansion and procedure akin to anti-counterfeiting remedies). The adoption by Massachusetts of the Uniform Trade Secrets Act (UTSA) concurrently with the Noncompetition Agreement Act<sup>138</sup> enhanced trade secret protection in Massachusetts and the earlier 2016 enactment of the Federal Defend Trade Secrets Act (FDTSA)<sup>139</sup> complements that protection. Technology advances add to the strength of internal trade secret protection programs, including enablement of access controls, audit trails of access to and employee uses of technical and business information.

Prior provisions of G.L. c. 93 §§ 42, 42A regarding trade secrets were superseded by amending Sections 42, 42A and adding Sections 42C-42G adopting the UTSA in Massachusetts. The UTSA preempts other state law in conflict with it, but allows exceptions for contracts, criminal law enforcement, nonsolicitation agreements, and garden leave. A question arises as to whether chapter 93A (involving unfair competition, awards of attorney fees, and potential treble damages) can also be invoked. Generally speaking, breaches of obligations of employment relationships are not deemed to be acts in commerce, but those related to planning and implementing post-employment competition may well come within the scope of 93A.<sup>140</sup> For a time, courts in Massachusetts and elsewhere flirted with a theory, applied in *PepsiCo v. Redmond*,<sup>141</sup> of issuing a noncompetition injunction to prevent “inevitable disclosure” of trade secrets, but most state courts and federal courts applying state law in diversity or adjunct jurisdiction cases eventually backed off from such a non-bargained-for virtual noncompetition covenant equivalent.

Noncompetition agreements are often used as an overbroad approach to protecting trade secrets by vague reference to the alleged secrets to be protected. This contradicts the trend in trade secret litigation to specify the alleged secrets to a greater degree of clarity, likely implementing *Bell Atlantic Corporation v. Twombly* and *Iannacchino v. Ford Motor Company*.<sup>142</sup> It also contradicts modern judicial application of trade secret laws, including UTSA and FDTSA and prior judicial antecedents, which require identification of alleged trade secrets in litigation (under a protective order), a showing of the economic value of the secret(s), and a demonstration that the employer took adequate protective measures.

130. Health Insurance Portability and Accountability Act, 45 C.F.R. pts. 160, 164 (1996); Bank Secrecy Act, 31 U.S.C. § 5311 et seq. (1970).

131. See, e.g., Mass. R. Prof. Conduct Rule 1.13 (lawyers).

132. Jerry Cohen, “Secrets of Government Enterprises and Individuals Affecting Access to Justice,” 93(1) MASS. L. REV. 220 (2010) (elaborating a spectrum of secrecy running from government/business secrecy to privileges to personal privacy).

133. See, e.g., *Augat, Inc. v. Aegis, Inc.*, 409 Mass. 165, 173-75 (1991) (defendant, a top managerial employee, wrongfully put loyalty to his new enterprise over loyalty to his new employer); *Chelsea Indus., Inc. v. Gaffney*, 389 Mass. 1, 10-20 (1983) (remedies for breach of fiduciary duty by employers even at lower levels than officers and directors, including recapture of compensation in excess of worth of tainted performance); see also Restatement (Third) of Agency (2006) ch. 8, cmt (duties of agent and principal to each other).

134. But failure to act honorably prior to leaving can result in forfeiting of compensation. *Chelsea Indus.*, 389 Mass. at 13.

135. <https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach>. (Sept. 2019).

136. See, e.g., *CVD, Inc. v. Raytheon, Co.*, 769 F.2d 842 (1st Cir. 1985) (anti-trust violation).

137. See, e.g., *Brown v. TGS Mgmt Co., LLC*, 57 Cal. App. 5th 303, 318-19 (2020) (overbroad confidentiality agreement as a *de facto* noncompete agreement barred by California McKinney Act, Cal. Bus. & Professional Code § 16600).

138. MASS. GEN. LAWS c. 93, §§ 42, 42A–42G, enacted concurrently with the MNAA.

139. 18 U.S.C. §§ 1831-1839 (the Economic Espionage Act of 1996 as amended by the Federal Defend Trade Secret Act in 2016 to include a private civil action right in Section 1836).

140. See *Manning v. Zuckerman*, 388 Mass. 8, 12-14 (1983) (rejecting application of chapter 93A to employee disputes); but see *Governo Law Firm, LLC v. Bergeron*, 487 Mass. 188 (2021) (post-employment use of trade secrets subject to M.G.L. c. 93A).

141. *PepsiCo v. Redmond*, 54 F.3d 1262 (7th Cir. 1995).

142. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Iannacchino v. Ford Motor Co.*, 451 Mass. 623 (2008).

Under the common law of trade secrets, the former employee's later use of general skill and experience of the trade is not restricted when changing jobs, even if enhanced by the prior employment. It is part of the calculus of bounding the employer's legitimate interest. But that concept is hard to apply consistently.<sup>143</sup> Despite the continuing skill and experience conundrum, the long-standing skill and experience doctrine and the relatively recent trade secret identification requirement are welcome disciplines *per se* and might also affect the scope of protection of the old employer's legitimate interests.

A highly instructive case is the First Circuit decision in *TLS Management & Marketing Services v. Rodriguez-Toledo*,<sup>144</sup> spelling out the necessity for adequate specification of allegedly misappropriated trade secrets. It was an appeal from a case governed by Puerto Rico law, but that law is the UTSA without significant local revision and is consistent with Massachusetts law. An overbroad trade secret protection agreement is arguably a virtual covenant not to compete and, if so, then in Massachusetts it would have to comply with the MNAA requirements.

The employer's interests often include several diverse instances of trade secrets, confidential information, and goodwill. One size of temporal and/or geographic restrictions rarely fits all. There is also danger in over-reliance on only a noncompetition covenant. The employee may mistakenly believe that trade secret non-disclosure/non-adverse usage obligations are coterminous with noncompetition obligations. But the duration of the ex-employee's obligation to maintain confidentiality is generally the duration of actual secrecy and thus can be infinite or ephemeral, dissipating wholly or partially when the information becomes non-secret without adverse action by the employee. In business-to-business transactions with roughly equally bargaining power, confidentiality often has a limited duration. But a non-disclosure agreement signed by an employee rarely has a fixed date of expiration though often allowing expiration if the covered information becomes publicly accessible without fault of the employee.

Ultimately, the employer needs a rigorous employee education program at the beginning and end of employment, as well as on frequent occasions in between. Such a program would show the benefits to all employees and owners/investors of protecting confidential information. The employer should explain its use of protective measures for facilities and records and strong cybersecurity (enhanced by artificial intelligence/machine learning advances and expanded computer and network speed and bandwidth) to enable profiling and monitoring. There should be realistic identification of protectable information and respect for employees and concern for them. In turn, each employee must respect the employer's (and

fellow employees') legitimate interests related to protection of the enterprise's valid trade secrets, confidential information, and/or goodwill.

The employer should act forcefully to protect its trade secret confidential information by enlisting the FBI if and when threatened by domestic or foreign piracy rather than relying on a noncompetition agreement (don't bring a knife to a gun fight) or seeking state law enforcement aid under G.L. c. 266 §30(4) (Mass. larceny statute). There are strong U.S. federal and state interests in protecting American technology against domestic and foreign pirates and a readiness to assist in prevention and remediation of piracy by private sector companies. But a run of the mill, bona fide difference between employer and employee is not piracy.

#### ***Patent, Copyright and Trademark Laws as Noncompetition Proxies or Complements***

The allocation of intellectual property (IP) rights in employment treats the employer as deemed owner of works of authorship and inventions of employees pursuant to express contracts or, in the absence of express contracts as implied by circumstances such as hired to create or otherwise within the scope of employment. There can be an issue of whether an employee's creation of such rights was made during and in the scope of the employment or outside such timing and scope. But a rigorous analysis is required. In *Bio-Rad Labs, Inc. v. International Trade Commission and 10X Genomics, Inc.*,<sup>145</sup> an employee group left Bio-Rad to form 10X Genomics, made significant inventions in microfluidic systems, patented them, and rubbing salt in the wound, sued Bio-Rad for infringing them. Bio-Rad defended, asserting that the inventions were conceived during the prior work for a predecessor of Bio-Rad and were therefore solely or at least jointly owned by Bio-Rad, which was therefore not liable for infringement. The defense failed since pre-existing ideas of the employees during employment by Bio-Rad did not amount to a sufficiently concrete "conception" (a term of art) under patent law. A wrinkle in the case was that the employees had sold their prior company (the predecessor) to Bio-Rad for \$12 million and thus became employees of Bio-Rad. A covenant not to compete, based on sale of a business, not employment, would have been valid, even in California, the relevant jurisdiction. But California would have rejected the validity of a "trailer clause" based on employment (an obligation of employees to assign inventions made within a specified period post-employment, typically 6-12 months), since that would be the equivalent of a covenant not to compete.<sup>146</sup>

In *Jamesbury Corp. v. Worcester Valve Co.*, an employee alleged that he conceived an invention in less than one month (arguably in one day) after leaving his employer and prevailed on that

143. See Camilla A. Hardy, "The General Knowledge, Skill, and Experience Paradox," 60 B.C. L. REV. 2409, *passim* (2019); see also *Dynamics Research Corp. v. Analytic Science*, 9 Mass. App. Ct. 254, 277 (1980) (a nondisclosure agreement restricting the employee's right to use non-secret information is against public policy). *But see* *Advanced Fluid Sys. v. Huber*, 958 F.3d 168, 177-78 (3d Cir. 2020) (lawful possession is enough standing for the employer even if not "owning" the trade secrets).

144. 966 F.3d 46 (1st Cir. 2020).

145. 996 F.3d 1302 (Fed. Cir. 2021).

146. *Whitewater Indus. v. Alleshouse*, 981 F. 3d 1045, 1053 (Fed. Cir. 2020) (citing *Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal. 5th 1130, 420 P.3d 571 (Cal. 2020) citing *Edwards v. Arthur Anderson LLP*, 44 Cal. 4th 937, 189 P.3d 285 (Cal. 2008)).



proposition in the United States District Court for Massachusetts.<sup>147</sup> Several companies responded by imposing trailer clauses making inventions by ex-employees within a period after employment actually or presumptively made in the inventor's prior employment and therefore belonging to the former employer. But the practice never gained significant traction; employees resisted because it would chill prospects for new employment.

Another aspect of patent law regarding employee inventors is that an employee who has assigned her invention/patent application to her employer is estopped from challenging validity of original claims of her old employer's application leading to a patent on the invention (with some narrow exceptions from the estoppel).<sup>148</sup>

In copyright law, the creative work of employees made within the scope of employment is a "work-for-hire," making the employer a "deemed author" as well as owner of the work.<sup>149</sup> The significance of status as a deemed author and owner is that the employer is not subject to a true author's right of termination of an assignment or license in the 35- to 40-year period following a grant.<sup>150</sup> The employer also is not subject to the "moral right" provision of 17 U.S.C. § 106A for works of fine art unless the work is not a "work-for-hire" pursuant to the employment's scope. But there are cases where the creative work (fine art or other work) is made outside such scope<sup>151</sup> and the employee is the author and owner unless having assigned the copyright to the employer, but possibly subject to a royalty-free "shop right" license for the employer.

Flaws of patents and copyrights as proxies for protection against competition include aspects of unsettled law such as, *inter alia*, subject matter eligibility in patent law and fair use in copyright law. Patent law flaws also include significant costs and delay in perfection of rights. Trademark law is more reliable and economical but more limited as to scope of protection. In some instances, however, an employer's brand recognition and goodwill built up over years and backed by trademark/trade dress law and related unfair competition law can confer significant market power. This might reduce the need for a noncompetition covenant or justify reliance on merely a nonsolicitation agreement complementing the goodwill protection of trademark law. Patent law rights perfection costs are vastly magnified when seeking multi-national rights. Costs of international rights perfection are far less for copyrights, trade secrets, and trademarks. Trade secrets are not registered with any government agency. Copyright registration is only needed in the United States and can be deferred but early registration enables a greater sense of readiness. Much of an inventive trade secret is exposed in a patent or published patent application, but not necessarily all of it.<sup>152</sup>

The MNAA brings significant change to the law of Massachusetts, but it does not exist in a vacuum. Practitioners must be constantly on the alert to many other statutes and common law decisions that may also limit the freedom of employees to compete with their former employers.

## PART IV

### Questions

As with every new statute, the process of judicial interpretation on a case-by-case basis will ultimately answer many of these questions or clarify issues that may seem unclear in the beginning. But the practitioner trying to draft agreements that will stand up in court must initially do so without the benefit of definitive case law. At best, one can try to identify potential problems, and perhaps develop a workaround or safe haven. Here, in no particular order are a few questions that the Act raises.

First, who is an employee in the modern "gig economy"? An Uber driver? An on-call part-time computer programmer working at home for several "clients" without benefits and getting a year-end 1099 instead of a W-2 from each of several company customers? MNAA makes reference to the check-list test of G.L. c. 149, § 148B to define employees and also includes "independent contractors" as protected.<sup>153</sup> When are (or are not) solo or small company independent contractors the equivalent of exempt employees? The SJC is already struggling with cases presenting these issues under c. 149, § 148B<sup>154</sup> and it is unclear whether the cross reference from MNAA will have any impact on how the § 148B cases are decided.

Second, who is the relevant beneficiary of the covenant? If company A hired the employee with a covenant not to compete, with benefit of the covenant also running, in typical fashion, to present or later "affiliates and successors," of the company (or acquired by the company) is that third party beneficiary provision valid in the face of Section 24L where the affiliates or successors had no material interest or need for a noncompetition covenant by this employee given her limited scope of work? Even if action against the employee by or for an affiliate/successor beneficiary is improbable, the existence of a broad range of such beneficiaries can chill prospects of future employment or of an investment in the ex-employee's new company. Section 24L(b)(vi) limits presumptively reasonable enforceability of a noncompetition covenant to a scope of proscribed activities in relation to the specific types of service by the employee at any time during the last two years of employment. But the rub is that if the employee tries to get clarity and confirmation, the answer

147. 318 F. Supp. 1, 4-6 (D. Mass. 1970).

148. *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298 (2021).

149. 17 U.S.C. §§ 101, 203 (copyright); *see, e.g.*, Sean M. O'Connor, "Hired to Invent vs. Work Made for Hire: Resolving the Inconsistency Among Rights of Corporate Personhood, Authorship and Inventorship," 35 SEATTLE U. L. REV. 1227 (patents).

150. 17 U.S.C. §§ 101, 203 and 304 and including in some instances a second termination option under the Sonny Bono Copyright Term Extension Act of 1998. Public Law 105-298, 17 U.S.C. § 304.

151. *See, e.g.*, *Avtec Sys. Inc. v. Peiffer*, 21 F.3d 568 (4th Cir. 1994); *Cramer v. Crestar Fin. Corp.*, 67 F.3d 294 (4th Cir. 1995).

152. The Patent Act requires the provision of a written description enabling making and using of the invention. 35 U.S.C. § 112. But failure to disclose

much related technology outside the scope of patent claims and non-essential material does not violate § 112. That section also requires disclosure of best mode known to the inventor(s) of practicing the invention, but under 35 U.S.C., § 282(3), failure to disclose best mode cannot be asserted in any proceeding — not in court litigation, nor in post grant review in the U.S. Patent & Trademark Office, nor in any ITC proceedings.

153. MASS. GEN. LAWS c. 149 § 24L(a) (defining employee status vs. independent contractor status by a three-factor A, B, C test).

154. *See Patel v. 7-Eleven, Inc.*, 489 Mass. 356 (2022) (response to question of employee vs. contractor status of certain franchisees certified to it by the First Circuit Court of Appeals holding that the Mass. Independent Contractor Act makes the franchisees employees entitled to labor law protections and is not preempted by federal franchise disclosure law).

may be, “You’re fired” or a cold non-response. Would it be a (post-employment) violation of G.L. c. 93A if the old employer or its affiliates or acquisition successors fail to give requested assurance that they would not enforce the covenant, where the requesting employee shows it would be unreasonable not to do so? The ability of the mobile employee to force the issue by a declaratory judgment action is cold comfort in view of the chilling effect, cost, and delay. In some instances, there may be a question of insufficiently mature case or controversy to enforce standing for a declaratory judgment plaintiff. Note the analogy to the UTSA provision for an attorneys’ fee award if a trade secret plaintiff (e.g. employer) willfully fails to withdraw an improperly sought injunction against the defendant.<sup>155</sup> A similar provision is made in the FDTSA.<sup>156</sup> But, these statutes provide symmetrically for an attorneys’ fee award against a defendant (e.g., the mobile employee and/or her new employer) who resists entry of such an injunction in bad faith and enhancement of damages for willful and malicious misappropriation.

Third, in the case of a noncompetition agreement made or altered after commencement of employment, how much adequate consideration is required? Continuation of employment *per se* no longer suffices. A token cash or in-kind consideration should not suffice. Something objectively greater or only slightly less than the garden leave (safe harbor) in value would suffice.<sup>157</sup> How far below the safe harbor can the employer go? Are there combinations of money and non-monetary benefits that will suffice? The MNAA applies the garden leave compensation of 50% of wages based on the best annualized base salary paid in the two years preceding employment termination. What is the calculation base for employees paid by commission with little or no base wages? The legislative history in the Addendum to this article shows that a proposed amendment to substitute 50% of total compensation for 50% of base wages was rejected. But a court can fashion equitable construction of base wages of extraordinary types. Can the employer require that the departing employee extend the term of employment or enter a consulting status for a period post-employment? This was practiced in the 1960s and 1970s as a distant predecessor of the current garden leave requirement and faded out, but was not wholly abandoned.<sup>158</sup> Actual consulting work was rarely requested but the agreement barred the ex-employee from competitive activity. A variant of the forced nominal consulting service engagement was an employment contract requiring a long notice period for the employee’s resignation (usually in a 3- to 6-month range). Noncompetitive activity outside

employment was allowed, usually without reducing the pseudo-consulting compensation, but in some cases such reduction occurred, or to put it another way, the consulting compensation was used to top up the alternative compensation obtained by the ex-employee from other sources. It was often the case that the employee was not given any work and was excluded from company information and networks.

Fourth, is the ex-employee on garden leave still an employee subject to income tax, the Federal Insurance Contributions Act (FICA), and Medicare withholding (and a W-2 at year end) and employer-matching FICA, Medicare payments?<sup>159</sup> Or is she an independent contractor receiving a 1099 form at year-end without deductions (but filing her own independent contractor periodic estimates/payments)? Applying traditional standards of employee vs. other status,<sup>160</sup> the ex-employee determines the vegetables, fruits, flowers, shrubs, and trees to be grown or not in the imaginary garden, provides her imaginary garden tools and hours of work or not, and can hire and fire imaginary assistants.<sup>161</sup>

Fifth, MNAA also applies invalidation (unenforceability) of contract provisions for forfeitures on account of competition.<sup>162</sup> For example, a pretextual carve-out of part of first year pay as a reserve for later garden leave payments or refund (akin to a landlord’s security deposit in rental of an apartment) would be a forfeiture for competition forbidden by the Act. But stock option/ownership forfeiture provisions should survive where loss of unvested rights applies alike on termination of employment pre-vesting for employees who do and don’t compete.<sup>163</sup> However, the ‘punishment’ for post-employment competition cannot include forfeiture of benefits covered by the Employee Retirement Income Security Act of 1974 (ERISA).<sup>164</sup> ERISA preempts contrary state laws.<sup>165</sup>

Sixth, what sort of “presumptions” did the legislature have in mind. Is there a difference between “may be presumed necessary” and “is presumptively reasonable”?<sup>166</sup> Who has the burden of proof on what issues in these cases? In the context of this statute, these “presumptions” should be rebuttable.<sup>167</sup> The powers to revise and reform agreements and to insure they are consonant with public policy should themselves lead to this conclusion. Common law experience teaches us that the concepts and terms in this field do not have fixed, abstract definitions, but gain meaning as they are applied to the particular facts of specific cases. Applying concepts like “necessary” and “reasonable” inevitably requires careful attention to the facts and a thorough analysis of the entire relationship between the parties, as demonstrated in *McFarland v. Schneider*.<sup>168</sup>

155. MASS. GEN. LAWS c. 93, § 42(ii).

156. 18 U.S.C. § 1836(b)(3)(D) (2016); *see* *Eaton v. Veterans Inc.*, 435 F. Supp. 3d 277 (D. Mass. 2020) (former employer cannot threaten legal action to enforce a noncompete in bad faith).

157. *See* notes 102-07, *supra* and 167-69, *infra* and related main text.

158. *See, e.g.*, *Vaulby v. Itarlow Meyer*, 633 N.Y.S. 2d 926 (Sup. Ct. N.Y.C. 1995); *Hekimian Labs, Inc. v. Domain Sup. Sys., Inc.*, 664 F. Supp. 493 (S.D. Fla. 1957). It was not called “garden leave” then, but was so denominated in retrospective reviews. *See* Peter A. Steinmeyer & Lauri F. Rasnick, “Garden Leave Provisions in Employment Agreements,” THOMSON REUTERS PRACTICAL LAW (Oct. 30, 2020).

159. This aside may not impress the IRS. *See* “Independent Contractor (Self-Employed) or Employee,” Internal Revenue Serv. (Nov. 9, 2021), available at <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>.

160. MASS. GEN. LAWS c.149. §145B.

161. *Cf.* *Comm. for Creative Non-Violence v. Reid*, 490 U.S. at 752 (sculptor not a work-for-hire employee of nonprofit advocacy corporation client for purpose of copyright law).

162. MASS. GEN. LAWS c. 149, § 24L(a) (definitions).

163. Some forms of forfeiture agreements are exempt under c. 149, § 24L.

164. 29 U.S.C. § 1053(a)(2)(A).

165. *Clark v. Lauren Young Tire Center Profit Sharing Trust*, 816 F.2d 480, 481 (9th Cir. 1987). Pending bills for federal regulation or mandates for FTC broad interpretation of unfair competition actionable under the FTC Act § 5 (15 U.S.C. § 45) might further limit such forfeitures for exempt employees.

166. Section 24L (b) (IV)-(V).

167. Mark S. Brodin & Michael Avery, *HANDBOOK OF MASSACHUSETTS EVIDENCE*, § 3.5 (Wolters Kluwer 2021 ed.); *Massachusetts Guide to Evidence* SJC Advisory Committee (2022) Article III.

168. 11 Mass. L. Rep. 711 (1998).

Seventh, does the recognition as a “legitimate business interest” in (b)(iii)(B) of “the employer’s confidential information that otherwise would not qualify as a trade secret” open the door to overly wide claims? Are there other “legitimate business interests” recognized in the statute? It is somewhat surprising that the statute nowhere expressly restates the rule that the employee is entitled to use general training and experience. But the three interests in (b) (iii) A (trade secrets), B (confidential information), and C (employer’s goodwill) seem to have been taken almost verbatim from *Marine Contractors v. Hurley*, which juxtaposed those interests against what was clearly not a legitimate business interest: “Protection of the employer from ordinary competition, however, is not a legitimate business interest, and a covenant not to compete designed solely for that purpose will not be enforced.”<sup>169</sup> This principle is such a bedrock of employee rights that it would be absurd to think this reform act intended to abolish it *sub silencio*.<sup>170</sup>

Eighth, MNAA includes an extension of the one-year maximum restricted period to a total of two years (including the original one year) if the former employee has taken the employer’s tangible or intangible property without authorization or broken a fiduciary obligation — a “springing” remedy comparable to a springing right under real estate or probate law. Interestingly, the SJC held in *Automile Holdings, LLC v. McGovern*,<sup>171</sup> a case predating the MNAA and primarily involving sale of a business interest, that the Superior Court judge abused his discretion in extending the expired-during-litigation-term of a non-solicitation covenant as a remedy when breach was finally adjudicated. On the other hand, in trade secret cases it is not an uncommon remedy to impose a noncompetition “head-start” injunction even after the information is no longer secret. This gives a plaintiff belatedly the benefit it would have had absent the misappropriation by the defendant.<sup>172</sup> Given the explicit legislative command establishing specific maximum restriction periods, it is difficult to see any authorization for courts to extend those periods.

Ninth, will administrative agencies become involved in interpreting or enforcing the statute? In the modern world, MNAA stands out for the virtual absence of administrative agency involvement. But the statute might trigger administrative action, as for example in promulgating regulations governing unfair competition under c. 93A. Some might think it worthwhile to amend MNAA to delegate rule-making powers filling gaps in the Act, such as those granted to the attorney general in enforcing chapter 93A or, perhaps more appropriately, to the Massachusetts Executive Office of Labor and Workforce Development (EOLWD) or the Massachusetts Office

of Consumer Affairs and Business Regulation (OCABR). Whether such amendments will be forthcoming, only time can tell. There will doubtless be other questions that arise under the new statute to be resolved by court decision or legislative amendment.<sup>173</sup>

Tenth, we close this Part IV with one of our favorites. Has the Great Pencil Box Debate finally ended? We think not, for a number of reasons.

## WHAT’S IN YOUR PENCIL BOX?

### *The Controversy of Semantics and Substance Over the “Blue Pencil” Doctrine*

The Blue Pencil Doctrine is a judicial tool that permits courts to take an overbroad restriction and enforce it only to the extent reasonable.<sup>174</sup> The Blue Pencil Doctrine varies widely among the 51 jurisdictions (metaphorically across the color spectrum), both in terms of how it is used and in terms of nomenclature.<sup>175</sup> The four main approaches are: the Red Pencil, the strict Blue Pencil, Reformation, and the Purple Pencil.

### *The Red Pencil or “All or Nothing” Approach*

In jurisdictions that adhere to the red pencil approach, courts will simply determine the reasonableness and, thus, the enforceability of the restrictive covenant as it is written and will not engage in eliminating, revising, or adding terms to the covenant. This approach voids the restrictive covenant in its entirety if any part of it is overbroad or unreasonable.<sup>176</sup> The policies underlying this approach are freedom of contract and judicial restraint.

Restraint avoids the possibility of trampling the parties’ contractual intent. . . setting a precedent that establishes the judiciary’s willingness to partake in drafting would simply be inappropriate public policy as it conflicts with the impartiality required of the bench . . .<sup>177</sup>

The primary criticisms of red-penciling are that it is draconian for employers, unfairly assumes that all employment contracts are contracts of adhesion, adopts a paternalistic view towards employees, and places upon the employer the burden of tailoring the restrictive covenant to the individual employee’s situation and predicting the reasonableness of the restriction.<sup>178</sup> On the other hand, red-penciling gives the employer the incentive to avoid over-reaching for fear the entire agreement will be invalidated.<sup>179</sup>

169. See <https://www.sec.state.ma.us/cis/ciscov/covidx.htm> (Mass. Secretary of State Galvin: An Explanation of Covenants Not to Compete in Massachusetts, 1st par. 10/9/07).

170. *Commonwealth v. G. F.*, 479 Mass. 180, 202 (2018).

171. 483 Mass. 797 (2020).

172. See Kane, *supra* note 3.

173. Two minor technical corrections have already been made by amendment in 2018 and 2020.

174. See *Midwest Sign & Screen Printing Supply Co. v. Dalpe*, 386 F. Supp. 3d 1037, 1047 (D. Minn. May 10, 2019).

175. See Russell Beck, “Employee Noncompetes: A State-by-State Survey,” BECK REED RIDEN LLP (JUNE 27, 2021), available at <https://faircompetitionlaw.com/wp-content/uploads/2021/06/Noncompetes-50-State-Survey-Chart-20210627.pdf>. This survey is frequently republished on the fair competition blog, with updated states’ information.

176. See, e.g., *Ferrofluidic Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1469 (1st Cir. 1992); Wis. Stat. § 103.465 (“ . . . imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint”).

177. *Golden Road Motor Inn, Inc. v. Islam*, 132 Nev. 476, 376 P.3d 151, 157 (Nev. 2016) (*superseded by* NRS 613.195(5)).

178. See generally, Harlan M. Blake, “Employee Agreements Not to Compete,” 73 HARV. L. REV. 625, 683 (1960) (discussing policy arguments against red-penciling); see also Tyler Watkins, “Interpreting the 2011 Georgia Restrictive Covenants Statute: How to Fix its Ambiguities and Allow the Blue Pencil While Detering the In Terrorem Effect,” 10 J. MARSHALL L. J. 110, 133 (2016-17) (discussing the Georgia Supreme Court’s rejection of blue penciling due to its *in terrorem* effect).

179. Kenneth R. Swift, “Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements,” 24 HOFSTRA LAB. & EMP. L. J. 223, 246 (2007).



## *The Blue Pencil Approach*

The strict blue pencil approach “enables the court to enforce the reasonable terms provided the covenant remains grammatically coherent once its unreasonable provisions are excised.”<sup>180</sup> The nomenclature here is a bit tricky because practitioners, scholars, and judges frequently use the term “blue pencil” to capture reformation (also known as “liberal blue pencil” or “partial enforcement”) as well as strict blue penciling. Strictly speaking, under this approach, judges employing the blue pencil can strike through contractual language but cannot *rewrite* it.

The most severe criticism of blue penciling is the moral hazard of encouraging over-reaching by employers who have no incentive to exercise restraint and the *in terrorem* effect of unreasonable provisions — not only upon the employee challenging the covenant in court, but also upon employees in general and their prospective new employers. In the words of Professor Harlan Blake:

For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction. If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable. This smacks of having one’s employee’s cake, and eating it too.<sup>181</sup>

Another criticism is that blue penciling violates basic contract interpretation principles and freedom of contract.<sup>182</sup> Yet another criticism is that strict blue penciling yields inconsistent, unpredictable results and consequently creates confusion for employers, employees, and the judiciary alike.<sup>183</sup>

Supporters of the strict blue pencil approach respond that it is a realistic middle ground among approaches to restrictive covenant enforcement. Its ability to excise unreasonable terms effectively strikes a balance between the competing yet compelling interests of the employer who seeks to protect legitimate interests and the

employee who seeks relief from overly broad restrictions. It holds employees to the reasonable restrictions to which they agreed in spite of overbroad terms. As a discretionary tool, it gives the courts flexibility. Further, the strict blue pencil approach is more consistent with traditional contract principles than is reformation, since the language enforced is at least part of the actual language agreed to by the parties.<sup>184</sup> In response to the *in terrorem* effect, proponents of the strict blue pencil approach point out that it is an equitable remedy that will not be used to aid employer over-reaching: “the price of over-reaching is that the restriction cannot be enforced at all.”<sup>185</sup>

## *The Reformation or “Partial Enforcement” Approach*

Under the reformation or “partial enforcement” approach, the court may reform or rewrite the restrictive covenant in order to enforce it to the extent that it is reasonable unless circumstances indicate bad faith or deliberate over-reaching on the part of the employer.<sup>186</sup> This approach gives the court the greatest leeway to change the agreement to make it reasonable. The rationale underlying reformation is that it is an equitable remedy to be used where the parties have no adequate remedy at law and the parties have reached a basic agreement that the employee will be restricted to some extent when the employment relationship ends.<sup>187</sup>

The same criticisms raised in regard to strict blue penciling apply with equal, if not more, force to reformation: by rewriting the restrictive covenant, the court is imposing contractual terms to which the parties never agreed. “Courts should interpret contracts, not create them.”<sup>188</sup> Further, the reformation approach encourages employers to draft the broadest possible restrictions because the employer can rely on the court to rein in an overly broad term.<sup>189</sup> Obviously, the *in terrorem* effect upon employees who strive to abide by their agreements and upon prospective employers is a real concern under the reformation approach.

The First Circuit in *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.* pointed out that “reasonableness” and “balance” are the touchstones under the reformation approach and admonished that courts in reformation jurisdictions:

must be vigilant to protect employees against overbroad and oppressive restrictions on their ability to work and earn a living, but must temper their vigilance with an awareness that employers, too, work for a living and are entitled to reasonable protection against the predations of unscrupulous former employees.<sup>190</sup>

180. *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1469 (1st Cir. 1992).

181. Blake, *supra* note 178.

182. *Golden Road Motor Inn, Inc.*, 132 Nev. at 157-58.

183. Griffin Toronjo Pivateau, “Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements,” 86 NEB. L. REV. 672, 691-93 (2008).

184. Miranda B. Nelson, “Sharpening South Carolina’s Blue Pencil: An Argument for Codifying a Strict Interpretation of the Blue-Pencil Doctrine,” 70 S.C. L. REV. 917, 931 (2019).

185. *Dearborn v. Everett J. Prescott, Inc.*, 486 F. Supp. 2d 802, 809 (S.D. Ind.

2007).

186. *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1469 (1st Cir. 1992).

187. See Swift, *supra*, note 179 at 250 (“The underlying reasoning for allowing a court to rewrite terms is that the parties have reached a basic agreement that the employee will be restricted in some manner after the employment relationship ends.”).

188. *Id.* at 255.

189. *Id.* at 254.

190. *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1471 (1st Cir. 1992).

Keeping in mind that equity will not come to the aid of a party with unclean hands, Professor Blake offered the following advice for resolving concerns over the *in terrorem* effect:

The general approach to resolving the dilemma seems clear. If the court is persuaded that the employer's policy and practice with respect to employee restraints generally is fair and designed only to protect legitimate interests, the court should tailor the covenant to provide such protection with a minimum burden to the employee. When it seems likely that the employer exacts the restriction for whatever advantage he can get from limiting the employees' mobility and bargaining power, or that he has not accorded employees' interests sufficient weight in devising and administering the restraints, severance should be denied. Courts should not aid and abet a grasping or negligent employer by reforming an unreasonably restrictive agreement.<sup>191</sup>

It is the equitable concept of unclean hands that guards against over-reaching and the *in terrorem* effect of blue penciling and reformation.<sup>192</sup> The Massachusetts SJC applied this equitable precept in refusing to enforce an otherwise reasonably limited restrictive covenant against a former employee who had been discharged without cause during the Great Depression:

If the defendant had left the employ of the plaintiff voluntarily, or had been discharged for cause, there would be little question that the plaintiff would be entitled to relief . . . An employer may act so arbitrarily and unreasonably in exercising his right of termination that a court of equity will refuse aid in enforcing for his benefit other parts of the contract.<sup>193</sup>

### ***The Purple Pencil Approach***

In the purple pencil approach, reformation of an overly restrictive employment noncompete agreement is disfavored, but will be permitted where the drafter's good faith is demonstrated.<sup>194</sup>

### ***The MNAA Approach***

Pursuant to G.L. c. 149, §24(d), "a court may, in its discretion, reform or otherwise revise a noncompetition agreement so as to render it valid and enforceable to the extent necessary to protect the applicable legitimate business interests." Section 24(b) sets out the minimum requirements that a noncompetition agreement must meet to be "valid and enforceable" and also provides parameters of presumptive reasonableness of restrictions, both of which will guide courts in reforming overly restrictive agreements. Since the MNAA specifically gives permission to judges, in their discretion, to reform or otherwise revise noncompetition agreements, it arguably gives judges the leeway to choose among red penciling, strict blue penciling, and reformation — perhaps with a glance at the purple pencil as well.

Given that the origins of covenants not to compete predate the Industrial Revolution, this legal terminology from an analog world seems appropriate, even though most editing will take place with a keyboard and screen or other futuristic technology. Whatever terminology is used, the ultimate success of the reforms sought by the MNAA will depend greatly on the manner in which judges construe and apply §24(d).

## **PART V**

### ***Prospects for Further Adoption and Expansion of Reform Measures***

The core of MNAA reform is now being imitated wholly or partially by some other states and in a proposed uniform state law as outlined below. Some advocates of reform are also seeking federal action at the legislative and presidential level, including proposals for regulatory involvement by the Federal Trade Commission, raising the possibility of federal preemption in a field of law that historically has been the primary domain of the states.

Similar reform bills have been adopted in New Hampshire,<sup>195</sup> Maine,<sup>196</sup> Rhode Island,<sup>197</sup> Washington,<sup>198</sup> New Jersey,<sup>199</sup> Oregon,<sup>200</sup> Virginia,<sup>201</sup> Maryland,<sup>202</sup> Nevada,<sup>203</sup> and the District of Columbia,<sup>204</sup> and more are pending in other states.<sup>205</sup> Multi-state adoption

191. Blake, *supra* note 178 at 683-684.

192. *See, e.g., Ferrofluidics Corp.*, 968 F.2d at 1470 (laying out considerations of over-reaching, bad faith and exploitation of the imbalance in bargaining power that would weigh against enforcement of a post-employment restrictive covenant); *see also, All Stainless, Inc. v. Colby*, 364 Mass. 773 (1974) (SJC reduced the geographic restriction from all of New England and New York to just the employee salesman's former sales territory after considering the equities and public interest).

193. *Econ. Grocery Stores Corp. v. McMenamy*, 290 Mass. 549 (1935).

194. *See, e.g., 820 ILL. COMP. STAT. §90/35* (stating that extensive judicial reformation may be against the public policy of the state, but granting courts discretion to choose to reform a covenant where the original restriction reflects a good-faith effort to protect a legitimate business interest).

195. N.H. REV. STAT. § 275:70-a.

196. ME. REV. STAT. § 599-A.

197. R.I. GEN. LAWS c. 28-58-1 et. seq.

198. WASH. REV. CODE c. 49.62 et. seq.

199. Assemb. Bill No. 1650, 219th Leg. (N.J. 2020).

200. OR. REV. STAT. § 635.2.

201. VA. CODE § 40.1-28.7:8 (effective July 1, 2020).

202. MD. CODE ANN., LAB. & EMPL. § 3-716 (2020).

203. NEV. REV. STAT (NRS) 613 § 95 (banning non-compel for hourly workers and "blue pencil" reformation).

204. D.C. Act 23-53, Ban on Non-Compete Agreements Amendment Act of 2020 (effective April 2022) (effective date extended twice because controversial). It goes over the top in disallowing a noncompetition covenant effective **during** the old employment.

205. Variants from the MNAA model and similarities in other states include salary thresholds rather than an exempt/non-exempt status division. But when salary thresholds are imposed, the employee must be at a high salary level — a multiple of the poverty level in some states, fixed sums in others.

of Massachusetts-led reforms have occurred in such fields as gay marriage<sup>206</sup> and medical/general cannabis usage.<sup>207</sup> Older precedents of Massachusetts reforms triggering other states' initiatives include banning slavery<sup>208</sup> and introducing the secret ballot.<sup>209</sup> Note also the Massachusetts HealthCare Reform Act of 2006 that inspired parts of the (later) U.S. Affordable Care Act. On the other hand, Massachusetts was the last state to adopt the UTSA, leaving New York as now the only outlier.<sup>210</sup>

U.S. Supreme Court Justice Louis D. Brandeis, a distinguished son of Massachusetts, said aptly that a virtue of U.S. federalism is that states can act as laboratories of democracy, i.e., enact a range of policies and other states can learn from success or failure of such enactments. A single courageous state can lead the way subject to the power (and, hopefully the will) of federal courts to strike down such laws if they exceed constitutional limits or intrude on constitutional liberties.<sup>211</sup> Eventually, a time may come to consider ways of achieving convergence and nation-wide uniformity, usually achieved by adoption of a uniform state law or a federal law or a combination of both.

On July 23, 2021, the National Conference of Commissioners for Uniform State Laws (NCCUSL), aka Uniform Laws Commission (ULC), approved a proposed Uniform Restrictive Employment Agreement Act (UREAA or UREA Act)<sup>212</sup> and began the usual practice of convincing state legislatures to enact it. Such laws often include a provision encouraging (but not mandating) state courts (and federal courts applying state law in diversity and adjunct jurisdiction cases) to use other states' interpretations, resolving ambiguities in the interest of national uniformity.

There are similarities between the MNA and the statute proposed by the Uniform Law Commissioners, but also striking differences. Anyone who wishes for additional reform in Massachusetts need only look at the UREA Act for ideas. Among other things, the drafters took to heart Lord Moulton's rant over a century ago against the practice of permitting courts to revise for the benefit of employers the overreaching and unenforceable agreements they

extracted from their employees, thereby removing the incentive to stay within the law in the first place. Why should the commonwealth pay its judges to draft employer agreements? Isn't it time to toss the pencils — red, blue, or purple — unless, as allowed with the UREA Act, the employer can prove by clear and convincing evidence that it was a good faith mistake, with reliance on legal advice unavailable as a defense?

The main features of the proposed UREA Act are these:

First, unlike the MNA, the UREA Act uses the term "worker" rather than employee and emphatically creates a broad range of protected workers. It defines a "worker" as anyone who provides services, i.e., anyone who works. It includes an independent contractor — e.g., a sole proprietor of a business entity, and includes contractors or company partners who provide service.<sup>213</sup> The reasonable protected interest of the employer does not include information that is not a trade secret<sup>214</sup> as opposed to MNA that protects "confidential information" as well as trade secrets. The worker definition excludes a member of the employer's board of directors or other governing or advisory board, and a person who exercises authority over the exercise of powers of the company.<sup>215</sup>

Second, it governs multiple types of restrictive agreements — i.e., noncompetition, nondisclosure and nonsolicitation, non-poaching, payment for competition, non-recruitment and training cost repayment agreements, recognizing their complementarity and interactions. The confidentiality component of a restrictive agreement is unenforceable unless it allows the worker to use information arising from general training and experience or is known in the art or otherwise legally accessible, a significant reform for resolving ambiguity of trade secret misappropriation claims. But an obligation not to do business with certain customers can be enforceable against an employee for up to 12 months (up to five years for a business sale).<sup>216</sup>

Third, it prohibits restrictive agreements for low-wage workers working for less than the state's annual mean wage.<sup>217</sup>

Fourth, it requires advance notice of 14 days for a restrictive agreement.<sup>218</sup>

206. *Goodridge v. Mass. Dept. of Public Health*, 440 Mass. 309 (2003).

207. *See* MASS. GEN. LAWS c. 94I (Nov. 8, 2016, voter approval of Question 4 ballot initiative, which was implemented in 2017).

208. *Commonwealth v. Jennison* (Mass. 1783) (unreported) (also known as the 1781-1783 Quock Walker Trials).

209. 1888 adoption of the present form of secret ballot following up (partially) precedents of Australia, Sweden, Germany, UK, Belgium and Kentucky. However, indentured servitude persisted in Massachusetts for immigrants of European descent in much of the 19<sup>th</sup> century, and treatises on employment law titled *Master and Servant* persisted into the 21<sup>st</sup> century and endure even now.

210. Massachusetts also produced the earliest United States trade secret/quasi noncompetition cases in *Peabody v. Norfolk*, 98 Mass. 452 (1868); *Taylor v. Blanchard*, 95 Mass. 370, 373, 13 Allen 370 (1866); *Vickery v. Welch*, 36 Mass. 523, 19 Pick, 523 (1837); and *Pierce v. Fuller*, 8 Mass. 223 (1811).

211. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting). On the other hand, praise for innovations of the state laboratories must be tempered by concern for occasional toxic experimental results, such as voter suppression. But federal and state courts have the power and hopefully the will to protect constitutional rights against such toxic results.

212. The chemical formula for urea is CH<sub>4</sub>N<sub>2</sub>O comprising two ammonium (NH<sub>4</sub>) groups, joined by a carbonyl (C=O) functional group. The chemical is

primarily used as a nitrogen-rich fertilizer but also has many other beneficial uses. The commissioners were aware of the awkward acronym but elected to maintain the descriptive title represented by the acronym and move on past initial risibility. The title behind the acronym is a perfect description of an elegant statutory framework bringing overlapping issues of noncompetition, nonsolicitation, no-poach and nondisclosure into a common framework without disturbing a state's uniform trade secrets act adoption.

213. The Uniform Restrictive Employment Agreement (UREA) Act, drafted by National Conference of Commissioners on Uniform State Laws (NCCUSL aka Uniform Laws Commission, ULC), was approved in July 2021 and published Dec. 1, 2021, sections definition 19-20.

214. *Id.* at Section 2(17) (incorporated the Uniform Trade Secrets Act definition and section 9 by reference) (confidentiality agreement not to include skill/expertise, or information ascertainable or irrelevant to employer business). The UREA Act process of filtering out invalid trade secrets assertions resembles the rigorous (and expensive) activity of invalidating patent claims. The MNA covers confidential information; the UREA Act does not.

215. *Id.* at Section 2(19).

216. *Id.* at Section 8.

217. *Id.* at Section 5.

218. *Id.* at Section 4 (agreements made pre-effective date are accepted).

Fifth, contrary to MNAA, UREA Act, section 16(A), if adopted by a state, prohibits a court from correcting or otherwise reforming an unduly restrictive agreement (i.e., makes it unenforceable) but gives adopting states the option in section 16(B) to adopt a discretionary allowance of such modification by a court if the court finds that the employer reasonably believed, in good faith, that the agreement was enforceable but only to the extent necessary to protect the employer's interest.<sup>219</sup>

Sixth, the agreement is unenforceable if the worker is terminated by the employer without good cause (willful or gross misconduct) or if the worker resigns for good cause attributable to the employer (i.e., constructive discharge).<sup>220</sup>

Seventh, it gives the state (via its attorney general or labor department) the right to bring an action on behalf of the worker (or the worker can sue independently) to enforce the statute seeking statutory damages of not more than \$5,000 per affected worker.<sup>221</sup>

Eighth, it requires a restrictive agreement to select the choice of law and venue of the jurisdiction where the worker primarily worked for the employer or as of the date of termination of the employment or at the time of the dispute.<sup>222</sup>

Ninth, it has a provision similar to other uniform acts where a court shall consider resolving ambiguities in a manner aiding the promotion of uniformity of the law among jurisdictions that enact it.<sup>223</sup>

The UREA Act seems unlikely to be adopted in Massachusetts in its present form, though it conceivably might lead to some amendments of MNAA. Expectations are muted for the Act's adoption by most other states, although some states that habitually adopt Uniform Acts promulgated by ULC may act reflexively to adopt the UREA Act.<sup>224</sup> Also, it often takes decades for a uniform law to achieve nationwide or nearly so adoption.

## Federal Law

Another alternative for promoting uniformity is federal action. Even though covenants not to compete have been governed primarily by state law in the past, national concerns and impacts on interstate commerce are clearly present. These concerns might be met by federal legislation and/or rule-making initiatives, paralleling and aiding, but not intruding upon, state law reforms. But a 2021 joint letter of lawyers and others (mostly from Massachusetts) to the FTC and White House Executive Office of the President cautioned against implementing a July 9, 2021, Presidential Executive Order with overbroad reach into the noncompetition covenants realm.<sup>225</sup> If the FTC does enact regulations,<sup>226</sup> Massachusetts practitioners should be alert to the provision in Chapter 93A that creates a private right of action for violation of those FTC regulations.<sup>227</sup> While 93A does not ordinarily apply to the employer-employee relationship, post-employment acts and consequences may fall within 93A, and trigger treble damages and attorneys' fees claims.<sup>228</sup>

Whenever federal action is contemplated in an area previously governed by state law, the question immediately arises, what is the likelihood of federal preemption? And how broad is the preemption likely to be? The lawyerly answer, of course, is that it depends. Unfortunately, it depends on a number of factors virtually impossible to predict with any certainty. The answer to the question may be that the snail's pace of developing federal policy will leave little to do after states have implemented all or nearly all needed reforms and converged to a rough uniformity. But a complementary federal act aiding enforcement of a uniform state act may also be useful. This would resemble the FDTSA complementing the UTSA protecting trade secrets at the state level.

There are different varieties of preemption.<sup>229</sup> For example, federal patent and copyright laws preempt state law in those realms,<sup>230</sup>

219. *Id.* at Section 16.

220. *Id.* at Section 6.

221. *Id.* at Section 16.

222. *Id.*

223. *Id.* at Section 18.

224. Some uniform acts end up failing to attain significant adoption. An example is the Uniform Computer Information Transactions Act (UCITA), derided by opponents as "U-Cheata." It provided support for shrink wrap licensing and other software proprietor benefits to attract businesses to move to the adoption states. It was adopted only in Maryland and Virginia and is now of little consequence in those states or elsewhere. The technology and economy of software including streaming in lieu of physical objects and a burgeoning open-source culture of sharing innovation consigned the UCITA to the dustbin of history. *See, e.g.*, David A. Szwak, "Uniform Computer Information Transaction Act: The Consumer's Perspective," § 3(1) *LA. LAW REV.* (2002) available at <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5963&context=lalrev>.

225. Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021). Disclosure: co-author Cohen of this article was among the signers of the letter urging caution and proportionality in addressing reform, assuming *arguendo* that the FTC had authority to label excessive restraints of noncompetition agreements as unfair and deceptive acts or unfair competition under the FTC Act § 5. *See* 15 U.S.C. § 45. The group sent a follow-up letter in December 2021 reiterating the earlier themes.

226. There is some doubt as to FTC authority to promulgate employee non-competition rules, i.e., a notion that the FTC regulates (in interstate commerce)

business-to-consumer and business-to-business relationships but not employer-to-employee relationships. This doubt is reinforced by the recent Supreme Court rejection of OSHA authority to impose vaccine mandates on a certain class of employers, where COVID-19 spread occurs both in the workplace and elsewhere, making it a public health issue, not a labor issue. *Nat'l Fed'n of Indep. Bus., et al v. DOL, OSHA*, 142 S. Ct. 661 (2022) (per curiam). Congress enacts substantive legislation, but it can delegate procedural rule-making powers to federal agencies. However, there is some room for agency substantive rules, such as the FTC's power under 15 U.S.C. § 45. *See* 15 U.S.C. § 45 (enabling FTC to define unfair acts and set trade regulation rules, which might include non-competition restraint scope depriving other companies of access to skilled employees. *See* note 26 *supra* regarding the Middle Ages Ordinance of Labourers). Notably, the FTC is approaching this possible expanded power with caution.

227. Massachusetts Chapter 93A with similar intrastate powers is sometimes referred to as a "Baby FTC Act."

228. *See* *Governo Law Firm, LLC v. Bergeron*, 487 Mass. 188 (2021); *Microsemi Corp. v. David Langlois, et al.*, Nos. 139890, SUCV20171065BLS1, 2018 Mass. Super. LEXIS 65, at \*1-2 (Mass. Super. Ct. Mar. 2, 2018) (Kaplan, J.).

229. Federal preemption can be statutory (28 U.S.C. § 1338(a), federal exclusive jurisdiction over patents and copyrights) or constitutional: states trespassing in realms reserved to Congress or frustrating the implementation of a federal enactment.

230. *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141 (1989); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964); *Sears, Roebuck & Co. v. Stiffel Co.*, 374 U.S. 826 (1963); *see also* 17 U.S.C. § 301 (copyright). The 1976 Copyright Act eliminated (over a 25-year transition period) the common law (state) copyright realm that had coexisted with statutory federal copyright since 1790.

but there has not been federal preemption of state franchise or trademark laws.<sup>231</sup> Sometimes, statutory preemption displaces state law that conflicts with federal law, but permits all or certain states to provide greater protections than federal law does (e.g., California emission standards). Depending on how it is drafted, the enactment of federal legislation might shift much of the litigation over employee covenants not to compete from the state courts to the federal district courts under their federal question jurisdiction.<sup>232</sup>

The likelihood of federal action is uncertain, but it is clear that much more federal attention is being paid to the law governing employee covenants not to compete than in the past. Thus, another field of law traditionally the domain of state courts and legislatures may be on the verge of federal preemption, though non-preemptive collateral regulation seems more likely. Perceptions of the wisdom of deference to the states on unfair competition and employer-employee relations may depend on what political party is in ascendance.

## CONCLUSION

Under the new Massachusetts Noncompetition Agreement Act, knowledge of the common law cases remains a valuable asset, and lawyers will still have plenty of work to do. Reform in noncompetition laws, policy, and practice is part of a new balance of employment and competition expectations more attuned to modern needs than the pre-reform standards. Apart from recalibrating the balance of bargaining leverage between employers and employees for fairness, the Act is an attempt to improve technology and the economy of the commonwealth through such recalibration. Reducing the reach of noncompetition covenants clearly enables greater mobility of professional and executive employees and investment in new enterprises (a virtuous cycle), but can also discourage investment in the old enterprise and diminish employer trust in employees (a malignant cycle). The dominance of California (Silicon Valley) over New England in semiconductor, telecommunication, social media, and other computer-related industries has been attributed, at least in part, to the absence of noncompetition restrictions in California, but this may be a matter of confusing correlation with causation.<sup>233</sup>

A long-sought rebalancing of rights and obligations by the MNAA was and is a foundation for reforms by other states, and

influenced some of the later reform provisions in the ULC's uniform act now being promoted for state-by-state adoption. Thus, the commonwealth has been at the forefront of the drumbeat for change in this area of employees' rights while preserving an employment-at-will regimen inclusive of a fairly balanced competition restriction option with safe-harbor clarity for the employer.

Employers should not be seriously harmed by the reforms, but rather may well appreciate the safe harbor guideposts of the MNAA for drafting enforceable agreements. The Act is prospective in effect to enable an orderly transition. Employers' decisions as to whether or not to pay-to-play for noncompetition restrictions may establish a trend to selectively imposing such restrictions. Employees will have fewer loopholes (flaws) in poorly drafted noncompetition agreements to exploit, but will have the benefit of greater certainty in making stay-or-go decisions, with a greater range of new employment or business start-up opportunities if they do decide to leave.

Passage of the groundbreaking Massachusetts Noncompetition Agreement Act is a beneficial paradigm shift for the commonwealth and the nation, confirming once again Holmes' adage that "the life of the law has not been logic, it has been experience"<sup>234</sup> and Brandeis' thesis of states as beneficial laboratories of democracy.<sup>235</sup>

## ADDENDUM

### *Summary of Massachusetts Noncompetition Agreement Act Legislative History*

The Massachusetts Noncompetition Agreement Act, G.L. c 149, § 24L, was enacted on Aug. 10, 2018.<sup>236</sup> The Massachusetts General Court compiled an online bill history of 2018 House Doc. No. 4732 (including links to the legislative documents) that is the bill directly underlying 2018 Mass. Acts c. 228, An Act Relative to Economic Development in the Commonwealth.<sup>237</sup> However, the original 2018 House Doc. No. 4732 made no mention of noncompetition agreements.<sup>238</sup> In a last-minute amendment on July 31, 2018, the House amended 2018 House Doc. No. 4732 to add in the text of 2018 House Doc. No. 4868 (Sections 21 and 71 of which is the text of the Massachusetts Noncompetition Agreement Act).<sup>239</sup> The Senate concurred in this amendment on Aug. 1, 2018.<sup>240</sup>

See 17 U.S.C. §301. State trade secret laws are not preempted by federal law. *Kewanee v. Bicon*, 416 U.S. 470, 474 (1974).

231. The FTC Trade Regulation rule re franchise disclosures states that it is non-preemptive of state regulations, and the U.S. Trademark Act, 15 U.S.C. §1050, et seq. states no preemption of state trademark laws. See note 155 *supra* re a recent Supreme Judicial Court decision construing the Massachusetts Independent Contractor Act, M.G.L. c. 149 §148B, to require treating certain franchise owners as employees of the franchisor. But this will be of limited effect and only micromanaged to the extent of that case. Franchisors can give their franchisees some greater autonomy while still protecting brand equity.

232. Federal courts have long exercised diversity (28 U.S.C. § 1332) and adjunct jurisdiction (28 U.S.C. § 1376) over state law causes of action. See also 28 U.S.C. § 1338(b) (adjunct jurisdiction over state unfair competition counts in federal IP cases).

233. Jonathan M. Barnett & Ted Sichelman, "The Case for Noncompetes," 87 U. CHI. L. REV. 953 (2020). The California ban of noncompetition covenants

as a generator of prosperity is asserted in Anna Lee Saxenian's *Regional Advantage* (1996). For further analysis, see Boston attorney Russell Beck's critique of the Saxenian thesis. Russell Beck, "Correlation Does Not Imply Causation: The False Comparison of Silicon Valley and Boston's Route 128," FAIR COMPETITION LAW (July 9, 2019), available at <https://faircompetitionlaw.com/2019/07/09/correlation-does-not-imply-causation-the-false-comparison-of-silicon-valley-and-bostons-route-128>.

234. Oliver W. Holmes Jr., *The Common Law* 1 (1881).

235. See *supra* note 212.

236. MASS. GEN. LAWS c. 149, §24L, inserted by 2018 Mass. Acts c. 228, §§21 and 71.

237. The 192<sup>nd</sup> General Court of the Commonwealth of Massachusetts, Bill H. 4732, available at <https://malegislature.gov/Bills/190/H4732/BillHistory>.

238. *Id.*

239. *Id.*

240. *Id.*



Later that same day, the House and the Senate both voted unanimously to enact 2018 House Doc. No. 4732 as amended.<sup>241</sup> Governor Baker signed the bill in part on Aug. 10, 2018, and sent a message to the General Court concerning sections of 2018 House Doc. No. 4732 that he disapproved.<sup>242</sup> The message makes no mention of Section 21 other than to note “the remainder of this bill I approve.”<sup>243</sup>

Underlying that last-minute amendment is nearly a decade of legislative travail over differing visions of how employee noncompetition agreements should be regulated — none of which appears in the online bill history of 2018 House Doc. No. 4732. To understand the General Court’s legislative intent concerning post-employment noncompetition agreements, a deeper dive into the legislative history is necessary.

Sen. Will Brownsberger published a detailed behind-the-scenes account of the struggle to enact the MNAA in an article, *A Study in Persistence and Compromise*, on his website on Aug. 13, 2018.<sup>244</sup> Sen. Brownsberger was moved to propose a bill to completely ban noncompetition clauses in employment contracts in 2009 after hearing a friend’s story of how her career had been derailed by an oppressive noncompetition clause.<sup>245</sup> Ironically, a week later, Rep. Lori Ehrlich filed a separate bill to codify the common law of noncompetition agreements in Massachusetts.<sup>246</sup> Sen. Brownsberger and Rep. Ehrlich then worked together and with others on compromise bills over the next nine years.<sup>247</sup> In the words of Sen. Brownsberger, the MNAA was:

a hard-fought compromise, banning non-competes for lower level workers, limiting them for higher level workers and providing procedural protections to assure that workers know what they are getting into when they sign them.<sup>248</sup>

What follows is an examination of the legislative documents generated in the final 22 months leading up to the enactment of the

MNAA. This examination identifies the areas of controversy and how the General Court resolved them in order to shed light on the legislature’s intent.<sup>249</sup> The documents themselves appear at the end of this examination.

Six different bills concerning noncompetition agreements in employment were filed within the first month of the 190<sup>th</sup> General Court.<sup>250</sup> With the exception of one bill that would have banned noncompetition agreements in employment entirely,<sup>251</sup> the bills were in agreement that noncompetition agreements in employment would need to meet the following criteria to be enforceable: 1) in writing; 2) signed by both employer and employee; 3) stating that employee has the right to consult with counsel prior to the commencement of employment; 4) that, if entered into after the commencement of employment, must be supported by fair and reasonable consideration; 5) that it must not be broader than necessary to protect trade secrets or confidential information; 6) that the restrictions must be reasonably limited in terms of time and geography; and 7) that it must be consistent with public policy. The bills also agreed that noncompetition agreements should be banned as to certain types of employees, such as low-wage earners and student employees, and that noncompetition agreements should not be enforceable against employees who had been discharged without cause or laid off.

The major issues among the six bills were:

- Whether independent contractors would be protected along with employees<sup>252</sup>
- Whether garden leave would be required and, if so, at what percentage of compensation<sup>253</sup>
- Whether the employer would be required to review the noncompetition agreement with the employee periodically and, if so, at what time intervals<sup>254</sup>

241. *Id.*

242. *Id.*

243. See 2018 House Doc. No. 4889 (setting forth the full text of Gov. Deval Patrick’s message to the 190th General Court).

244. Will Brownsberger, “A Study in Persistence and Compromise” (Aug. 13, 2018), available at <https://willbrownsberger.com/a-study-in-persistence-and-compromise-legislation-regulating-agreements-not-to-compete/>.

245. *Id.*; 2009 House Doc. No. 1794.

246. 2009 House Doc. No. 1799.

247. See, e.g., 2010 House Doc. No. 4607 (which was a compromise bill combining Sen. Will Brownsberger’s 2009 House Doc. No. 1794 and Rep. Lori Ehrlich’s 2009 House Doc. No. 1799); see also 2017 House Doc. No. 2366 (which was jointly filed by Sen. Brownsberger and Rep. Ehrlich)

248. Brownsberger, “A Study in Persistence and Compromise” (Aug. 13, 2018), available at <https://willbrownsberger.com/a-study-in-persistence-and-compromise-legislation-regulating-agreements-not-to-compete/>.

249. Although Massachusetts courts primarily look to the text of a statute to determine the legislature’s intent, courts may also “enlist the aid of other reliable guideposts, such as the statute’s progression through the legislative body. . .” Sheehan v. Weaver, 467 Mass. 734, 737 (2014); Sean J. Kealy, “A Guide to Gathering and Using Legislative History in Massachusetts,” 97 MASS. L. REV. 46, 47-48 (2016) (describing Massachusetts courts’ use of legislative history to

determine legislative intent).

250. 2017 Senate Doc. No. 1020 (filed on Jan. 12, 2017); 2017 Senate Doc. No. 840 (filed on Jan. 19, 2017); 2017 House Doc. No. 2366 (filed on Jan. 19, 2017); 2017 Senate Doc. No. 988 (filed on Jan. 20, 2017); 2017 Senate Doc. No. 1017 (filed on Jan. 20, 2017); 2017 House Doc. No. 2371 (filed on Jan. 20, 2017).

251. 2017 Senate Doc. No. 1020 (titled “An Act to protect trade secrets and eliminate non-compete agreements”).

252. 2017 Senate Doc. No. 1020 would have banned noncompetition agreements as to independent contractors as well as employees; 2017 House Doc. No. 2366 and 2017 Senate Doc. No. 988 would not have applied to independent contractors unless the independent contractor provided services to a business entity for more than one year; 2017 House Doc. No. 2371 would have treated employees and independent contractors alike; 2017 Senate Doc. No. 840 was silent as to independent contractors.

253. 2017 Senate Doc. No. 840 and 2017 Senate Doc. No. 1017 required garden leave at 100% base salary; 2017 House Doc. No. 2371 required garden leave at 50% base salary; 2017 House Doc. No. 2366 and 2017 Senate Doc. No. 988 made no provision for garden leave.

254. 2017 Senate Doc. No. 840, 2017 Senate Doc. No. 988 and 2017 House Doc. No. 2366 required a three-year review period; 2017 Senate Doc. No. 1017 required a five-year review period; 2017 House Doc. No. 2371 did not mandate periodic review of noncompetition agreements.

- What would be the maximum time limit upon the restrictive covenant and whether the time limit should be extended for employee misconduct<sup>255</sup>
- Whether the employer would be required to give notice of intent to enforce the noncompete agreement<sup>256</sup>
- Whether courts would have discretion to reform noncompetition agreements to render them enforceable<sup>257</sup>
- Whether clauses penalizing employees from challenging or defending against noncompetition agreements would be declared void<sup>258</sup>

On April 17, 2018, the House Committee on Labor and Workforce Development hammered out a compromise bill, 2018 House Doc. No. 4419, to replace the six bills under consideration.<sup>259</sup> This bill included individual employers in the definition of business entities, expressly protected independent contractors as well as employees, placed a one-year time limit on restrictive covenants that could be extended up to two years for employee misconduct, required garden leave pay at 50% of base salary, and permitted courts to exercise broad discretion in reforming noncompetition agreements.<sup>260</sup>

In the meantime, the 190th General Court was hard at work on an omnibus appropriations bill, 2018 House Doc. No. 4732, an act relative to economic development in the commonwealth.<sup>261</sup> This bill, as mentioned earlier, initially made no mention of noncompetition agreements. The compromise bill concerning noncompetition agreements resurfaced word-for-word as a Senate amendment, 2018 Senate Doc. No. 2625, to the engrossed 2018 House Doc. No. 4732 that had passed the House on July 10, 2018.<sup>262</sup> During the Senate's consideration of the amendment, there were three unsuccessful attempts to change the wording of the amendment: 1) re-draft amendment 30 would have carved out franchise arrangements from the definition of noncompetition agreements; 2) amendment 82 would have prohibited judicial reformation of noncompetition agreements; and 3) amendment 304 would have changed the garden leave formula from 50% of base salary to 50% of total compensation.<sup>263</sup> The Senate rejected all three proposed amendments to 2018 Senate Doc. No. 2625, passed it, and reprinted it as 2018 Senate Doc. No. 2635 on July 25, 2018.<sup>264</sup> The House concurred in the Senate amendment and reprinted it as 2018 House Doc. No. 4868 on July 31, 2018, with the Senate concurring later that same day.

2018 House Doc. No. 4868 passed the full General Court unanimously on Aug. 1, 2018.

Thus, the legislative process underlying the MNAA is truly a study in compromise.<sup>265</sup>

***Itemization of the Legislative Documents (in reverse chronological order):***

- 2018 Mass. Acts c. 228, §§21 and 71
- 2018 House Doc. No. 4889 (Gov. Patrick's message to 190th General Court)
- Notes of William F. Welch, Clerk of 190th General Court, re: 2018 House Doc. No. 4732
- 2018 House Doc. No. 4868
- 2018 Senate Doc. No. 2635
- 2018 Senate Doc. No. 2625 (with accompanying Ways and Means Committee Report)
- Rejected 2nd Redraft Amendment 30
- Rejected Amendment 304
- Rejected Amendment 82
- 2018 House Doc. No. 4714 (with accompanying Ways and Means Committee Report)
- 2018 House Doc. No. 4419 (with accompanying Labor and Workforce Development Committee Report)
- 2017 House Doc. No. 2371
- 2017 Senate Doc. No. 1017
- 2017 Senate Doc. No. 988
- 2017 House Doc. No. 2366
- 2017 Senate Doc. No. 840
- 2017 Senate Doc. No. 1020
- 2016 Senate Doc. No. 2418 (with accompanying Rules Committee Report)
- 2016 House Doc. No. 4434
- 2010 House Doc. No. 4607
- 2009 House Doc. No. 1794
- 2009 House Doc. No. 1799

The MNAA is stated in the attached Appendix. The remaining documents can be accessed by selecting "MBA Reports" under the "Advocacy" tab on the Massachusetts Bar Association's website, [www.massbar.org](http://www.massbar.org), then clicking on the folder marked "Legislative Reports."

255. 2017 Senate Doc. No. 840 set a 12-month time limit with no extensions for employee misconduct; 2017 House Doc. No. 2366, 2017 Senate Doc. No. 988 and 2017 House Doc. No. 2371 set a 12-month time limit with extensions up to two years for employee misconduct; 2017 Senate Doc. No. 1017 set a 90-day time limit with extensions up to two years for employee misconduct.

256. 2017 Senate Doc. No. 840 and 2017 Senate Doc. No. 1017 would have required 10-days' notice from termination of employment of employer's intent to enforce the noncompetition agreement.

257. 2017 Senate Doc. No. 840 and 2017 Senate Doc. No. 1017 would have banned judicial reformation of noncompetition agreements; 2017 House Doc. No. 2366 and 2017 Senate Doc. No. 988 would have limited courts' discretion to reform noncompetition agreements (Purple Pencil Doctrine); 2017 House Doc. No. 2371 acknowledged the courts' broad discretion to reform noncompetition agreements.

258. 2017 Senate Doc. No. 840 would have voided such penalty clauses.

259. 2018 House Doc. No. 4419 and the accompanying committee report dated April 17, 2018.

260. *Id.*

261. 2018 House Doc. No. 4732.

262. 2018 Senate Doc. No. 2625.

263. Re-draft amendment 30, amendment 82 and amendment 304 to 2018 Senate Doc. No. 2625.

264. 2018 Senate Doc. No. 2635.

265. Russell Beck, "Consideration Under the New Massachusetts Noncompete Law: Compromise Happens," FAIR COMPETITION LAW (Oct. 19, 2019), available at <https://faircompetitionlaw.com/2019/10/19/consideration-under-the-new-massachusetts-noncompete-law-compromise-happens/>.

## APPENDIX

### Acts (2018) Chapter 228

SECTION 21. Chapter 149 of the General Laws, as appearing in the 2014 Official Edition, is hereby amended by inserting after section 24K the following section:

Section 24L. (a) As used in this section, the following words shall have the following meanings:

“Business entity”, any person or group of persons performing or engaging in any activity, enterprise, profession or occupation for gain, benefit, advantage or livelihood, whether for profit or not for profit, including but not limited to corporations, limited liability companies, limited partnerships or limited liability partnerships.

“Employee”, an individual who is considered an employee under section 148B of this chapter; provided, however, that the term “employee”, as used in this chapter, shall also include independent contractors under section 148B.

“Forfeiture agreement”, an agreement that imposes adverse financial consequences on a former employee as a result of the termination of an employment relationship, regardless of whether the employee engages in competitive activities following cessation of the employment relationship. Forfeiture agreements do not include forfeiture for competition agreements.

“Forfeiture for competition agreement”, an agreement that by its terms or through the manner in which it is enforced imposes adverse financial consequences on a former employee as a result of the termination of an employment relationship if the employee engages in competitive activities.

“Garden leave clause”, a provision within a noncompetition agreement by which an employer agrees to pay the employee during the restricted period, provided that such provision shall become effective upon termination of employment unless the restriction upon post-employment activities are waived by the employer or ineffective under subsection (c) (iii).

“Noncompetition agreement”, an agreement between an employer and an employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that he or she will not engage in certain specified activities competitive with his or her employer after the employment relationship has ended. Noncompetition agreements include forfeiture for competition agreements, but do not include: (i) covenants not to solicit or hire employees of the employer; (ii) covenants not to solicit or transact business with customers, clients, or vendors of the employer; (iii) noncompetition agreements made in connection with the sale of a business entity or substantially all of the operating assets of a business entity or partnership, or otherwise disposing of the ownership interest of a business entity or partnership, or division or subsidiary thereof, when the party restricted by the noncompetition agreement is a significant owner of, or member or partner in, the business entity who will receive significant consideration or benefit from the sale or disposal; (iv) noncompetition agreements outside of an employment relationship; (v) forfeiture agreements; (vi) non-disclosure or confidentiality agreements; (vii) invention assignment agreements; (viii) garden leave clauses; (ix) noncompetition agreements made in connection with the cessation of or separation from employment if the employee is expressly given seven business days to rescind acceptance; or (x) agreements by which an employee agrees

to not reapply for employment to the same employer after termination of the employee.

“Restricted period”, the period of time after the date of cessation of employment during which an employee is restricted by a noncompetition agreement from engaging in activities competitive with his or her employer.

(b) To be valid and enforceable, a noncompetition agreement must meet the minimum requirements of paragraphs (i) through (viii).

(i) If the agreement is entered into in connection with the commencement of employment, it must be in writing and signed by both the employer and employee and expressly state that the employee has the right to consult with counsel prior to signing. The agreement must be provided to the employee by the earlier of a formal offer of employment or 10 business days before the commencement of the employee’s employment.

(ii) If the agreement is entered into after commencement of employment but not in connection with the separation from employment, it must be supported by fair and reasonable consideration independent from the continuation of employment, and notice of the agreement must be provided at least 10 business days before the agreement is to be effective. Moreover, the agreement must be in writing and signed by both the employer and employee and expressly state that the employee has the right to consult with counsel prior to signing.

(iii) The agreement must be no broader than necessary to protect one or more of the following legitimate business interests of the employer: (A) the employer’s trade secrets, as that term is defined in section 1 of chapter 93L; (B) the employer’s confidential information that otherwise would not qualify as a trade secret; or (C) the employer’s goodwill. A noncompetition agreement may be presumed necessary where the legitimate business interest cannot be adequately protected through an alternative restrictive covenant, including but not limited to a non-solicitation agreement or a non-disclosure or confidentiality agreement.

(iv) In no event may the stated restricted period exceed 12 months from the date of cessation of employment, unless the employee has breached his or her fiduciary duty to the employer or the employee has unlawfully taken, physically or electronically, property belonging to the employer, in which case the duration may not exceed 2 years from the date of cessation of employment.

(v) The agreement must be reasonable in geographic reach in relation to the interests protected. A geographic reach that is limited to only the geographic areas in which the employee, during any time within the last 2 years of employment, provided services or had a material presence or influence is presumptively reasonable.

(vi) The agreement must be reasonable in the scope of proscribed activities in relation to the interests protected. A restriction on activities that protects a legitimate business interest and is limited to only the specific types of services provided by the employee at any time during the last 2 years of employment is presumptively reasonable.

(vii) The noncompetition agreement shall be supported by a garden leave clause or other mutually-agreed upon consideration between the employer and the employee, provided that such consideration is specified in the noncompetition agreement. To constitute a garden leave clause within the meaning of this section, the agreement must (i) provide for the payment, consistent with the requirements for the payment of wages under section 148 of chapter 149 of the

general laws, on a pro-rata basis during the entirety of the restricted period, of at least 50 percent of the employee's highest annualized base salary paid by the employer within the 2 years preceding the employee's termination; and (ii) except in the event of a breach by the employee, not permit an employer to unilaterally discontinue or otherwise fail or refuse to make the payments; provided, however, if the restricted period has been increased beyond 12 months as a result of the employee's breach of a fiduciary duty to the employer or the employee has unlawfully taken, physically or electronically, property belonging to the employer, the employer shall not be required to provide payments to the employee during the extension of the restricted period.

(viii) The agreement must be consonant with public policy.

(c) A noncompetition agreement shall not be enforceable against the following types of workers: (i) an employee who is classified as nonexempt under the Fair Labor Standards Act, 29 U.S.C. 201-219; (ii) undergraduate or graduate students that partake in an internship or otherwise enter a short-term employment relationship with an employer, whether paid or unpaid, while enrolled in a full-time or part-time undergraduate or graduate educational institution; (iii) employees that have been terminated without cause or laid off; or (iv) employees age 18 or younger. This section does not render void or unenforceable the remainder of the contract or agreement containing the unenforceable noncompetition agreement, nor does it preclude the imposition of a noncompetition restriction by a court, whether through preliminary or permanent injunctive relief or otherwise, as a remedy for a breach of another agreement or a statutory or common law duty.

(d) A court may, in its discretion, reform or otherwise revise a non-competition agreement so as to render it valid and enforceable to the extent necessary to protect the applicable legitimate business interests.

(e) No choice of law provision that would have the effect of avoiding the requirements of this section will be enforceable if the employee is, and has been for at least 30 days immediately preceding his or her cessation of employment, a resident of or employed in Massachusetts at the time of his or her termination of employment.

(f) All civil actions relating to employee noncompetition agreements subject to this section shall be brought in the county where the employee resides or, if mutually agreed upon by the employer and employee, in Suffolk county; provided that, in any such action brought in Suffolk county, the superior court or the business litigation session of the superior court shall have exclusive jurisdiction.

SECTION 71. Section 24L of chapter 149 of the General Laws may be referred to as the Massachusetts Noncompetition Agreement Act and shall apply to employee noncompetition agreements entered into on or after October 1, 2018.

# CASE COMMENT

## Criminal Law: Modifying the Standard for Addressing Possible Discrimination During Jury Selection

*Commonwealth v. Sanchez*, 485 Mass. 491 (2020)

In a landmark decision, *Commonwealth v. Sanchez*,<sup>1</sup> the Supreme Judicial Court (SJC) clarified its law on peremptory strikes during jury selection by retiring the specific language that had led to confusion, namely the “pattern” and “likelihood” language that had governed the first-step inquiry under Massachusetts law.<sup>2</sup>

Though the history of the case was lengthy, involving numerous postconviction procedural events,<sup>3</sup> the core issue was simple, and succinctly described in the SJC decision’s opening sentence: “Throughout the thirteen years of his incarceration, the defendant pressed the same claim at every stage of appeal or motion for post-conviction relief — that the trial judge did not properly inquire as to whether the prosecutor unconstitutionally struck young African-American men from the jury.”<sup>4</sup> As explained below, that tenacity paid off and, in the process, paved the way for a significant revision of jury selection law.

### I. THE BACKGROUND

After preserving a *Batson-Soares*<sup>5</sup> objection, the defendant proceeded to trial, where he was convicted of second-degree murder.<sup>6</sup> The SJC laid out the case’s relevant background:

The original dispute centered on the prosecutor’s twelfth peremptory challenge, in which he struck a nineteen year old African-American college student from the jury. Because two other young, African-American men also had been struck, defense counsel objected on *Batson-Soares* grounds. Instead of seeking a reason from the Commonwealth or determining that the prima facie showing had been made, the judge responded, “I think his youth and the fact that he’s a full-time college student could be a problem.” Upon

further argument from defense counsel, the judge sought to “shortcut” the process by asking the prosecutor if he would proffer a race-neutral reason for the strike. The prosecutor argued that age is not a protected characteristic and insisted that the judge formally find that a threshold showing of impropriety had been made before proceeding to the second step of the inquiry. Noting that five African-American jurors had been seated, the judge declared that the prima facie showing had not been made, and then allowed the prosecutor to use the peremptory challenge without requiring him to give a race-neutral reason. Defense counsel renewed her objection, and the case proceeded to trial, where the defendant was convicted of murder in the second degree and possession of a firearm without a license.<sup>7</sup>

On direct review, the verdict was upheld, and the SJC and Supreme Court of the United States declined additional review.<sup>8</sup>

It was during federal habeas review where the defendant’s ultimate victory began to take shape.<sup>9</sup> After the U.S. District Court for the District of Massachusetts denied relief, concluding that the defendant had not shown a *Batson* violation, the First Circuit reviewed the claim de novo.<sup>10</sup> It concluded that state courts had unreasonably applied clearly established federal law.<sup>11</sup> (This essay will omit the details of this decision<sup>12</sup> but note that some of its reasoning and language were subsequently adopted by the SJC prior to that court’s own *Sanchez* decision.<sup>13</sup>) The First Circuit remanded the case for an evidentiary hearing on the prosecutor’s peremptory strike, but the District Court ultimately denied relief, and, on its second look, the First Circuit affirmed that determination.<sup>14</sup>

Despite losing again, Sanchez persisted, filing a motion for a new

1. 485 Mass. 491 (2020).

2. *Id.* at 492, 511.

3. *Id.* at 494-98.

4. *Id.* at 492.

5. See *Batson v. Kentucky*, 476 U.S. 79, 93-94 (1986); *Commonwealth v. Soares*, 377 Mass. 461, 489-490, cert. denied, 444 U.S. 881 (1979).

6. *Commonwealth v. Sanchez*, 485 Mass. 491, 494 (2020).

7. *Id.* (internal citations omitted).

8. *Id.* (citing all three levels at which the defendant sought direct appellate review).

9. *Id.* at 495.

10. *Id.*

11. *Id.* at 495-496, citing *Sanchez v. Roden*, 753 F.3d 279, 293 (1st Cir. 2014).

12. See *Commonwealth v. Sanchez*, 485 Mass. 491, 496-97 (2020).

13. See *Commonwealth v. Jones*, 477 Mass. 307, 325 (2017).

14. *Sanchez*, 485 Mass. at 496-97.



trial in state court.<sup>15</sup> Relying on both the original First Circuit case and SJC precedent, the motion judge reasoned that the defendant had been deprived of the benefit of “clear, preexisting law” and concluded that Sanchez should have prevailed initially before the Appeals Court.<sup>16</sup> Accordingly, the judge granted the motion, and this time the commonwealth appealed.<sup>17</sup> After rejecting procedural arguments by both parties,<sup>18</sup> the SJC arrived at the analysis of the *Batson-Soares* problem.

## II. THE COURT’S INTERPRETATION OF STATE LAW

The court identified the key issue that had led to confusion: differing language between Massachusetts and federal courts’ articulations of the unconstitutional peremptory challenge framework. It then resolved that confusion.

The SJC recognized that “[b]oth Federal and Massachusetts courts employ a three-step burden-shifting analysis to examine whether a peremptory strike is being used impermissibly.”<sup>19</sup>

First, the party challenging the strike must rebut a presumption that the peremptory challenge is proper. In Massachusetts, the presumption of propriety is “rebutted on a showing that (1) there is a pattern of excluding members of a discrete grouping and (2) it is likely that individuals are being excluded solely on the basis of their membership in that group.” If a party makes such a showing, “the burden shifts to the party exercising the challenge to provide a ‘group-neutral’ explanation for it.” Finally, the “judge must then determine whether the explanation is both ‘adequate’ and ‘genuine.’”<sup>20</sup>

The SJC described the state-federal dichotomy as follows:

Under the frequently cited language of *Soares*, 377 Mass. at 489-490, the presumption that a peremptory challenge is properly made is rebutted by a “showing that (1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and (2) there is a likelihood they are being excluded from the

jury solely by reason of their group membership.” At the same time, “under *Batson*, a defendant must merely raise an inference that the prosecutor struck a juror because of race or other protected status.”<sup>21</sup>

The SJC essentially stated that these articulations are the same but that the federal formulation is written in less confusing language:<sup>22</sup>

We do not agree that the requirements of *Soares*, as we consistently have interpreted them, are at odds with the requirements of *Batson*. . . . Nonetheless, it is easy to see how the language of *Soares* continues to sow confusion.<sup>23</sup>

The court determined it was time to retire the source of this confusion. Accordingly, it adopted the standard articulated in federal law for a first-step challenge pursuant to *Batson*, replacing the “pattern” language with a test instructing the trial judge to find that “the presumption of propriety is rebutted when ‘the totality of the relevant facts gives rise to an inference of discriminatory purpose.’”<sup>24</sup>

## III. IMPLICATIONS OF THIS CASE

The SJC’s decision in *Sanchez* is noteworthy for at least three reasons: (1) foreshadowing a potential sea change in peremptory challenge law; (2) illustrating more broadly its willingness to reassess precedent for workability and clarity; and (3) its specific decision on the remedy.

### A. Practical Implications of the New Standard

*Sanchez* may mark the beginning of the end for peremptory challenges in the commonwealth. Though the SJC had observed three years earlier that some states “have eliminated the need to make a *prima facie* showing, and require a race-neutral reason whenever [such a] challenge is made,”<sup>25</sup> it did not follow suit.<sup>26</sup>

That status quo, however, may be short-lived. There has long been an inherent tension between *Batson*’s Supreme Court progeny and the requirement of a *prima facie* showing in Massachusetts jury trials.<sup>27</sup>

15. *Id.* at 497.

16. *Id.*

17. *Id.* at 497-98.

18. *Commonwealth v. Sanchez*, 485 Mass. 491, 498-509 (2020).

19. *Id.* at 493

20. *Id.* (internal citations omitted). The SJC had already held decades earlier that a “pattern” was not required “because the principles stated in the *Soares* and *Batson* decisions apply as well to the peremptory challenge of a single prospective juror within a protected class.” *Commonwealth v. Harris*, 409 Mass. 461, 465 (1991); *accord* *Commonwealth v. Curtiss*, 424 Mass. 78, 79 (1997), and cases cited. Nevertheless, the “pattern” language remained in case after case. *See, e.g.*, *Commonwealth v. Ortega*, 480 Mass. 603, 606 (2018), and cases quoted. The *Curtiss* case actually states that “[a] single peremptory challenge can constitute a *prima facie* showing that rebuts the presumption of proper use,” *Curtiss*, 424 Mass. 78, 79 (1997), but then describes the legal standard as requiring a “pattern” on the next page. *Id.* at 80.

21. *Id.* at 509.

22. As one example of this confusion, the court in *Sanchez* had already stated

that both the state and federal constitutions “forbid[] striking even a single prospective juror for a discriminatory purpose.” 485 Mass. at 493, quoting *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019) and citing *Commonwealth v. Robertson*, 480 Mass. 383, 393 (2018). Therefore, a “pattern,” as traditionally understood, is never constitutionally required.

23. *Sanchez*, 485 Mass. at 510 (internal citation omitted).

24. *Commonwealth v. Sanchez*, 485 Mass. 491, 511 (2020) (internal quotations omitted).

25. *Commonwealth v. Jones*, 477 Mass. 307, 322 n.23 (2017).

26. *Id.* at 321.

27. Compare *Jones*, 477 Mass. at 321-22 (not automatically requiring an actual answer) with *Johnson v. California*, 545 U.S. 162, 172 (2005) (“The *Batson* framework is designed to produce *actual answers* to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a *direct answer can be obtained by asking a simple question.*”), citing *Batson v. Kentucky*, 476 U.S. 79, 97-98, and n.20 (1986) (emphasis added).

*Sanchez* revealed some justices' openness to depart at least from the first step of *Batson-Soares*. Justice David Lowy, in a concurring opinion, asserted that even the clarification of *Sanchez* still renders the *Batson-Soares* inquiry insufficient, and called for abandoning step one.<sup>28</sup> And Chief Justice Ralph Gants, in a separate concurring opinion, agreed with Justice Lowy that there were "sound reasons" to consider abandoning the first step of *Batson-Soares* but continued, "I defer from joining his concurrence only because I agree with the court that if we were to announce such a departure from our current jurisprudence, we should do so in a case where the question is squarely presented and where we have the benefit of briefing by the parties and amici."<sup>29</sup>

Even the majority opinion, authored by Justice Frank Gaziano, which took a moderate approach to *Batson-Soares* reform, recognized the value of considering a more drastic alteration: abolishing peremptory challenges altogether. In a footnote responding to Justice Lowy's concurrence, the majority in *Sanchez* acknowledged that "[t]here may well be good arguments for [eliminating peremptory challenges]," citing Justice Thurgood Marshall's *Batson* concurrence, in which Justice Marshall argued that only eliminating peremptory challenges will end racial discrimination in jury selection.<sup>30</sup>

Several justices prior to Justice Lowy have also questioned the concept of peremptory challenges. Some of his predecessors joined the call for their elimination as a whole.<sup>31</sup> Their concerns may prove clairvoyant.

Within a year of announcing *Sanchez*, the SJC released another decision expanding the path for *Batson* to live up to its promise of eliminating biased manipulation of jury selection. That case, *Commonwealth v. Carter*,<sup>32</sup> while extending *Batson-Soares* protections,<sup>33</sup>

further illustrated the difficulty in faithfully applying the *Batson* framework.<sup>34</sup> It expanded *Batson-Soares* by declaring sexual orientation a protected class subject to the new peremptory challenge protocol<sup>35</sup> but also exemplified how trial judges could struggle with that peremptory challenge framework.<sup>36</sup> *Carter*, however, may be the outcome of obsolete language; *Sanchez* is designed to remedy the confusion that led to the result.

And soon after *Carter*, major peremptory challenge news was made across the country: Arizona announced it would be the first state to abolish peremptory challenges.<sup>37</sup> It is unlikely to be the last. Especially in light of vigorous debate contained in the dueling *Sanchez* opinions, Massachusetts may soon follow Arizona's lead.

## B. A Court Striving for Clarity and Workability

More broadly, *Sanchez* illustrates how the SJC will consider modifying precedent for clarity and workability. Though the *Sanchez* court found the federal and state language consistent with each other,<sup>38</sup> it acknowledged an "[a]pparent conflict in *Batson-Soares* standards."<sup>39</sup> As a result, the SJC declared: "We retire the language of 'pattern' and 'likelihood,' ... because we conclude that this language has resulted in persistent confusion for judges and litigants alike."<sup>40</sup>

The SJC's replacement of the confusing language that had long governed state peremptory challenges represented another step in the court's recent practice of reevaluating and clarifying legal principles to be more workable in the lower courts when confronted with law that proved to be confusing, unworkable, or difficult to apply.

In criminal contexts, the SJC has been upfront in acknowledging the importance of clarifying confusion.<sup>41</sup> Similarly, it has expressed

28. *Sanchez*, 485 Mass. at 515-17 (Lowy, J., concurring); *but see id.* at 415 n.19 (majority op.); *see also* *Commonwealth v. Carter*, 488 Mass. 191, 210, 216 (2021) (Lowy, J., concurring) (calling *Carter* remedy "unworkable").

29. *Sanchez*, 485 Mass. at 518 (Gants, C.J., concurring).

30. *Id.* at 514 n.19, citing *Batson*, 476 U.S. at 103 (Marshall, J., concurring).

31. *See* *Commonwealth v. Maldonado*, 439 Mass. 460, 468 (2003) (Marshall, C.J., concurring) (joined by Justices John Greaney and Francis Spina) ("it is time either to abolish them entirely, or to restrict their use substantially"); *Commonwealth v. Calderon*, 431 Mass. 21, 29 (2000) (Lynch, J., dissenting) ("The result the court reaches today can be of little help to trial judges and attorneys in guiding their conduct in jury selection. I would prefer that, rather than impose on trial judges the impossible task of scrutinizing peremptory challenges for improper motives, we abolish them entirely.")

32. 488 Mass. 191 (2021)

33. *Id.* at 192 (vacating first-degree murder convictions and holding sexual orientation is a protected class for purposes of peremptory challenges). Moreover, though not a holding, the SJC's reliance on *Bostock v. Clayton County*, Ga., 140 S. Ct. 1731, 1737-38 (2020) — which extended federal statutory employment protection to both gay and transgender peoples — indicates its reasoning would naturally apply to transgender people. *See Carter*, 488 Mass. at 202 (citing *Bostock* — which also applied to transgender people — for proposition that "there is no question that gay people constitute a 'discrete group' as contemplated by art. 12 and as protected by the equal protection clause of the Fourteenth Amendment.")

34. *See Carter*, 488 Mass. at 210-11 (Lowy, J., concurring) (discussing

difficulty).

35. *Id.* at 192.

36. *Id.* at 197-201. There are many factors a judge must weigh with no precise formula to guide them. Moreover, it is difficult to identify when a peremptory strike is the result of implicit bias or pretense. *See id.* at 210-11 (Lowy, J., concurring).

37. Hassan Kanu, "Arizona breaks new ground in nixing peremptory challenges," REUTERS (Sept. 1, 2021, 2:52 PM), <https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-2021-09-01/>.

38. *Commonwealth v. Sanchez*, 485 Mass. 491, 510 (2020).

39. *Id.* at 509.

40. *Id.* at 492.

41. *See, e.g.*, *Commonwealth v. Pearson*, 486 Mass. 809, 813 (2021) ("We begin by noting that our articulation of the independent source test in prior cases appears to have led to some confusion"); *Commonwealth v. Torres-Pagan*, 484 Mass. 34, 38 (2020) ("We acknowledge that these differing articulations of the patfrisk standard may have caused confusion"); *Commonwealth v. Williams*, 481 Mass. 443, 444 (2019) ("Our jurisprudence regarding how to assess beliefs or opinions expressed by prospective jurors during voir dire has been less than clear"); *id.* at 452 n.7 (emphasizing subtle but important distinction about prospective jurors' beliefs); *Commonwealth v. Crayton*, 470 Mass. 228, 249 n.27 (2014) (clarifying admissibility standard after observing, "[o]ur case law has not always been consistent..."); *Commonwealth v. Simmons*, 448 Mass. 687, 688 n. 2 (2007) (disavowing SJC's earlier error of terminology).

a willingness to expand or modify earlier precedent that might have been unworkable in practice,<sup>42</sup> and, relatedly, it will confine the scope of holdings to avoid problematic results.<sup>43</sup>

And, of course, when necessary, it will clarify the limits of an earlier holding.<sup>44</sup> Furthermore, in certain instances, the SJC is willing to abrogate precedent where there is a persuasive enough justification.<sup>45</sup> *Sanchez* shows that, at its core, workability plays a critical role in the SJC's decision-making process.<sup>46</sup>

### C. The Court's Decision on the Remedy

For many readers, *Sanchez's* first few pages summarize its most important points. The SJC “recognize[d] and address[ed] apparent differences between Massachusetts and Federal procedures and remedies for impermissible peremptory challenges,” “adopt[ed] the

language of the Federal standard for the first step of a challenge pursuant to” *Batson*, and “retire[d] the language of ‘pattern’ and ‘likelihood,’ which has long governed the first-step inquiry under” *Soares*, as it “conclude[d] that this language has resulted in persistent confusion for judges and litigants alike.”<sup>47</sup> However, the most important question for the defendant was whether the motion judge’s determination of erroneous termination of a *Batson-Soares* step-one inquiry that amounted to structural error<sup>48</sup> would be overturned.

The SJC rejected the commonwealth’s estoppel argument that would have precluded the motion judge’s ruling that *Sanchez* was entitled to a new trial.<sup>49</sup> It also rejected the argument — which had been referenced as remaining open in footnotes of previous cases — that the case could be remanded for an evidentiary hearing.<sup>50</sup> While the SJC did not completely close the door to such a remand in a

42. See *Commonwealth v. Long*, 485 Mass. 711, 720-21 (2020) (expressing view that earlier precedent rested on erroneous belief and consequently addressing that precedent’s “practical shortcomings”); *Commonwealth v. Russell*, 470 Mass. 464, 477 (2015) (concluding clarification of precedent on jury instruction was justified); *Blanchard v. Steward Carney Hosp., Inc.*, 477 Mass. 141, 143 (2017) (augmenting framework from civil precedent “[b]ecause the statute as thus construed remains at odds with evident legislative intent, and continues to raise constitutional concerns...”); *L.L. v. Commonwealth*, 470 Mass. 169, 185 n. 27 (2014) (retiring language from precedent because under that articulation, “an abuse of discretion would be as rare as flying pigs”); *Papadopoulos v. Target Corp.*, 457 Mass. 368, 369, 380-81 (2010) (abolishing long-standing rule for determining liability of a landowner for injury resulting from snow or ice and reasoning that the old rule should be abandoned due to difficulties applying its distinction); *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-36 (2008) (refining civil procedure standard and retiring obsolete language); see also *Long*, 485 Mass. at 737 (Budd, J., concurring) (explicitly acknowledging change from view expressed earlier that it is “unworkable” to shift SJC jurisprudence away from the authorization test for traffic stop); *Williams*, 481 Mass. at 458 (Gants, C.J., concurring) (recognizing practical difficulty for trial judge during jury selection); *Vazquez Diaz v. Commonwealth*, 487 Mass. 336, 338 (2021) (“courts have adapted to the restrictions of the COVID-19 pandemic by increasingly relying on Zoom”); *id.* at 367 (Kafker, J., concurring) (observing practical difficulties with virtual hearings during pandemic).

43. See, e.g., *Commonwealth v. Augustine*, 467 Mass. 230, 251-52 (2014) (carving out exception to general Fourth Amendment rule — though relying on art. 14 — based on “distinctive characteristics of cellular telephone technology” and ability to track location). *Augustine* could also be characterized as narrowing or even partially overruling precedent in a new context as a practical policy outcome in light of the proliferation of cell phone location tracking. See *Commonwealth v. Henley*, 488 Mass. 95, 107 (2021) (summarizing *Augustine's* holding distinguishing third-party phone service precedent); see also *Carpenter v. United States*, 138 S. Ct. 2206, 2214-17 (2018) (applying similar reasoning

to *Augustine* though not citing that case); Orin S. Kerr, “An Equilibrium—Adjustment Theory of the Fourth Amendment,” 125 HARV. L. REV. 476, 499-502 (2011) (discussing theory of how courts ensure balance between government and privacy interests as technology progresses as illustrated by cases on location tracking).

44. See, e.g., *Parker v. EnerNOC, Inc.*, 484 Mass. 128, 135 (2020); *Pinti v. Emigrant Mortg. Co., Inc.*, 472 Mass. 226, 238-40 (2015).

45. See *Commonwealth v. Hernandez*, 481 Mass. 582, 592-93, 599 (2019) (reconsidering precedent and then announcing new rule); see also *Doull v. Foster*, 487 Mass. 1, 16, 19 n.25 (2021) (determining legal standard not “workable” despite acknowledging SJC’s “endorsement,” then stating that “based on its confusing application provid[ing] good reason to reconsider its use ... we conclude that the substantial contributing factor test should no longer be used in most negligence cases”; abrogating cases going back to the 1930s); *Tyler v. Michaels Stores, Inc.*, 464 Mass. 492, 502-03 (2013) (stating, “[t]his court’s decision in [a consumer protection case] has been a source of some confusion in the years since” it was decided, then explicitly disclaiming some of its language).

46. See, e.g., *Bridgeman v. Dist. Att’y for Suffolk Dist.*, 476 Mass. 298, 318 (2017) (“we as a judiciary must and do find ways to make justice not only fair but workable”); *Commonwealth v. Scott*, 467 Mass. 336, 352 (2014) (“it is incumbent upon us to exercise our superintendence power to fashion a workable approach”); *Comm. for Pub. Couns. Servs. v. Chief Just. of Trial Ct.*, 484 Mass. 1029, 1029-30 (2020) (promptly modifying ruling on incarcerated population in urgent and unprecedented context of pandemic).

47. *Commonwealth v. Sanchez*, 485 Mass. 491, 492 (2020).

48. *Id.* at 499.

49. *Id.* at 503.

50. *Sanchez*, 485 Mass. at 502-503, citing *Commonwealth v. Ortega*, 480 Mass. 603, 608 n.10 (2018), quoting *Commonwealth v. Jones*, 477 Mass. 307, 326 n.31 (2017).

future case,<sup>51</sup> the door appears to be virtually shut.<sup>52</sup>

Despite a string of losses, Sanchez was granted a new trial in light of the *Batson-Soares* structural error.<sup>53</sup> His victory will help ensure that other criminal defendants receive the proper scrutiny of peremptory strikes against prospective jurors in subsequent trials.<sup>54</sup>

#### IV. CONCLUSION

At some level, all attempts to exclude potential jurors amount to discrimination. The line between a permissible and impermissible

justification can be blurry.<sup>55</sup> And beyond the context of *Batson-Soares*, subtle distinctions can similarly determine whether such attempts are permissible.<sup>56</sup> The SJC historically had been a leader in legal developments. After all, it established the *Soares* framework in 1979, preceding *Batson* by more than half a decade.<sup>57</sup> The commentary of the SJC justices in their recent jury selection cases portends a similar fate with regard to peremptory challenges.

— Max Bauer

51. *Sanchez*, 485 Mass. at 503 (“If ever there were circumstances in which a remand was appropriate, **this case** — where the remand occurred nearly eight years after the original voir dire — does not present such circumstances”) (emphasis added).

52. *Id.* (noting the parties’ and SJC’s failure to “identif[y] a single instance where an appellate court in Massachusetts actually has remanded a case for an evidentiary hearing after a first-stage *Batson-Soares* error in the more than forty years since *Soares* was decided” and practical impossibility in *Sanchez* given passage of time); compare *Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021) (making “explicit” that theoretical exception left open in previous cases is “moribund”).

53. *Commonwealth v. Sanchez*, 485 Mass. 491, 514 (2020).

54. The defendant’s lengthy procedural saga finally came to an end in May 2021, when he accepted an agreed-upon plea. *See* entry for May 28, 2021, on docket no. 0584CR10545.

55. *Commonwealth v. Jackson*, 486 Mass. 763, 780 & n. 27 (2021) (affirming conviction based on exclusion of Black juror because her children had been involved in the criminal legal system but adding in a footnote, “[w]e nevertheless acknowledge the need for careful consideration of strikes based on minor offenses, particularly those involving young black men who have been subject to disparate treatment in the criminal justice system.”).

56. *See Commonwealth v. Heywood*, 484 Mass. 43, 45-46 (2020) (approving seating of blind juror but contrasting earlier case in which “empanelment of blind juror constituted reversible error where identification of perpetrator was contested, and ability to compare visually physical evidence was required”); *Commonwealth v. Williams*, 481 Mass. 443, 448-49 (2019) (“Where ... a prospective juror has expressed an opinion or world view based upon his or her life experience or belief system, rather than asking him or her to set it aside (which is difficult if not impossible to do), a judge must determine whether, given that particular opinion, the juror nevertheless is able to be impartial in the case to be tried.”).

57. The right to counsel for noncapital offenses is another example where Massachusetts was years ahead of the Supreme Court. *See Carrasquillo v. Hampden Cty. Dist. Cts.*, 484 Mass. 367, 372 (2020) (telling this history). So is requiring a warrant for historical cell site location information, *see Commonwealth v. Hobbs*, 482 Mass. 538, 543 (2019) (noting both holdings), the establishment of a two-part test for ineffective assistance of counsel, *see Commonwealth v. Fuller*, 394 Mass. 251, 256 n.3 (1985) (comparing the tests), and retroactively applying the prohibition on mandatory life without parole for juvenile homicide offenders. *See Montgomery v. Louisiana*, 577 U.S. 190, 193, 212 (2016) (citing *Diatchenko v. District Attorney for Suffolk Dist.*, 466 Mass. 655, 661-67 (2013), then agreeing with its holding).

# CASE COMMENT

## Supreme Judicial Court Decision Properly Avoids Crisis in the Massachusetts Foreclosure Market

*Thompson v. JPMorgan Chase Bank, N.A.*, 486 Mass. 286 (2020)

### BACKGROUND

Conducting residential foreclosures in the Commonwealth of Massachusetts is not necessarily an easy or straightforward process. The commonwealth has a long history of providing strong protections for homeowners facing foreclosure. These protections are well warranted given the substantial power that mortgagees enjoy in their right of statutory foreclosure without judicial oversight. However, a mortgagee's slight error in procedure can invalidate a foreclosure entirely, even if no actual harm results from the error. To top it off, Massachusetts courts have been willing to declare industry common practices as invalid, resulting in widespread disruptions. For example, in *U.S. Bank National Association v. Ibanez*,<sup>1</sup> the Supreme Judicial Court (SJC) found that the foreclosing entity must be "the assignee[] of the mortgage[]" at the time of the notice of sale and the subsequent foreclosure sale."<sup>2</sup> This ruling ran contrary to common practice at the time,<sup>3</sup> and was made retroactive in effect, resulting in a cloud on the title to thousands of properties in Massachusetts.<sup>4</sup>

That is why, for almost two years, the Massachusetts real estate, banking and insurance community collectively watched the case of *Thompson v. JPMorgan Chase Bank, N.A.*<sup>5</sup> work its way through the courts. At the heart of this case was an accusation that a standard foreclosure notice form containing language required by regulation was defective because it was potentially deceptive to mortgagors.<sup>6</sup> An adverse ruling from the commonwealth's highest court could have impacted title to thousands of properties and caused a crisis that would have taken many years to fully unravel.<sup>7</sup>

Ultimately, the SJC ruled in *Thompson* that the foreclosure notice form in question was not defective.<sup>8</sup> Though the ruling did not

result in any widespread disruption to the market, the period of uncertainty leading to this decision was problematic for the Massachusetts real estate industry, and the issues involved highlight areas of critical importance to anyone dealing with residential foreclosure-related matters or properties.

### SUMMARY OF CASE HISTORY

The *Thompson* case has an interesting procedural history spanning almost three years, but the genesis of this dispute stretches back much further. The story is an unfortunately common one. On June 13, 2006, Mark and Beth Thompson (the Thompsons) entered into a standard form "Freddie Mac/Fannie Mae" residential mortgage agreement with the predecessor in interest to the eventual mortgage holder, JPMorgan Chase Bank, N.A. (Chase).<sup>9</sup> The Thompsons defaulted on their mortgage payments in July 2009 and since that time have made no payments.<sup>10</sup> Eight years later, Chase foreclosed on the mortgage and conducted a foreclosure auction pursuant to the mortgage's statutory power of sale.<sup>11</sup>

On Dec. 15, 2017, one month after the foreclosure, the Thompsons filed a complaint in Plymouth County Superior Court against Chase seeking to set aside the foreclosure on various theories, including breach of contract and violations of the statutory power of sale that Massachusetts affords mortgagees.<sup>12</sup> The Thompsons alleged that Chase failed to comply with the notice requirements in their mortgage prior to foreclosing on their property.<sup>13</sup> The Thompsons' claims of noncompliance centered on the procedural and notice provisions found in paragraphs 19 and 22 of the standard form "Freddie Mac/Fannie Mae" residential mortgage.<sup>14</sup>

1. 458 Mass. 637 (2011).

2. *Id.* at 648.

3. Prior to the court's decision in *Ibanez*, it was the understanding of the Massachusetts conveyancing bar that it was acceptable practice for a noteholder to commence foreclosure proceedings with the understanding that the necessary confirming assignments could be obtained and later recorded.

4. *Ibanez*, 458 Mass. at 648.

5. 486 Mass. 286 (2020).

6. *Id.* at 287.

7. *Id.* at 291.

8. *Id.* at 294.

9. *Id.* at 288.

10. *Id.* at 290.

11. *Thompson v. JPMorgan Chase Bank, N.A.*, 486 Mass. 286, 297 (2020).

12. *Id.*

13. *Id.*

14. *Id.* at 288-89.



Specifically, the Thompsons' argument centered on a difference in language between Chase's notice letter that was statutorily promulgated by the Massachusetts Division of Banks and the language of paragraph 19 of the standard form "Freddie Mac/Fannie Mae" residential mortgage.<sup>15</sup> A portion of Chase's notice letter stated that the Thompsons could "still avoid foreclosure by paying the total past-due amount before a foreclosure sale takes place."<sup>16</sup> The relevant language from paragraph 19 of the mortgage stated that the Thompsons could only pay the past-due amounts up to "five days before the sale of the [p]roperty pursuant to any power of sale contained in this [mortgage]."<sup>17</sup> These paragraph 19 conditions and time limitations on the Thompsons' post-acceleration reinstatement rights were not included in Chase's notice.<sup>18</sup> Therefore, the Thompsons argued, Chase's notice letter was inaccurate and misleading. The Thompsons pointed out that if they relied on the letter and attempted to cure within five days of the foreclosure sale, Chase might have refused, relying on paragraph 19.<sup>19</sup> While no such cure was ever attempted by the Thompsons,<sup>20</sup> the requirement of strict compliance does not require any particularized prejudice.<sup>21</sup>

The Thompsons' allegations were particularly meaningful given the SJC's holding in *Pinti v. Emigrant Mortg. Co.*<sup>22</sup> that "strict compliance with the notice of default provisions in paragraph 22 of the mortgage [is] required as a condition of a valid foreclosure sale."<sup>23</sup> The requirement of "strict compliance" is justified because Massachusetts is a nonjudicial foreclosure state, meaning that a mortgagee can foreclose on a mortgaged property without first seeking affirmative judicial authorization.<sup>24</sup> In exchange for this substantial power, Massachusetts courts require foreclosing parties to strictly comply with the terms of sale.<sup>25</sup> In the case of *Pinti*, ambiguous language in a foreclosure notice was held to not be in strict compliance with the mortgagee's notice obligations, and therefore the foreclosure was invalidated.<sup>26</sup>

"Strict compliance" sets a high bar for foreclosing mortgagees.<sup>27</sup>

If the court in *Thompson* were to find that Chase had not strictly complied with the notice requirements in its mortgage, then the foreclosure on the Thompsons would have been invalid. The impact of such a decision would have a broader reach because the notice form in question was promulgated by the Massachusetts Division of Banks<sup>28</sup> and used in virtually all residential foreclosures in the commonwealth. Such a ruling could impact thousands of foreclosures spanning many years.

On Jan. 23, 2018, Chase removed the suit to the U.S. District Court for the District of Massachusetts.<sup>29</sup> Chase then filed a motion to dismiss.<sup>30</sup> The District Court concluded that Chase's default and acceleration notice strictly complied with the requirements as defined in paragraph 22 of the mortgage and granted Chase's motion to dismiss.<sup>31</sup> The Thompsons appealed to the First Circuit.<sup>32</sup>

On Feb. 8, 2019, the First Circuit reversed and remanded, holding that the foreclosure notice was deceptive.<sup>33</sup> This opinion sent shockwaves through the Massachusetts real estate, banking and insurance communities, creating uncertainty for lenders, homeowners, landlords, title insurers and attorneys. The notice that the First Circuit had deemed deceptive was statutorily<sup>34</sup> required with its text promulgated in Massachusetts Regulation by the Massachusetts Division of Banks.<sup>35</sup> The potential implication of the First Circuit's decision was far-reaching: if this notice was "deceptive," then every residential foreclosure conducted in Massachusetts was likely invalid.

Following the First Circuit's decision, Chase filed a petition for reconsideration and rehearing, accompanied by a flurry of amicus briefs from others in the industry, including from the American Banks Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation and the Real Estate Bar Association for Massachusetts, Inc.<sup>36</sup> For the first time, it was pointed out to the First Circuit that the form used by Chase was in fact promulgated by the Massachusetts Division of Banks.<sup>37</sup> Briefs

15. *Id.*

16. *Thompson v. JPMorgan Chase Bank, N.A.*, 915 F.3d 801, 803 (1st Cir.) opinion withdrawn sub nom. *Thompson v. JPMorgan Chase Bank, N.A.*, 931 F.3d 109 (1st Cir. 2019), certified question answered sub nom. *Thompson*, 486 Mass. 286 (2020).

17. *Thompson*, 915 F.3d at 802.

18. *Id.*

19. *Id.* at 805.

20. *Id.*

21. *Pinti v. Emigrant Mortg. Co.*, 472 Mass. 226, 238 n.20 (2015) ("The defendants' assertion that the plaintiffs in this case were not prejudiced by any failure to comply with the provisions of paragraph 22 misses the point. Paragraph 22 demands strict compliance, regardless of the existence, or not, of prejudice to a particular mortgagor.")

22. *Id.*

23. *Id.* at 227.

24. *See Thompson v. JPMorgan Chase Bank, N.A.*, 486 Mass. 286, 291 (2020).

25. *Id.*

26. *Pinti*, 472 Mass. at 237, 250 (holding that the notice language to the plaintiffs that they "have the right to assert in any lawsuit for foreclosure and sale

the nonexistence of a default or any other defense [they] may have to acceleration and foreclosure and sale" was not in strict compliance with the paragraph 22 provision of the mortgage requiring that the mortgagee inform the plaintiffs of "the right to bring a court action to assert the non-existence of a default or any other defense of [the plaintiffs] to acceleration and sale") (emphasis added).

27. *Thompson*, 486 Mass. at 292.

28. 209 CODE MASS. REGS. §§ 56.03 & 56.04.

29. *Thompson v. JPMorgan Chase Bank, N.A.*, 982 F.3d 809, 811 (1st Cir. 2020).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Thompson v. JPMorgan Chase Bank, N.A.*, 915 F.3d 801, 805 (1st Cir. 2019).

34. MASS. GEN. LAWS c. 244, § 35A.

35. 209 CODE MASS. REGS. §§ 56.03 & 56.04.

36. *Thompson v. JP Morgan Chase Bank, N.A.*, 931 F.3d 109, 110 (1st Cir. 2019).

37. *Id.*; *see also* 209 CODE MASS. REGS. §§ 56.03 & 56.04.

also gave “predictions of disaster[s]” that would occur in the Massachusetts real estate market if this ruling were to stand.<sup>38</sup> Accordingly, the First Circuit withdrew its earlier opinion and certified the following question to the SJC:

Did the statement in the August 12, 2016, default and acceleration notice that “you can still avoid foreclosure by paying the total past-due amount before a foreclosure sale takes place” render the notice inaccurate or deceptive in a manner that renders the subsequent foreclosure sale void under Massachusetts law?<sup>39</sup>

The SJC answered the reported question: “No.”<sup>40</sup>

### THE SUPREME JUDICIAL COURT’S DECISION

The SJC’s analysis begins with the relevant provisions of “a GSE Uniform Mortgage contract.”<sup>41</sup> Paragraph 22 requires notice to the mortgagor before foreclosure proceedings can commence, and paragraph 19 “places limits and conditions on mortgagors’ rights to reinstate a mortgage after acceleration.”<sup>42</sup>

In addition to these contractual obligations, G.L. c. 244, §35A also provides notice requirements for mortgagees before they can accelerate and foreclose on residential properties.<sup>43</sup> The SJC, citing §35A, noted that “the required notice must inform the mortgagor, *inter alia*, ‘that the mortgagor may redeem the property by paying the total amount due, prior to the foreclosure sale.’”<sup>44</sup> A provision of §35A also requires that the Division of Banks shall adopt regulations regarding the precise form that this notice to cure must take.<sup>45</sup> Critically, the court observed that according to the plain language of the regulation, a foreclosing mortgagee may not alter the notice.<sup>46</sup> Chase’s notice to the Thompsons complied with the statute and conformed verbatim with the template notice found in the regulations.<sup>47</sup>

The court next examined the scheme of statutory nonjudicial foreclosures in Massachusetts and the guardrails in place to guide foreclosing mortgagees.<sup>48</sup> While affirming that mortgagees enjoy substantial power to foreclose without oversight, the court reaffirmed that this power comes with corresponding obligations.<sup>49</sup> Of particular import to the Thompsons’ arguments was the court’s

statement in *Pinti* that

our decisions suggest that the mortgage terms requiring strict compliance are limited to (1) terms directly concerned with the foreclosure sale authorized by the power of sale in the mortgage, and (2) those prescribing actions the mortgagee must take in connection with the foreclosure sale — whether before or after the sale takes place.<sup>50</sup>

In that case, the SJC held that the notice required by paragraph 22 was “essentially a prerequisite to use of the mortgage’s power of sale” and therefore a term of the mortgage that required strict compliance.<sup>51</sup> The notice at issue in *Pinti* was deemed potentially deceptive because it did not track the language in paragraph 22 of that mortgage.<sup>52</sup> The Thompsons argued that where Chase’s notice did not incorporate the limits and conditions on reinstatement found in paragraph 19, Chase’s notice was potentially deceptive.<sup>53</sup> The SJC rejected this argument.<sup>54</sup>

The SJC observed that paragraph 12 of the mortgage allows Chase the ability to extend the deadline for a reinstatement payment and that paragraph 16 additionally provides that all “rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law.”<sup>55</sup> Mass. Gen. Laws c. 244, § 35A and its accompanying regulations, including 209 Code Mass. Regs. § 56.04, are “Applicable Law.”<sup>56</sup> Applying normal rules of contractual interpretation, the court simply noted: “Reading paragraphs 12 and 16 of the plaintiffs’ mortgage together with this applicable regulation makes clear that Chase not only had the contractual option to accept a reinstatement payment at any point prior to foreclosure, but also was required to do so.”<sup>57</sup> Either theory appears sufficient to hold that Chase’s notice was not deceptive.<sup>58</sup>

The scenario imagined by the Thompsons, and invoked by the First Circuit, was one in which a mortgagor attempted to make a reinstatement payment three days prior to the date of the foreclosure sale.<sup>59</sup> In this scenario, the Thompsons argued that paragraph 19’s five-day deadline would prohibit reinstatement.<sup>60</sup> Such an outcome

38. *Thompson*, 931 F.3d at 110.

39. *Id.* at 111.

40. *Thompson v. JPMorgan Chase Bank, N.A.*, 486 Mass. 286, 288 (2020).

41. *Id.*

42. *Id.*

43. MASS. GEN. LAWS c.244, § 35A.

44. *Thompson*, 486 Mass. at 289, citing MASS. GEN. LAWS c.244, § 35A(c)(8).

45. 209 CODE MASS. REGS. § 56.04

46. *Thompson v. JPMorgan Chase Bank, N.A.*, 486 Mass. 286, 289 (2020) (“... notice must conform to the following: ...”).

47. *Id.* at 290.

48. *Id.* at 291-92.

49. *Id.*

50. *Pinti v. Emigrant Mortg. Co.*, 472 Mass. 226, 235 (2015).

51. *Id.* at 236.

52. *Id.* at 237.

53. *Thompson v. JPMorgan Chase Bank, N.A.*, 486 Mass. 286, 293 (2020).

54. *Id.*

55. *Id.*

56. *Id.* at 294.

57. *Id.*

58. *Id.* at 295.

59. *Thompson v. JPMorgan Chase Bank, N.A.*, 486 Mass. 286, 295 (2020).

60. *Id.*

would indeed mean the default notice was deceptive when it purported to allow the mortgagors until the date of the foreclosure sale to make a reinstatement payment. That outcome could not come to pass, however, as the applicable law — G.L. c. 244, § 35A and its accompanying regulations, including 209 Code Mass. Regs. § 56.04 — supersedes the conflicting provisions of the mortgage, and the five-day deadline does not apply at all.<sup>61</sup>

Before concluding, the SJC disposed of the Thompsons' argument that the requirements of G.L. c. 244, § 35A are of no significance to Chase's duty to notify pursuant to the terms of the mortgage.<sup>62</sup> It is true that in previous precedent, including *Pinti*, the court had observed that mortgage terms and statutes are to be read separately and given independent meaning.<sup>63</sup> The Thompsons' argument would have required foreclosing mortgagees to send multiple notices full of details and compliant with different consumer protection schemes.<sup>64</sup> The SJC dismissed this idea as both confusing for the consumer and unnecessary because there is no reason that one communication could not satisfy both the contractual and statutory notice requirements, particularly where the statutory scheme controlled.<sup>65</sup>

### OUTCOME OF THE UNDERLYING ACTION

On Dec. 9, 2020, the First Circuit issued a judgment consistent with the SJC's ruling.<sup>66</sup> The First Circuit spent most of the decision reviewing the case history and explaining how it arrived at its initial Feb. 8, 2019, ruling.<sup>67</sup> The First Circuit specifically pointed out that Chase only raised for the first time in its petition for rehearing the arguments that the SJC found persuasive.<sup>68</sup> Perhaps this is one reason why the First Circuit awarded the plaintiffs their costs while simultaneously affirming the District Court's ruling for Chase.<sup>69</sup>

### CONCLUSION

*Thompson* was an affirmation of the current practice in foreclosure proceedings. While it did not alter the law or practice, the ruling was significant because it ended several years of uncertainty in the Massachusetts real estate market. Practitioners feared that any

other alternative ruling would have resulted in a protracted crisis in the Massachusetts real estate market — years of legal challenges to void prior foreclosures clouding title to thousands of properties now owned by third parties. *Thompson* clarified that the current practice of foreclosure notices does not violate the Massachusetts law, and the courts will uphold lenders' rights. *Thompson* is not necessarily part of a greater trend, but the ruling could signal a loosening of the "strict compliance" requirements found in previous cases such as *Ibanez* and *Pinti*. Regardless, the immediate potential disruption was avoided.

The second takeaway from the *Thompson* decision is that Massachusetts law controls when it conflicts with standard mortgage provisions. Practitioners can now take as settled that applicable laws and regulations will prevail over conflicting mortgage provisions at least so long as the requisite language, found in the standard mortgage paragraphs 12 and 16, is included. This is consistent with commonly accepted jurisprudence generally, and may initially seem self-evident, but it is important when viewed alongside the previously understood requirement that foreclosing mortgagees must comply strictly with the terms of the mortgage and that these terms might be given independent meaning apart from any particular statutory scheme.<sup>70</sup> The *Thompson* decision clarified and confirmed that the terms of the mortgage give way to the laws of the commonwealth. This holding is significant because there was some debate among practitioners previously as to whether prior case law operated to require separate notices for the statutory and contractual pre-acceleration notice requirements.

What does all of this mean? Practically speaking, foreclosing mortgagees can continue to use the prescribed notice language found in 209 Code Mass. Regs. § 56.04 without concern, and properties that have been in limbo can now be moved on without concern of a "*Thompson*" defect. The SJC's specific ruling in this case was just and appropriate. The alternative — punishing lenders for complying with regulatory requirements — would have been illogical and caused substantial disruption in the Massachusetts market.

— Nathaniel Donoghue

61. *Id.*

62. *Id.*

63. *Pinti v. Emigrant Mortg. Co.*, 472 Mass. 226, 240 (2015).

64. *Thompson*, 486 Mass. at 294-95.

65. *Thompson v. JPMorgan Chase Bank, N.A.*, 486 Mass. 286, 294-95 (2020).

66. *Thompson v. JPMorgan Chase Bank, N.A.*, 982 F.3d 809, 811 (1st Cir. 2020).

67. *Id.* at 809-12.

68. *Id.* at 812. The filings accompanying the petition for rehearing to the First Circuit, both Chase's brief and the several amici filings, made multiple arguments for the first time in the *Thompson* proceedings. These arguments eventually carried the day and are a good reminder to not take any position or arguments for granted.

69. *Id.* at 813.

70. *Pinti v. Emigrant Mortg. Co.*, 472 Mass. 226, 227, 240 (2015).

# BOOK REVIEW

## *Law & Leviathan: Redeeming the Administrative State*

By Cass R. Sunstein and Adrian Vermeule (Belknap Press, 2020), 208 pages

“Is the modern administrative state illegitimate? Unconstitutional? Unaccountable? Dangerous? Intolerable?” So begins *Law & Leviathan: Redeeming the Administrative State*, by Cass R. Sunstein and Adrian Vermeule.<sup>1</sup> The authors answer these questions with a nuanced “no,” arguing that the administrative state may be “redeemed” by rules of “internal morality” that will “inform, limit, and improve the exercise” of agency power.

The book should especially interest members of the Massachusetts bar with practices in constitutional and administrative law and regulatory policy. These readers will recognize many of the federal issues addressed in the book as similar to issues arising in Massachusetts state and local agency practice but should take care to note some key differences between federal and Massachusetts administrative law, as explained below.

Sunstein and Vermeule teach at Harvard Law School. Sunstein served as head of the Office of Information and Regulatory Affairs in the Obama White House. He has written widely on administrative law and regulatory matters.<sup>2</sup> Vermeule has addressed similar issues in many books and articles.<sup>3</sup> The authors know of what they speak.

Administrative agencies occupy an “awkward constitutional position”<sup>4</sup> in the United States. The federal and most state constitutions expressly distinguish among executive, legislative and judicial power, but few mention administrative agencies. From these humble origins, scores of federal and state agencies have grown, mostly creatures of statute. Justice Stephen Breyer has written: “[They] typically possess great power.”<sup>5</sup> They write “regulations that, like . . . statutes, take effect as law. They resolve disputes, often in much the same way that courts adjudicate controversies. They investigate private behavior. They impose sanctions, such as heavy fines, on those who violate their rules, and they license businesses or individuals to perform services.”<sup>6</sup> For these reasons alone, agencies warrant the close scrutiny paid by the authors through the years and in their latest book.

The authors in Chapter 1 summarize the major criticisms

currently leveled against the administrative state: (1) that “[b]road grants of authority to agencies amount to an unconstitutional transfer of legislative power to the executive,” in violation of Article I; (2) that “independent” agencies such as the Federal Trade Commission “represent an invalid encroachment on the executive power” conferred on the president by Article II; and (3) that “judicial deference to agencies on questions of law encroaches on the judicial power” conferred by Article III.<sup>7</sup> The authors next summarize the views of supporters of the administrative state, who argue that “it is essential to promoting the common good in contemporary society; that it does more good than harm; that it is a clear reflection of the common will; and that it is entirely legitimate on constitutional grounds.”<sup>8</sup>

With these points charted, the authors develop their thesis. Chapters 2 and 3 outline “principles associated with the rule of law” with close relevance to administrative law. In Chapter 2, the authors define the “internal morality” of law by reference to the writings of legal philosopher Lon Fuller. Fuller states eight ways “that the attempt to create and maintain a system of legal rules may miscarry.”<sup>9</sup> The authors summarize these failures as follows:

(1) a failure to make rules in the first place, ensuring that all issues are decided on a case-by-case basis; (2) a failure of transparency, in the sense that affected parties are not made aware of the rules with which they must comply; (3) an abuse of retroactivity, in the sense that people cannot rely on current rules, and are under threat of change; (4) a failure to make rules understandable; (5) issuance of rules that contradict each other; (6) rules that require people to do things that they lack the power to do; (7) frequent changes in rules, so that people cannot orient their action in accordance with them; and (8) a mismatch between rules as announced and rules as administered.<sup>10</sup>

1. Cass R. Sunstein & Adrian Vermeule, *Law & Leviathan: Redeeming the Administrative State* (2020).

2. See, e.g., Cass R. Sunstein, *Simpler: The Future of Government* (2013).

3. See, e.g., Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (2016).

4. Cass R. Sunstein, “Interpreting Statutes in the Regulatory State,” 103 HARV. L. REV. 405, 446 (1989).

5. Stephen Breyer, *Making Our Democracy Work* 107 (2010).

6. *Id.* at 107-08.

7. Sunstein & Vermeule, *supra* note 1, at 20, citing Gary Lawson, “The Rise and Rise of the Administrative State,” 107 HARV. L. REV. 1231, 1240-41 (1994), and Philip Hamburger, *Is Administrative Law UnLawful?* (2014).

8. Sunstein & Vermeule, *supra* note 1, at 19.

9. Lon L. Fuller, *The Morality of Law* 38-39 (rev. ed 1969).

10. Sunstein & Vermeule, *supra* note 1, at 39-41, citing Fuller, *supra* note 9, at 39.

The authors believe that these principles have a “utility . . . for thinking about the administrative state and administrative law.”<sup>11</sup> The authors think that these failures lie at the roots of the current objections to the administrative state and that such errors may be avoided by the “internal morality of administrative law,” “safeguards” that “would ensure that agency behavior is infused and structured by a conception of the rule of law, one that channels and shapes agency discretion in ways that make it both efficacious and efficacious as law, rather than as arbitrary command.” The authors call these principles the “surrogate safeguards” of administrative law: “The broader point is that administrative law has increasingly converged on Fullerian principles as a set of safeguards for the values underlying the rule of law. Rather than protecting those values by eliminating administrative power directly, the law hopes to inform, limit and improve the exercise of power.”<sup>12</sup>

Chapter 3 deals with the thorny problems of the consistency of, and reliance on, agency action, and what the authors call “the extension of administrative decision-making over time.” The authors explain how the reasoning of Fuller informs related administrative law principles, including: (1) the requirement that agencies “follow their own rules”; (2) judicial deference to agency interpretation of their rules; (3) judicial deference to agency interpretation of statutes; and (4) due process principles that may apply upon presidential intervention in formal adjudication or rulemaking. In each case, the authors argue that it is the “internal morality” of administrative law, not the text of the Constitution or Administrative Procedure Act (APA), that cabins administrative discretion, and that these guardrails work sufficiently to calm most critics of the administrative state. In Chapter 5, the authors offer an “extended case study,” placing their “themes in the context of” the non-delegation issue, agencies’ interpretation of their own regulations, and the question of whether agency decision-making should be reviewable for pretext, with a focus on three cases from the Supreme Court’s 2018-2019 term.<sup>13</sup>

Two points of rebuttal might occur to close readers. First, despite the best efforts of the authors, there remains some tension between (1) their reliance on their principles of internal morality and (2) the fidelity of administrators and courts to the *text* of the federal APA. As the authors admit, it is settled law that courts may not impose procedural requirements on agencies not mandated by the APA or

the Constitution.<sup>14</sup> More generally, the authors confront the recent judicial trend that elevates statutory text over “purpose” in statutory interpretation. As Justice Elena Kagan, honoring the legacy of Justice Antonin Scalia, stated in 2015: “We’re all textualists now.”<sup>15</sup> Some readers might think that the authors could have worked harder to link Fullerian principles to the text of the APA, if only to blunt a textualist riposte.

Second, the authors might be a bit too sanguine about the future of administrative law in the hands of the John Roberts court. The authors discount the prospect of a major constitutional ruling on, say, the “non-delegation” of legislative authority.<sup>16</sup> But portents of structural change are in plain sight. The court has decided a string of recent cases strictly enforcing Article II’s grant of the executive power to the president.<sup>17</sup> The court seems poised to consider the constitutionality of all “independent” agencies, including such great baronies as the Federal Trade Commission.<sup>18</sup> President Joe Biden’s firing of the commissioner of the Social Security Administration — an officer ostensibly protected by statute from firing without “cause” — will ensure that this structural issue remains in play. Meanwhile, two of the newest justices — Neil Gorsuch and Brett Kavanaugh — had already voiced skepticism of the administrative state while serving as judges on the federal court of appeals. While the Roberts court invoked less dramatic (perhaps Fullerian?) grounds in vacating executive action in the U.S. census<sup>19</sup> and the Deferred Action for Childhood Arrivals (DACA)<sup>20</sup> cases in 2019 and 2020, some readers may think that *Law & Leviathan* too quickly dismisses the structural tremors emanating from the court. As Wade Bowen and Randy Rogers sing, “You don’t hear the lone train, ‘til you’re tied up on the track/. . . It never happens ‘til it does.”

Massachusetts readers should note an omission from the book, albeit one explainable by its brevity. The book exclusively focuses on federal administrative law. Massachusetts lawyers practicing before state and local agencies will benefit from the federal points in the book but should note some key differences between federal and Massachusetts administrative law. For example, the Massachusetts Constitution creates a plural — not unitary — executive, like most state constitutions adopted before and after the U.S. Constitution of 1787. These state constitutions vary in detail but are common in form: executive power is dispersed among a wide range of actors,

11. *Id.* at 41.

12. *Id.* at 11, 117-18.

13. *Gundy v. United States*, 139 S.Ct. 2116 (2019); *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019); *Dep’t of Com. v. New York*, 139 S.Ct. 2551 (2019).

14. Sunstein & Vermeule, *supra* note 1, at 95-96; *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 523-25, 549 (1978).

15. Harvard Law School, The Scalia Lecture: “A Dialogue with Justice Kagan on the Reading of Statutes,” YouTube (Nov. 17, 2015) <https://www.youtube.com/watch?v=dpEtszFT0Tg>.

16. Sunstein & Vermeule, *supra* note 1, at 122-23, citing *Gundy*, 139 S.Ct. 2116.

17. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010); *Seila Law LLC v. Consumer Fin. Prot. Bd.*, 140 S.Ct. 2183 (2020); *Collins v. Yellen*, 141 S.Ct. 1761 (2021); *United States v. Arthrex, Inc.* 141 S.Ct. 1970 (2021).

18. The Yale Journal of Regulation, Notice & Comment Blog, published a series of interesting posts about *Law & Leviathan* at: <https://www.yalejreg.com/topic/symposium-on-cass-sunstein-and-adrian-vermeules-law-and-leviathan-redeeming-the-administrative-state/>.

19. *Dep’t of Commerce v. New York*, 139 S.Ct. 2551 (2019).

20. *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S.Ct. 1891 (2020).

most of them elected by the people of each state in a statewide ballot or by the legislature. Whatever the pros and cons of such a plural executive — and Alexander Hamilton thought the cons far outweighed the pros<sup>21</sup> — many important functions of the *state* “administrative states” are performed by officers with direct accountability to the people through the ballot box. To some extent, therefore, “independent” agencies are baked in the state constitutional cake. The constitutional status and structure of these agencies takes some steam out of claims of critics about a so-called “headless fourth branch.” The states may be hydra-headed, but their “extra” executives are not “headless.” These “unbundled” state executive branches will provide readers with useful comparisons with the federal executive examined in *Law & Leviathan*.<sup>22</sup>

In addition, in the realm of statutes, readers should note that the Massachusetts APA, enacted in 1954,<sup>23</sup> a few years after the federal APA, differs from the federal model in some key respects. The Massachusetts APA (1) has no provision for “formal,” “trial-type” hearings prior to the promulgation of regulations, and (2) generally does not require agencies to explain the legal, factual and policy bases for their rules, at least not to the extent required by the federal APA. In the mid-1980s, Supreme Judicial Court Justices Neil Lynch, Joseph Nolan and Francis O’Connor noted these differences and wrote or joined dissenting opinions that protested the lack of an evidentiary

basis for certain rules promulgated by state and local agencies. One result of these Massachusetts provisions, according to Justice Lynch, was a “conceivable basis” test applied on judicial review that was a “standard of non-review” and “one more step toward agency non-accountability and *carte blanche*, a process that has already gone too far.”<sup>24</sup> This state judicial debate reminds readers that the federal APA reflects merely one example of a legislative settlement of the issues presented by the work of an executive branch.

In their conclusion, the authors admit the flaws of the administrative state, but argue that its virtues outweigh its flaws, and that the “inner morality” of administrative law will “legitimize” the state.<sup>25</sup> But some readers will nonetheless ask whether the authors have faced up to a central thrust of the criticism of the federal “Leviathan”:<sup>26</sup> angst over the unchecked rise in the volume of new agencies and federal regulations over recent decades. Can the “rise and rise”<sup>27</sup> of the administrative state be adequately cabined by an “internal morality” of law? The “redemption” that the authors propose — fruit of the grace of the “surrogate safeguards” of the “inner morality” of administrative law — may not satisfy critics who seek a more decisive means of redemption, a means more associated with Michael the Archangel than Lon the Philosopher. Does a final battle for “administrative heaven” yet loom?

— Thomas A. Barnico

21. Alexander Hamilton, *The Federalist* No. 70.

22. With state constitutions as their guides, some state courts have charted an independent course on key issues of administrative law. For example, Judge Jeffrey Sutton notes: “Many state courts have not followed the U.S. Supreme Court’s abandonment of the non-delegation doctrine.” Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of Constitutional Law* 263 n.15 (2018). “A similar story had unfolded in the context of state limitations on judicial deference to administrative agencies. . . . [M]any state courts have imposed limitations of their own, either by limiting the settings in which deference applies or by construing state separation of powers to bar judicial deference to agency interpretations of law.” Jeffrey S. Sutton, et al., *State Constitutional Law: The Modern Experience* 838 (3d ed. 2020). These state courts thus deny the deference established by *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). See Sunstein & Vermeule, *supra* note 1, at 134-37.

23. The Massachusetts APA was first inserted by Mass. Stat. 1954, § 681, eight years after enactment of the federal APA. See A. Sacks & W. Curran, “Administrative Law,” 1 ANN SURV. MASS. L. 126 (1953-1954). See generally, as to practice under the Massachusetts APA, A. Cella, *Massachusetts Practice — Administrative Law* (West 1986 and Supp.) (3 vol.) and M. Randazzo and J. Hitt (eds.), *Massachusetts Administrative Law and Practice* (LexisNexis 2019).

24. See *American Grain Prod. Processing Inst. v. Dep’t of Pub. Health*, 392

Mass. 309, 330 (1984) (Lynch, J., dissenting, with whom Nolan and O’Connor, JJ., joined); *Arthur D. Little, Inc. v. Comm’r of Health and Hosp. of Cambridge*, 395 Mass. 535, 557 (1985) (Lynch, J., dissenting); *Worcester Sand & Gravel Co., Inc. v. Bd. of Fire Prevention Regul.*, 400 Mass. 464, 471 (1987) (Lynch, J., dissenting); *id.* at 473 (O’Connor, J., dissenting).

25. Sunstein & Vermeule, *supra* note 1, at 142-45.

26. Sunstein and Vermeule borrow their title in part from the 1651 masterpiece by Thomas Hobbes (1588-1679), *Leviathan*. Even the cover of their book — which depicts a vast, faceless populace — recalls the frontispiece of *Leviathan*, which features an embodied sovereign in all its majesty, brandishing scepter and sword, holding sway over the polity. The authors of *Law & Leviathan* also borrow a shorthand expression — “The New Coke” — from the Hobbesian era to describe (and chide) the current critics of the American administrative state; they explain that while Edward Coke (1552-1634) — renowned jurist, parliamentarian, and defender of the rule of law — was indeed an important critic of the Stuart kings, those monarchs bear no resemblance to the current U.S. executive branch. Hobbes was a fierce critic of Coke and championed an all-powerful sovereign. See Mary Ann Glendon, *The Forum and the Tower* 81, 82-97 (2011). While the authors repeatedly use the term “The New Coke,” the name “Thomas Hobbes” is absent from the text and notes of *Law & Leviathan*.

27. Lawson, *supra* note 7.