

# Real Employees: Cognitive Psychology and the Adjudication of Non-Competition Agreements

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Today many companies ask employees to sign non-competition agreements.<sup>1</sup> The reasons for this trend include increases in workplace mobility, escalating competition, advancing technology, and thriving service-oriented industries.<sup>2</sup> To protect themselves from unfair competition, employers increasingly ask lower-level employees to sign non-competition agreements—often before employees even start to work for the employer.<sup>3</sup> In the past, such practices occurred much later in an employee's career.<sup>4</sup> Still, non-competition agreements fail to deter most job applicants, who care mostly about their salary and the duration of their employment contract.<sup>5</sup> In fact, employees usually fail to notice the terms of the

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1. For an explanation of this phenomenon, see William Corrigan, *Non-Compete Agreements—An Overview*, 54 J. MO. B. 140 (1998), explaining that, for many companies, profit margins are shrinking and competition is fierce . . . [M]anagement wants to protect the business from key employees who leave to compete against them . . . [S]uccessful employees are often in high demand and want the option to work for the highest bidder, or the employee wants to start his or her own business and compete directly against the former employer.

*Id.* See Kendall B. Coffey & Thomas F. Nealon, III, *Noncompete Agreements Under Florida Law: A Retrospective and a Requiem?*, 19 FLA. ST. U. L. REV. 1105, 1136-37 (1992) (“Covenants not to compete are already used in virtually every industry, through every employment level from management to clerical, and even in hourly positions.”).

2. Ann Davis & Joann Lublin, *More Managers Have Trouble Jumping Ship*, WALLST. J., Apr. 3, 1997, at B1. In computer and other technology-based industries, employees at every level have access to an employer's sensitive and confidential information. *Id.* In high-tech industries where technologies constantly transform, employees and development teams must be intimately familiar with the way the employer's products work. *Id.* Consultants in a wide variety of fields must become experts in nearly every aspect of an employer's operations by the very nature of their job description. *Id.* In addition, many companies understand that employees mold crucial relationships with customers and that, when employees leave, the customers usually go with them. *Id.*

3. *See id.*

4. *See id.*

5. *See id.*

non-competition agreement when they begin employment.<sup>6</sup> Accordingly, non-competition agreements are now ordinary additions to the terms of employment and subsequently become a recurring source of litigation.<sup>7</sup>

Part I of this Note provides a summary of the current treatment of non-competition agreements. This section describes Missouri's approach to non-competition agreements in detail. Missouri's approach is then used as a point of reference to explain other states' inconsistent treatment of these agreements.<sup>8</sup> Part II explicates recent advances in cognitive psychology relevant for contract law analysis. Part III applies cognitive psychologists' discoveries about human cognitive limits to the employee faced with the decision of whether to sign a non-competition agreement. Finally, Part IV advocates the use of those discoveries in the future adjudication and regulation of non-competition agreements.

## I. NON-COMPETITION AGREEMENTS IN MISSOURI AND OTHER STATES

### A. *Missouri's Rebuttable Presumption*

Like nearly every other jurisdiction, Missouri courts disfavor non-competition agreements because such agreements interfere with an individual's ability to earn a living and conflict with notions of a free economy and free marketability.<sup>9</sup> When deciding to enforce a non-competition agreement, the objective of Missouri courts is two-fold:

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6. *See id.*

7. Tracey Staid, *Enforceability of Noncompetition Agreements When Employment is At-Will: Reformulating the Analysis*, 2 EMPLOYEE RTS. & EMPL. POL'Y J. 95 (1988).

8. Missouri law is described in detail to introduce some of the central issues involved in the adjudication of non-competition agreements. However, any state could be selected as a point of reference for the arguments set forth in this Note.

9. *See, e.g.,* Sentilles Optical Serv. v. Phillips, 651 So. 2d 395, 398. (La. Ct. App. 1995) (noting that North Carolina courts disfavor non-competition agreements because they are contracts which restrain trade); Creative Entertainment, Inc. v. Lorenz & Proactive, Inc., 638 N.E.2d 217 (Ill. App. Ct. 1994); Renal Treatment Ctrs. v. Braxton, 945 S.W.2d 557, 563 (Mo. Ct. App. 1997) (citing CALAMARI & PERILLO, CONTRACTS §§ 16-19 (1977) and refusing to enforce a non-competition agreement signed by the former medical director of several kidney dialysis treatment centers because he had no contact with patients and therefore the center had no protectable interest).

to protect employers from unfair competition by former employees and to protect employees from unreasonable restraint by former employers.<sup>10</sup> The Missouri Supreme Court requires “counterbalancing” which recognizes the public’s interest in protecting the freedom of persons to contract and to enforce contractual rights and obligations.<sup>11</sup> In a more recent case, the Missouri Supreme Court stated that non-competition agreements restrain commerce and limit the employee’s freedom to pursue her own trade; therefore, courts carefully restrict the enforcement of such agreements.<sup>12</sup>

Accordingly, non-competition agreements are presumed *prima facie* unenforceable in Missouri.<sup>13</sup> That presumption is rebuttable, however, upon a showing of a legitimate protectable interest by the employer.<sup>14</sup> Missouri courts generally recognize two categories of protectable interests: trade secrets<sup>15</sup> and customer contacts.<sup>16</sup>

### 1. “Trade Secrets” Defined by the Restatement of Torts

Missouri courts adopted the concept of “trade secrets” as established by the Restatement of Torts.<sup>17</sup> Employing the

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10. *See, e.g., Sturgis Equip. Co. v. Falcon Indus. Sales Co.*, 930 S.W.2d 14, 17 (Mo. Ct. App. 1996) (observing that courts must consider the threatened danger to the employer absent the non-competition agreement and noting that to be reasonable, the agreement must do no more than “protect employers from unfair competition by former employees without imposing unreasonable restraint on the employees.”).

11. *See Willman v. Beheler*, 499 S.W.2d 770, 777 (Mo. 1973) (rejecting the notion that public policy should prevent the enforcement of all non-competition agreements).

12. *Osage Glass, Inc. v. Donovan*, 693 S.W.2d 71, 73-74 (Mo. 1985).

13. *See Corrigan, supra* note 1, at 141; *Orchard Container Corp. v. Orchard*, 601 S.W.2d 299, 303 (Mo. Ct. App. 1980).

14. *See, e.g., Easy Returns Midwest v. Schultz*, 964 S.W.2d 450, 453 (Mo. Ct. App. 1998) (noting that an employer may only seek to protect certain narrowly defined interests, namely trade secrets and stock in trade).

15. *Id.* at 454. *See West Group Broad. v. Bell*, 942 S.W.2d 934, 937 (Mo. Ct. App. 1997) (citing *Mo-Kan Cent. Recovery Co. v. Hedenkamp*, 671 S.W.2d 396, 399 (Mo. Ct. App. 1984)). *See also Grebing v. First Nat’l Bank of Cape Girardeau*, 613 S.W.2d 872 (Mo. Ct. App. 1981).

16. *See supra* notes 9 and 12.

17. According to the RESTATEMENT OF TORTS § 757 (1977), a trade secret may: consist of any formula, pattern, device, or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound,

Restatement definition of a “trade secret,” a Missouri court observed that an enforceable non-competition agreement protects an employer from the “unauthorized dissemination and use of confidential information about an employer’s business.”<sup>18</sup> Applying several of the factors suggested by the Restatement, the court noted that the employer made a significant effort to advise its employees of the confidential nature of the information and that competitors could, if unrestricted, use that information to determine the risk of success or

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a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. . . It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

*Id.* Recognizing that an exact definition of a “trade secret” is impossible, the drafters of the Restatement outlined several factors that courts should consider in order to determine whether information constitutes an employer’s trade secret:

(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Id.* In 1995, Missouri adopted the Uniform Trade Secret Act (MUTSA). MO. REV. STAT. § 417.453 (1997). While no Missouri court has used the Act’s definition of a trade secret for the adjudication of a non-competition agreement, courts presumably will use the Act’s definition in the future. The MUTSA defines a trade secret as:

[I]nformation, including but not limited to, technical or nontechnical data, a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

§ 417.453(4) Other states that have adopted the Uniform Trade Secret Act include Arizona, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Nevada, New Mexico, Ohio, Oklahoma, Oregon, South Dakota, Utah, Virginia, and Washington.

18. *Cape Mobile Home Mart, Inc. v. Mobley*, 780 S.W.2d 116, 119 (Mo. Ct. App. 1989) (concluding that the employer demonstrated a legitimate protectable interest in confidential information provided to an employee sufficient to overcome the invalidity presumption of non-competition agreements in Missouri). *See also Nat’l Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 18-19 (Mo. 1966) (finding that the employer failed to take any steps to keep secret and confidential the information asserted as a trade secret, and, therefore, such information was not within the Restatement’s definition of trade secret).

failure in competing with the employer.<sup>19</sup>

## 2. The Employee Must Have Influence Over Customers or Substantial Dealings With Customers to Constitute Customer Contacts

Missouri courts define a customer contact as “one who repeatedly has business dealings with a particular salesperson or business.”<sup>20</sup> The mere fact that an employee had some form of contact with customers is insufficient to establish an employer’s protectable interest in customer contacts.<sup>21</sup> Rather, customer contacts derive from the influence an employee may acquire over her employer’s customers.<sup>22</sup>

In *Osage Glass, Inc. v. Donovan*, rather than examining whether the employee had influence over the employer’s customers, the Missouri Supreme Court focused on whether the employee had substantial customer contacts.<sup>23</sup> Using a broad notion of customer contacts, the court found that the employer had a legitimate protectable interest in its customer contacts, and thus enforced the non-competition agreement against the former employee.<sup>24</sup>

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19. 780 S.W.2d at 119. *See supra* note 17.

20. *Steamatic of Kan. City, Inc. v. Rhea*, 763 S.W.2d 190, 192 (Mo. Ct. App. 1988). *See* *Herrington v. Hall*, 624 S.W.2d 148, 152 (Mo. Ct. App. 1981). *See also* *Deck & Decker Personnel Consultants, Ltd. v. Pigg*, 555 S.W.2d 705, 707 (Mo. Ct. App. 1977); *House of Tools & Eng’g, Inc. v. Price*, 504 S.W.2d 157, 159 (Mo. Ct. App. 1973); *Mills v. Murray* 472 S.W.2d 6, 12 (Mo. Ct. App. 1971); *Renwood Food Prods. v. Schaefer*, 223 S.W.2d 144, 151 (Mo. Ct. App. 1949).

21. *See Easy Returns Midwest, Inc. v. Schultz*, 964 S.W.2d 450, 454 (Mo. Ct. App. 1998).

22. *See id.*

23. 693 S.W.2d 71, 75 (Mo. 1985).

24. *Id.* Several Missouri courts have employed stricter notions of customer contacts, finding that “[i]f customers only use the employer’s services on a single occasion or there is little repeat business, the employer does not have a stock of customers and there is no protectable interest.” *Steamatic of Kan. City, Inc.*, 763 S.W.2d at 192. In *West Broad Ltd. v. Bell*, 942 S.W.2d 934 (Mo. Ct. App. 1997), the court addressed the unique problem of whether to enforce a six-month non-competition agreement signed by a radio disc jockey. The employee left the radio station and took on a new air-name and persona at a different radio station. *Id.* at 936. The radio station argued that the disc jockey’s voice was very recognizable and their radio audience might recognize her voice and switch to the other station. *Id.* at 937. The radio station argued that the covenant should be enforced because of its legitimate protectable interest in customer contacts. *Id.* The court disagreed, finding no evidence of a legitimate protectable interest as the disc jockey used a different name, time-slot, and format in her new position. *Id.* at 939. In his dissent, Judge Crow contended that the agreement should have been enforced

### 3. Non-Competition Agreements Must be Reasonable in Geographical and Temporal Scope

Additionally, Missouri courts analyze whether the geographical and temporal scope of a non-competition agreement is reasonable in light of the employer's legitimate protectable interest.<sup>25</sup> In *Schott v. Beussink* the Missouri Court of Appeals observed that a non-competition agreement must be reasonable as to time and space to be valid and enforceable.<sup>26</sup> A non-competition agreement must protect the former employer from unfair competition without imposing unreasonable restraint on the employee.<sup>27</sup> For example, in *National Motor Club of Missouri v. Noe* the Missouri Supreme Court found a non-competition agreement void and against public policy because it was not reasonably limited to any territory of competition.<sup>28</sup> Conversely, in *National Starch and Chemical Corp. v. Newman* the Missouri Court of Appeals found a non-competition agreement reasonable in scope even though it contained only a vague geographical limitation, because the agreement only restricted the employee for two years.<sup>29</sup>

Missouri courts apply a "reasonable alteration" approach to non-competition agreements that are unreasonable in scope.<sup>30</sup> A Missouri court will not refuse to enforce an agreement simply on grounds that it contains an unreasonably broad geographical or temporal

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because the disc jockey exerted enormous influence over her audience. 942 S.W.2d at 942.

25. See, e.g., *Herrington*, 624 S.W.2d at 148; *Grebing v. First Nat'l Bank of Cape Girardeau*, 613 S.W.2d 872 (Mo. Ct. App. 1981); *Schnucks Twenty-Five, Inc. v. Bettendorf*, 595 S.W.2d 279 (Mo. Ct. App. 1979); *Chem. Fireproofing Corp. v. Bronska*, 542 S.W.2d 74 (Mo. Ct. App. 1976); *Mitchell v. Branham*, 79 S.W. 739 (Mo. Ct. App. 1904).

26. 950 S.W.2d 621, 625-26 (Mo. Ct. App. 1997) (citing *Osage Glass*, 693 S.W.2d at 74; *Accord Renal Treatment Ctrs. v. Braxton*, 945 S.W.2d 557, 563 (Mo. Ct. App. 1997)).

27. See *Sturgis Equip. Co. v. Falcon Indus. Sales Co.*, 930 S.W.2d 14, 17 (Mo. Ct. App. 1996).

28. 475 S.W.2d 16, 22 (Mo. 1972).

29. 577 S.W.2d 99, 104 (Mo. Ct. App. 1978). The geographic limitation in the non-competition agreement prohibited the employee from soliciting any customers with whom the employee dealt while under the supervision of the former employer. *Id.* The court conceded that this was not an authentic geographic limitation and focused instead on the reasonableness of the time limitation in the agreement. *Id.*

30. See, e.g., *AEE-EMF, Inc. v. Passmore*, 906 S.W.2d 714, 719 (Mo. Ct. App. 1995) ("Noncompete clauses not demonstrably reasonable are not enforceable, and refusal to effect unreasonable terms does not constitute impermissible judicial 're-writing' of an agreement.").

restriction.<sup>31</sup> Under Missouri law, instead of invalidating an overbroad agreement, a court can modify broad restrictions to prevent an unreasonable restraint of the employee.<sup>32</sup>

### *B. Lack of Consistency Among Other States in Their Treatment of Non-Competition Agreements*<sup>33</sup>

As noted above, nearly every state disfavors non-competition agreements because they unfairly restrain trade and people's ability to earn a living.<sup>34</sup> Nonetheless, states do not afford equal weight to the above general policy in their legislative or judicial treatment of non-competition agreements. Some states view the prevention of trade restraints as the single overriding policy concern in their treatment of non-competition agreements,<sup>35</sup> while some states balance prevention of trade restraint against other policy concerns.<sup>36</sup>

In those states that view the prevention of trade restraints as the overriding policy, courts evaluate the harm to the general public, as well as to the employee, that arises when an employer attempts to prevent an employee from working in a specific field.<sup>37</sup> Those states

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31. *See id.*

32. For example, in *Orchard Container Corp. v. Orchard*, 601 S.W.2d 299, 303 (Mo. Ct. App. 1980), the court concluded that an employer "obviously cannot reasonably extend the limitations of the non-compete agreement to areas in which he has no protectable interests." Proceeding on this theory, the court modified the agreement from a 200-mile restriction on competition to a 125-mile restriction. *See Mid States Paint & Chem. Co. v. Herr*, 746 S.W.2d 613, 615-17 (Mo. Ct. App. 1988) (reducing former salesman's covenant not to compete from three to two years and from a 350-mile radius to a 250-mile radius).

33. A complete survey of every state's treatment of non-competition agreements is beyond the scope of this Note. A comprehensive survey of this area of the law requires multiple volumes, as there is little consistency between states or even within each state, about the enforceability of these agreements. In this section, a brief description of the treatment of non-competition agreements among the states elucidates general inconsistencies in the law. *See COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY* (Brian M. Malsberger ed., 2d ed. 1998). Cases and statutes in this section of the Note are drawn primarily from this series.

34. *See supra* note 9 and accompanying text.

35. *See infra* notes 37-38 and accompanying text.

36. *See infra* notes 39-41 and accompanying text.

37. *See, e.g., Rao v. Rao*, 718 F.2d 219, 223 (7th Cir. 1983) (noting that courts should not enforce a non-competition clause merely because the parties agreed to such an arrangement); *Hekimian Lab., Inc. v. Domain Sys., Inc.*, 664 F. Supp. 493, 497 (S.D. Fla. 1987) (applying Maryland law); *Clark v. Liberty Nat'l Life Ins. Co.*, 592 So. 2d 564, 565-66 (Ala. 1992) (concluding that a court must determine whether the restriction imposes undue hardship on the former employee by examining the employee's age, marital or parental status, financial

scrutinize whether the agreement is reasonable and necessary in its geographical and temporal scope in light of the employer's protectable interests.<sup>38</sup> However, some state courts consider the preservation of freedom to contract and the protection of an employer's legitimate interest as competing policy concerns in adjudicating non-competition agreements, in addition to prevention of trade restraints.<sup>39</sup> Consequently, in those states judges eschew any analysis of harm to the general public or the employee.<sup>40</sup> Rather, in varying degrees, those state courts give greater weight to an employee's consent to the agreement and to the employer's protectable interests but are less strict in their analysis of the

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obligations, and lack of training in other areas); *Data Mgmt. v. Greene*, 757 P.2d 62, 65 (Alaska 1988) (holding that five-year statewide non-competition agreement was unreasonable because the agreement would bar the employee's sole means of support); *Am. Credit Bureau v. Carter*, 462 P.2d 838, 840 (Ariz. Ct. App. 1969) (holding that a non-competition agreement is enforceable only where the restraint is not unreasonably restrictive upon rights of the employee and does not contravene public policy); *Scott v. Gen. Iron & Welding Co.*, 368 A.2d 111 (Conn. 1976); *Norlund v. Faust*, 675 N.E.2d 1142, 1154 (Ind. Ct. App. 1997) (concluding that in order to establish an enforceable agreement, the former employer must show that the terms of the agreement are reasonable with regards to: (1) the necessity of the breadth of the protection for the employer; (2) the restriction upon the former employee; and (3) the public interest); *Roy v. Bolduc*, 34 A.2d 479, 480 (Me. 1943) (holding that a non-competition agreement must not impose undue hardship on the employee and not be broader than is reasonably necessary for the protection of the employer); *Smith, Batchelder & Rugg v. Foster*, 406 A.2d 1110, 1312-13 (N.H. 1997); *Carolina Chem. Equip. Co. v. Muckenfuss*, 471 S.E.2d 721, 723-24 (S.C. Ct. App. 1996); *Knight, Vale & Gregory v. McDaniel*, 680 P.2d 448, 451-52 (Wash. Ct. App. 1984); *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 911 (W. Va. 1982) (holding that to show an enforceable non-competition agreement, an employer must demonstrate that the agreement does not impose undue hardship on the employee and is not injurious to the public).

38. See, e.g., *Bernard Pers. Consultants v. Mazarella*, No. CIV.A.11660, 1990 WL 124969, at \*5 (Del. Ch. Aug. 28, 1990) (holding that a one-year statewide non-competition agreement is unenforceable because its temporal and geographic scope was unnecessary to protect the employer's trade secrets). See also *Birmingham Television Corp. v. DeRamus*, 502 So. 2d 761 (Ala. Civ. App. 1986) (refusing to enforce a six month non-competition agreement and finding the scope of the agreement unreasonable in relation to the employer's protectable interests, the employee's young age, and new marital status).

39. See *Uncle B's Bakery, Inc. v. O'Rourke*, 920 F. Supp. 1405, 1423 (N.D. Iowa 1996) ("[T]he principle of freedom of contract is entitled to some precedence where courts have accepted certain restraints on trade."). See also *Dick v. Geist*, 693 P.2d 1133, 1135 (Idaho Ct. App. 1985) ("[A]ny detriment to the public interest in the possible loss of services of the covenantor is more than offset by the public benefit arising out of preservation of the freedom to contract."); *Weber v. Tillman*, 913 P.2d 84, 89 (Kan. 1996) ("[P]aramount public policy is that freedom to contract is not to be interfered with lightly.").

40. For a statutory example of this approach, see FLA. STAT. ANN. § 542.335 (West 1996). Essentially, Florida's new non-competition statute prohibits courts from analyzing any hardship to the employee.



agreement's reasonableness.<sup>41</sup>

Like Missouri, nearly every other state recognizes that an employer has a legitimate protectable interest in its trade secrets and customer contacts.<sup>42</sup> However, states do not agree on the proper weight to afford an employer's protectable interest in the adjudication of non-competition agreements.<sup>43</sup> Most states agree on the definition of a trade secret, and use either the Restatement of Torts or the Uniform Trade Secret Act to define a trade secret.<sup>44</sup> Conversely, state

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41. Missouri and Florida are examples of such states. For Missouri's approach, see *supra* notes 9-12, 25 and accompanying text. Missouri courts will not void a non-competition agreement solely on the basis of public policy because the employer's legitimate protectable interests are also worthy of protection. However, some Missouri courts follow the approach of those states that view restraints on trade as the overriding policy concern and will void an agreement based on public policy grounds. For other states following this approach, see *Uncle B's Bakery, Inc.*, 920 F. Supp. at 1432 (enforcing a five-year, 500-mile radius non-competition agreement as applied to a bagel plant manager because of the employer's legitimate business interests and a more general concern for the preservation of freedom to contract). For Florida's approach to non-competition agreements, see *supra* note 40.

42. See, e.g., *Owens v. Penn Mut. Life Ins. Co.*, 851 F.2d 1053, 1055 (8th Cir. 1988); *SI Handling Sys. v. Heisley*, 753 F.2d 1244, 1254 (3rd Cir. 1985); *Nat'l Interstate Ins. Co. v. Perro*, 934 F. Supp. 883, 890 (N.D. Ohio 1996); *Sheffield v. Stoudenmire*, 554 So. 2d 125, 126 (Ala. 1989); *Metcalf Inv., Inc. v. Garrison*, 919 P.2d 1356, 1361 (Alaska 1996) (noting that a real estate brokerage firm had a protectable interest in its customer lists and confidential information); *Bryceland v. Northey*, 772 P.2d 36, 39 (Ariz. Ct. App. 1989); *Loral Corp. v. Moyes*, 174 Ca. App. 3d 268, 276 (1985); *Sunstates Refrigerated Servs., Inc. v. Griffin*, 449 S.E.2d 858, 860 (Ga. Ct. App. 1994); *Technicolor, Inc. v. Traeger*, 551 P.2d 163 (Haw. 1976); *Ins. Assocs. Corp. v. Hansen*, 782 P.2d 1230 (Idaho 1989); *Jenkins v. King*, 65 N.E.2d 121 (Ind. 1946); *Weber v. Tillman*, 913 P.2d 84, 91 (Kan. 1996) (observing that "seeing that contracts with clients continue" is among legitimate protectable business interests); *Dixie Parking Serv., Inc. v. Hargrove*, 691 So. 2d 1316, 1320 (La. Ct. App. 1997) (concluding that trade secrets, including management techniques, constitute protectable employer interests); *Holloway v. Faw, Casson & Co.*, 552 A.2d 1311, 1319 (Md. Ct. Spec. App. 1989); *Kroeger v. Stop & Shop Co.*, 432 N.E.2d 566 (Mass. App. Ct. 1982); *Hayes-Albion Corp. v. Kuberski*, 364 N.W.2d 609 (Mich. 1984); *Bayly, Martin & Fay, Inc. v. Pickard*, 780 P.2d 1169, 1170 (Okla. 1989) (concluding that an employer's protectable interests include actual customer contacts and trade secrets); *Paramount Office Supply Co., Inc. v. MacIsaac, Inc.*, 524 A.2d 1099, 1101 (R.I. 1987); *Cam Int'l L.P. v. Turner*, No. 01-A-01-9203CH00116, 1992 WL 74567 (Tenn. Ct. App. Apr. 15, 1992); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 682 (Tex. 1990); *Robbins v. Finlay*, 645 P.2d 623 (Utah 1982). North Dakota is the only state that does not recognize this protectable interest. N.D. CENT. CODE § 0-08-06 (1987). In North Dakota, all covenants not to compete in the employment context are void, while those in the sale of business context are enforceable under certain circumstances. See also CAL. BUS. & PROF. CODE § 16600-16602.6 (West 1997).

43. See, e.g., *id.*

44. See *supra* note 17. For other states using the Uniform Trade Secret Act (UTSA), see *supra* note 17. For an example of other states using the Restatement of Torts, see *SI Handling Sys.*, 753 F.2d at 1254. As the Restatement and UTSA definition are very similar

legislatures and courts are less uniform in their definitions of an employer's legitimate protectable interest in its customer contacts. While some courts find that an employer has a protectable interest in customer lists,<sup>45</sup> other courts do not consider a customer list to be a protectable interest unless the list is not readily available to the public.<sup>46</sup> Furthermore, some state courts treat customer lists as an employer's protectable interest only if such lists give the employee an unfair advantage, while others evaluate whether the employer has established a relationship with its customers.<sup>47</sup> Finally, a few state courts consider customer contacts to be an employer's protectable interest only if the employee was originally hired to obtain those contacts.<sup>48</sup>

Likewise, states differ in their treatment of those non-competition agreements when such agreements are found unenforceable. Like Missouri,<sup>49</sup> some states follow the reasonable alteration approach;

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inconsistencies between the states do not appear to derive from the fact that some states use the Restatement and others use the UTSA to define a trade secret.

45. See *Roto-Die Co. v. Lesser*, 899 F. Supp. 1515, 1518 (W.D. Va. 1995); *Technical Aid Corp. v. Allen*, 591 A.2d 262, 266 (N.H. 1991) ("When an employee is put in a position involving client contact, it is natural that some of the goodwill emanating from the client is directed to the employee rather than the employer. The employer has a legitimate interest in preventing its employees from appropriating this goodwill to its detriment." (citations omitted)).

46. See *In re Uniservices, Inc.*, 517 F.2d 492, 496 (7th Cir. 1975) (holding that former employer has no protectable interest in customer lists and information that can be obtained by lawful surveillance); *Allen v. Johar, Inc.*, 823 S.W.2d 824, 826-27 (Ark. 1992) (interpreting Arkansas Trade Secret Law, ARK. CODE ANN. § 4-75-601 (Michie 1987), to mean that customer lists are an employer's protectable interest only if customer identities are not easily ascertainable and the employer keeps the list of such identities confidential).

47. See OR. REV. STAT. § 653.295 (1993); *Reynolds & Reynolds, Co. v. Tart*, 955 F. Supp. 547, 552-53 (W.D.N.C. 1997) (concluding that customer contacts constitute an employer's legitimate protectable business interests when employees, during the course their employment, develop or improve customer relationships); *Darugar v. Hodges*, 471 S.E.2d 33, 36 (Ga. Ct. App. 1996) (concluding that an employer has a protectable "interest in the customer relationships its former employee established at work and [a] right to protect itself from the risk that the former employee might use contacts so cultivated to unfairly appropriate customers . . ."); *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 685 N.E.2d 434, 443 (Ill. App. Ct. 1997) (employing a permanence of relationship test to determine whether an employer had a legitimate protectable business interest); *Empiregas Inc. of Kosciusko v. Bain*, 599 So. 2d 971, 976 (Miss. 1992) (noting that an employer has an interest in protecting its customer base and its goodwill).

48. See *IDS Life Ins. Co. v. SunAmerican, Inc.*, 958 F. Supp. 1258, 1273 (N.D. Ill. 1997) (applying Minnesota law).

49. See *supra* note 32 and accompanying text.

courts in those states will modify, subtract, or add terms to a good faith agreement to the extent necessary to create an agreement reasonable in scope.<sup>50</sup> Other states employ a “blue pencil” approach, deleting unreasonable clauses in an agreement only if a more reasonable agreement will be left intact.<sup>51</sup> A few states will not alter or “blue pencil” any sections of the non-competition agreement; if the agreement is unreasonable, the court will not enforce any portion or derivation of the agreement.<sup>52</sup>

## II. COGNITIVE PSYCHOLOGY AND ITS RELEVANCE TO CONTRACT LAW

Many legal theorists use recent discoveries in cognitive psychology to criticize the underlying assumptions of neoclassical economic legal theory.<sup>53</sup> Essentially, neoclassical economists assume

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50. States that follow Missouri’s reasonable alteration approach include: Alabama; Arkansas; Arizona; Connecticut; Delaware; Florida; Illinois; Idaho; Iowa, Moore Bus. Forms, Inc. v. Wilson, 953 F. Supp. 1056, 1064 (N.D. Iowa 1996); Kansas; Maine; Massachusetts; Michigan, Frontier Corp. v. Telco Communications Group, Inc., 965 F. Supp. 1200, 1208-09 (S.D. Ind. 1997) (applying Michigan law); Minnesota; Mississippi; Nevada; New Jersey; New York, Muller v. N.Y. Heart Ctr. Cardiovascular Specialists P.C., 656 N.Y.S.2d 464, 465 (N.Y. App. Div. 1997); Ohio, Nat’l Interstate Ins. Co. v. Perro, 934 F. Supp. 883, 891 (N.D. Ohio 1996); Oklahoma; Oregon; Pennsylvania, Hillard v. Medtronic, Inc., 910 F. Supp. 173, 177 (M.D. Pa. 1995); Texas, TEX. BUS. & COM. CODE ANN. § 15.51(c) (1994); Tennessee, Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc., 946 F. Supp. 495, 501 (E.D. Ky. 1996); Washington; and West Virginia.

51. In other words, the courts will not supplement or modify the agreement, but they will uphold a reasonable clause in the agreement if that clause is severable. States that follow the blue-pencil approach include: Colorado, Nat’l Graphics Co. v. Dilley, 681 P.2d 546, 547 (Colo. Ct. App. 1984); Indiana, College Life Ins. Co. of Am. v. Austin, 466 N.E.2d 738, 744 (Ind. Ct. App. 1984); New Hampshire, Technical Aid Corp. v. Allen, 591 A.2d 262, 271-72 (N.H. 1991); Rhode Island, Dial Media, Inc. v. Schiff, 612 F. Supp. 1483, 1490 (D.R.I. 1985); and S.C., Cafe Assocs. v. Gerngross, 406 S.E.2d 162, 165 (S.C. 1991).

52. States that will not alter or cross-out any portion to create an enforceable agreement include: Arkansas, Rector-Phillips-Morse v. Vroman, 489 S.W.2d 1, 5 (Ark. 1973) (refusing to enforce a contract that the parties might have made, but did not make); Georgia, Sysco Food Servs. of Atlanta, Inc. v. Chupp, 484 S.E.2d 323, 326 (Ga. Ct. App. 1997); Nebraska, Terry D. Whitten, D.D.S., P.C. v. Malcolm, 541 N.W.2d 45, 48 (Neb. 1995); Wisconsin, WIS. STAT ANN. § 103.465 (West 1997); and Virginia, Alston Studios, Inc. v. Lloyd V. Gress & Assocs., 492 F.2d 279, 285 (4th Cir. 1974) (applying Virginia law). States that have not yet decided which approach to employ for unreasonably broad or restrictive non-competition agreements include: California; District of Columbia; Hawaii; Louisiana; Maryland; Montana; New Mexico; North Dakota; New York; South Dakota; Utah; and Vermont.

53. See, e.g., Larry T. Garvin, *Adequate Assurance of Performance: Of Risk, Duress, and*

that humans “maximize their utility, from a stable set of preferences, and accumulate an optimal amount of information and other inputs in a variety of markets.”<sup>54</sup> The neoclassical economic rational choice model relies upon the assumption that decision makers “know, or can know, all the feasible alternative actions open to them, that they know, or can easily discover, all relevant prices, and that they know their wants and desires.”<sup>55</sup> Accordingly, neoclassical economists contend that courts should enforce all agreements between such rational maximizers.<sup>56</sup> Therefore, if two parties enter into a voluntary private exchange, both must believe the exchange is likely to make them better off or they would not have entered into the agreement.<sup>57</sup>

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*Cognition*, 69 U. COLO. L. REV. 71 (1998) (arguing that the law of adequate assurance should take into account cognitive psychology); Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391 (1990) (applying cognitive psychologists’ research on framing effects to unsafe product warnings and adhesion contracts); Henry T.C. Hu, *Risk, Time, and Fiduciary Principles in Corporate Investment*, 38 UCLA L. REV. 277, 329-31 (1990) (noting that cognitive defects affect director and shareholder attitudes to risk); Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 305 (1989) (using cognitive heuristics to describe jury behavior); Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 772-78 (1990) (arguing that policy makers should take account of cognitive error when regulating risk).

54. Christine Jolls, et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (1998) (quoting GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976)).

55. Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 213 (1995) (quoting Thomas S. Ulen, *Cognitive Imperfections and the Economic Analysis of Law*, 12 HAMLINE L. REV. 385, 385-86 (1989)).

56. See, e.g., MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962). However, several economists treat covenants not to compete as an exception to the general rule that courts should enforce all agreements between capable actors on the theory that such contracts are impermissible restraints on trade and the market. See, e.g., RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 125-26 (1995). While that view may accord with the outcome of this Note, the arguments and regulations suggested herein are quite distinct. Others argue that non-competition agreements, like all other contracts, should be fully enforced because “they are not anticompetitive per se, and in fact may foster competition by affording employers needed protection for confidential business information or investments in training.” Maureen B. Callahan, Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 727 (1985). See Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93 (1981) (arguing for the enforceability of non-competition agreements based on economic analyses). But see Steve D. Shadowen & Kenneth Voytek, Note, *Economic and Critical Analyses of the Law of Covenants Not to Compete*, 72 GEO. L.J. 1425 (1984) (criticizing Shedd and Rubin’s account of non-competition agreements using critical legal theory as an alternative to the economic approach).

57. See MICHAEL TREBILCOCK, *THE LIMITS OF FREEDOM TO CONTRACT* 7 (1993) (explaining the premise or foundation of what the author refers to as “normative economic

Alternatively, cognitive psychologists suggest that because neoclassical economics ignores important limits on human cognition in situations involving risk or uncertainty, it relies on an idealized and impossible view of human behavior.<sup>58</sup> Cognitive psychologists seek to expose intellectual limits and propose methods to improve the quality of thinking, as well as to locate errors and biases that reveal the psychological processes that control judgment and inference.<sup>59</sup> Legal theorists who use discoveries in cognitive psychology are deeply concerned with the ramifications that actual, and not merely hypothesized, human behavior will have for the law.<sup>60</sup>

One such theorist and preeminent contract law scholar, Melvin A. Eisenberg, suggested that the underlying cognitive limit inherent in all contracts presents concern for the future.<sup>61</sup> Therefore, every contract involves varying degrees of uncertainty.<sup>62</sup> However, for the neoclassical economist, actors make choices in the face of uncertainty and rationally elect the options that maximize their utility.<sup>63</sup> Neoclassical economics relies on the assumption that decisionmakers can accurately compute probability estimates of uncertain future events, determine their own attitudes toward risk, integrate all of that information, and choose the action that best maximizes their expected utility.<sup>64</sup> In response, Eisenberg argued experiments demonstrated that actors systematically violate the classical rational choice model due to limits on human cognition, especially under conditions of uncertainty.<sup>65</sup>

Eisenberg argued that contract law already recognizes many exceptions to the rule that courts fully enforce bargains between all capable actors; for example, liquidated damages,<sup>66</sup> adhesion

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analysis”).

58. See *supra* notes 53 and 55.

59. See Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225, 226 (1986) (quoting Kahneman & Tversky, *On the Study of Statistical Intuitions*, 11 COGNITION 123, 124 (1982), reprinted in JUDGMENT UNDER UNCERTAINTY, HEURISTICS AND BIASES 494 (D. Kahneman et al. eds., 1982)).

60. See Jolls, *supra* note 54, at 1476.

61. See Eisenberg, *supra* note 55, at 212-13.

62. See *id.* at 213.

63. See *id.*

64. See *id.*

65. See *id.* at 216.

66. See U.C.C. § 2-718(2) (1998), which provides:

contracts,<sup>67</sup> and prenuptial agreements.<sup>68</sup> While reference to unfair exploitation or unconscionability can explain many exceptions to the classical rational choice model,<sup>69</sup> such grounds cannot justify all cases of the aforementioned exceptions. For Eisenberg, cognitive psychology, and its recognition of the inherent limits on human cognition, provides an explanation to these exceptions and reveals how other legal doctrines should be fashioned.<sup>70</sup>

While there is much theoretical and empirical documentation concerning cognitive limits, this Note examines only those specific cognitive limits that relate to contract law. Legal scholars who advocate the work of cognitive psychologists focus on the following two overlapping categories of systematic cognitive limitations: (1) bounded rationality and rational ignorance; and (2) limits based on defective capability.

### A. *Bounded Rationality and Rational Ignorance*

Herbert Simon, the father of modern cognitive psychology, suggested that bounded rationality places serious limits on human cognition.<sup>71</sup> The term “bounded rationality” encompasses the notion

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Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds (a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or (b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller.

67. See Hasen, *supra* note 53, at 424.

68. See Eisenberg, *supra* note 55, at 224-57. Eisenberg argued that while courts recognize these types of contracts and contractual provisions require special treatment, they have not explicitly justified this special treatment based on the limits of cognition. *Id.* Therefore, the relevant doctrines often lack a satisfactory or coherent explanation. *Id.*

69. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); U.C.C. § 2-302(1) (1998), providing:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

70. See Eisenberg, *supra* note 55, at 216.

71. 3 HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY* 291 (1982).

that human cognitive abilities are finite and imperfect; it is a recognition that humans have limited knowledge and computational capacity.<sup>72</sup> Essentially, bounded rationality describes the observable fact that decision makers fail to “process information perfectly even if they wish to do so, because human ability to calculate consequences, understand implications, and make comparative judgments on complex alternatives is limited.”<sup>73</sup> These limitations include the time, energy, and financial costs of searching for and processing information, as well as general imperfections in human processing ability.<sup>74</sup> Studies show that bounded rationality plays an especially significant role in cognition whenever actors assess the probability of uncertain events or values.<sup>75</sup>

### *B. Limits Based on Defective Cognitive Capability*

Individuals sometimes act irrationally even within the scope of information they possess.<sup>76</sup> Noted cognitive psychologists Amos Tversky and Daniel Kahneman argued that “the deviations of actual behavior from the [rational choice] model are too widespread to be ignored, too systematic to be dismissed as random error.”<sup>77</sup> Those deviations include the use of heuristics, framing effects, over-optimism, defective risk-assessment faculties, and defective telescopic faculties.<sup>78</sup>

#### 1. Heuristics

Heuristics are rules of thumb or shortcuts individuals use when making decisions.<sup>79</sup> Due to bounded rationality—the limits on human information processing ability—individuals employ heuristics in

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72. *See id.*

73. Eisenberg, *supra* note 55, at 216.

74. *See id.* at 214.

75. *See* Jolls, *supra* note 54, at 1480.

76. *See* Eisenberg, *supra* note 55, at 216.

77. Amos Tversky & Daniel Kahneman, *Rational Choice and Framing of Decisions*, 59 J. BUS. S251, S252 (Supp. 1986).

78. These categories do not constitute an exhaustive list of all cognitive limits and are not discrete categories.

79. *See* Jolls, *supra* note 54, at 1477.

order to efficiently process available information.<sup>80</sup> Tversky and Kahneman's research has demonstrated that individuals use heuristics such as "availability" and "representativeness" in systematic ways that inevitably lead to predictable mistakes.<sup>81</sup>

Researchers studying the availability heuristic suggest that individuals often retrieve only the information that is readily available from memory or imagination in order to make decisions.<sup>82</sup> Actors often favor prominent, vivid, or salient information over considered, tedious, or objective information about the frequency or probability of an event.<sup>83</sup> Inevitably, this shortcut leads to systematic biases.<sup>84</sup>

Researchers of the representativeness heuristic have demonstrated that instead of gathering all the relevant data to make decisions, individuals make decisions based on some subset of data that they judge to be representative.<sup>85</sup> A decision maker using this heuristic evaluates probabilities by the degree to which *A* resembles *B*.<sup>86</sup> Thus, individuals systematically view inordinately small samples as representative of larger trends.<sup>87</sup>

## 2. Framing

Behavioral studies suggest that an individual's choices often depend more on the framing of outcomes than the substance of the factors involved.<sup>88</sup> Surprisingly, these studies show that the effects of framing are so powerful that decision makers often adhere to their

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80. See Eisenberg, *supra* note 55, at 220.

81. See Jolls, *supra* note 54, at 1477.

82. See Eisenberg, *supra* note 55, at 220.

83. See *id.*

84. See *id.* at 221. For example, when asked to estimate the frequency of various causes of death in the United States, respondents overestimated the frequency of sensational and memorable causes of death, like homicide, accidents and natural disasters, and underestimated the frequency of less vivid causes of death like asthma, emphysema and diabetes. See Sarah Lichtenstein et al., *Judged Frequency of Lethal Events*, 4 J. EXPERIMENTAL PSYCOL.: HUM. LEARNING & MEMORY 551 (1978).

85. See Eisenberg, *supra* note 55, at 222.

86. See Hasen, *supra* note 53, at 395.

87. See Eisenberg, *supra* note 55, at 222.

88. See Hasen, *supra* note 53, at 329-30.



inconsistent choices even when apprised of the inconsistencies.<sup>89</sup>

In a frequently cited study of the framing effect, Tversky and Kahneman divided research subjects into two groups.<sup>90</sup> They told both groups that an exotic disease expected to kill six-hundred people will infiltrate the United States. Subsequently, they told the groups to choose between two alternative programs to combat the disease. The authors told Group One: if they adopt *Program A* it will save two-hundred people and if they adopt *Program B* there is a 33% probability that it will save six-hundred people and a 66% probability that all will perish. Seventy-two percent of Group One selected *Program A*. The authors told Group Two: if they adopt *Program C* four-hundred people will die, and if they adopt *Program D* there is a 33% probability that no one will die and a 66% probability that six-hundred people will die. Seventy-eight percent of Group Two selected *Program D*.<sup>91</sup>

*Programs A* and *C* communicate the same information. Nevertheless, 72% of the research subjects chose *Program A*, while only 22% preferred *Program C*. The only difference between the *Programs* is that the former is framed in terms of lives saved, while the latter is framed in terms of lives lost.<sup>92</sup> Likewise, *Program B* and *Program D* convey the same substantive outcome and yet only 28% of those studied chose *Program B*, while 78% chose *Program D*.<sup>93</sup> Again, the only difference is framing.

The framing effect functions like a “visual or optical illusion, rather than as a computational error.”<sup>94</sup> In effect, a decision maker’s choice sometimes depends less on real consequences and more on how outcomes are framed: specifically, whether an outcome is framed as a gain or a loss.<sup>95</sup>

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89. See Eisenberg, *supra* note 55, at 220.

90. See Garvin, *supra* note 53, at 156.

91. See *id.*

92. See *id.* at 157.

93. See *id.*

94. Hasen, *supra* note 53, at 399.

95. See Garvin, *supra* note 53, at 157.

### 3. Over-Optimism

Cognitive psychologists' work shows that people are unrealistically optimistic.<sup>96</sup> The research demonstrates that people systematically overestimate benefits and underestimate risks.<sup>97</sup> Most people unrealistically believe their chances are better than average for personal and professional success.<sup>98</sup> In a recent study, Lynn Baker and Robert Emery asked people about to marry to compare their chances of divorce to the general population.<sup>99</sup> The research subjects correctly believed that 50% of marriages in the United States end in divorce.<sup>100</sup> However, they then estimated that their own chance of divorce was zero.<sup>101</sup>

### 4. Defective Risk/Assessment

Studies illustrate that actors systematically underestimate risks by failing to recognize the existence of unknown surprises in the future.<sup>102</sup> For example, one study demonstrated that even when offered subsidized insurance premiums, individuals prefer to insure only against high-probability, low-loss hazards and not against low-probability, high-loss hazards.<sup>103</sup> Decision makers often underestimate low-probability or less certain hazards, regardless of the magnitude of potential loss.<sup>104</sup>

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96. See Neil D. Weinstein, *Unrealistic Optimism about Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980).

97. See Garvin, *supra* note 53, at 149.

98. For example, most college students think they are more likely than their classmates to like their postgraduate job. See Weinstein, *supra* note 96, at 809-10. Additionally, nearly 90% of drivers believe they drive better than average. See Garvin, *supra* 53, at 149.

99. Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993).

100. *Id.*

101. *Id.*

102. See Eisenberg, *supra* note 55, at 222 (citing Kenneth Arrow, *Risk Perception in Psychology and Economics*, 20 ECON. INQUIRY 1, 5 (1982)).

103. See Martin Feldstein, *The Optimal Level of Social Security Benefits*, 100 QJ. ECON. 303, 307 (1985).

104. At the other end of the spectrum, some people overestimate low-probability hazards. See W. KIP VISCUSI AND WESLEY A. MAGAT, *LEARNING ABOUT RISK: CONSUMER AND WORKER RESPONSES TO HAZARD INFORMATION* 95 (1987).

## 5. Defective Telescopic Faculties

People systematically grant too little weight to future benefits and costs as compared to present benefits and costs.<sup>105</sup> In short, due to defective telescopic faculties, as well as over-optimism, decision makers often fail to sufficiently prepare for their long-term prosperity.<sup>106</sup> Many theorists justify mandatory savings for Social Security or the fresh-start policy in bankruptcy law by reference to defective telescopic faculties.<sup>107</sup>

### III. APPLICATION: LIMITS ON COGNITION WHEN FACED WITH A NON-COMPETITION AGREEMENT

In this section of the Note, the limits on cognition described in Part II are applied to the employee faced with the decision to sign a non-competition agreement. Through the use of a fictional example, this Part demonstrates how cognitive limits and defects impair the employee's decision.

#### *A. Employees are Limited by Bounded Rationality*

When deciding whether to sign a non-competition agreement, employees cannot know, and it would be inefficient for employees to learn, every potential future alternative action open to them as well as all of their wants and desires. First, employers usually do not give employees much time to decide whether to sign a non-competition agreement. Second, general limitations on human information gathering and imperfections in human information processing severely restrict employees. Generally, employees cannot accurately

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105. See Eisenberg, *supra* note 55, at 222. Some theorists refer to this cognitive defect as "myopia."

106. For example, some people lie out in the sun or smoke cigarettes to reap immediate benefits like a suntan or a calm feeling. If individuals correctly weighed the future cost to the present benefits, presumably they would not sunbathe or smoke cigarettes. See Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U.L.Q. 1, 27 (1995).

107. See, e.g., George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307, 317 (1982); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1392, 1408-10 (1985).

calculate the probabilities of termination with or without cause, finding compensation satisfactory over the long term, downsizing or better opportunities elsewhere as a result of market shifts, and of personal, familial, and economic factors that might effect decisions about employment. Third, most employees do not have the appropriate resources to obtain all of this information. In short, the list of bounds on employees when faced with the decision whether to sign a non-competition agreement may extend ad infinitum because they must choose between alternatives even though the future remains uncertain.

*B. Employees are Limited by Defective Cognitive Capability*

TechnO Corporation (TechnO) invited Julie for an interview after she spent six months searching for a job following her graduation. Her interview at TechnO with Bill, the hiring coordinator, went very well and he offered Julie a position. Bill told Julie that TechnO was a great place to work and that 50% of new recruits stay with the company for more than two years. Bill's offer included a \$4000 signing bonus and a \$40,000 yearly salary. Bill gave Julie a stack of notes: "All you need to start working here is to sign some notes, and we can get you into an office later this week."

Julie looked through the documents, finding information about her salary, health benefits, and general company policies, as well as a non-competition agreement. Julie took a few moments to think about her situation. She considered the following factors; (1) she enjoyed working as a research assistant for her computer science professor, and she always did well in school; (2) her two close friends from college signed non-competition agreements when they started their new jobs; (3) half of TechnO's employees chose to stay with the company for more than two years; and (4) the signing bonus could cover her student loan payments for the next several months. Excited to embark on her new career, Julie signed the non-competition agreement.

Julie's decision to sign the non-competition agreement was affected by the following several cognitive defects.

### 1. Julie Enjoyed Working for Her Computer Science Professor and Was Successful in School

To simplify and expedite her decision making process, Julie used the availability heuristic and relied on information readily available to her in light of her limited past experiences.<sup>108</sup> This line of reasoning will become more common as employers today ask employees to sign non-compete agreements earlier in their careers.<sup>109</sup> Younger and newer employees have less experience and thus draw on a smaller body of information when making decisions.

Additionally, as a result of Julie's over-optimism, she believed that her past successes in school and as a research assistant meant that she would also find success working at TechnO.<sup>110</sup>

### 2. Julie's Friends Signed Non-Competition Agreements

Julie used the representativeness heuristic when she relied on the experience of her two friends as representative of her situation, rather than considering the similarities and differences between TechnO's non-competition agreement and the agreements her friends signed.<sup>111</sup> In addition, due to bounded rationality, Julie did not calculate the actual benefits and detriments of signing the non-competition agreement.<sup>112</sup>

### 3. Half of the Employees Stay with TechnO for More Than Two Years

As a result of Julie's over-optimism, she neither considered the possibility that she could be part of the 50% that leave the company within two years, nor investigated the reasons why certain individuals left.<sup>113</sup> To be sure, absent a difficult employment history, most employees are over-optimistic about their chances of success.<sup>114</sup>

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108. See *supra* notes 82-84 and accompanying text.

109. See *supra* note 4 and accompanying text.

110. See *supra* notes 96-101 and accompanying text.

111. See *supra* notes 81, 85-87 and accompanying text.

112. See *supra* notes 71-75 and accompanying text.

113. See *supra* notes 96-101 and accompanying text.

114. Upon receipt of an employment offer, an individual presumably feels successful and

Furthermore, Julie underestimated the risks involved in signing the non-competition agreement. While the possibility that Julie will need to leave the company may be low, she stands to lose plenty in the event that she actually does leave the company. If Julie leaves, she will lose not only her salary from TechnO, but also may be unable to find lucrative employment elsewhere as a result of the non-competition agreement. Absent Julie's defective risk assessment, she would request additional consideration to compensate her for the possibility of such a high-loss hazard.<sup>115</sup> Instead, Julie used low-probability as the sole deciding factor and accepted inadequate consideration for the risk of substantial loss.

Finally, the way Bill framed this information led to Julie's decision to sign the agreement.<sup>116</sup> If Bill told Julie 50% of the employees left the company within two years, Julie would have viewed this as a loss or detriment and might not have been so quick to sign the agreement. Instead, due to framing effects, Julie understood this information as a positive gain or benefit in making her decision.

#### 4. Bill Told Julie that all She Needed to Start Working Was to Sign the Agreement

Bill told Julie the benefit of signing the agreement—starting a new job. If Bill had said to Julie, “If you do not sign this agreement, then you cannot work here,” she might have requested additional time to consider the seriousness of the agreement.<sup>117</sup> As such, the framing effect played a role in Julie's decisionmaking process.

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fails to consider the probability of job termination, lack of fulfillment at work, or other “unhappy” variables when asked to sign a non-competition agreement.

115. See *supra* notes 102-04 and accompanying text.

116. See *supra* notes 88-95 and accompanying text.

117. See *supra* notes 3, 68. Many employees are not well versed in legal terminology. Therefore, they are particularly vulnerable to the ways employers describe employee retention rates. Given the effects of framing, one cannot assume that contract terms are accurately understood by employees. Presumably, the framing effect is greater for those employees who fail to read the agreement.

### 5. The Signing Bonus Would Help Alleviate Julie's Mounting Student Loans

Julie overlooked potential future problems that could arise as a result of the non-competition agreement because TechnO offered her the opportunity to quickly repay a portion of her student loans. Julie received an enticing immediate benefit: the signing bonus. Due to defective telescopic faculties, Julie failed to sufficiently weigh the long-term effects of signing the agreement.<sup>118</sup> An employee's irrational over-optimism may exacerbate the effect of defective telescopic faculties.<sup>119</sup>

#### IV. ANALYSIS: THE ROLE COGNITIVE LIMITS OUGHT TO PLAY IN THE ADJUDICATION AND REGULATION OF NON-COMPETITION AGREEMENTS

As Part I of this Note demonstrates, courts' treatment of non-competition agreements differs from state-to-state, as well as from court-to-court. Judicial treatment of these non-competition agreements is inconsistent because courts rely on faulty assumptions about human cognition, and thus judicial opinions are poorly reasoned. Additionally, as Parts II and III of this Note demonstrate, judicial treatment of non-competition agreements is inadequate because courts do not explicitly take into account the cognitive limits that impair an employee's judgment.

##### *A. Inconsistent Treatment and Faulty Assumptions*

Like the exceptions to the rational choice model Eisenberg described, non-competition agreements are not always enforced by courts.<sup>120</sup> Due to the significant public policy concerns, courts do not

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118. See *supra* notes 105-07 and accompanying text. Today, defective telescopic faculties are likely to play a greater role in an employee's signature on a non-competition agreement as companies increasingly offer large signing bonuses to attract desirable job applicants.

119. See *supra* notes 96-101 and accompanying text.

120. Inconsistency may also be a result of tension between state statutes that prohibit all restraint on trade and judicially carved-out exceptions for some non-competition agreements. See, e.g., MO. REV. STAT. § 416.031 (1997) (mandating that "[e]very contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful"). The tension between

blindly enforce any restrictive covenants on a theory of freedom to contract between capable actors or rational maximizers. Specifically, in varying degrees, courts balance the interests of the employer, the employee, and the general public when deciding to enforce a non-competition agreements.<sup>121</sup>

Even when an agreement is clear and unambiguous, the employee's voluntary assent to the agreement, by itself, is insufficient to justify enforcement. Absent findings of unconscionability, duress, or diminished capacity, courts give no weight to an employee's assent. Because this practice ignores the limits of cognition, it is unjustifiable. While concerns about the prevention of unfair competition and trade restraint indirectly explain why courts consider an employer's protectable interests, such policies fail to explain, directly or indirectly, why courts ignore an employee's signature on a lucid contract.

If individuals are rational maximizers, courts need not weigh the benefits and detriments of an agreement for an employee. However, in practice, courts do weigh the benefits and detriments of an agreement on behalf of an employee. Therefore, courts do not treat the employee as a rational maximizer. Further, courts do not justify, legitimize, or explain their forbearance from investigating an employee's assent to a non-competition agreement. As such, judicial opinions in this area implicitly and improperly rely upon the standard rational choice model. This poor reasoning, which relies upon faulty assumptions about human behavior, results in arbitrary and inconsistent treatment of non-competition agreements.

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state statutes' general prohibitions against all restraints on trade and courts' willingness to create exceptions to this rule results in inconsistent treatment because this area of law essentially becomes a collection of anomalies and exceptions. See MO. ANN. STAT. § 416.031 (West 1996). Other states with similar tensions between the judicial and legislative response to non-competition agreements include: Alabama, *compare* ALA. CODE § 8-1-1 (1993), with *Digitel Corp. v. DeltaCom, Inc.*, 953 F. Supp. 1486, 1496 (M.D. Ala. 1996); Georgia, *compare* GA. CONST. of 1983, art. III, § VI, ¶ V (c), with *Pitman v. Harbin Clinic P.A.*, 437 S.E.2d 619, 621-22 (Ga. Ct. App. 1993); Montana, *compare* MONT. CODE ANN. §§ 28-2-703, 704 (1999), with *Dobbins, DeGuire & Tucker, P.C. v. Rutherford, MacDonald & Olson*, 708 P.2d 577 (Mont. 1985); Ohio, *compare* OHIO REV. CODE ANN. § 1331.02 (West 1994), with *Nat'l Interstate Ins. Co. v. Perro*, 934 F. Supp. 883 (N.D. Ohio 1996); West Virginia, *compare* W. VA. CODE § 47-18-3 (1995), with *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906 (W. Va. 1982). See *supra* notes 55 and 68 and accompanying text.

121. See *supra* note 9 and accompanying text.



### *B. Inadequate Treatment*

When courts recognize their faulty assumptions and begin to base judgments on empirically accurate accounts of human cognition, decisions will be better reasoned, less arbitrary, and more consistent. However, as a result of these faulty assumptions, the current treatment of non-competition agreements is wholly inadequate. Judges fail to consider cognitive limits, and, therefore, courts do not consider whether an employee actually knew and fully understood the benefits and detriments of the non-competition agreements.

### *C. Solutions*

Consistent treatment is especially important in the adjudication of non-competition agreements. Employers must know how to create enforceable agreements in order to prevent unfair competition.<sup>122</sup> In order to prevent unreasonable restraints on future opportunities, employees need to know the rights and responsibilities that arise when they sign a non-competition agreement. Under the current system, employers and employees must muddle through inconsistent, poorly reasoned, and wholly inadequate case law and guess whether a court will enforce a non-competition agreement. The judiciary and legislature can take actions to alleviate some of these problems.

#### 1. Courts

Courts should employ recent discoveries about cognitive limits to explain and legitimize treatment of non-competition agreements. By reference to bounded rationality and other limits on cognitive capability, courts can justify examination of the reasonableness of assent to a non-competition agreement to determine its enforceability.<sup>123</sup> As such, judicial analysis will be better reasoned, less arbitrary, and, therefore, more consistent.

Courts should employ recent developments in cognitive

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122. Unequivocal and consistent regulation of non-competition agreements is crucial in today's information-driven economy.

123. See *supra* notes 71-107 and accompanying text.

psychology to achieve an empirically accurate analysis of the employee's assent to the terms of a non-competition agreement. For example, in order to diminish framing effects, courts should examine the methods employers utilize to describe the terms in non-competition agreements to employees.<sup>124</sup> Courts can then better determine whether an employee understood the consequences of the agreement and thus better decide what aspects of the agreement to enforce.

In light of other cognitive defects such as heuristics, over-optimism, defective risk assessment, faulty telescopic faculties, and bounded rationality, courts should question the substantive fairness of the agreement.<sup>125</sup> Courts should examine the following factors: (1) had the employee properly calculated the level of probability and risk of leaving the company, and how much additional consideration should she have bargained for given that probability; and (2) but for the impact of cognitive defects, would a rational employee have entered into the agreement. This examination will not only lead to enhanced judicial decisions, but also to more consistency because experiments demonstrate that cognitive errors and limitations are systematic.<sup>126</sup>

## 2. Legislature

Legislation is a more radical solution to the problem of inconsistency in adjudication.<sup>127</sup> Legislation has been used to curb freedom to contract in other areas including consumer warranties and contracts against public policies.<sup>128</sup> Legislation could provide uniform guidelines for employers, and thus they will be able to design enforceable agreements with greater certainty than under the current

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124. See *supra* notes 88-95 and accompanying text.

125. See *supra* Part II.B.

126. See *supra* note 65 and accompanying text.

127. Some states already have statutes regulating non-competition agreements, though they do not accomplish the goals set out in this Note. See, e.g., FLA. STAT. ANN. § 542.335 (West 1996). Additionally, courts often ignore state statutes governing non-competition agreements. See *supra* note 120 and accompanying text.

128. For example, contracts for illegal narcotics and for prostitution are addressed by criminal statutes.

system.<sup>129</sup> Finally, legislative regulation can provide procedural safeguards to protect employees from the problems that emerge due to cognitive limits and defects.

The legislature should require that employers grant employees a waiting period in which to decide whether to sign a non-competition agreement. Such a period would be similar to the twenty-one day waiting period required under the Age Discrimination in Employment Act (ADEA) for an employee's waiver of litigation rights under the ADEA<sup>130</sup> or the period required for many consumer transactions.<sup>131</sup> The mandatory grant of a waiting period imparts seriousness to employees, and, therefore, employees are more likely to actually read the agreement. The waiting period would also give employees more time to research the meaning of terms in non-competition agreements and consider the benefits and detriments of signing. Accordingly, employees would be less vulnerable to framing effects.<sup>132</sup> And while employees will always be impaired by bounded rationality, a waiting

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129. Legislation in this area would also resolve the tension between general statutory prohibitions against all restraints on trade and judicial exceptions to that rule. *See supra* note 120.

130. *See* 29 U.S.C. § 626(f) (1994), which states:

Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. a waiver may not be considered knowing and voluntary unless at a minimum—(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate . . . (E) the individual is advised in writing to consult with an attorney prior to executing the agreement; (F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement; (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired . . .

The waiting period for non-competition agreements may need to be significantly shorter than that of the ADEA because non-competition agreements are often a condition of employment, and employer's tend to hire new employees quickly.

131. *See* 16 C.F.R. § 429.1 (1999); UNIF. CONSUMER CREDIT CODE §§ 3.501-505 (1974). *See also* Bryon D. Sher, *The "Cooling-Off" Period in Door-to-Door Sales*, 15 UCLAL REV. 717 (1968); Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618 (1969).

132. *See supra* notes 88-95 and accompanying text.

period would reduce the effects of heuristic devices and allow employees to gather more information relevant to the decision making process.<sup>133</sup>

Next, the legislature should require specific, unambiguous, and conspicuous language depicting the legal consequences of signing a non-competition agreement, similar to the specific terminology required by the Uniform Commercial Code<sup>134</sup> and Magnuson-Moss Act for consumer warranty disclaimers.<sup>135</sup> Indeed, the unequal

133. See *supra* notes 81-87 and accompanying text.

134. See U.C.C. § 2-316(2), which states, in part:

Exclusion or Modification of Warranties . . .

(2) . . . [T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

135. See 15 U.S.C. § 2302(a) (1988), stating, in part:

Rules governing contents of warranties . . .

(a) Full and conspicuous disclosure of terms and conditions; additional requirements for contents.

In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require the inclusion in the written warranty of any of the following items among others:

(1) The clear identification of the names and addresses of the warranties.

(2) The identity of the party or parties to whom the warranty is extended.

(3) The products or parts covered. (4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warrant—at whose expense—and for what period of time.

(5) A statement of what the consumer must do and expenses he must bear.

(6) Exceptions and exclusions from the terms of the warranty. (7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty. . . .

(9) A brief, general description of the legal remedies available to the consumer. . . .

(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

bargaining power involved in a consumer transaction is similar to that of an employer-employee relationship. Requiring specific language in a non-competition agreement will impart seriousness to the employee and curb the negative effects that arise from adherence to defective telescopic faculties and risk assessment.<sup>136</sup>

Alternatively, the legislature should require that employers inform employees about their general rights and responsibilities in connection with the non-competition agreement, much like the informed consent doctors are generally required to receive from their patients.<sup>137</sup> Disclosure will curb framing effects, as well as reduce problems with over-optimism and other cognitive defects.

#### *D. Response to Paternalism Objection*

Some neoclassical economists will object to the use of cognitive psychology in formulating judicial guidelines and legislation as dangerous paternalism.<sup>138</sup> For the neoclassical economist, the law should respect and enforce people's decisions because they are rational actors, that is, they know what it is in their best interests. Some would object to the suggestions in this Note on a libertarian theory that any sort of legislative or judicial action that restrains or inhibits free will is inherently iniquitous and paternalistic.<sup>139</sup> Such objections do not go to the heart of the recommendations for legislation and further judicial examination of non-competition agreements.

First, the law is paternalistic in many other areas including the obvious cases involving children or incompetents.<sup>140</sup> Examples

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136. See *supra* notes 102-07 and text accompanying note 115.

137. See, e.g., ROBERT J. LEVINE, *ETHICS & REGULATION OF CLINICAL RESEARCH* (2d ed. 1986).

138. See, e.g., FRIEDMAN, *supra* note 56.

139. See CHARLES FRIED, *CONTRACT AS PROMISE* (1981); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). The neoclassical economist and libertarian view overlap extensively. More precisely, many libertarian and neoclassical economists value efficiency as a means to maximize individual freedom. Thus, economic freedom is a necessary precondition for political and individual freedom. Perhaps what most binds the neoclassical economists and the libertarians is the doctrine of negative liberty that states liberty is defined as freedom from external constraint on individual right of self-determination.

140. One could argue that simply because the law is paternalistic, it does not follow that the law ought to remain paternalistic.

include the following: mandatory savings plans for pension funds, the bankruptcy fresh start policy and the bankruptcy court's careful regulation of reaffirmation agreements between debtors and creditors,<sup>141</sup> mandatory seat belt<sup>142</sup> and motorcycle helmets,<sup>143</sup> and prohibitions against suicide.<sup>144</sup>

Second, assuming absolute freedom was possible, intervention into one's freedom is often necessary to further an individual's own good or well-being. In defending paternalism on a theory of personal integrity, one might suggest that protection or paternalism is necessary to assure that too much liberty is not given away.<sup>145</sup> Empirical evidence demonstrating that actors are systematically prone to cognitive defects and bounded rationality legitimizes, in many respects, the notion that some form of paternalism is necessary to make sure that actors receive adequate and fair treatment from the legal system.

Finally, excessive or arbitrary legal paternalism is undesirable because most of us want to live in a society in which the legal system respects our decisions and permits us to carry out our own projects and aspirations.<sup>146</sup> Because experiments have shown that cognitive error is systematic, it follows that regulations informed by those cognitive errors should also be systematic. Nevertheless, excess

141. See 11 U.S.C. § 524 (1988), stating in part:

Effect of discharge . . .

(a) A discharge in a case under this title (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged . . . whether or not discharge of such debt is waived; (2) operates as an injunction against the commencement or continuation of any action, the employment of process, or an act, to collect, recover, or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived . . .

142. See, e.g., CAL. VEH. CODE. § 27315 (West 1999).

143. See, e.g., ALA. CODE § 32-5A-245 (1993); CAL. VEH. CODE § 27803 (West 1999); NEB. REV. STAT. § 60-6,279 (1998).

144. See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

145. There may be some circularity to this argument: that is, in order to ensure that individuals do not bargain away their freedom, courts and legislatures sometimes must restrain or limit some of that freedom.

146. Perhaps paternalistic objectives in the hands of legislatures or the judiciary are most dangerous when those objectives are coupled with irrational stereotypes about the inferiority of a race, class, or gender.

paternalism is an issue because legislatures are far removed from the particular facts of each case and may enact overinclusive legislation.<sup>147</sup>

For that reason, this Note suggests a two-tiered approach to the regulation of non-competition agreements. In the first tier, legislation provides broad procedural safeguards to structure the transaction between the employer and employee in order to reduce the effects of cognitive error and bounded rationality. In the second tier, the judiciary should make determinations about the substantive fairness and objective reasonableness of the agreement, in light of any cognitive limits affecting the employee's decision to sign. Judges are in the best position to analyze the transaction and determine whether an agreement should be enforced, modified, or invalidated.<sup>148</sup>

## V. CONCLUSION

Surely people want to think of themselves as rational decision makers. Since at least the Age of Enlightenment, people have attempted to know and understand every aspect of the universe, believing that they are somehow getting closer to perfect understanding. Perhaps over-optimism is our collective cognitive defect.

Needless to say, the notion that all people are rational maximizers underlies our entire legal system. According to traditional contract analysis, individuals rationally enter into agreements, and thus courts should enforce them. That is the foundation of our cherished freedom to contract. A brief look into a first-year contracts course

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147. This problem or risk is inherent in all legislative schemes.

148. Justice Stevens' concurrence in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 514 (1989), provides the theoretical grounding for this approach. Stevens stated that:

[T]his [affirmative action case] involves an attempt by a legislative body, rather than a court, to fashion a remedy for a past wrong. Legislatures are primarily policymaking bodies . . . [t]he constitutional prohibitions against the enactment of ex post facto laws . . . reflect a valid concern about the use of the political process to punish . . . past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed.

demonstrates that the reasons courts enforce some agreements, modify other agreements, and void other agreements are inconsistent with the standard or classical assumptions of contract law. Absent explicit reference to cognitive limits, judicial reasoning will remain inconsistent and arbitrary. Courts, as well as legislatures must begin to use empirically accurate accounts of human cognition in order to produce more consistent and adequate treatment of agreements.

The dangers of maintaining false underlying assumptions are especially obvious and alarming in the area of non-competition agreements. As a result of inconsistent judicial decisions in this area of law, employers and employees are unable to predict their legal rights and responsibilities and, therefore, are unsure how to best protect their competing interests. Moreover, because employers have started asking employees with little, if any, experience to sign non-competition agreements, employees need more protection from the courts than ever before. Absent explicit reference to limits on human cognition, courts can not provide consistent or adequate treatment of non-competition agreements.