

MAKING NON-COMPETES UNENFORCEABLE

Viva R. Moffat^{*}

The law of employee non-competition agreements is a mess. Differing standards, unpredictability, and uncertainty within and between jurisdictions is the norm. This diversity of state law provides an incentive to forum shop, which leads to conflict of laws and parallel litigation. Conflict-of-laws doctrine, comity principles, and abstention doctrine all fail to satisfactorily address these problems. Uniformity in non-compete law, whether achieved through the uniform act process, a model act, or otherwise, is thus desirable. Moreover, a uniform rule of unenforceability would do the most to reduce the disadvantages of the diversity of state law and to facilitate the flow of commercial transactions because such a rule is discrete, easily applied, the least likely to be subject to interpretive changes over time, and promotes a free market in labor.

^{*} Associate Professor, University of Denver Sturm College of Law. This Article has benefitted greatly from feedback I received at the Intellectual Property Scholars Conference and the Rocky Mountain Junior Scholars Conference and from conversations I have had with Rachel Arnow-Richman, Bernard Chao, Alan Chen, Sam Kamin, Paul Ohm, Harry Surden, and Ryan Vacca. I am grateful for outstanding research assistance from Heidi Haberman and Amanda Walck.

TABLE OF CONTENTS

INTRODUCTION	940
I. THE DIVERSITY OF STATE LAW ON NON-COMPETES	943
A. One End of the Spectrum: Non-Competition Agreements Are Unenforceable	944
B. The Other End of the Spectrum: Reasonable Non-Competition Agreements Are Enforceable	946
C. The Middle of the Road: Varying Restrictions on the Enforceability of Non-Competes	951
II. THE DISADVANTAGES ARISING FROM THE DIVERSITY IN STATE LAW	952
A. Conflict-of-Laws Principles and Choice-of-Law Problems	953
1. When There Is No Choice-of-Law Clause	955
2. When There Is a Choice-of-Law Clause	957
B. Diversity in State Law and Races to the Courthouse	959
III. THE STATES SHOULD ADOPT A UNIFORM RULE OF UNENFORCEABILITY OF EMPLOYEE NON-COMPETITION AGREEMENTS	965
A. The Rule of Unenforceability	965
B. A Uniform Rule of Unenforceability Is Both Desirable and Practicable	969
1. Desirability	969
a. Avoiding the Disadvantages of Diversity in State Law	969
b. Facilitating the Flow of Commercial Transactions	977
c. A Rule of Unenforceability Is the Substantively Preferable Rule	978
2. Practicability	980
IV. THE UNIFORM ACT PROCESS IS NOT PERFECT	982
CONCLUSION	984

INTRODUCTION

In California, non-competition agreements—agreements by employees not to compete with their employers following the termination of employment—are unenforceable. As a result, a software engineer working for Google in Silicon Valley, for example, can go work for Microsoft immediately after leaving Google. A software engineer working for Google in Virginia, on the other hand, may be subject to enforceable post-employment restrictions that prohibit her from working for Microsoft (or any other competitor of Google) for some period of time.¹ Thus, the California employee will have jobs and opportunities not available to the Virginia employee. Indeed, the Virginia employee may be unable to accept a job in

1. This is purely a hypothetical. I have no information about Google's practice concerning non-competes. There is, however, one notable case between Google and Microsoft related to an employee non-compete. *Google, Inc. v. Microsoft*, 415 F. Supp. 2d 1018, 1020 (N.D. Cal. 2005) (involving Google contesting validity of non-compete drafted by Microsoft and imposed on a Microsoft employee).

2012] MAKING NON-COMPETES UNENFORCEABLE 941

her chosen profession for the period of the restriction because such agreements are regularly enforced in Virginia based on a multi-factor balancing test.

As this example suggests, state law governing non-competition agreements varies significantly. Although no jurisdiction follows an unfettered private ordering approach, some states will enforce all “reasonable” non-competition agreements. Other states subject such agreements to more rigorous scrutiny, by balancing the employer’s protectable interest against the employee’s interest and also by evaluating the public interest. A number of states prohibit non-competition agreements with a set of exceptions. A few states, including California, refuse to enforce the agreements entirely.

Now imagine Google’s in-house counsel attempting to draft employment agreements for Google’s employees in its many offices, including California and Virginia. In drafting the agreements for the two software engineers, even if they occupy the same position with the same title and the same benefits, the in-house counsel will have to determine how the agreements should differ. The attorney must determine the content of the different states’ laws and then make decisions about drafting: Should the agreements be tailored to each state’s law? Should a non-competition provision be included in the California employee’s agreement, notwithstanding its unenforceability? Should a choice-of-law clause be included, and if so, what state’s law should be selected? These options give rise to the possibility of strategic selection of state law on the part of employers and their lawyers (who nearly always draft the employment agreements). There is evidence that this strategic selection is occurring, leading to concerns about a “race to the bottom” in state employment law.²

Google’s corporate headquarters are in California, and it is incorporated in California. It therefore might make sense for Google to select California law for all of its agreements. But Google may decide that it does not like California’s rule concerning non-competition agreements, and so it might give employees in different states differing agreements. Suppose that the Virginia employee’s contract contains both a non-competition provision prohibiting employment with any other search engine entity for two years and a Virginia choice-of-law clause.

2. Timothy Glynn has argued that the conditions are ripe for just such a race to the bottom, with the possibility of states enacting law favorable to employers in the hopes of attracting their law business. Timothy Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381, 1384 (2008) (“These developments are important because law-as-commodity competition, if it takes hold in the employment context, could have dangerous implications for workers—frustrating state-level employment law reform efforts, and, in some instances, speeding the race to the regulatory bottom.”). Larry Ribstein and Erin O’Hara are more sanguine, describing the situation as a “market for law” and advocating for courts to enforce choice-of-law clauses in order to “enhance jurisdictional competition and help restore predictability to the conflict of laws problem.” Erin Ann O’Hara & Larry E. Ribstein, *Conflict of Laws and Choice of Law*, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 631, 631 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); see also Larry E. Ribstein & Erin A. O’Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661 [hereinafter Ribstein & O’Hara, *Corporations and the Market for Law*].

Further suppose that the employee wishes to join Microsoft's search engine team in California. What state's law of non-competes ought to apply? Should the employee file a declaratory judgment action in California, seeking the application of California law (and thus attempt to void the non-compete)? What if Google simultaneously files a breach-of-contract action in Virginia?

Though hypothetical, this situation presents a very plausible scenario. These considerations and the resulting legal maneuvering are common. Indeed, there has been a "rise of interjurisdictional disputes involving [non-compete] enforcement."³ Disparity in state law is not, in and of itself, a bad thing. But the variation in the law of non-competes, along with the increasingly national employment market, have led to intractable conflict-of-laws problems and to interstate concerns when the parties forum shop and commence parallel litigation in more than one state. In these cases, courts have turned to conflicts doctrine to determine which state law should apply and to abstention and comity principles to address the interstate disputes. None of these doctrines produces satisfying, predictable, or certain outcomes, however.

Presented with a dispute flowing out of a scenario like the one described above, a court faces some difficult decisions, such as determining the content and intent of the contract, determining the content of various states' laws, and resolving both the conflict-of-laws issues and the substantive question of the enforceability of the agreement (which can often be a close call). The result is unpredictability on every level—for employees, employers, and courts. This uncertainty has only increased as more entities operate on a nationwide basis and employees are increasingly mobile and willing to move across state boundaries.

This unpredictability, and its accompanying costs, has become enough of a problem that a uniform approach ought to be adopted. Additionally, the benefits of uniformity in the law are much more likely to accrue with a straightforward rule of unenforceability. This rule could be adopted through the Uniform Act process, by reference to a model act, or simply as a result of the dissemination of information about the advantages of uniformity and the benefits of a rule of unenforceability.⁴ Regardless of how it is achieved, a rule of unenforceability would virtually eliminate the myriad disadvantages of diversity in state law in this context.

3. Glynn, *supra* note 2, at 1385.

4. A rule passed at the national level would, obviously, achieve the same result I suggest here and I would welcome it. I do not, however, propose it as a potential solution simply because it is almost certainly politically, if not constitutionally, untenable. Even if a congressional ban on non-compete enforcement were adopted, it would apply only to interstate commerce and would thus not address the many intrastate non-compete disputes. It would thus be only a partial solution to the problems that exist. It should be noted that there have been some proposals for nationalizing workplace law entirely. *See, e.g.*, Jeffrey M. Hirsch, *Revolution in Pragmatist Clothing: Nationalizing Workplace Law*, 61 ALA. L. REV. 1025, 1028 (2010) ("[R]ather than continuing to view the workplace as it used to exist, we should instead recognize that the federal government is the best entity to regulate the workplace as it now exists.").

Part I describes the first problem outlined above: the vast disparities in the state law treatment of non-competition agreements. Part II discusses the conflict-of-laws and state-to-state problems that have arisen because of the diversity of state law. Part III of the Article explains why the current doctrinal tools—conflicts law, comity principles, and abstention doctrine—fail to address the concerns identified in Parts I and II and why uniformity is the best way to ameliorate those concerns. Finally, Part IV addresses some of the possible objections to uniformity in this area of the law and then concludes that uniform state law is the best of the imperfect solutions.

I. THE DIVERSITY OF STATE LAW ON NON-COMPETES

The law governing non-competition agreements is a mess.⁵ There is wide state-to-state variation in the treatment of non-compete provisions. Some states routinely enforce “reasonable” non-competition agreements while other states refuse to enforce virtually all such provisions.⁶ Many others are somewhere in the middle: scrutinizing non-competition agreements more closely than other contracts but allowing enforcement of many.⁷ Some states have statutes governing the enforceability of non-competes, whereas others have left the question of enforceability to common-law development.⁸ These differences are substantial and result in significantly different legal rights and obligations among the states.⁹ Notably, however, not a single state takes a pure private ordering approach; the extra scrutiny given to these agreements reflects the philosophical and public policy tensions that inhere in attempts to impose post-employment restrictions on employees.

5. Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 705 (2008) (“Academics and practitioners alike have examined the subject. The reason for such interest is obvious: many can see an upcoming disaster. The noncompete agreement, which was born centuries ago against a very different social backdrop, fails to comport with modern notions of employment. Employees today are highly mobile: across employers, across careers, and across the world. . . . Although its weaknesses have been apparent for some time, surprisingly few courts have attempted to reform the analytical frameworks through which non-competes are examined. Instead, repeated attempts to salvage the covenant have only managed to produce a morass of laws, doctrines, and analyses.”).

6. *Id.* at 677–78.

7. See Gillian Lester & Elizabeth Ryan, *Choice of Law and Employee Restrictive Covenants: An American Perspective*, 31 COMP. LAB. L. & POL’Y J. 389, 392 (2010) (“A key point is that states vary widely in their friendliness to employee non-compete agreements. A few states, such as California, have such a strong policy favoring employee mobility that they either prohibit or very strictly limit such agreements.”).

8. Pivateau, *supra* note 5, at 678.

9. Glynn, *supra* note 2, at 1420 (describing the variety of state approaches and concluding that “in practice, state treatment lies along a wide spectrum from near-certain nonenforcement to frequent enforcement.”). *But see* Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 754 (2011) (describing variation in the law of non-competes but stating that “most states will moderately enforce noncompetes using the standard reasonableness test”).

A. One End of the Spectrum: Non-Competition Agreements Are Unenforceable

A few states have a strong rule against the enforceability of non-competes. California and North Dakota both have statutes rendering virtually all non-competition agreements unenforceable, and Georgia has a similar, though a bit more vague, constitutional provision.¹⁰ Montana and Oklahoma have statutes similar to those in California and North Dakota,¹¹ but the courts in Montana and Oklahoma have interpreted the statutes to permit enforcement of non-competes in some instances.¹²

The California statute has garnered a great deal of attention and generated significant scholarly debate.¹³ The California rule against the enforceability of non-competes is codified in section 16600 of the Business & Professions Code, which states that “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”¹⁴ The California courts “have consistently affirmed that section 16600 evinces a settled legislative policy in favor of open competition and employee mobility.”¹⁵ In *Edwards v. Arthur Andersen LLP*, the California Supreme Court emphatically reaffirmed the strong version of the rule, rejecting a “narrow-restraint” exception developed by the Ninth Circuit. The Ninth Circuit had discussed two cases that it believed carved out an exception to the broad rule in section 16600 prohibiting enforcement of the agreements.¹⁶ The California Supreme Court made its interpretation of the statute and its view of the statute’s role clear: “We reject Andersen’s contention that we should adopt a narrow-restraint exception to section 16600 and leave it to the Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600.”¹⁷ Thus, the California Supreme Court has made it clear that the rule against the enforceability of non-competes in that state takes the strong form.

10. GA. CONST. art. III, § 6, ¶ V(c) (prohibiting the general assembly from authorizing contracts that inhibit competition); CAL. BUS. & PROF. CODE § 16600 (2012) (voiding contracts that prohibit anyone “from engaging in a lawful profession, trade, or business of any kind”); N.D. CENT. CODE ANN. § 9-08-06 (2012); see *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 296 (Cal. 2008) (reaffirming the strong version of the California rule).

11. MONT. CODE ANN. § 28-2-703 (2012); OKLA. STAT. tit. 15, § 217 (2012).

12. See *Dobbins, Deguire & Tucker, P.C. v. Rutherford, MacDonald & Olson*, 708 P.2d 577 (Mont. 1985); *Thayne A. Hedges Reg’l Speech & Hearing Ctr., Inc. v. Baughman*, 996 P.2d 939 (Okla. Civ. App. 1998).

13. See *infra* Parts II.B, III.B.1.c.

14. CAL. BUS. & PROF. CODE § 16600. The Code contains exceptions for non-competition agreements in the sale or dissolution of corporations, see *id.* § 16601, partnerships, see *id.* § 16602, and limited liability companies, see *id.* § 16602.5.

15. *Edwards*, 189 P.3d at 288. The court concluded that “section 16600 prohibits employee noncompetition agreements unless the agreement falls within a statutory exception.” *Id.* at 285.

16. *Id.* at 290–91.

17. *Id.* at 292.

2012] MAKING NON-COMPETES UNENFORCEABLE 945

This rule is expressed in public-policy terms, and the rule against enforcement of non-competes was deemed strong even before the *Edwards* decision.¹⁸ Historically, non-competition agreements, as restraints on trade, were upheld under the common law if the restraints were reasonable.¹⁹ The California statute abrogated the common-law rule.²⁰ In *Edwards*, the court described this as a “settled legislative policy in favor of open competition and employee mobility.”²¹ According to the court, the “law protects Californians and ensures that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice. It protects the important legal right of persons to engage in businesses and occupations of their choosing.”²² The *Edwards* court emphasized the fundamental nature of California’s policy of voiding non-competition agreements.²³

North Dakota has taken a similarly strong position against the enforceability of non-competes, and its statute and policy derive from the same source as California’s, the Field Code.²⁴ Except in connection with the sale of a business or the dissolution of a partnership, non-competition agreements are void in North Dakota: “Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void”²⁵ This statute reflects North Dakota’s “long-standing public policy against restraints upon free trade.”²⁶ This policy is directed at the public interest: “Although the statute may appear to protect the party against whom a contract not to compete is sought to be enforced, statutes making void contracts in restraint of trade are based upon consideration of public policy and not necessarily upon consideration for the party

18. 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, 607 (1999) (“Other than two statutory exceptions, . . . the statute’s prohibition is essentially unqualified.”).

19. *Hill Med. Corp. v. Wycoff*, 103 Cal. Rptr. 2d 779, 783 (Ct. App. 2001).

20. *Id.* (“In contrast, however, California has settled public policy in favor of open competition.”).

21. 189 P.3d at 288; *see also* *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573, 577 (Ct. App. 1994) (noting that the California policy is based upon the desire to encourage competition and permit “every citizen [to] retain the right to pursue any lawful employment and enterprise of their choice”).

22. *Edwards*, 189 P.3d at 288 (citations omitted) (internal quotation marks omitted).

23. *Id.* at 291–92 (“Section 16600 is unambiguous, and if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect. We reject Andersen’s contention that we should adopt a narrow-restraint exception to section 16600 and leave it to the Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600.”).

24. *See Warner & Co. v. Solberg*, 634 N.W.2d 65, 70 n.1 (N.D. 2001) (“Section 9-08-06, N.D.C.C., is derived from the Field Code, the same source as Section 16600 of the California Business and Professional Code, and the language of the California statute is nearly identical to N.D.C.C. § 9-08-06.”).

25. N.D. CENT. CODE § 9-08-06 (2012).

26. *Warner & Co.*, 634 N.W.2d at 70.

against whom relief is sought.²⁷ The public interest involves the public's ability to access the services provided by the employee unencumbered by contractual restrictions.²⁸ The policy rests on the belief that an absence of restrictions on the free flow of labor will promote commercial activity.²⁹ For example, the North Dakota courts have applied the strong form of this rule and have rejected exceptions for relatively narrow non-solicitation agreements.³⁰

Thus, employers and employees in both California and North Dakota, along with a few other states,³¹ have operated for a long period of time under a legal regime in which virtually all non-competition agreements are unenforceable.³²

B. The Other End of the Spectrum: Reasonable Non-Competition Agreements Are Enforceable

At the other end of the spectrum of enforceability, many states leave the evaluation of non-competition agreements to common-law development. Although the particulars differ to some extent, most of these states apply a rule of reason (the same common-law rule of reason rejected by California and some of the states

27. *Id.*

28. *Id.*; see also *CDI Energy Servs. v. W. River Pumps, Inc.*, 567 F.3d 398, 404 (8th Cir. 2009) (applying North Dakota law) (“North Dakota deems the public’s access to services to be a more pressing policy concern than the details of the relationship between a particular employee and employer.”).

29. *Herman v. Newman Signs, Inc.*, 417 N.W.2d 179, 181 (N.D. 1987) (“The intention of Section 9-08-06, N.D.C.C., is to promote commercial activity by restricting the ability of individuals to form agreements which limit commercial exchange or more specifically limit agreements not to compete.”).

30. *Warner & Co.*, 634 N.W.2d at 70–71 (rejecting the Eighth Circuit’s conclusion that less burdensome restrictions may survive, referring to *Kovarik v. American Family Ins. Grp.*, 108 F.3d 962, 965 (8th Cir. 1997)).

31. Georgia, Montana, and Oklahoma also have statutes establishing the virtual unenforceability of non-competes. See GA. CONST. art. III, § 6, ¶ V(c); MONT. CODE ANN. § 28-2-703 (2012); OKLA. STAT. tit. 15, § 217 (2012).

32. Of course, this does not prevent employers from including non-competition provisions in employment agreements in California or North Dakota. Litigation over the validity and enforceability of non-competes in both states indicates that employers still attempt to impose such restrictions, perhaps for the *in terrorem* effects, or perhaps in conjunction with a choice-of-law provision selecting the law of another state. See Matt Marx et al., *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875, 875–89 (2009). The facts in *Edwards v. Arthur Andersen LLP*, for example, do not indicate why Arthur Andersen included a covenant not to compete in Edwards’s employment agreement, but the provision was included in the contract, which was presented to Edwards by the Los Angeles office of the company. 189 P.3d 285, 285 (Cal. 2008). The rule against the enforceability of non-competes has been in force in California since 1872, when the predecessor sections to the current statute were enacted. *Bosley Med. Grp. v. Abramson*, 161 Cal. App. 3d 284, 291 (1984) (holding a non-compete provision in a stock purchase agreement unenforceable because it was a “sham” agreement “devised to permit plaintiffs to accomplish that which the law otherwise prohibited: an agreement to prevent defendant from leaving plaintiff medical group and opening a competitive practice”).

2012] MAKING NON-COMPETES UNENFORCEABLE 947

described in the previous Section) and regularly enforce non-competition agreements. All states, however, scrutinize non-competes more closely than ordinary commercial contracts by requiring slightly different standards of assent, applying a balancing test, requiring the employer to prove that it has a “protectable interest,”³³ or requiring more than a “peppercorn” of consideration.³⁴ That is, no state takes a pure private-ordering approach. This additional judicial scrutiny reflects the tensions inherent in the imposition of non-competes, and the result is an ad hoc balancing test that creates a great deal of uncertainty.

The *Restatement of Contracts* sets forth a test for the enforceability of non-competes that reflects the general common-law rule-of-reason approach, under which a court must consider: (1) whether “the restraint is greater than is needed to protect the [employer’s] legitimate interest”; (2) the hardship to the employee; and (3) “the likely injury to the public.”³⁵ The recently drafted *Restatement (Third) of Employment Law* also contains a set of provisions concerning non-competes, and it sets forth a similar balancing approach.³⁶ Both are putative restatements of the law; however, as demonstrated here, there is hardly a law of non-competes to be restated or summarized.³⁷

Although there is no single approach, many jurisdictions do employ the reasonableness balancing formulation.³⁸ For example, the Virginia Supreme Court described its test for enforceability as follows:

This Court evaluates the validity and enforceability of restrictive covenants in employment agreements using well settled principles. First, covenants in restraint of trade are not favored, will be strictly construed, and, in the event of an ambiguity, will be construed in favor of the employee. Second, the employer bears the burden to show that the restraint is no greater than necessary to protect a legitimate business interest, is not unduly harsh or

33. Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 395 (2006) (“Across the country, however, postemployment covenants not to compete are subject not merely to the ordinary requirements of contract law but to additional substantive conditions that external law imposes on these agreements in particular.”).

34. See, e.g., *Lucht’s Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058, 1061 (Colo. 2011).

35. RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981). The language of the *Restatement* is quite awkward, and many states use a variation on the approach.

36. RESTATEMENT (THIRD) OF EMPLOYMENT LAW (draft on file with author).

37. In addition, the entire project of restating the law of employment has been the subject of a great deal of controversy. See, e.g., Michael J. Zimmer, *The Restatement of Employment Law is the Wrong Project*, 13 EMP. RTS. & EMP. POL’Y J. 205, 205 (2009) (“As the project has progressed, I am only further convinced that a *Restatement* of the common law was the wrong place for the ALI to start work in the labor and employment law area.”).

38. Piveteau, *supra* note 5, at 678.

oppressive in curtailing an employee's ability to earn a livelihood, and is reasonable in light of sound public policy.³⁹

The New York Court of Appeals set forth the common-law reasonableness standards for enforceability of non-competes as follows:

A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public. A non-compete agreement must also be reasonably limited temporally and geographically.⁴⁰

Some states have non-compete statutes that essentially restate the common-law rule of reason. The Texas statute, for example, provides:

[A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.⁴¹

Notwithstanding the fact that a majority of states apply some version of this "reasonableness" approach,⁴² there is hardly uniformity or predictability even

39. *Modern Env'ts, Inc. v. Stinnett*, 561 S.E.2d 694, 696 (Va. 2002) (citations omitted) (holding that the employer did not carry "its burden of showing that the restrictive covenant at issue is reasonable and no greater than necessary to protect a legitimate business interest"); *see also* *Roanoke Eng'g Sales Co., v. Rosenbaum*, 290 S.E.2d 882, 884 (Va. 1982) (stating that the court should ask whether the restraint is reasonable (1) "from the standpoint of the employer . . . in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest"; (2) "[f]rom the standpoint of the employee . . . in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood"; and (3) "from the standpoint of a sound public policy").

40. *Natural Organics, Inc. v. Kirkendall*, 860 N.Y.S.2d 142, 143 (App. Div. 2008) (citations omitted) (internal quotation marks omitted) (holding the non-compete unenforceable because there was "no legitimate employer interest to protect").

41. TEX. BUS. & COM. CODE ANN. § 15.50 (2012). The Texas Supreme Court recently modified its interpretation of the non-compete statute:

[A]n at-will employee's non-compete covenant becomes enforceable when the employer performs the promises it made in exchange for the covenant. In so holding, we disagree with [our earlier language] stating that the Covenants Not to Compete Act requires the agreement containing the covenant to be enforceable the instant the agreement is made.

Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 646 (Tex. 2006) (footnote omitted). Texas is considering proposed legislation to place physicians under the requirements of section 15.50. S.B. 894, 82d Leg., Reg. Sess. (Tex. 2011). Texas also recently passed legislation banning non-competes for physicians employed by the state. S.B. 1303, 82d Leg., Reg. Sess. (Tex. 2011).

42. Bishara, *supra* note 9, at 754.

2012] MAKING NON-COMPETES UNENFORCEABLE 949

among those states. This is a result of applying a rule-of-reason standard⁴³ and of the variability of the specifics of the rule and its exceptions in each state.⁴⁴

For example, in some states the courts will apply the “blue pencil” doctrine, reforming the contract to bring it within the rule of reason.⁴⁵ Other states applying the common-law approach refuse to modify non-competes after the fact.⁴⁶ The First Circuit summarized the different approaches:

Courts presented with restrictive covenants containing unenforceable provisions have taken three approaches: (1) the “all or nothing” approach, which would void the restrictive covenant entirely if any part is unenforceable, (2) the “blue pencil” approach, which enables the court to enforce the reasonable terms provided the

43. One court described the difficulty of applying a reasonableness standard to non-competes as follows:

Reasonableness, in the context of restrictive covenants, is a term of art, although it is not a term lending itself to crisp, exact definition. Reasonableness, as a juridical term, is generally used to define the limits of acceptability and thus concerns the perimeter and not the structure of the area it is used to describe. This general observation is nowhere more particularly true than with respect to a restrictive covenant. Once a contract falls within the rule of reason, the rule operates only as a conclusive observation and provides no further guidance. A court’s manipulation of the terms of an anticompetitive covenant, where none of its provisions standing alone is an inherently unreasonable one, cannot be accomplished with reasonableness as the standard. It is like being in the jungle—you’re either in or you’re out, and once you’re in the distinction is worthless for establishing your exact location.

Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 911 (W. Va. 1982).

44. *See, e.g., Lester & Ryan, supra* note 7, at 392–93 (“Moreover, even among states more willing to enforce reasonable agreements, the ease of creating and enforcing restrictive covenants varies widely. Some states operate under constitutional limitations that impose strict limits on enforcement, some require consideration, some statutorily limit duration, some limit protectable interests (other than trade secrets) to an employer’s well-established customer relationships, some distinguish between high-level employees and others, some permit, and others prohibit, reformation or blue-penciling.” (footnotes omitted)). Norman Bishara describes a “national status quo where . . . state law and human capital policy related to noncompetes varies such that the enforceability of a post-employment restriction on an employee’s mobility will be uncertain.” Bishara, *supra* note 9, at 756.

45. *See Pivateau, supra* note 5, at 687–88 (citing Minnesota, Illinois, New Jersey, and Pennsylvania as examples of states in which courts use a “liberal” blue-pencil doctrine to “enforce [non-competes] to the extent that is reasonable under the circumstances” “rather than deem the covenant void ab initio”). Some states will apply the blue-pencil doctrine only under certain circumstances. *See id.* at 683–87 (describing this approach in a variety of states, including Indiana, Arizona, and West Virginia).

46. *Id.* at 682–83 (discussing the “no modification” approach to non-competes taken by Georgia, Virginia, and Wisconsin). Wisconsin has codified this rule. WIS. STAT. § 103.465 (2012) (“Any covenant [not to compete] . . . 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.”).

covenant remains grammatically coherent once its unreasonable provisions are excised, and (3) the “partial enforcement” approach, which reforms and enforces the restrictive covenant to *the extent it is reasonable*, unless the “circumstances indicate bad faith or deliberate overreaching” on the part of the employer.⁴⁷

Another example is the split on whether continued employment constitutes consideration for a non-compete entered into once the employment relationship has begun. In Colorado, for instance, the Supreme Court recently reversed a Court of Appeals decision requiring additional consideration, above and beyond continued employment, for a non-compete entered into after the commencement of employment.⁴⁸ The Colorado Court of Appeals held that “when an employee continues his or her job without receiving additional pay or benefits when a noncompete agreement is signed, the agreement lacks consideration.”⁴⁹ The Colorado Supreme Court, however, held on more traditional contract grounds that continued employment (in an at-will situation) was sufficient consideration.⁵⁰ These two different opinions demonstrate the difficulties in enforcing non-competes and reflect the variations in state law on this point.⁵¹

Another difference arises in how courts analyze non-compete agreements in specific professions. New York courts, for example, examine non-compete agreements closely but are less skeptical of agreements not to compete between

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

48. *Lucht’s Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058, 1059–60 (Colo. 2011).

49. *Lucht’s Concrete Pumping, Inc. v. Horner*, 224 P.3d 355, 358 (Colo. App. 2009).

50. *Lucht’s Concrete*, 255 P.3d at 1061 (“Because an employer may terminate an at-will employee at any time during the employment relationship as a matter of right, its forbearance from terminating that employee is the forbearance of a legal right. As such, we find that such forbearance constitutes adequate consideration to support a noncompetition agreement with an existing at-will employee.”).

51. A number of states require additional consideration, consistent with the Colorado Court of Appeals’ approach, while others take the more classical contract view of consideration in this context. *Compare, e.g.*, *Nat’l Recruiters v. Cashman*, 323 N.W.2d 736, 741 (Minn. 1982), *Access Organics, Inc. v. Hernandez*, 175 P.3d 899, 903 (Mont. 2008), *Stevenson v. Parsons*, 384 S.E.2d 291, 293 (N.C. Ct. App. 1989), *George W. Kistler, Inc. v. O’Brien*, 347 A.2d 311, 316 (Pa. 1975), *Poole v. Incentives Unlimited, Inc.*, 548 S.E.2d 207, 209 (S.C. 2001), *Martin v. Credit Prot. Ass’n*, 793 S.W.2d 667, 670 (Tex. 1990), *Labriola v. Pollard Grp., Inc.*, 100 P.3d 791, 794–96 (Wash. 2004); *PEMCO Corp. v. Rose*, 257 S.E.2d 885, 890 (W. Va. 1979), *and Worley v. Wyo. Bottling Co.*, 1 P.3d 615, 621 (Wyo. 2000) (all requiring additional consideration for “mid-stream” non-competes), *with Research & Trading Corp. v. Powell*, 468 A.2d 1301, 1305 (Del. Ch. 1983), *Ackerman v. Kimball Int’l, Inc.*, 652 N.E.2d 507, 509 (Ind. 1995), *Sherman v. Pfefferkorn*, 135 N.E. 568, 569 (Mass. 1922), *Brignull v. Albert*, 666 A.2d 82, 84 (Me. 1995), *Camco, Inc. v. Baker*, 936 P.2d 829, 831–32 (Nev. 1997), *Lake Land Emp’t Grp. of Akron, LLC v. Columer*, 804 N.E.2d 27, 31–32 (Ohio 2004), *and Summits 7, Inc. v. Kelly*, 886 A.2d 365, 373 (Vt. 2005) (all consistent with the newly announced Colorado rule, not requiring additional consideration).

2012] MAKING NON-COMPETES UNENFORCEABLE 951

professionals. For those agreements, New York courts “have given greater weight to the interests of the employer in restricting competition within a confined geographical area.”⁵²

C. The Middle of the Road: Varying Restrictions on the Enforceability of Non-Competes

Some states detail the treatment of non-competes in statutes with a variety of specific requirements. In these jurisdictions, the statutes often establish a strong public policy against the enforcement of non-competition agreements, yet permit enforcement under some circumstances.

Section 8-2-113 of the Colorado Revised Code, for example, provides that “[a]ny covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void . . .”⁵³ The statute then goes on, however, to carve out exceptions for (1) contracts for the purchase and sale of a business or its assets;⁵⁴ (2) contracts for the protection of trade secrets;⁵⁵ (3) contracts providing for training or education expenses for an employee;⁵⁶ and (4) “[e]xecutive and management personnel and officers and employees who constitute professional staff to executive and management personnel.”⁵⁷ The statute makes Colorado’s public-policy stance clear, but the case law concerning these exceptions is limited, and thus the requirements are not fully explicated. Accordingly, notwithstanding the relatively detailed statute, Colorado law concerning the enforceability of non-competition agreements is unclear. Because of this, it is difficult to predict how a Colorado court will resolve a dispute over an agreement.⁵⁸

Louisiana also has a fairly detailed statute⁵⁹ and somewhat inconclusive case law. The state has “a strong public policy . . . disfavoring non-competition agreements between employers and employees . . . based on the state’s desire to prevent an individual from contractually depriving himself of the ability to support himself and consequently becoming a public burden.”⁶⁰ Both the statute concerning non-competes and the agreements themselves are strictly construed because of public-policy concerns.⁶¹

52. BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1223 (N.Y. 1999).

53. COLO. REV. STAT. § 8-2-113(2) (2012).

54. *Id.* § 8-2-113(2)(a). Note that this is similar to the exceptions under California and Montana law.

55. *Id.* § 8-2-113(2)(b).

56. *Id.* § 8-2-113(2)(c).

57. *Id.* § 8-2-113(2)(d).

58. See generally Daniel F. Warden, COLO. NON-COMPETE L. BLOG, <http://www.coloradononcompetelaw.com/> (last visited Sept. 11, 2012) (discussing recent cases and issues in Colorado non-compete law).

59. LA. REV. STAT. ANN. § 23:921 (2012).

60. Bell v. Rimkus Consulting Grp., Inc., 8 So. 3d 64, 67 (La. Ct. App. 2009).

61. SWAT 24 Shreveport Bossier, Inc. v. Bond, 808 So. 2d 294, 298 (La. 2001) (“Louisiana has long had a strong public policy of disfavoring non-competition agreements

Some commentators describe non-compete law as being relatively consistent,⁶² but the approaches taken by various jurisdictions in fact differ greatly. From this summary of non-compete law, it is clear that the requirements for enforceability—and, indeed, enforceability itself—vary dramatically from state to state. In some states, non-competes are flatly unenforceable, while in others they are regularly upheld. And still in others, a statutory scheme governs enforceability. With the exception of California and North Dakota, nearly all states apply some version of an inherently unpredictable, ad hoc, and fact-intensive standard of reasonableness.

II. THE DISADVANTAGES ARISING FROM THE DIVERSITY IN STATE LAW

Diversity in state law is not necessarily a problem. Indeed, federalism principles celebrate such diversity as central to our constitutional structure. Diversity in state law provides a “laboratory” for different doctrines to be tested and where local mores can reign.⁶³ But there may be times when the diversity of state law becomes a problem, and there may be times when the experiments conducted in the “laboratories” yield results. The law of non-competes is one such area. Moreover, the results from the laboratories of state law provide some guidance as to the best approach to non-competes. In this Part, I describe the significant disadvantages caused by diversity in the law of non-competition agreements—namely, the conflict of laws that have arisen in the context of litigating non-competition agreements and that pose challenges to the interstate system.

Given the wide variation between the states in their treatment of non-competition agreements, it is hardly surprising that conflicts have arisen. As firms operate in more than one state and as employees become increasingly mobile, firms have begun using choice-of-law provisions to select favorable state law. Also unsurprising, forum-shopping, races to the courthouse, and litigation over choice of law all have increased.⁶⁴ Firms expend substantial resources planning and drafting non-competition agreements, a particularly difficult task when a company operates in multiple jurisdictions. Employees might need or want to retain counsel to review non-competition agreements, but most often, employees do not seek

between employers and employees. Thus, the longstanding public policy of Louisiana has been to prohibit or severely restrict such agreements.” (citations omitted)); *see also* *McCray v. Cole*, 251 So. 2d 161, 163–64 (La. 1971) (finding “agreement not to engage in the practice of psychology in Lafayette Parish for two years” unenforceable under section 23:921).

62. *See* Bishara, *supra* note 9, at 754.

63. This metaphor was coined by Justice Brandeis: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

64. *See* Lester & Ryan, *supra* note 7, at 393 (“It is this variation among states in their willingness to enforce non-compete agreements that creates the conditions for conflict of laws and strategic litigation.”).

advice of counsel and do not really understand the substance or enforceability of a non-compete provision. When there is a dispute about a former employee's activities, the decision concerning the applicable law can be dispositive. The state of the law of conflicts only adds to the existing uncertainty concerning the enforceability of non-competes in various jurisdictions.

A. *Conflict-of-Laws Principles and Choice-of-Law Problems*

The conflict over the choice of law applicable to a non-compete may arise in two ways. The first is when the non-compete agreement (or the non-compete provision within an employment agreement) contains a choice-of-law clause but the employee argues that another state's law should apply. This might occur when the employer seeks to have all of its contracts governed by the law of the state of incorporation, but employees work in a number of different states. This might also give rise to a conflict when an employee seeks to move to a different state and wants the law of that state to govern the enforceability of the non-compete. Conflict of laws may also arise when the employment agreement is silent as to choice of law, but the law of more than one state might plausibly govern the agreement under choice-of-law rules. This arises, for example, when a company's headquarters and legal department are in one state, and the employee works in another state.

Just as the law concerning non-compete enforceability is varied and unpredictable, conflict-of-laws doctrine is itself also somewhat unsettled.⁶⁵ The *Restatement (Second) of Conflict of Laws* has not been universally adopted, but it is the dominant framework.⁶⁶ Some jurisdictions continue to apply the *Restatement (First)*, while others follow a common-law approach.⁶⁷ More than 20 jurisdictions apply the *Restatement (Second)* approach to choice-of-law issues and to the resolution of conflicts.⁶⁸ The basic principle is one of federalism: "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."⁶⁹

65. This is, perhaps, a charitable description. Lester and Ryan describe the law of conflicts (and, in particular, as applied to non-competes) as follows:

The state of the law is perhaps characterized more by inconsistency than anything else, so much so that commentators lament the "disarray" and "mish-mash" of the law, and criticize courts for their "post-hoc rationalizing of intuitions" or their use of a "hodgepodge of factors, often with insignificant explanation of how they decide what weight to give each."

Lester & Ryan, *supra* note 7, at 395 (footnotes omitted).

66. PETER HAY ET AL., *CONFLICT OF LAWS* 72 (5th ed. 2010).

67. *Id.* at 94.

68. *Id.* at 72.

69. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). Section 6 goes on to list seven factors to be applied when "there is no such directive," including: "(b) the relevant policies of the forum"; "(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue"; "(e) the basic policies underlying the particular field of law"; and "(f) certainty, predictability and uniformity of result." *Id.*

When the parties have not included a choice-of-law provision in their agreement, the courts will apply the principles of section 188 of the *Restatement (Second) of Conflict of Laws* to determine what state's law ought to apply. Section 188 provides that generally the law of the state with "the most significant relationship to the transaction and the parties" will apply.⁷⁰ The "contacts to be taken into account" in determining what state has the "most significant relationship to the transaction and the parties" are "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties."⁷¹ Section 188 goes on to state that "if the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied."⁷² In a dispute concerning the enforceability of a non-compete, it is possible that the contract could be drafted in one state, executed in another, performed in yet another state, and that still other states might have an interest in the outcome by virtue of the domicile, residence, nationality, place of incorporation, and place of business of the parties. Thus, the *Restatement* approach will not regularly provide a simple resolution when the parties have not included a choice-of-law clause.⁷³

Even when the parties have included a choice-of-law provision in their agreement, determining what state's law ought to apply is not necessarily straightforward. In general, the parties' choice of law will be respected.⁷⁴ Section 187(1) of the *Restatement* provides that the "law of the state chosen by the parties to govern their contractual rights and duties will be applied."⁷⁵ Subsection 2, however, sets forth the circumstances in which a court may refuse to apply the chosen law. A court may employ these "escape valves" when

either (a) the chosen state has no substantial relationship to the parties of the transaction and there is no other reasonable basis for the parties' choice, or (b) *the application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of*

70. *Id.* at § 188(1).

71. *Id.* at § 188(2).

72. *Id.* at § 188(3).

73. *See Lester & Ryan, supra* note 7, at 396 (discussing the conflicts rules in the absence of a choice-of-law provision and concluding that "in most states applying the *Restatement* there is no clear-cut rule and courts will sometimes apply the law of the place of contracting, particularly if any part of the performance occurred there. Notably, courts will disregard the foregoing rules and apply the substantive law of the forum if applying another state's law would undermine the public policy of the forum.").

74. *Id.* at 397 ("In general, courts defer to choice of law clauses because they are presumed to represent the express intention of the parties.").

75. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 187(1) (1971). The full text of subsection (1) reads: "The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." *Id.*

2012] MAKING NON-COMPETES UNENFORCEABLE 955

§ 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.”⁷⁶

The italicized language has given rise to a great deal of litigation in the non-compete context. Parties have attempted to use the second prong as an escape valve from the choice-of-law provision, arguing that a state, such as California, has a materially greater interest in the outcome of a non-compete dispute based on its very strong public policy against enforcement of the agreements.⁷⁷ Such arguments are only sometimes successful, but are powerful enough, and the stakes are high enough, to give rise to a great deal of litigation around the choice-of-law issue.

1. When There Is No Choice-of-Law Clause

As we might expect given the variation in non-compete law, choice-of-law disputes arise when the employer operates in more than one state and the parties have not made a choice-of-law selection in their agreement.⁷⁸ *Dresser Industries v. Sandvick* provides a good example.⁷⁹ In that case, the employer, Dresser, sued three former employees in an attempt to enforce a covenant not to compete. The agreement in question was a standard agreement presented to the employees, who worked as mud engineers.⁸⁰ The non-compete was the same for all three employee-defendants, but the place of contracting was different for each employee (North Dakota, Colorado, and Wyoming).⁸¹ The place of performance was potentially a ten-state area, but two of the employees performed most of their work in North Dakota and the third employee in Montana. Dresser, the employer, was a Delaware corporation with its principal place of business in Texas.⁸² The

76. *Id.* at § 187(2) (emphasis added).

77. Lester & Ryan, *supra* note 7, at 398 (“Although the second question—whether application of the chosen law would offend the public policy of the states with a materially greater interest—should ordinarily follow, some courts conflate the two inquiries and conclude that another state has a materially greater interest *because* its public policy would be offended if the chosen law were applied. When this happens, the interest balancing test is reduced to a starker contest among competing public policies.” (emphasis added)).

78. There are many such cases. *See, e.g.,* *McGough v. Nalco Co.*, 496 F. Supp. 2d 729, 743 (N.D.W. Va. 2007) (applying conflicts principles in holding that West Virginia had the “most significant relationship” concerning enforceability of non-compete, but applying Alabama law to other portions of the contract); *see also* *Fort Smith Paper Co., Inc. v. Sadler Paper Co.*, 482 F. Supp. 355, 357 (E.D. Okla. 1979) (involving court sitting in diversity applying the conflicts rules of the forum state; holding non-compete unenforceable: “The law in Oklahoma has long been that contracts which are contrary to the public policy of Oklahoma will not be enforced by Oklahoma courts regardless of their validity in the state where made.”).

79. 732 F.2d 783 (10th Cir. 1984).

80. *Id.* at 784 (explaining that a “mud engineer” for Dresser was “an employee with limited technical training who, by using standard tests and calculations, determines the additives necessary to maintain the consistency of the drilling mud formulated for the well”).

81. *Id.* at 785.

82. *Id.*

trial court found that the “location of the subject matter of the contract” was “difficult to determine, but if subject matter is identified as an interest in the employment relationship, that interest existed in Texas and the states where the employees actually lived and performed.”⁸³

As described above, the law governing non-competes varies substantially among the interested jurisdictions, and this fact made the court’s decision more difficult here. The trial court held that the covenants likely would be enforced under Texas law but would be unenforceable in Colorado, North Dakota, and Montana.⁸⁴ Therefore, “because of the interests of those states in contracts entered into by their citizens, North Dakota law applies to Sandvick’s employment agreement, Colorado law applies to Petty’s employment agreement, and either Colorado or Wyoming law governs the validity of Eide’s covenant.”⁸⁵ Note that the court had to grapple with the unpredictability of each state’s law concerning non-competes along with the added twist of a choice-of-law determination.

Considering Dresser’s appeal, the Tenth Circuit applied the *Restatement (Second)* approach⁸⁶ and sought to determine which state had the “most significant relationship to the transaction and the parties.”⁸⁷ The Court stated that the most important factors were the relevant policies of the forum and the other interested states.⁸⁸ With respect to employment agreements—and to covenants not to compete in particular—the Tenth Circuit concluded that “a state in which a party is domiciled has an interest in rules it promulgates to protect its residents against the unfair use of superior bargaining power and to protect their freedom to use their employable skills to support themselves and their families.”⁸⁹ As this statement indicates, the court put a great deal of weight on the public-policy aspects of state law concerning non-competes. Indeed, the court concluded that the “states where the parties entered into the employment relationships . . . have a substantial interest in invalidating covenants not to compete signed within their borders.”⁹⁰ The court characterized the law of the states of Colorado, North Dakota, and Montana, where the various defendants resided, as being strongly averse to the enforcement of non-competes as a matter of public policy. The court also looked to the policy of the forum state, in this case Colorado, and examined the strength of the policy.⁹¹

83. *Id.*

84. *Id.* (“If Texas law applies, the covenants not to compete may be enforceable. If Texas law does not apply, the covenants are unenforceable under the laws of any of the other potentially interested states. The [trial] court noted that the statutes of Colorado, North Dakota, and Montana express a strong public policy against covenants not to compete.”).

85. *Id.*

86. *Id.* (“A federal court in a diversity case must apply the choice of law principles of the forum state. Thus, we must follow Colorado law, which resolves conflicts under the principles set forth in *Restatement (Second) of Conflict of Laws* §§ 6 and 188.” (citations omitted)).

87. *Id.*

88. *Id.* at 788.

89. *Id.* at 786.

90. *Id.*

91. *Id.* at 787.

2012] MAKING NON-COMPETES UNENFORCEABLE 957

According to the court, the “substantive law of another jurisdiction should not apply if application of that law would violate a fundamental policy of the forum.”⁹²

The court’s consideration of the law of the forum state as a separate factor is significant because it is likely to encourage forum-shopping for favorable law by both employees and employers.⁹³ In *Dresser*, the Tenth Circuit acknowledged the potential for incentivizing forum-shopping but stated that the price of discouraging forum-shopping in this instance was too high in terms of its restrictions on employee mobility.⁹⁴ Opinions such as this have no doubt given hope to employees (and their lawyers) that choice of forum may well make a difference in the outcome of a non-compete dispute.⁹⁵

2. When There Is a Choice-of-Law Clause

Even when parties include choice-of-law provisions, conflict-of-laws disputes arise regularly. The Seventh Circuit’s opinion in *Curtis 1000, Inc. v. Suess* provides an example.⁹⁶ In that case, Roy Suess had been employed by Curtis 1000 in Illinois for 24 years when, believing his employment was about to be terminated, he quit.⁹⁷ Five days later he accepted a job with ABF, a competitor of Curtis 1000.⁹⁸ Suess had signed three separate non-competition agreements during his employment with Curtis 1000, the most recent of which contained a provision selecting Delaware law to govern the agreement.⁹⁹ Curtis 1000 was incorporated in Delaware, but otherwise had “no significant contacts with that state.”¹⁰⁰ Curtis

92. *Id.* The court concluded that “[b]ecause we agree with the trial court that the forum state and the states with the most significant contacts all invalidate the type of covenant not to compete at issue here, we hold that Dresser is not entitled to damages for any alleged breach of that covenant.” *Id.* at 788.

93. *See id.* at 788 (noting the “tendency of the courts to apply the policy of the forum state when parties are litigating covenants not to compete”).

94. *Id.* at 786 (quoting the *Restatement (Second) of Conflict of Laws*, the court stated that “the factors of certainty, predictability, and uniformity ‘are important values in all areas of the law. To the extent that they are attained . . . , forum shopping will be discouraged. These values can, however, be purchased at too great a price.’”).

95. It is impossible to generalize about the outcome of these kinds of disputes except to say that they are unpredictable. *See, e.g.*, *Transperfect Translations, Inc. v. Leslie*, 594 F. Supp. 2d 742, 750–51 (S.D. Tex. 2009) (Texas court applying Texas law even though it would violate the public policy of another interested state); *Extracorporeal Alliance, L.L.C. v. Rosteck*, 285 F. Supp. 2d 1028, 1037, 1039 (N.D. Ohio 2003) (Ohio court applying Florida law); *Maxxim Med., Inc. v. Michelson*, 51 F. Supp. 2d 773, 780–81 (S.D. Tex. 1999), *rev’d on other grounds*, 182 F.3d 915 (5th Cir. 1999) (Texas court applying California law, in part because of California’s strong public-policy stance on non-competes).

96. 24 F.3d 941, 943 (7th Cir. 1994).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

1000 brought a breach-of-contract action against Sues, alleging that he had violated the non-competition agreement.¹⁰¹

The federal district court in Illinois, sitting in diversity, refused to enforce the non-compete. The court held (according to the Seventh Circuit) that “the covenant had an insufficient connection to Delaware” and that “an Illinois court would consider the Delaware law of covenants not to compete repugnant to the public policy of Illinois.”¹⁰² Curtis 1000 appealed, and the Seventh Circuit considered the question in terms of the differences between Illinois and Delaware non-compete law. After considering in some detail the differences between the two states’ consideration requirements, as well as the difference between Illinois’ “protectable interest” requirement and Delaware’s “legitimate interest” requirement for the enforceability of a non-compete, the court concluded the differences were “too slight to induce an Illinois court to take the rather drastic step of invalidating a consensual choice of law clause.”¹⁰³ The court ultimately upheld the district court’s result, however, because it concluded that there was an “insufficient connection between the contract [in which the parties had selected Delaware law rather than Illinois law to govern the employment contract] and the State of Delaware.”¹⁰⁴ Thus, Illinois law applied to the evaluation of the non-compete between Sues and Curtis 1000. The Seventh Circuit believed that an Illinois court would refuse to enforce the covenant not to compete under Illinois law and therefore affirmed the denial of Curtis 1000’s request for a preliminary injunction.¹⁰⁵

Similar conflicts issues have arisen regularly, and they appear to be on the rise as more employers ask employees to sign non-competes. In *Pro Edge, L.P. v. Gue*, a federal district court, hearing a case (filed by the employer) removed from state court, considered whether to apply Iowa law (as indicated by a choice-of-law provision in the employment agreement) or Montana law (the place where the employee had most recently worked for Pro Edge and where he competed with Pro Edge).¹⁰⁶ A conflict existed because, according to the court, non-compete “covenants are routinely upheld in Iowa, whereas Montana’s extremely narrow view of such covenants routinely results in their unenforceability.”¹⁰⁷ The court

101. *Id.*

102. *Id.* at 944.

103. *Id.* at 948.

104. *Id.* at 948–49 (“Businesses incorporate in Delaware in order to take advantage of that state’s corporation law, and its judicial expertise concerning corporate governance, rather than to conduct business there. Curtis’s headquarters are in Georgia, and it has no offices or operations in Delaware. Sues of course has no contacts with Delaware. Curtis and Sues are operating in Illinois, so Illinois has an interest in applying its law to their relations. If the choice of law provision in the covenant not to compete had designated Georgia law we assume the Illinois courts would defer to that designation, recognizing that Georgia has as much interest in regulating the out of state operations of ‘its’ firm as Illinois does in protecting its citizen, Mr. Sues. But that is not the case here.”).

105. *Id.* at 949.

106. 374 F. Supp. 2d 711, 735–36 (N.D. Iowa 2005).

107. *Id.* at 736 n.10.

2012] MAKING NON-COMPETES UNENFORCEABLE 959

applied *Restatement* section 187 and concluded that “a substantial relationship” within the meaning of § 187(2)(a), does exist between the parties, the transaction, and Iowa.”¹⁰⁸ Given that conclusion, the court then applied subsection (2)(b) and determined that there was essentially a tie between Iowa law and Montana law in terms of what state’s law would apply in the absence of a contractual provision and what state had a materially greater interest. Thus, the court applied the law selected by the parties in the contract¹⁰⁹ and held the covenant not to compete enforceable under Iowa law.¹¹⁰

Because many states express their approach to non-competition agreements in terms of the “strong” or “fundamental” public policy of the state, and because those public-policy issues are deemed to affect employees, employers, and the public, disputes concerning non-competes are particularly apt to create difficult conflict-of-laws problems.¹¹¹ This is so because the escape valve allows courts to take into account “fundamental” public policies in in considering which state has a “materially greater interest” in the dispute.¹¹²

B. Diversity in State Law and Races to the Courthouse

The state-to-state disparities in the law provide an incentive for employers to use choice-of-law clauses to take advantage of favorable state law and an incentive for both parties to race to the courthouse in an effort to have the jurisdiction with the more favorable law hear the case.¹¹³ There is evidence that

108. *Id.* at 737–38.

109. *Id.* at 737–39 (“In sum, the choice of law analysis has resulted in the application of Iowa law in conformance with the choice of law provision in the 1996 Agreement.”).

110. *Id.* at 740–41.

111. *See, e.g.*, *DCS Sanitation Mgmt., Inc. v. Castillo*, 435 F.3d 892, 897 (8th Cir. 2006) (applying the *Restatement (Second) of Conflict of Laws* and overriding the parties’ choice of Ohio law because of its conflict with Nebraska public policy); *Keener v. Convergys Corp.*, 342 F.3d 1264, 1266–67 (11th Cir. 2003) (applying the traditional approach to conflicts rather than the *Restatement (Second) of Conflict of Laws* and overriding the parties’ choice of Ohio law because of its conflict with Georgia policy); *Kelly Services, Inc. v. Marzulla*, 591 F. Supp. 2d 924, 938 (E.D. Mich. 2008) (applying the *Restatement (Second) of Conflict of Laws* approach and enforcing parties’ choice of Michigan law).

112. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971); *see also* Lester & Ryan, *supra* note 7, at 399 (“Some courts find it virtually impossible to apply the law of another state that permits enforcement of non-compete covenants. The Georgia Supreme Court, for example, has held that the same public policies that underlie Georgia’s firm prohibition against non-compete agreements inform its choice of law analysis, implying that choice of law clauses selecting law favorable to non-competes will be regularly invalidated.”).

113. Scott Hovanyetz, *Non-Compete Agreements and the Equity Conflict: Applying Baker v. General Motors Through the Lens of History*, 38 SETON HALL L. REV. 253, 256 (2008) (“Employers seeking to avoid these state policies to enforce non-competes are likely to craft choice-of-law clauses in the agreements to obtain favorable law; conversely, employees seeking to escape non-competes are likely to seek declaratory relief in a state that is unlikely to uphold non-competes.”); *see* *LeFebvre v. Syngenta*

these kinds of disputes are on the rise.¹¹⁴ The conflicts rules, along with the strong public-policy pronouncements by many states and courts concerning non-competes, provide an opening for both employers and employees to make arguments about which state's law should apply. This, in turn, creates another layer of unpredictability on top of the already fluid and difficult non-compete law within each state and the conflicts issues to be resolved by the courts. It also sets up conflicts between the courts, as there may well be parallel actions in two different jurisdictions.

The most notable case in this genre is *Advanced Bionics Corp. v. Medtronic, Inc.*,¹¹⁵ in which the California and Minnesota state courts simultaneously considered the validity of the same non-compete. The procedural history is tortuous, demonstrating the problems that may arise because of the vast disparities between states' non-compete laws.¹¹⁶ The dispute concerned a non-compete provision in an employment contract between Medtronic, a Minnesota corporation, and Mark Stultz, an employee hired by Medtronic as a "senior product specialist."¹¹⁷ The non-compete provided "that for two years after employment termination, Stultz would not" work for any entity or person competing with Medtronic "in any geographic area in which Medtronic actively markets a Medtronic Product or intends to actively market a Medtronic Product of the same general type or function."¹¹⁸ The agreement also included a choice-of-law provision, stating that the agreement would be governed by "the laws of the state in which the Employee was last employed by Medtronic."¹¹⁹ Throughout his

Biotechnology, Inc., No. C 08-02732 JW, 2008 WL 5245056, at *1 (N.D. Cal. Dec. 15, 2008); *Park-Ohio Industries, Inc. v. Carter*, No. 06-15652, 2007 WL 470405, at *3-4 (E.D. Mich. Feb. 8, 2007) (addressing thirty-year-old non-compete provision with an Ohio choice-of-law provision; the plaintiff sought the application of Michigan law which would have invalidated the non-compete at the time that it was drafted but not at the time of the litigation); *Google, Inc. v. Microsoft Corp.*, 415 F. Supp. 2d 1018, 1022-26 (N.D. Cal. 2005); *West Publ'g Corp. v. Stanley*, No. Civ. 03-5832(JRT/FLN), 2004 WL 73590, at *7-10 (D. Minn. Jan. 7, 2004); *Biosense Webster, Inc. v. Superior Court*, 135 Cal. App. 4th 827, 838-39 (2006).

114. See, e.g., Glynn, *supra* note 2, at 1385-86 (summarizing some of the cases and describing a "changing dynamic"); Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 374-76 (2003).

115. 59 P.3d 231 (Cal. 2002).

116. *Advanced Bionics v. Medtronic* provides an excellent example, but other examples abound. See, e.g., *King v. PA Consulting Grp.*, 78 F. App'x 645, 649 (10th Cir. 2003) (remanding non-compete dispute after holding that a forum-selection clause in former employee's employment contract "effected only a permissive selection of venue in New Jersey"); *EMC Corp. v. Donatelli*, 25 Mass. L. Rptr. 399, 400 (Super. Ct. 2009) (involving former employee filing suit in California, prompting former employer to file suit in Massachusetts the following day); Gilson, *supra* note 18, at 612 n.111 (describing a dispute concerning a non-compete, the application of California, New Hampshire, and Massachusetts law, and races to the courthouse); see also *infra* note 140 and accompanying text.

117. *Advanced Bionics*, 59 P.3d at 233.

118. *Id.*

119. *Id.*

2012] MAKING NON-COMPETES UNENFORCEABLE 961

employment with Medtronic, Stultz worked in Minnesota, but in June 2000, Stultz resigned from Medtronic and began to work for Advanced Bionics Corporation in California, thus setting up a dispute between the parties and a conflict between California law (which refuses to enforce non-competes) and Minnesota law (which regularly enforces such agreements).

Racing to the courthouse in an effort to take advantage of California law, Stultz and Advanced Bionics sued Medtronic for declaratory relief in California state court on the day Stultz was hired by his new employer.¹²⁰ They sought a temporary restraining order (“TRO”), asserting that “Medtronic would use the time to ‘race to court’ in Minnesota.”¹²¹ Medtronic removed the California state action to federal court before the hearing on the TRO occurred and did indeed race to court in Minnesota, filing an action in Minnesota state court against Stultz (for breach of contract) and Advanced Bionics (for tortious interference with contract). Medtronic sought and obtained a TRO from the Minnesota court, which “enjoin[ed] Advanced Bionics from hiring Stultz in any competitive role” and also barred both parties from taking any steps that would interfere with the resolution of the dispute by the Minnesota court.¹²² Shortly thereafter, the federal court in California remanded that action, finding that Medtronic had improperly sought removal in order to avoid an unfavorable ruling in the California state court.¹²³

Advanced Bionics and Stultz then sought to halt the litigation in Minnesota, and Medtronic attempted to halt the litigation in California. The California state trial court refused to dismiss the California lawsuit and the Minnesota state court issued a preliminary injunction that prevented Stultz from working for a Medtronic competitor.¹²⁴ A few weeks later, the California court enjoined Medtronic “from taking any further steps in the Minnesota action . . . , finding there was a ‘substantial chance’ that Medtronic would ‘go to the Minnesota court [and] attempt to undercut the California court’s jurisdiction.’”¹²⁵ Medtronic appealed. Then the Minnesota court amended its earlier order, enjoining Stultz and Advanced Bionics from seeking relief in any other court “that would effectively stay, limit or restrain [the Minnesota] action” and ordering them to “move to

120. *Id.* (“On the same day, in Los Angeles County Superior Court, Stultz and Advanced Bionics sued Medtronic for declaratory relief, alleging the Medtronic’s covenant not to compete and choice-of-law provisions violate California’s law and public policy and are void under Business and Professions Code section 16600.”).

121. *Id.*

122. *Id.* at 234 (“The order also barred both parties ‘[f]rom making any motion or taking any action or obtaining any order or direction from any court that [would] prevent or interfere in any way with [the Minnesota court’s] determining whether it should determine all or any part of the claims alleged in [the Minnesota] lawsuit, including claims for temporary, preliminary or permanent relief.’” (alterations in original)).

123. *Id.* (“The federal court order stated that removal was improper because Medtronic, a Minnesota company, purported to rely on diversity jurisdiction, even though it knew Stultz was still a Minnesota resident. The federal court also noted that Medtronic had removed the California action ‘not to have the matter heard in this court, but to interfere with [the TRO] matter being heard.’”).

124. *Id.*

125. *Id.* (alteration in original).

vacate and rescind” the California TRO.¹²⁶ Thus there was an impasse, with both the California and Minnesota courts asserting their authority to resolve the dispute.

As a matter of comity, courts often employ the “first-filed rule” to limit the problematic results flowing from parallel litigation.¹²⁷ In Stultz’s case, however, the Minnesota court rejected “rigid or inflexible” application of the first-filed rule and retained jurisdiction of the matter.¹²⁸ At roughly the same time, the California Court of Appeals rejected Medtronic’s appeal, holding that “notwithstanding the choice-of-law provision in the Agreement, the case would be decided under California law; and . . . because California law would apply and the California action was filed first, California courts should decide the dispute.”¹²⁹ Medtronic appealed, and the California Supreme Court blinked:

We agree that California has a strong interest in protecting its employees from non-competition agreements under section 16600. But even assuming a California court might reasonably conclude that the contractual provision at issue here is void in this state, this policy interest does not, under these facts, justify issuance of a TRO against the parties in the Minnesota court proceedings. A parallel action in a different state presents sovereignty concerns that compel California courts to use judicial restraint when determining whether they may properly issue a TRO against parties pursuing an action in a foreign jurisdiction.¹³⁰

126. *Id.*

127. *See, e.g.,* *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1004 (8th Cir. 1993) (upholding Minnesota court’s decision to enjoin parallel litigation in Texas because Minnesota suit was filed first).

128. *Advanced Bionics*, 59 P.3d at 234 n.4. The Minnesota court concluded that “Minnesota . . . has a strong interest in having contracts executed in this state enforced in accordance with the parties’ expectations.” *Id.* (internal quotation marks omitted).

129. *Id.* at 235.

130. *Id.* at 237. In this case, the court did not find that California’s public interest in voiding non-compete agreements outweighed the comity and other considerations, but the California courts have regularly given great weight to that public policy. Ronald Gilson believes that is the standard approach, in fact.

Even if the employment agreement which contains a postemployment covenant not to compete explicitly designates the law of another state, under which the covenant would be enforceable, as controlling, and even if that state has contacts with the contract, California courts nonetheless will apply section 16600 on behalf of California residents to invalidate the covenant.

Gilson, *supra* note 18, at 608 (citing *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 97 Cal. Rptr. 811, 814 (Ct. App. 1971) (applying California law to invalidate non-compete despite agreement’s validity under New York law and contractual designation of New York law as controlling)). It may be that if Stultz had been deemed a resident of California, rather than a Minnesota resident, the result of the California litigation would have been different.

2012] MAKING NON-COMPETES UNENFORCEABLE 963

Thus, the California court dissolved the injunction restricting the parties from litigating in Minnesota.¹³¹ The court did not, however, dismiss the California action, stating that the “Minnesota action does not divest California of jurisdiction, and Advanced Bionics remains free to litigate the California action unless and until Medtronic demonstrates to the Los Angeles County Superior Court that any Minnesota judgment is binding on the parties.”¹³²

Advanced Bionics is hardly the only case with such a convoluted procedural history. *In re AutoNation, Inc.*¹³³ involved a non-compete agreement between a Florida entity and an employee residing and working in Texas. The agreement contained a forum-selection clause and a choice-of-law provision designating Florida courts and law for any disputes concerning the agreement. The Texas Supreme Court succinctly described the complicated procedural history:

Relator AutoNation, Inc. sued Garrick Hatfield in Florida to enforce a covenant not to compete. In the employment contract containing the covenant, AutoNation and Hatfield had agreed to litigate any disputes arising under the contract in Florida under Florida law. Hatfield later sued AutoNation in Texas under the contract. The trial court declined to dismiss or stay this action and enjoined AutoNation from pursuing its first-filed Florida lawsuit. AutoNation now seeks mandamus relief to enforce the mandatory forum-selection clause, and we conditionally grant it.¹³⁴

Hatfield (the employee) sought relief in Texas because he lived and worked in Texas. He argued that the non-compete should be governed by Texas law (by virtue of his residence in Texas) and that the non-compete would be invalid under Texas law. Indeed, he asserted that enforcement of the non-compete would violate Texas public policy.¹³⁵

Notwithstanding very strong pronouncements by Texas courts concerning the state’s public policy against non-competes,¹³⁶ the Texas Supreme Court

131. Glynn describes this case as evidence of a dynamic in which “comity seems to run only one way, leaving California’s public policy at risk to aggressive state-law exporters.” Glynn, *supra* note 2, at 1387.

132. *Advanced Bionics*, 59 P.3d at 238.

133. 228 S.W.3d 663 (Tex. 2007).

134. *Id.* at 664.

135. *Id.* at 666. (Hatfield argued “that Texas law should govern a Texas resident’s non-compete agreement, that AutoNation was attempting the circumvent Texas law by pursuing the Florida action, and that the Florida court likely would refuse to apply Texas law in deciding the enforceability of the non-compete agreement. Hatfield cited an unpublished Florida case . . . in support of his argument that the Florida court would apply Florida non-compete law, which Hatfield contended would ‘yield a result that offends Texas public policy.’”).

136. *Id.* at 667 (“The court of appeals relied on our 1990 decision in *DeSantis v. Wackenhut*, [793 S.W.2d 670 (Tex. 1990),] in which we held that the enforcement of non-compete covenants was a matter of fundamental Texas public policy, governed by Texas law. The court noted that Hatfield had presented the trial court with the *Hankins* decision, which indicated that Florida courts would apply their own law to this dispute. The court of

ultimately deferred to the Florida litigation in the Hatfield case.¹³⁷ Citing freedom of contract and comity principles, the Court held the forum-selection clause applicable: “[T]he parties’ bargained-for agreement merits judicial respect. This dispute should be heard in the first-filed Florida action, as the parties explicitly contracted.”¹³⁸ The Court noted that the “decision according deference to the first-filed Florida action, besides honoring the parties’ contractual commitment, also honors principles of interstate comity.”¹³⁹

These kinds of conflicts and state-to-state stand-offs have not been uncommon in the last decade. Numerous instances have arisen in which parallel litigation commences, in federal court or state court or both, and neither conflict-of-laws principles nor federal court abstention doctrines manage to resolve the resulting problems. At least 13 other cases look quite similar to *Advanced Bionics* and *In re AutoNation*. In each, litigation over the enforceability of a non-compete proceeded in courts in two different states; there were plausible arguments for the application of either state’s law, and the only solution was for one court to back off as a matter of comity.¹⁴⁰ That is, there was no satisfactory doctrinal solution responsive to the disadvantages created by the diversity in state law.

appeals concluded that “[b]ecause the Texas Supreme Court has held that fundamental Texas public policy requires application of Texas law to the question of enforceability of a non-compete agreement, we are unable to hold that the trial court abused its discretion in issuing an injunction to halt the Florida proceeding and allow the Texas case to proceed to trial.” (alteration in original)).

137. *Id.* at 669. The court differentiated (though it is not clear if this was a dispositive issue) between a choice-of-law clause and a forum-selection clause. “[W]e decline Hatfield’s invitation to superimpose the *DeSantis* choice-of-law analysis onto the law governing forum-selection clauses.” *Id.*

138. *Id.*

139. *Id.* at 670; *see also* Charles M. Hosch, *Business Torts*, 61 SMUL REV. 589, 592–94 (2008).

140. *See* *Marcelo v. Ivy Ventures, LLC*, No. C 10-04609 WHA, 2010 WL 5115437, at *8 (N.D. Cal. Dec. 9, 2010) (involving litigation first-filed in Virginia; dismissed by California federal court based on comity and deference to its “sister federal court.”); *Rimkus Consulting Grp., Inc. v. Cammarata*, 255 F.R.D. 417, 431–32 (S.D. Tex. 2008) (involving stand-off between courts in Texas and Louisiana; Texas refused to determine whether Louisiana decision invalidating non-compete applied in other jurisdictions); *St. Jude Med. S.C., Inc. v. Hasty*, Civil No. 06-4547, 2007 WL 128856, at *3–7 (D. Minn., Jan. 12, 2007) (relying on Minnesota choice-of-law clause, Georgia court deferred to Minnesota jurisdiction); *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 172–74 (S.D.N.Y. 2006) (involving first-filed court in California; New York court refused to dismiss or stay, rejecting abstention argument); *Swenson v. T-Mobile USA, Inc.*, 415 F. Supp. 2d 1101, 1106 (S.D. Cal. 2006) (deferring to earlier-filed suit in Washington state, in part based on a choice-of-law clause); *Mouchantaf v. Int’l Modeling & Talent Ass’n*, 368 F. Supp. 2d 303, 308 (S.D.N.Y. 2005) (abstaining and deferring to Arizona litigation, based on *Colorado River* doctrine); *Covance Labs., Inc. v. Orantes*, 338 F. Supp. 2d 613, 619 (D. Md. 2004) (applying *Colorado River* doctrine, Maryland federal court abstained in favor of Wisconsin proceedings); *W. Publ’g Corp. v. Stanley*, No. Civ. 03-5832 (JRT/FLN), 2004 WL 73590, at *11 (D. Minn. Jan. 7, 2004) (involving litigation in three states, Minnesota court granted employer’s preliminary injunction, and Nevada and California courts stepped aside);

III. THE STATES SHOULD ADOPT A UNIFORM RULE OF UNENFORCEABILITY OF EMPLOYEE NON-COMPETITION AGREEMENTS

There is a way out of this morass that would virtually eliminate conflict of laws in this area, benefit employees as a class, and reduce the costs to the legal system and the litigants. The states should adopt a rule of unenforceability of employee non-competes similar to California's statutory provision rendering virtually all non-compete agreements unenforceable. If every state adopted such a rule, the uncertainty and the strategic litigation that are the hallmarks of current non-compete law would disappear.

Uniformity in this area is both desirable and practicable.¹⁴¹ It is desirable because it would reduce the disadvantages in the diversity of state law; it would facilitate the flow of commercial transactions; and it is, on balance, the substantively preferable rule. It is practicable because the rule proposed here is both discrete and easily adoptable by the states; there is experience with and evidence concerning the substance of the rule along with some momentum for change in the law of non-competes; and the benefits of the rule would accrue even in the absence of complete adoption by the states. Notably, all of these advantages are more likely to accrue with a uniform rule of unenforceability than with a different uniform rule—a uniform “reasonableness” approach, for example—because a rule of unenforceability is much simpler and much less susceptible to varying interpretations, applications, and factual disputes. After briefly discussing the nuts and bolts of this proposal, this Article explains the proposal's desirability and practicability before addressing some possible objections.

A. *The Rule of Unenforceability*

Section 16600 of the California Business & Professions Code provides as follows: “Except as provided in this chapter, every contract by which anyone is

Schmitt v. JD Edwards World Solutions Co., No. C 01-1009 VRW, 2001 WL 590039, at *1–2 (N.D. Cal. May 18, 2001) (dismissing cases filed in California and Colorado on the same day, finding it likely that the employee had filed suit preemptively); DeFeo v. Proctor & Gamble Co., 831 F. Supp. 776, 779–80 (N.D. Cal. 1993) (declining to exercise jurisdiction in light of later-filed action in Ohio state court); Ethicon Endo-Surgery, Inc. v. Pemberton, 27 Mass. L. Rptr. 541, 544 (Super. Ct. 2010) (involving California court and Massachusetts court granting conflicting motions for preliminary injunction; Massachusetts court stated that it was not required to defer to California ruling, noting that California is an outlier in non-compete law); EMC Corp. v. Donatelli, 25 Mass. L. Rptr. 399, 406–07 (Super. Ct. 2009) (granting employer's preliminary injunction motion while a parallel case filed by the employee was pending in California).

141. Desirability and practicability form the basic standard by which the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) promotes enactment of uniform state laws. *About ULC*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/Narrative.aspx?title=About the ULC](http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC) (last visited Sept. 10, 2012). Although the focus here is on the *goal* of uniformity rather than the process by which that uniformity is achieved, NCCUSL's approach provides a helpful organizing principle.

restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”¹⁴² The California code sets forth exceptions for non-competes in connection with the sale of a business¹⁴³ or dissolution of a partnership.¹⁴⁴

A uniform or model act might read as follows:

- (1) Except as provided in subsections (2) and (3), every contract by which any person is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.
- (2) Any person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interest in the business entity, may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold has been carried on, so long as the buyer carries on a like business therein.
- (3) In the event of the dissolution of a partnership or the dissociation of a partner from a partnership, a partner may agree that he or she will not carry on a similar business within a specified geographic area where the partnership business has been transacted, so long as any other member of the partnership, or any person deriving title to the business or its goodwill from any such other member of the partnership, carries on a like business therein.

This language is quite similar to the language of the California statute (as well as that of Montana, North Dakota, and a few other states)¹⁴⁵ and is intended to set forth a strong rule against the enforceability of non-competition agreements.¹⁴⁶ It derives from the Field Code, which was adopted in whole or in part by a number

142. CAL. BUS. & PROF. CODE § 16600 (2012).

143. *Id.* § 16601 (“Any person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interest in the business entity . . . may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold . . . has been carried on, so long as the buyer . . . carries on a like business therein.”).

144. *Id.* § 16602 (“Any partner may [in the event of the dissolution of a partnership or the dissociation of a partner from a partnership] agree that he or she will not carry on a similar business within a specified geographic area where the partnership business has been transacted, so long as any other member of the partnership, or any person deriving title to the business or its goodwill from any such other member of the partnership, carries on a like business therein.”).

145. *See supra* Part I.

146. Gilson, *supra* note 18, at 607 (“Other than two statutory exceptions (which track the general rule outside of California) allowing enforcement of covenants not to compete associated with the sale of a business, the statute’s prohibition is essentially unqualified.”); *see also* Edwards v. Arthur Andersen LLP, 189 P.3d 285, 296 (2008).

2012] MAKING NON-COMPETES UNENFORCEABLE 967

of Western states in need of codification and uniformity in their laws.¹⁴⁷ The statute contains elements of the common-law rule of reason, reflected in the exceptions for the sale of a business and the dissolution of a partnership.¹⁴⁸ The provision voiding all other restraints on post-termination employment constitutes a break from the common law, however.¹⁴⁹ Accordingly, in almost all states it would require the adoption of a statute abrogating the common law or amending the current statutory approach.

This proposal is structured as a uniform or model act for adoption by the states for several reasons. First, employment law and contract law are traditionally matters of state law and probably ought to remain so generally.¹⁵⁰ Second, even assuming Congress had the authority under the Commerce Clause (or otherwise) to pass a statute concerning the enforceability of non-competes, it is quite unlikely to do so. Finally, the Uniform Commercial Code (“UCC”) and other uniform acts drafted through the National Conference of Commissioners on Uniform State Law’s (“NCCUSL’s”) uniform act process provide a template and precedent for the adoption of uniform laws. The first two points are relatively uncontroversial.

As to the third point, although the focus in this Article is on uniformity as a *result*, rather than on NCCUSL’s uniform act *process*, a few words about the uniform or model act approach are in order. A brief overview of the drafting and adoption of the UCC demonstrates the efficacy, in certain circumstances, of the approach to uniformity used by the NCCUSL.¹⁵¹ The UCC set the stage for a variety of other uniform acts. It was the brainchild of Karl Llewellyn and others, growing out of the realist movement in the mid-twentieth century. As more and

147. For a history of the adoption of the predecessor to section 16600 of the CAL. BUS. & PROF. CODE, see Gilson, *supra* note 18, at 613–19. Gilson describes the adoption of the rule against non-competes not as “the result of the prescience of the California legislature” but as an outgrowth “of the nineteenth century coincidence of the codification movement in American law . . . and the need for a new state to bring some order to the chaotic condition of its laws following its admission to the Union.” *Id.* at 613–14.

148. *Id.* at 617.

149. *Id.* at 618–19 (“Thus, beginning with the enactment of the Civil Code in 1872, California law on postemployment covenants not to compete diverged from that of Massachusetts and the rest of the large industrial states.”).

150. To be sure, there are issues of both employment law and contract law that have for good reason been nationalized, such as nondiscrimination law, but many aspects of employment law and contract law are local in nature and reasonably subject to regionally different forms of regulation. *But see* Hirsch, *supra* note 4. To the extent that non-competes operate as a form of intellectual property protection—and they do—the balance may be somewhat different. I have argued in the past that intellectual property protection should be a matter primarily of federal law and that the overlapping protection provided by the states conflicts with the goals of federal intellectual property law. *See* Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45 (2007); *see also* Viva R. Moffat, *Regulating Search*, 22 HARV. J.L. & TECH. 475 (2009); Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L.J. 1473 (2004).

151. NCCUSL is also known as the Uniform Law Commission (“ULC”). *About ULC*, *supra* note 141.

more transactions were conducted across state lines, the need for uniformity in the law governing those transactions grew. The passage by all of the states of the UCC (in one form or another) paved the way for uniform acts of all variety. The UCC became and remains a joint project of the NCCUSL and the American Law Institute (“ALI”). Since the drafting and adoption of the UCC, the NCCUSL has been involved with the drafting of a multitude of uniform acts, from the UCC to the Uniform Adoption Act to the Uniform Trade Secrets Act. The NCCUSL’s self-stated mission is “to study and review the law of the states to determine which areas of law should be uniform. The commissioners promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable.”¹⁵²

The passage of the UCC in whole or in part by all of the states is probably the most significant achievement of this movement, and it has largely been deemed a success.¹⁵³ To be sure, the UCC has not resulted in complete uniformity. Not all states have adopted the Code in its entirety, and judicial application of its provisions has in some instances resulted in divergent interpretations.¹⁵⁴ This is hardly surprising, however, and notwithstanding this development, the UCC has brought a degree of predictability and uniformity to commercial transactions that would not have existed in the absence of the uniform codification movement.¹⁵⁵

The NCCUSL has promulgated a variety of other smaller-scale uniform acts, and a majority of the states have adopted many of them.¹⁵⁶ It is impossible to generalize about the reasons for the drafting and adoption of these various acts by the 50 states, but it is safe to say that in many cases the states deemed the need for uniformity to be significant enough to overcome objections based on the desirability of differing state laws and state sovereignty.

Many of the uniform acts might be described as resulting from the “laboratories of state law.” Over time, state law diverges as legislatures and courts promulgate, apply, and interpret a variety of rules. In some situations, the divergent rules and interpretations give rise to problems, such as when many transactions take place across state borders, when individuals move from one state to another, or when entities operate in more than one state. As conflicts arise and

152. *Id.* Similarly, the ALI, which drafts the *Restatements*, works toward the clarification and efficacy of the law. The ALI’s charter stated that its purpose was “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” ABOUT THE AMERICAN LAW INSTITUTE 1, available at <http://www.ali.org/doc/thisIsALI.pdf>. The ALI has drafted the *Restatement (Third) of Employment Law*, which includes a section on non-competes, but it remains controversial.

153. See 1 ROBERT S. SUMMERS & JAMES J. WHITE, UNIFORM COMMERCIAL CODE 444 (4th ed. 2010).

154. See Gerald T. McLaughlin, *The Evolving Uniform Commercial Code: From Infancy to Maturity to Old Age*, 26 LOY. L.A. L. REV. 691, 692–93 (1993). For objections concerning the failure of the uniform act process, see *infra* Part IV.

155. McLaughlin, *supra* note 154, at 696–97.

156. See *Completed Acts*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Acts.aspx> (last visited Sept. 10, 2012).

2012] MAKING NON-COMPETES UNENFORCEABLE 969

states gain experience with a particular rule or set of rules, it may be possible to draw conclusions about the efficacy of a particular rule or set of interpretations.¹⁵⁷ When that occurs, uniformity in the law becomes appealing both because of the conclusion that there is a substantively preferable rule and because uniformity will reduce or eliminate the problems caused by differing state-law approaches. The laboratories of state law on non-competition agreements have now percolated such that some conclusions can be drawn about the efficacy of each approach.

B. A Uniform Rule of Unenforceability Is Both Desirable and Practicable

1. Desirability

Uniformity of state law is most desirable when it works to avoid conflicts or otherwise decrease the disadvantages flowing from the diversity in state law and when it facilitates the flow of commercial transactions.¹⁵⁸ A uniform rule of unenforceability of non-competes would do both. In particular, it would significantly reduce the disadvantages of diverse state law by reducing or eliminating the number and difficulty of disputes while simultaneously reducing the incentives for strategic litigation. In addition, as employers operate increasingly on a nationwide basis and as individuals are increasingly mobile, greater uniformity in some aspects of the employment relationship will facilitate commercial transactions and make the legal structures governing the employment relationship more predictable and, ultimately, more fair.

a. Avoiding the Disadvantages of Diversity in State Law¹⁵⁹

A uniform rule of unenforceability of employee non-competition agreements would go a long way toward reducing or eliminating the current disadvantages that arise from the diversity of state law in this area. As described above, state law concerning non-competes varies dramatically, from regular enforcement of “reasonable” non-competes to fairly searching inquiries into the

157. There are a variety of ways of thinking about this “laboratory of state law,” of course. See, e.g., Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229 (1994) (discussing “competing models of federalism”). At least one way of thinking about the metaphor is as an example of the scientific method. Amar describes this view:

[F]ederalism permits pragmatic testing of novel policy proposals. State laboratories are *practical* and *empirical*. In effect, innovative states can conduct controlled legislative “experiments” whose results can be monitored and interpreted by “scientific policymakers.” Data may be collected and compiled, comparisons (both spatial and temporal) performed, hypotheses tested, and sound policy conclusions derived and applied elsewhere, if appropriate.

Id. at 1234.

158. The goal of NCCUSL is to propose uniform acts “where uniformity is desirable and practicable,” and that is most common where uniformity would facilitate the flow of commercial transactions or avoid conflicts of law. See *About ULC*, *supra* note 141.

159. NCCUSL, CRITERIA FOR NCCUSL INTERNATIONAL PROJECTS 2 (2001), available at http://www.uniformlaws.org/Shared/Docs/Criteria_IntlProjects.pdf.

propriety of the agreements to outright refusal to enforce. This diversity in the law, along with the national scope of the labor market, has led to thorny choice-of-law problems, forum shopping, and regular races to the courthouse in an effort to secure a favorable result. All of these are, of course, to be expected in a federal system, but the frequency and difficulty of the issues arising in the non-compete context are such that the disadvantages of diversity in state law outweigh the benefits.

As employers often operate in more than one state and as employees have become increasingly mobile, the unpredictability of non-compete enforcement has taken on an interstate dimension. Employers regularly, and increasingly, have asked employees to sign non-competition agreements, many with choice-of-law and forum-selection clauses.¹⁶⁰ Commentators agree that non-competes “generate an unusual number of disputes about their validity.”¹⁶¹ As described above in Part II, the conflicts issues have become quite knotty as employers and employees alike attempt to game the system with choice-of-law clauses, forum-selection provisions, arguments about fundamental public policies, and races to the courthouse.¹⁶² This has vastly increased the unpredictability surrounding non-competition agreements, creating another layer on top of the unpredictability that

160. Sylvia Hsieh, *Litigation over Non-Compete Agreements on the Rise*, LAW. USA, June 12, 2009 (“In the past few years, employers have dramatically stepped up their use of non-compete agreements to limit what a departing employee can do.”).

161. Estlund, *supra* note 33, at 401 n.69 (“Professor Stone maintains that ‘disputes over ownership of human capital’—mostly involving postemployment restraints on competition—are becoming one of the most frequently litigated issues in the employment law field.”) (quoting KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 128 (2004)). According to Estlund, non-compete agreements (and arbitration agreements) occupy a hybrid position between rights and contract, and it is this hybrid status that leads to difficulties of resolution.

The contractual platform enables parties—read ‘employers’—wide discretion in drafting agreements, and generates almost endless variety in the kinds of provisions that might be included. Those provisions are potentially reviewable in court under multifaceted . . . legal standards that govern validity. Conditionally waivable rights have neither the uniformity of ordinary rights nor the presumptive validity of ordinary contracts.

Id. at 401–02; *see also id.* at 392 (“[A]s firms’ profits have come increasingly to depend on information that is carried around in the heads of employees, non-compete covenants have filtered down to lower-level employees with relatively little sophistication, bargaining power, or economic wherewithal The growth of the information-based economy has converged with increasing job mobility to generate an upsurge in covenants not to compete” (footnotes omitted)). When I was in practice I had employers ask me on a number of occasions to draft non-competes for *all* of their employees, regardless of level of seniority or access to confidential or trade-secret information.

162. Lester & Ryan, *supra* note 7, at 406–07 (the fact that non-compete disputes are governed by varying state-law approaches, that either side can seek relief, and that both sides are likely to turn to the courts—rather than arbitration—“sets the stage for the proverbial ‘race to the courthouse’ that has characterized much recent litigation in the area of employee restrictive covenants”).

2012] MAKING NON-COMPETES UNENFORCEABLE 971

already exists within many state-law approaches. Moreover, this unpredictability is exacerbated by the public-policy aspects of non-compete enforcement and is present even between states that regularly enforce “reasonable” non-competes.¹⁶³ The ability of states to “opt out” or refuse to enforce choice-of-law clauses on public-policy grounds adds to the instability of the current system.¹⁶⁴

The diversity in state law also provides an incentive on both sides to forum shop. Forum shopping is an inherent part of our federal system, but in the case of non-compete disputes, it has become particularly problematic because conflicts rules, which are designed to eliminate at least some of the incentive to forum shop, do not do so.¹⁶⁵ Because non-compete policy is a “fundamental” or “significant” policy in many jurisdictions, parties are able to use it as an “escape valve” in many cases.¹⁶⁶ As its name suggests, this is a device that perhaps is meant to be used only in the extraordinary case. However, the escape valves only serve to increase unpredictability because they regularly undermine the stability created by a contractual choice-of-law selection.¹⁶⁷ In fact, Professor Larry Ribstein found that in 71 non-compete cases he reviewed, the parties’ choice of law was not enforced in 29 of the cases.¹⁶⁸ Thus, conflicts doctrine fails to address in a satisfactory way the conflicts that arise in non-compete disputes.¹⁶⁹

163. *Id.* at 402 (“Despite the attention garnered by cases involving conflicts between states that are willing to enforce reasonable employee non-compete agreements beyond the limited context of protectable trade secrets and those that categorically prohibit or virtually prohibit them, it bears emphasis that conflicts also arise between states that have a common willingness to enforce reasonable covenants but differ by degree.”).

164. *See* Glynn, *supra* note 2, at 1437.

165. *See supra* Part II.

166. *Id.*

167. *See* Glynn, *supra* note 2, at 1409 (“More general choice-of-law principles apply in the employment context, and, under these terms, a forum state is far less likely to adhere to a contractual choice-of-law clause, particularly when important state public policies are implicated.”); *see also* Ribstein & O’Hara, *Corporations and the Market for Law*, *supra* note 2, at 689 (“Most states will refuse to enforce chosen law if it is contrary to an interested states’ ‘fundamental policy.’ This exception carves out a category of ‘super-mandatory’ rules that trump contractual provisions not only under local law, but also as against the law of the contractually selected jurisdiction.”).

168. Ribstein, *supra* note 114, at 376; *see also* Symeon C. Symeonides, *Choice of Law in the American Courts in 2007: Twenty-First Annual Survey*, 56 AM. J. COMP. L. 243, 287 (2008) (“The ability of employers to bind mobile employees to the law of a particular state through a choice-of-law clause depends in large part on which state’s courts decide the question. This is because, as indicated by cases reported in the Surveys of previous years, choice-of-law clauses fare significantly better in the courts of the state whose law is chosen by the clause than in other states.”).

169. *See* Lester & Ryan, *supra* note 7, at 404 (“[W]hen a conflict of laws issue arises in litigation over employee restrictive covenants, choice of law clauses are by no means foolproof mechanisms for ensuring application of a particular state’s law. The discretionary nature of conflicts rules, combined with the weight given to public policy concerns, combined with the fact that a public policy tension sits at the very heart of the law of employment restraints—a tension between public policies in favor of employee mobility, freedom of contract, and public access to certain kinds of professional services—means that

Comity and abstention principles—which are generally matters of discretion and are applied only in extraordinary circumstances—also fail to increase certainty or predictability when the courts of more than one state become involved in a non-compete dispute.¹⁷⁰ In a number of non-compete cases, forum-shopping by the parties led to challenges to the interstate system because both parties raced to the courthouse, each in different states, resulting in parallel litigation in more than one court.¹⁷¹ This can lead to a standoff in which neither jurisdiction clearly has a stronger interest in the resolution of the case or in which one or both states assert a strong policy preference concerning non-compete enforcement. That is, just as the conflicts rules do not lead to an obvious answer about what state’s law ought to apply, the doctrines relating to interstate disputes fail to assist in resolving these non-compete cases in a satisfactory way.¹⁷²

In a recent article, Professor Gillian Lester and Elizabeth Ryan survey the various permutations of interstate litigation, summarizing the issues raised in the three different contexts: federal–federal cases, federal–state cases, and state–state cases.¹⁷³ In the situation of parallel litigation in federal courts in different jurisdictions, “[t]he ‘first-filed rule’ is a strong presumption across federal circuits, in the interests of conservation of judicial resources and orderly administration of justice.”¹⁷⁴ Generally, the court in the second-filed action will stay or dismiss the case, but it is within the court’s discretion “and federal courts do not invariably follow it.”¹⁷⁵ In the non-compete context, it seems that, because of concerns about promoting or protecting the forum state’s public policy, courts do not necessarily feel the need to stay or dismiss the second-filed suit. Thus, as with the application of conflicts principles, the fact that non-compete law is deemed a matter of public

resolution of these disputes can be highly unpredictable and depend a good deal on forum.”).

170. See, e.g., *King v. PA Consulting Grp.*, 78 F. App’x 645, 649 (10th Cir. 2003) (former employee filed suit in Colorado despite New Jersey forum-selection clause) (in the interest of full disclosure, I should mention that I represented Mike King, the employee, in this case); *Marcelo v. Ivy Ventures, LLC*, No. C 10-04609 WHA, 2010 WL 5115437, at *4 (N.D. Cal. Dec. 9, 2010) (former employee filed suit in California state court against Virginia-based employer and sought to transfer employer’s Virginia suit to California); *Schmitt v. JD Edwards World Solutions Co.*, No. C 01-1009 VRW, 2001 WL 590039, at *3 (N.D. Cal. May 18, 2001) (court found former employee’s filing in California to be preemptive in an attempt to take advantage of the first-filed rule); *DeFeo v. Procter & Gamble Co.*, 831 F. Supp. 776, 777 (N.D. Cal. 1993) (former employee filed suit in California state court in the absence of a choice-of-law clause; employer filed in Ohio).

171. Lester & Ryan, *supra* note 7, at 404 (“Forum selection clauses are more reliable contractual devices for securing future application of a particular law, but they, too, offer no guarantee. The result is that, wholly aside from the substantive merits of a particular dispute over the enforceability of an employee non-compete agreement, parties have strategic incentives to seek a forum favorable to their respective positions in order to increase their chances of a favorable verdict.”).

172. See *id.* at 405 (“The law of parallel litigation is complicated, conflicting, and rife with incentives for parties to seek tactical advantage.”).

173. *Id.* at 407–20.

174. *Id.* at 407.

175. *Id.*

policy undermines the effectiveness of the doctrines used to address the diversity of state law.

Federalism concerns are paramount in federal–state parallel litigation, but the abstention doctrines are far from clear or simple. The Court’s opinions “give wide latitude to courts faced with federal–state parallel litigation . . . [and] [u]nless and until the Supreme Court offers further guidance, the federal (and state) courts may continue to take *widely divergent views* on whether strategic forum shopping even ought to be a matter for concern.”¹⁷⁶ This brief summary is perhaps sufficient to indicate that the law in this area certainly provides no helpful resolution of the parallel litigation problem. Instead, it seems to assume that such problems are the exception. If that is the case, then an unsatisfactory doctrine is just that. But when the number of similar disputes is on the rise, this kind of uncertainty is costly and only exacerbates the potential for strategic litigation.

The final permutation involves parallel litigation in different state courts. The way in which one state will react to earlier or later-filed parallel litigation in the court of another state is, unsurprisingly, unpredictable. Generally speaking,

[s]tate courts are more likely to defer to actions in sister states if the second filed action is a declaratory action, if there is a forum-selection clause selecting the other state, or based on the common law doctrine of *forum non conveniens*, which relies heavily on equitable principles of judicial comity.¹⁷⁷

As Lester and Ryan detail, the two issues that have arisen most regularly with respect to state–state non-compete litigation are (1) the geographic reach of civil judgments—that is, the extent to which a state can export its own non-compete policy—and (2) the possibility of anti-suit injunctions.¹⁷⁸ As to the first, the Full Faith and Credit Clause obviously governs the general question, but the extent to which courts are willing to issue nationwide injunctions in a non-compete case varies a great deal. As Professor Timothy Glynn points out, it is this issue that most affects whether a “market for law” in non-competes exists.¹⁷⁹ At a minimum, as Glynn argues, it would behoove states concerned about employer overreach and employee rights to understand the potential for export of another state’s public policy.¹⁸⁰ In thinking about the disadvantages of the diversity of state law concerning non-competes, the Full Faith and Credit Clause simply does not address the problem.¹⁸¹ Instead, the difficulty of its application in the non-compete context merely mirrors the disadvantages of diversity in the law in that area.

Finally, the potential for anti-suit injunctions looms over parallel state–state litigation. Although this possibility arises in a different situation—the Full

176. *Id.* at 413 (emphasis added).

177. *Id.* at 414.

178. *Id.* at 414–15.

179. Glynn, *supra* note 2, at 1424.

180. *Id.*

181. Lester & Ryan, *supra* note 7, at 417 (“The cleaving of substantive judgments from remedies for purposes of extraterritorial force shifts the focus, but not the existence, of strategic incentives in parallel litigation.”).

Faith and Credit Clause applies only to final judgments—the same conclusion can be drawn about the effectiveness of any relevant doctrine in addressing the disadvantages that arise from the diversity of state law: Comity concerns may influence a court’s decision-making, but that is hardly a useful rule in terms of certainty or disincentivizing strategic litigation.¹⁸² In sum, the discretionary and unsettled nature of the doctrines governing parallel litigation may encourage forum shopping and races to the courthouse. Under all of these scenarios, both employees and employers are likely to race to court in an effort to secure a favorable forum in which the preferred law would apply.¹⁸³

The litigated non-compete cases provide strong evidence of the disadvantages of the diversity of state law and of the failure of the current doctrine to ameliorate those disadvantages. *Advanced Bionics v. Medtronic* and *In re AutoNation* both present fact patterns that are the direct result of significant differences in state law and the uncertainty created by the doctrines available to mediate those differences.¹⁸⁴ In *Advanced Bionics*, Medtronic included a choice-of-law clause in Stultz’s non-compete agreement, designating the law of the state in which Stultz last worked for Medtronic, which was Minnesota. Under Minnesota law, the non-compete provision was enforceable.¹⁸⁵ Given California’s statute, the provision was likely unenforceable there. The parties certainly acted as if the results would be different in the two states. As the Minnesota court said, “The California courts may view Medtronic’s attempt to enforce the non-compete agreement in Minnesota as an attempt to evade California law. But it is clear that Advanced Bionics filed suit in California specifically to avoid Minnesota law, which is more likely to result in enforcement of the contract provision.”¹⁸⁶ In other words, both sides forum-shopped in an effort to obtain a favorable outcome.¹⁸⁷

The same dynamic was present in the *In re AutoNation* cases. The former employer, AutoNation, filed suit in Florida, where the non-compete clause was more likely to be enforceable. Hatfield, the former employee, filed a declaratory relief action in Texas, his new state of residence, where the non-compete would most likely be held unenforceable.¹⁸⁸ These are not just isolated incidents of the incentive provided for strategic litigation; it occurs regularly in the non-compete context.¹⁸⁹

182. See *Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231, 232–33 (Cal. 2002).

183. Lester & Ryan, *supra* note 7, at 420 (“When taken together, modern rules on choice of laws and parallel litigation create significant incentives for parties in litigation over non-compete agreements to seek an advantageous forum.”).

184. See *supra* Part II.

185. *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 455–56 (Minn. App. 2001).

186. *Id.* at 450.

187. *Id.* at 455 (“Moreover, applying Minnesota law does not promote forum shopping any more than applying California law. Both parties filed suit in the state that best fit their desired outcomes.”).

188. *In re AutoNation, Inc.*, 228 S.W.3d 663, 665–66 (Tex. 2007).

189. See *supra* note 140 and accompanying text.

2012] MAKING NON-COMPETES UNENFORCEABLE 975

Moreover, in neither case did basic conflict-of-laws principles assist in resolving the dispute because the courts treated the issue as deeply rooted in state public policy, allowing for the use of the escape valve. In *Advanced Bionics*,¹⁹⁰ the employer was based in Minnesota, the non-compete was entered into in Minnesota, the employee had worked in Minnesota, and the agreement was enforceable in Minnesota. California's interests were strong as well, however. The new employer was based in California, Stultz had moved to California, and California law expresses a strong public policy prohibiting enforcement of non-compete agreements. For California to enforce the Minnesota non-compete within its borders would be contrary to that policy. Thus, courts in both states reasonably asserted jurisdiction over the matter, and both did so, in part, on the basis of public policy.¹⁹¹ It is this characterization of non-compete enforcement as a matter of strong or fundamental public policy that creates the standoff; public-policy arguments permit circumvention of choice-of-law clauses such that the effort to contract around potential conflicts is far from airtight. None of the various conflict-of-laws approaches permit a predictable or rational resolution to this kind of conflict. In *Advanced Bionics*, the California court eventually relinquished jurisdiction over the litigation, but as a matter of comity (even though the matter was first-filed in California) rather than conflicts doctrine.¹⁹²

Similarly, the Texas court in *In re AutoNation*, though expressing a strong public-policy preference against the enforcement of the non-compete against a citizen of Texas, deferred to the Florida litigation (which in that matter was the first filed). Both courts quite reasonably asserted jurisdiction over the matter: The employer was based in Florida, the employee had worked in Florida, and the non-compete contained a Florida choice-of-law and forum-selection clause. However, the employee moved to Texas and found new employment there, and Texas public policy was in the employee's favor.

Both *Advanced Bionics* and *In re AutoNation* involved parallel litigation. Just as the conflicts rules were unavailing in resolving the choice-of-law issues, the doctrines governing parallel litigation did not lead to results that would promote certainty or deter parties from racing to court. In *Advanced Bionics*, the litigation proceeded in state court in California and Minnesota.¹⁹³ Stultz, the employee, and *Advanced Bionics*, his new employer, filed an action for declaratory relief in state court.¹⁹⁴ Shortly thereafter, Medtronic, Stultz's former employer, filed a lawsuit in Minnesota state court.¹⁹⁵ The Minnesota court issued what amounted to an anti-suit injunction, ordering Stultz not to take any action that would interfere with the

190. 59 P.3d 231 (Cal. 2002).

191. Glynn does not characterize the Minnesota court's actions so charitably and recommends that "[i]f California is serious about protecting employees working within its borders, it ought to recalibrate its comity-driven judicial norms to account for interjurisdictional competition." Glynn, *supra* note 2, at 1439.

192. 59 P.3d at 232–33.

193. *Id.* at 233–34.

194. *Id.* at 233.

195. *Id.*

Minnesota court's jurisdiction.¹⁹⁶ The California court likewise issued a TRO against Medtronic.¹⁹⁷ Although the first-filed action was in California, the Minnesota court refused to defer to the California action. Instead, the California Supreme Court stood down, citing comity concerns. Here, then, the applicable first-filed principle was not applied, further reducing the certainty that one might hope the law would provide. Stultz and Advanced Bionics won the race to the courthouse in the jurisdiction with favorable law, yet still failed to achieve their desired result. The result will not, however, deter the kinds of actions taken by either party in the case.

In *In re AutoNation*, the Texas court, though agreeing that enforcement of the non-compete would violate its public policy, deferred to the employer's first-filed action in deference to "the parties' contractual commitment" and "principles of interstate comity." Thus, there are occasions in which the parties' choice of law and the principles governing parallel litigation resolve the dispute in the way one might expect at the outset.¹⁹⁸ When this occurs, it does indeed provide some measure of predictability, but still does little to discourage strategic litigation. In fact, it might encourage such behavior, and it certainly increases the possibility of states marketing their law (as applied through choice-of-law clauses drafted by employers focused on this issue).

Professor Timothy Glynn argues that we are on the brink of just such a trend. As he discusses, non-compete enforceability may be the single most important employment-related issue for some firms.¹⁹⁹ As employers have the motivation and ability to select favorable law, states may well be motivated to cater to those preferences, creating the potential for an "interjurisdictional market" for non-compete law between the states.²⁰⁰ Glynn argues that this is cause for concern, particularly for those worried about the disparities in bargaining between employers and employees generally.²⁰¹ Glynn does not advocate for a specific change in the law, but his argument emphasizes the problems or potential problems in the current state of the law of non-competes.²⁰² A uniform rule of unenforceability would address the very concerns that Glynn has expressed.

Diversity in state non-compete law has many disadvantages. The combination of the interstate employment markets and the failure of the choice-of-law rules to resolve the public-policy differences between states makes the diversity of state law on non-competes a significant disadvantage. Even if the

196. *Id.* at 234.

197. *Id.*

198. *See, e.g.,* *Pro Edge, L.P. v. Gue*, 374 F. Supp. 2d 711 (N.D. Iowa 2005); *In re AutoNation, Inc.* 228 S.W.3d 663 (Tex. 2007).

199. Glynn, *supra* note 2, at 1421 ("Indeed, at least with regard to some types of firms or categories of workers, employers' *ex ante* concerns regarding NCA enforceability against departing employees may outweigh all other employment law considerations.").

200. *Id.* at 1424 ("States where the internal dynamics have produced such employer-friendly noncompetition regimes therefore have powerful incentives to please home firms by offering to enforce their law extraterritorially.").

201. *Id.* at 1444; *see also* Bishara, *supra* note 9, at 751.

202. *See* Glynn, *supra* note 2, at 1387-88.

cases are rare, simply because few cases actually get litigated so extensively, the potential for this outcome creates vast uncertainty. The current state of the law—widely varying degrees of enforcement and manipulable conflicts rules—leads to an extremely unstable state of affairs that should be avoided.

It follows from this argument that if state non-compete law were uniform, nearly all of these problems would disappear. Theoretically, at least, if non-competes were unenforceable nationwide, employers would not seek to impose them on employees. And even if they did, the predictability of outcome would be quite high: We can assume that courts would invalidate the agreements. If that were so, most, if not all, litigation over the agreements would disappear. Although there are alternatives, the best option is to reduce or eliminate the diversity in state law on non-compete enforceability. Finding a better resolution to the conflicts problems and a way to avoid the interstate stand-offs is either improbable or impracticable, or both.²⁰³ While *any* uniform rule might reduce the problems identified here, a uniform rule of unenforceability would be much more effective in that regard. A uniform rule-of-reason approach would leave the enforceability of non-competes still somewhat uncertain within any given jurisdiction and even more so between states. That is, such a uniform rule would do little to reduce or eliminate the disadvantages arising from the diversity in state law.

b. Facilitating the Flow of Commercial Transactions²⁰⁴

Uniformity in non-compete law is attractive not only because it would reduce the disadvantages of diversity in state law, but also because it would facilitate the flow of commercial transactions. Employment may be considered a kind of commercial transaction; it is certainly a contractual relationship that benefits from predictability in the law.

There is little predictability in the law of non-competes, however. Not only is it somewhat difficult in many states to predict whether a given non-compete will be enforceable,²⁰⁵ it is difficult to predict which state's law might

203. *Id.* at 1428 (“In sum, we observe employers using choice-of-law clauses to take advantage of more favorable noncompetition law, and the states supplying that law enforcing it robustly. Activity on both the demand and supply sides is therefore consistent with the emergence of export-style competition. Whether the supplier states consciously compete to drum up ‘enforcement business’ beyond simply protecting domestic employers is unclear. But, at a minimum, some states are pushing their noncompetition law (regulating the activity of former employees and their potential new employers in other jurisdictions) for competitive advantage.”).

204. NCCUSL, *supra* note 159, at 2.

205. *See supra* Part I. Various doctrines, including the rule-of-reason and the blue-pencil approach can create a great deal of uncertainty. “In a blue pencil state, an employee wishing to leave his employer for a competitor will not know the actual terms of his noncompete agreement. Even if the agreement appears unreasonable and unenforceable, the blue pencil doctrine creates uncertainty.” Pivateau, *supra* note 5, at 691; *see* Christine M. O’Malley, *Covenants Not to Compete in the Massachusetts Hi-Tech Industry: Assessing the Need for a Legislative Solution*, 79 B.U. L. REV. 1215, 1226 (1999) (arguing for a

eventually be applied, and therefore, how to draft or negotiate a non-compete agreement and a choice-of-law clause. These layers of unpredictability are costly to employers, employees, and to the legal system as a whole. Employees may be ignorant of the law and thereby harmed. Employers, on the other hand, are more likely to have access to legal counsel, but that alone is costly. Uncertainty about the state of the law, the possibility of enforcement, and the risks of non-enforcement all impose costs.²⁰⁶ Costs are imposed when the disputes bubble up to the judicial system, presumably reducing the number of transactions and increasing the costs of those that do occur.²⁰⁷

A uniform rule of unenforceability would facilitate commercial transactions because it is a rule that promotes the free flow of labor. Employers would more easily be able to hire the employees they most need, and employees would be freer to accept the most profitable and satisfying employment available. In this way then, it is not simply uniformity, but this *particular* uniform rule that would reduce the disadvantages of the diversity in state law and facilitate commercial transactions. This is surely the most contested element of the argument. As briefly summarized below, however, there are good reasons to believe that a rule of unenforceability is the substantively preferable rule for both employees *and* employers.

c. A Rule of Unenforceability Is the Substantively Preferable Rule

There have been numerous calls for legal reform related to non-competition agreements. These have involved suggestions on a state-specific level,²⁰⁸ proposals for changes in the general approach to interpreting and applying non-competes,²⁰⁹ and various other ideas for altering the doctrine.²¹⁰ Despite this

statutory revision in Massachusetts, in part because of the unpredictability of the common-law approach).

206. Privateau, *supra* note 5, at 692 (“Although the point is often lost in the discussion of noncompete agreements, for every employer that benefits from the noncompete agreement, another suffers. Companies who want to hire an applicant subject to a noncompete agreement must weigh the potential benefits of the agreement against the burden of possibly having to enforce the agreement.”).

207. *See, e.g., id.* at 693 (“The blue pencil doctrine creates confusion for the legal system. Among those states where noncompete agreements are enforced, courts can look forward to an ever-growing stream of noncompete litigation. Courts are already overburdened with the need to decide questions of reasonableness and whether the restraint as set forth in the agreement is actually necessary to protect the legitimate business interests of the employer.”).

208. *See, e.g., O’Malley, supra* note 205, at 1217, 1229–33 (arguing that by passing a statute “the Massachusetts legislature could clarify the state’s public policy position, thus enabling the courts to act more consistently” and suggesting the possibility of the Massachusetts legislature adopting the California rule).

209. *See Estlund, supra* note 33, at 421–26 (floating a number of suggestions, including widespread adoption of a “strict scrutiny” approach and the potential of requiring “garden leave”—payment to employee during the postemployment period of restriction); *see also* Eileen Silverstein, *Bringing Forth a New World from the Ashes of the Old*, 34 CONN. L. REV. 803, 815 (2002).

2012] MAKING NON-COMPETES UNENFORCEABLE 979

variety of proposals, no one has called for uniformity in the law.²¹¹ More than enough conflicts have arisen and the costs of the disparity in the law are sufficient to give rise to the need for uniformity. Moreover, there has now been sufficient experience in the laboratories of state law such that the best substantive approach can be determined. The uniform or model-act approach allows for information gathering and dissemination in a manner that may convince policymakers of the benefits of the proposed rule.

The rule of unenforceability is preferable from the employee perspective, but there is evidence that it should be preferable for employers as well. In a seminal article about economic development in Silicon Valley, Professor Ronald Gilson contended that California's refusal to enforce non-competes solved a collective-action problem. Because of the information spillovers created by employee mobility, it is collectively irrational for firms to impose non-competes on their employees, but a legal regime in which such contracts are enforceable makes it individually rational (or at least appealing) for firms to use the agreements.²¹² Recent empirical studies support Gilson's argument. There is, for example, evidence of greater rates of economic development and innovation in California than in Massachusetts.²¹³ Studies indicate that the labor market is more mobile and there is more innovation where non-competes are not enforceable.²¹⁴

Finally, a rule of unenforceability is arguably preferable in the context of the state and federal intellectual property regimes. Non-compete agreements should be generally unenforceable because although they are used by firms

210. See, e.g., Pivateau, *supra* note 5, at 674 (arguing that "courts everywhere" should abandon the blue-pencil doctrine and refuse to reform non-competes to make them reasonable; proposing a new test for reasonableness requiring a high level of specificity in any non-compete).

211. The ALI included a *Restatement* provision on non-competes. RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981). The *Restatement* is, however, intended to be more descriptive than proscriptive, and I do not regard it as a call for uniformity. Jeffrey Hirsch has called for the nationalization of all of workplace law, which would, presumably, include non-compete enforcement, but his proposal does not discuss the agreements in particular. Hirsch, *supra* note 4, at 1059–60.

212. Gilson, *supra* note 18, at 595–96.

213. ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128, at 3 (1994).

214. See, e.g., Richard Gordon, *Innovation, Industrial Networks and High-Technology Regions*, in INNOVATION NETWORKS: SPATIAL PERSPECTIVES 174, 185–91 (Roberto Camagni ed., 1991) (arguing that employee mobility leads to increased innovation and economic growth because of the transfer of information among firms); see also Richard C. Levin, *Appropriability, R&D Spending, and Technological Performance*, 78 AM. ECON. REV. 424, 427 (1988) (suggesting that information spillovers between firms do not negatively affect spending for research and development). There is no consensus on this issue, of course. Some have asserted that there may be too much employee mobility, arguing that employee mobility is beneficial to individuals but imposes costs on the economy as a whole. See RICHARD L. FLORIDA & MARTIN KENNEY, THE BREAKTHROUGH ILLUSION: CORPORATE AMERICA'S FAILURE TO MOVE FROM INNOVATION TO MASS PRODUCTION 91–92 (1990).

primarily as tools for protecting intellectual property assets, they are ill-suited to that task. Non-competes do not work well to protect intellectual property assets because they are, at the same time, both too narrow and too blunt an instrument. They are too narrow because they operate only between an employer and an employee and thus do not protect the intellectual property against the world. And they are too blunt because, unlike other forms of intellectual property protection, they are directed at people rather than at (intangible) things.²¹⁵ Moreover, as an effort to protect intellectual property, non-competes may well impinge upon the existing intellectual property regimes. There is substantial evidence that employers seek to use non-competes to protect information that they cannot protect with trade-secret law, copyright law, or patent law.²¹⁶ To the extent that those regimes are deemed to have achieved the proper balance between protection and the public domain, non-competes conflict with and upset that balance. Even if the balance is not optimal—and it surely is not optimal—non-competes nonetheless interfere with the *effort* in the IP regimes to work toward a balance.²¹⁷

The extent of academic commentary and the number of proposals for reform indicate the widespread discomfort with the use of non-competition agreements. A straightforward rule of unenforceability is simply the most practicable solution to the myriad problems presented by the agreements as a substantive matter.

2. *Practicability*

Not only is a uniform rule of unenforceability desirable, but it is also practical as an administrative matter: It is concise and will require only a simple legislative change; some states already have experience with the rule and there is momentum for change in a number of jurisdictions; and benefits would accrue from the rule even in the absence of complete adoption by all of the states.

The proposed uniform rule is brief and involves a single, discrete legal issue. Adoption by most states would be simple. Many states have left the enforceability of non-competes to common-law development.²¹⁸ In those states, all that would be required is the adoption of the uniform act. In jurisdictions with an existing statute, that statute would have to be repealed and replaced with the uniform act. In either case, however, the brevity of the uniform act and its focus on a single issue makes it a relatively practicable legislative change. Moreover, as compared to the rule of reason, a rule of unenforceability is subject to substantially less interpretation and needs less iterative common-law development. The various rule-of-reason approaches taken by many states are similar in their broad brush, but they differ greatly in the details, with the result that there is no uniformity even among the states that ostensibly apply the same approach. A rule of unenforceability, on the other hand, is simpler, can be enacted as a relatively short

215. Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 914 (2010).

216. *Id.* at 898–99.

217. *Id.*

218. *See supra* Part I.

2012] MAKING NON-COMPETES UNENFORCEABLE 981

statute, and, if applied in its strong form, has little need for interpretation, fact-intensive discovery, or development of exceptions.

A rule of unenforceability is not just theoretically appealing; it is demonstrably workable. A number of states have applied a rule of unenforceability for many years, demonstrating that the rule is practicable.²¹⁹ A few states—most notably California—have existed under a legal regime in which non-competition agreements are unenforceable and have not apparently suffered particularly ill effects. Indeed, there is evidence that a simple rule of unenforceability is the substantively preferable approach and is pro-competition, pro-growth, and pro-innovation.²²⁰

The uniform or model act process would allow for the collection and dissemination of all these kinds of studies and other information about the various states' experience with differing rules concerning non-competition agreements. Because of the legislative-style consideration of uniform acts, with the involvement of lawyers, judges, law professors, and others, testimony from experts and interested parties, and sessions for debate, relevant information is likely to be collected, presented, and disseminated. This process, of course, also entails the downsides of the legislative process—such as compromise and the possibility of capture.²²¹ It is difficult, however, to argue that more information is a bad thing, and there are few other ways to disseminate information about the effects and efficacy of non-competes.

Finally, even if not all jurisdictions adopted the rule proposed here, the benefits of some uniformity would accrue. This would be particularly true if a few of the more populous states adopted the rule. For example, if Massachusetts, New York, and Texas adopted a rule of unenforceability of non-competes, it would affect a huge number of employers and employees and, presumably, substantially reduce the actual number of conflicts disputes that would arise. Moreover, the movement by some states to eliminate non-compete enforcement might make it less likely that employers would ask employees to sign non-competes and less likely that the parties would resort to litigation in the event that a dispute arises.

219. See Glynn, *supra* note 2, at 1420; Pivateau, *supra* note 5, at 677–78.

220. See *supra* notes 214–15 and accompanying text. An absolute rule of unenforceability is a substantially better rule than the approach taken in most states. While the approach taken in all states purports to take into account the problematic aspects of non-competition agreements—indeed, no state treats non-competes as it treats other commercial contracts—it is ineffective. Briefly put, the “reasonableness” test, however it is applied, does not prevent the imposition of many overbroad and unenforceable agreements, it does not address the employee mobility concerns, it fails to account for the cognitive and behavioral mechanisms that are present in the bargaining process, and it fails to recognize that non-competes are used primarily to protect intellectual property and they are the wrong tool for that job. See Moffat, *supra* note 215, at 918–20.

221. See *infra* Part IV.

IV. THE UNIFORM ACT PROCESS IS NOT PERFECT

Various objections to this proposal will certainly be raised: Uniformity may not be desirable when the states have varying “political policies or philosophies”; the uniform act process has its flaws and may, in some circumstances some have argued, actually *reduce* interstate uniformity; and, finally, some will argue that if the rule proposed here is the substantively preferable rule, it will be adopted by most, if not all, states eventually. I briefly address each of these critiques below.²²² While these critiques are not without their merit, I maintain that the uniform or model act process is, on balance, nonetheless likely to be the most effective tool in an effort to reduce the disadvantages of the diversity in state law, and to disseminate information about the actual operation and effects of employee non-competition agreements.

One of the strongest arguments in favor of uniformity is also one of the most powerful critiques of uniformity: The states have differing policy preferences. One reason to celebrate diversity in state law is that it allows different jurisdictions to express divergent policies and philosophies, perhaps reflecting differing demographics, geographies, and social mores. And indeed, many states express their policies concerning non-competition agreements as a matter of fundamental public policy. But, as described above, the fact that non-competes are deemed a matter of public policy has increasingly led to intractable conflicts, particularly as the employment relationship has grown increasingly national in scope. This has led to the myriad disadvantages of the diversity in state law described above. Thus, an argument in favor of diversity in state law counsels at the same time for uniformity in state law and the disadvantages of diversity weigh heavily against the traditional notions of local control in this instance.

Moreover, another reason to advocate the diversity of state law is to foster a “laboratory” in which different legal approaches can be tested. In the context of non-competition agreements, the laboratories of state law have yielded some results: An absolute rule of unenforceability is preferable to the rule-of-reason approach. The argument for the diversity of state law is weaker when there is reason to believe that there is a substantively better rule.

Finally, diverse state law is preferable and certainly less problematic when it affects “purely local” areas traditionally governed by state law. While this might have been true of the employment market and the employment relationship a century ago, it is no longer the case. Many employers operate on a national, if not an international, scale, and employees are increasingly mobile. Even if a business does not have an interstate presence, the labor market is national in scope and individuals are far more likely to move multiple times in their career.²²³ Differing

222. I do not here address the objection that a rule of unenforceability is not the substantively preferable rule. I discuss that briefly in Part III above, and in depth in Moffat, *supra* note 215, at 914.

223. KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 74–83 (2004).

2012] MAKING NON-COMPETES UNENFORCEABLE 983

rules governing the employment relationship are thus much more likely to lead to conflicts and unpredictability when employment disputes arise.

Another critique focuses on the uniform act process in particular. Professor Larry Ribstein and others have conducted a number of studies and have concluded that, under some circumstances at least, the uniform act process actually leads to *less* uniformity.²²⁴ This is the case, he argues, because of NCCUSL's structure as a legislative-style body and the compromises that structure entails.²²⁵ These compromises lead to "idiosyncratic" proposals that are less likely to be adopted by the states than, for example, the "leading forms" for LLC formation.²²⁶ Professors Ribstein and Kobayashi conclude that "[t]he basic problem is that the uniformity goal invites a process that, ironically, subverts the uniformity that the process is intended to achieve."²²⁷

While this certainly may be the case in some instances, as described by Ribstein and Kobayashi, this Article focuses on uniformity as a result, not on any particular process. To be clear, a uniform rule of unenforceability is preferable regardless of the means by which the states reach that uniformity. Ribstein does not conclude that the uniform act process always leads in this direction. Rather, it is under circumstances in which the uniform act process leads away from the "leading forms" or other organic movements toward uniformity.²²⁸ It is thus the uniform act *process* rather than uniformity of law as a goal to which Ribstein and others have objected.

A related concern might be that even when states putatively apply the same rule, differing interpretations and factual scenarios result in some degree of divergence over time. This may well be true. A state with a rule against enforcement of non-competes might well adopt an exception, or apply a narrow interpretation of one element. This is only to say, however, that no legal rule or solution is perfect. The hurdle for a proposal like this is to show that it is the best of the imperfect approaches, and it is the goal of this Article to clear that hurdle.

A corollary to the critique of the uniform act process is that if a substantively better rule emerges it will eventually be adopted by the various states without the formal NCCUSL process. Although this is an appealing notion, it is not clear that it actually occurs. A number of states have recently reconsidered their approaches to non-compete enforceability.²²⁹ And it certainly will not happen

224. Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. CORP. L. 327, 359 (2009).

225. *Id.* at 343–44.

226. *Id.* at 352–53.

227. *Id.* at 360.

228. *See id.* at 352–53.

229. *See, e.g.*, S.B. 140, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011) (prohibiting hospitals from entering into employment contracts with healthcare providers that include non-competes); H.B. 2293, 187th Gen. Ct., Reg. Sess. (Mass. 2011) (setting up specific requirements for enforcement of non-competes); H.B. 2296, 187th Gen. Ct., Reg. Sess. (Mass. 2011) (establishing a presumption that a restriction of six months or less is reasonable); S.B. 786, 96th Leg., Reg. Sess. (Mich. 2011) (requiring employers to inform

in the absence of research and the dissemination of information. The uniform act process is one way in which information can be distributed and shared.

CONCLUSION

This Article will end where it started: The state of non-compete law is a mess. Commentators generally agree, legislatures are considering a variety of statutory changes, and courts have been tinkering with the doctrine. Rather than adding another proposal for incremental change, this Article advocates for wholesale reform: Employee non-competes should be unenforceable, and the states should adopt a rule to that effect.

While this is in some ways a radical proposal, it is not so implausible. A few states already have a rule of unenforceability and thus far have not suffered terribly as a result. In fact, a number of recent studies indicate that a legal regime in which non-competes are unenforceable is preferable not just for employees (which goes without saying), but also for employers who will gain from access to more skilled and qualified employees and from increased overall innovation and financial returns. The results of these studies should be quite compelling to policymakers, as should the argument presented here. In the context of employee non-competes, the disadvantages of diversity in state law far outweigh the usual benefits of the “laboratories of state law.” The experiment has been allowed to run, and the results are clear—a uniform rule of unenforceability of non-competes would virtually eliminate the myriad problems resulting from the current state of the law.

employees of non-compete provisions in initial offer of employment); H.J.R. 24, 59th Leg., Gen. Sess. (Utah 2011) (undertaking a study into the impact of non-competes on employees); H.B. 3046, 80th Leg., Reg. Sess. (W. Va. 2011) (voiding all non-compete agreements).