

ON THE INTERPRETATION OF NO-HIRE  
PROVISIONS IN PENNSYLVANIA—THE CASE  
FOR UTILIZING FEDERAL ANTITRUST LAW

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# ON THE INTERPRETATION OF NO-HIRE PROVISIONS IN PENNSYLVANIA—THE CASE FOR UTILIZING FEDERAL ANTITRUST LAW

Henry Greco \*

## ABSTRACT

Courts around the country lack guidance when evaluating the enforceability of an ancillary no-hire provision. In a jurisdiction without a statute directly on point, such as Pennsylvania, the paths taken thus far have ranged from adopting a noncompete framework to looking to other jurisdictions for assistance to relying on public policy rationales. The Pennsylvania Supreme Court recently adopted a test based on the reasonableness of the challenged provision, but the factors and the overarching reasoning confuse and conflate the concepts of “restraints of trade” and “restrictive covenants,” making it more difficult to reach a clear, sensible, and permanent solution.

This Note draws a simple, logical line connecting no-hire provisions and the federal Rule of Reason test, advocating for its use whenever the enforceability of a no-hire provision is at issue. I argue that a no-hire provision is correctly categorized as a horizontal restraint of trade, that only reasonable restraints of trade are enforceable, and that the federal Rule of Reason test is the method by which the reasonability of a restraint is determined. Using this test provides a time-tested, inclusive, and fact-intensive framework that produces a well-considered and thorough conclusion as to the reasonability of a particular no-hire provision.

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## INTRODUCTION

When presented with the question of the enforceability of a no-hire agreement, courts have been consistently left without guidance. Aside from public policy considerations and looking to “related” areas of the law, courts seem to have nothing up their sleeves. Current approaches to evaluating the enforceability of no-hire provisions tend to blend the distinction between restrictive covenants (in this case, noncompetes) and restraints of trade. In their desperation, courts have, in some cases, turned to and relied upon noncompete jurisprudence that looks and feels relatively similar.

In 2019, the Pennsylvania courts encountered this issue of a lack of guidance in *Pittsburgh Logistics Systems, Inc. v. BeeMac Trucking, LLC*.<sup>1</sup> With no state precedent to work from and no concrete framework to apply, the court mischaracterized the no-hire provision as a noncompete, resting its decision primarily on considerations of abstract public policy. While this is perhaps understandable, the Rule of Reason offers a simpler, much more sensible framework that is more easily justified, having been refined over a century and applied in cases where the reasonability of a restraint of trade is in question.

Since no-hire provisions do not bind employees but instead reduce competition in the labor market and restrict the output of laborers, I take the position that they are properly categorized as horizontal restraints of trade. I also argue that the Rule of Reason is *the* test for evaluating restraints of trade to determine whether the anticompetitive effects outweigh the procompetitive benefits such that it is unreasonable to enforce the restraint.

Part I provides a general background, including the definition of “no-hire provisions” and the scope of this Note, as well as a discussion and critique of the current judicial approaches to dealing with no-hire provisions. Part II focuses on the *Beemac* saga, reviewing and criticizing the reasoning of both the intermediate appellate court<sup>2</sup> and the state high court. Part III gives a background of federal antitrust law and tracks the development of the federal Rule of Reason test. Part IV makes the argument for utilizing the federal Rule of Reason test, cleanly and

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<sup>1</sup> 202 A.3d 801, 801 (Pa. Super. Ct. 2019), *aff’d*, 249 A.3d 918 (Pa. 2021). The superior court capitalized the “m” in Beemac (making it “BeeMac”), but the state high court did not, and it appears the correct formatting is “Beemac,” which is what I use.

<sup>2</sup> The Pennsylvania Superior Court largely tracks the reasoning of the trial court, so a discussion of the superior court’s reasoning necessarily means discussing the trial court’s reasoning. *Pittsburgh Logistics Sys., Inc. v. BeeMac Trucking, LLC*, 202 A.3d 801, 801 (Pa. Super. Ct. 2019).

succinctly drawing logical lines supporting its adoption. Part V offers a glimpse into a possible application of the Rule of Reason to the facts of *Beemac*.

## I. GENERAL BACKGROUND

### A. Defining “No-Hire Provision” & Framing Perspective

No-hire provisions, sometimes called “no-hire agreements”<sup>3</sup> or “no-poach agreements,”<sup>4</sup> are not particularly complicated. At its core, a no-hire agreement is a promise given by one company or individual to another that it will not hire the employees of that other company or individual.<sup>5</sup> These agreements may be “naked,” where the entire agreement is composed of the promise to refrain from hiring,<sup>6</sup> or “ancillary,” where the no-hire provision is part of a larger contract, the primary purpose of which is something other than the agreement not to hire.<sup>7</sup> Even where a restraint is contained within a larger agreement, a court may find that the larger agreement is a “front”<sup>8</sup> for an intent to engage in anticompetitive conduct.<sup>9</sup>

In some cases, a no-hire provision may be part of an employment agreement between employee and employer, possibly paired with (or contained within) a non-

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<sup>3</sup> *E.g.*, *Eichom v. AT&T Corp.*, 248 F.3d 131, 142 (3d Cir. 2001).

<sup>4</sup> *No-Poach Approach*, DOJ, <https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach> [<https://perma.cc/5RGU-UVM2>] (last updated Sept. 30, 2019).

<sup>5</sup> *See* DEP’T OF JUST. ANTITRUST DIV. & FED. TRADE COMM’N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016) [hereinafter HR GUIDANCE].

<sup>6</sup> *See id.*; *see also* HERBERT HOVENKAMP, PRINCIPLES OF ANTITRUST 168 (2017) (“A restraint is “naked” if it is formed with the objectively intended purpose or likely effect of increasing price or decreasing output in the short run, with output measured by quantity or quality.”). Hovenkamp’s definition is geared toward more traditional notions of competition and markets, but with a shift in perspective, a no-hire is properly seen as a restraint whose effect may be a decrease in possibly both quantity and quality of output where output equals employees in the particular industry. Every industry has employment competition to varying degrees, and where firms in that industry agree to not hire each other’s employees, the result is a reduction in the competition of that market for laborers. *See infra* notes 202–07 and accompanying text.

<sup>7</sup> *See* *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 188–89 (7th Cir. 1985) (outlining the difference between ancillary and naked restraints). This Note focuses on ancillary no-hire agreements, and I use “agreement,” “provision,” and “clause” interchangeably in that context.

<sup>8</sup> HOVENKAMP, *supra* note 6, at 173 (“Some so-called ‘joint-ventures’ are nothing more than fronts for naked restraints.”).

<sup>9</sup> *See, e.g.*, *United States v. Romer*, 148 F.3d 359 (4th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999) (rejecting the argument that a bid-rigging agreement was actually a joint venture).

solicitation provision;<sup>10</sup> in those circumstances, the no-hire clauses prohibit that employee from recruiting or hiring any other employee from their employer upon the bound employee's termination.<sup>11</sup> No-hire provisions may also arise in a number of other contexts, including in the sale of a business or in franchise agreements.<sup>12</sup>

In this Note, I am concerned only with no-hire provisions that are ancillary to another agreement that is not an employment agreement, franchise agreement, or sale of a business. The case to which I devote a substantial amount of space below involves two entities in the shipping industry, but the scope of my recommendation is not so limited. One of the benefits of my recommendation is its flexibility to deal with the specific conditions and peculiarities of many industries.

It is important to remember throughout this discussion that no-hire provisions are properly characterized as restraints of trade, not as restrictive covenants in the employment context.<sup>13</sup> No-hire provisions between two entities bind those entities to

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<sup>10</sup> See, e.g., *Luck v. OTX Acquisition Corp.*, No. CV101671SVWPJWX, 2010 WL 11595817 (C.D. Cal. Aug. 3, 2010).

<sup>11</sup> See *id.* at \*3 (“[T]he Employee shall not, directly or indirectly . . . : (I) employ, solicit, recruit or attempt to employ, solicit or recruit any employee of the Company to leave the Company’s employment . . .”). Cases like *Luck* invalidate one of the chief concerns with enforcing no-hire provisions—lack of consideration. However, a no-hire provision may also arise in a settlement agreement in the employment context, as in an employer requiring that no branch of their company, wherever located, hire the terminated employee back after settlement. While this agreement is supported by consideration, it looks like retaliation, especially for low-wage employees in positions that do not require specialized skills and have high turnover. That is a topic for another article.

<sup>12</sup> In these agreements, the franchisee agrees to not hire the employees of another franchise stemming from the same common entity, the franchisor. See Press Release, Pennsylvania Off. of Att’y Gen., AG Shapiro Secures Win for Workers as Four Fast Food Chains Agree to End Use of No-Poach Agreements (Mar. 12, 2019), <https://www.attorneygeneral.gov/taking-action/press-releases/ag-shapiro-secures-win-for-workers-as-four-fast-food-chains-agree-to-end-use-of-no-poach-agreements/> [<https://perma.cc/A37U-XP9H>] [hereinafter AG Press Release].

<sup>13</sup> The terms “restrictive covenant” and “restraint of trade” are not synonymous. It is tempting to say that a covenant is just a promise to do or not do something (in the case of a negative covenant), and “restrain” is a synonym of “restrict,” therefore a restraint of trade involving a negative covenant is a restrictive covenant. But “restrictive covenant” has become a term of art in multiple sections of the law with specific meanings in each, along with different rules and perceptions of how to deal with them when they arise. See, e.g., Stephen L. Brodsky, *Restrictive Covenants in Employment and Related Contracts: Key Considerations You Should Know*, ABA (Feb. 8, 2019), <https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2019/restrictive-covenants-employment-related-contracts/> [<https://perma.cc/MR7P-URK5>]; see also *Covenant*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A promise made in a deed or implied by law; esp., an obligation in a deed burdening or favoring a landowner.”). I will not dive into the minutiae; it is enough to say that when courts talk about “restrictive covenants” in a similar context, they are referring to noncompetes. *GeoDecisions v. Data Transfer Sols., LLC*, No. 1:10-CV-2180, 2010 WL 5014514, at \*3 (M.D. Pa. Dec. 3, 2010). I take the position that no-

refrain from hiring certain individuals—they do not bind the employees, even though employees are inexorably affected. Much of courts' confusion comes from the failure to shift their perception away from the employment/restrictive covenant/noncompete realm. The mere fact that an employee is affected does not open the door to using employment-based rules and laws; these cases present an issue of reduction of "employment competition," that is, fewer firms competing against one another for labor.<sup>14</sup> The employees affected by the agreement then have fewer choices for possible future employers. This reduction in competition and the corresponding reduction in choice is exactly the type of restraint that antitrust law is meant to address,<sup>15</sup> and it is no different in the labor market.

### B. Current Approaches

The current landscape of courts' interpretations of no-hire provisions is both bare and far from settled.<sup>16</sup> Courts have generally ended up in one or more of four "buckets" of interpretation: (1) appropriating the relevant jurisdiction's noncompete framework, treating the no-hire as a restrictive covenant;<sup>17</sup> (2) applying some form of a "reasonableness" analysis (sometimes called some form of "rule of reason"), usually stemming from a noncompete ancestor—with the goal of determining whether the parties had legitimate business interests to protect, whether the no-hire

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hire provisions are properly understood as restraints of trade and using the term "restrictive covenant" invites confusion and serves only to distract.

<sup>14</sup> Donald J. Polden, *Restraints on Workers' Wages and Mobility: No-Poach Agreements and the Antitrust Laws*, 59 SANTA CLARA L. REV. 579, 590 (2020).

<sup>15</sup> See *infra* Part III.

<sup>16</sup> Although no empirical study has been done, in order to get a sense of the number of cases that deal with the enforceability of no-hire or no-poach provisions, I entered the following search into both Lexis and Westlaw: [(no-hire or "no hire" or nohire or "no poach" or no-poach) and enforceable and (provision or clause)]. At the time this Note was written, Lexis returned 134 results, Westlaw returned 94. 44 of the Lexis results were unique and 8 of the Westlaw results were unique. Theoretically, the number of unique cases of one source added to the number of cases of the other source should equal the same equation with the sources switched (Lexis unique + Westlaw = Westlaw unique + Lexis), however, it does not here. The discrepancy can be explained by slight differences in the citations of the cases making them appear unique but were more likely scrivener's errors.

Even if we take the larger number, 144 results, fewer than 100 of them involved the interpretation of a no-hire provision and a final ruling on its enforceability. In more than half of those cases, the court considered the no-hire provision to be in the nature of a noncompete and analyzed it under that framework. In almost every instance, the court looked to other jurisdictions for assistance in finding the proper framework.

<sup>17</sup> *E.g.*, *Heyde Cos. v. Dove Healthcare, LLC*, 654 N.W.2d 830 (Wis. 2002).

was more onerous than required, and whether the risk to the public renders the no-hire unreasonable;<sup>18</sup> (3) relying primarily on public policy considerations, including the employees' lack of knowledge of the no-hire and the lack of consideration provided to employees;<sup>19</sup> or (4) in a state where it is applicable, interpreting or incorporating statutory authority.<sup>20</sup>

Each bucket is somewhat interrelated. The fact that questions of no-hire enforceability are generally cases of first impression<sup>21</sup> means courts look to a broader range of authorities and likely hit most of the buckets at some point when attempting to interpret these provisions.

### C. *Problems with Current Approaches*

Each of the four buckets above is not without its issues.<sup>22</sup> It is understandable that courts appear lost in their search for answers—when a case is one of first impression, courts must look anywhere and everywhere for guidance. In that search and without assistance, perhaps the best path is not so clear at the outset, and it is easy to explain away any problem with the other popular approaches. I focus my discussion on the pressing issues from buckets one and two.

#### 1. Bucket One: Missing the Point and Creating Confusion

While state law governs the enforceability of noncompetes, there are some common factors between the states. Taking Pennsylvania and New York as examples, their frameworks are relatively similar. In Pennsylvania, “restrictive covenants are enforceable only if they are: (1) ancillary to an employment relationship between an employee and an employer; (2) supported by adequate consideration; (3) . . . reasonably limited in duration and geographic extent; and

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<sup>18</sup> See *H&M Com. Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 805 N.E.2d 1177, 1183–84 (Ill. 2004).

<sup>19</sup> See *VL Sys., Inc. v. Unisen, Inc.*, 61 Cal. Rptr. 3d 818 (Cal. Ct. App. 2007).

<sup>20</sup> See *Heyde*, 654 N.W.2d at 831 (holding that the no-hire provision at issue constituted “an unreasonable restraint of trade, in violation of Wis. Stat. § 103.465 (restrictive covenants)” and as against Wisconsin’s public policy).

<sup>21</sup> *Pittsburgh Logistics Sys., Inc. v. BeeMac Trucking, LLC*, 202 A.3d 801, 801 (Pa. Super. Ct. 2019).

<sup>22</sup> Since the fourth bucket is a question of statutory interpretation, it falls outside of my Note’s focus, and I will not discuss it. The fact that there is a statute directly on point would negate the need to provide courts more guidance or recommend a test. Further, the primary issue with bucket three is that public policy arguments are generally for supporting another line of reasoning or as a last resort, not as the only anchor. For this reason, and because public policy likely already leans in favor of enforcing reasonable restraints while not enforcing unreasonable ones, I will not devote a section to the issues of bucket three.



(4) . . . designed to protect the legitimate interests of the employer.”<sup>23</sup> The New York test sounds similar: “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.”<sup>24</sup> The New York Court of Appeals continued: “In this context a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer’s legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee.”<sup>25</sup>

The two most important factors from Pennsylvania and New York’s approaches are (1) the requirement that the employer’s interest sought to be protected is legitimate, and (2) that the restriction be reasonable in geographic and temporal scope. Generally, courts that fall into bucket one latch onto these two factors.

When courts bundle the terms “restrictive covenant” and “restraint of trade,” or when they categorize no-hire provisions as restrictive covenants because they simply look and feel similar to noncompetes, the focus of the analysis shifts to the employee, a non-party to the agreement. All subsequent considerations are then brought back to and centered on that employee. The “noncompete in disguise” reasoning allows the incidental effect of the clause (the effect on the employees) to dictate its categorization rather than what the clause actually is. Two companies agreeing not to hire each other’s employees does not bind the employees—it binds the companies. On this fact alone, appropriating the noncompete framework makes little sense. For another perspective, consider the converse, applying that reasoning to a noncompete. Since a noncompete provision prevents employees from working for competitor-employers, it has the incidental effect of binding those competitor-employers without providing them consideration, consent, or even knowledge in many cases. Under this flawed reasoning, all noncompete provisions are “no-hire provisions in disguise.” This is unworkable, and it would be surprising if any court found this assertion convincing.

In addition, a theoretical discussion about harm to the public in the abstract or the legitimacy of a certain business interest does little to determine the actual

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<sup>23</sup> *Socko v. Mid-Atl. Sys. of CPA, Inc.*, 126 A.3d 1266, 1274 (Pa. 2015).

<sup>24</sup> *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1223 (N.Y. 1999) (first citing *Technical Aid Corp. v. Allen*, 591 A.2d 262, 265–66 (N.H. 1991); then citing RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. L. INST. 1981)).

<sup>25</sup> *Id.* (citing *Reed, Roberts Assocs. v. Strauman*, 353 N.E.2d 590 (N.Y. 1976)).

reasonableness of the provision at issue.<sup>26</sup> The focus should be on the actual anticompetitive effects of the restraint, and that is exactly what the Rule of Reason analysis considers, along with a multitude of other factors.<sup>27</sup>

Should there be any concern that I am suggesting courts ignore the effect on the employees altogether, fret not; the restriction of the employee's ability to choose a future employer and the reduction in competition for employees is exactly the type of information that is relevant as an anticompetitive effect under the Rule of Reason test. Further, the existence of less onerous methods, while not bearing directly on the reasonability of the challenged provision, may be a factor in determining the intent of the party attempting to enforce the restraint, another relevant consideration under the Rule of Reason test.<sup>28</sup>

## 2. Bucket Two: Close, But Not It

Bucket two includes various forms of "reasonableness tests." Of the several jurisdictions that fall into this bucket, a portion have named their test a "rule of reason," but no court thus far has adopted the federal Rule of Reason.

For example, New York has acknowledged that its courts (including federal) sometimes apply a "simple rule of reason," where the no-hire is in the context of "ordinary commercial contracts."<sup>29</sup> Summed up, their position is that in a contract other than one for the sale of a business or an employment arrangement, a no-hire provision is best interpreted by "balanc[ing] the competing public policies in favor

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<sup>26</sup> Also, a finding of another less onerous method of protection does not necessarily preclude a finding of reasonableness for the restraint at issue, nor should it bar the use of the perhaps more onerous restraint if that restraint is agreed upon by sophisticated parties in an arms-length transaction supported by sufficient consideration. Parties should be free to structure agreements as they see fit, pricing in onerousness accordingly; only when that restraint's anticompetitive effects outweigh its procompetitive benefits should the parties be barred from engaging in it. The Rule of Reason offers the opportunity to balance these interests.

<sup>27</sup> See discussion *infra* Part III. Some of these considerations may have to do with the effects on the individual employee, but some may not, and a test that focuses solely on the effects on the employee misses every other consideration.

<sup>28</sup> See discussion *infra* Part III. If a court were presented with evidence of an intent to suppress employment competition, or with evidence that a particular restraint *always* results in anticompetitive effects with no countervailing procompetitive benefits, it would be within the court's discretion to weigh that evidence in determining the restraint's enforceability under the Rule of Reason test.

<sup>29</sup> See, e.g., *DAR & Assocs., Inc. v. Uniforce Servs., Inc.*, 37 F. Supp. 2d 192, 197 (E.D.N.Y. 1999); *Lodging Sols., LLC v. Miller*, No. 19-CV-10806 (AJN), 2020 WL 6875255, at \*6 (S.D.N.Y. Nov. 23, 2020).

of robust competition and freedom of contract.”<sup>30</sup> This inquiry also looks for a legitimate business interest and whether there were any less onerous options to protect the interests.<sup>31</sup> Although New York courts appear to be increasingly on board with applying a test for reasonableness, some of the state’s courts have balked at the formal adoption of such a test for their no-hire interpretations.<sup>32</sup>

Similar to New York, and as discussed below, the Pennsylvania Supreme Court seems to be coming around to a basic reasonableness approach with its pronouncement in *Pittsburgh Logistic Systems v. Beemac Trucking, LLC*,<sup>33</sup> adopting a test based on the “rule of reason” from the Restatement (Second) of Contracts.<sup>34</sup>

Although tests in this bucket use reasonability as the touchstone of the analysis, I caution against their adoption for a few reasons. First, the origin is noncompete jurisprudence, which confuses “restrictive covenant” and “restraint of trade” as well as gives dispositive force to the effect on an employee. We are not in the employment realm—this is competition for labor, and a no-hire restrains that competition. Relatedly, it takes fewer judicial acrobatics to reach my suggested approach, the federal Rule of Reason. The line is relatively straightforward leading from no-hire provisions to the Rule of Reason, and it keeps the realms of “restrictive covenants” and “restraints on trade” separate. When confronted with a no-hire provision, it is properly characterized as a restraint on trade that must be analyzed through the Rule of Reason test to determine its enforceability.

Ultimately, the focus of the tests in bucket two is too narrow, missing out on a number of relevant considerations.<sup>35</sup> As discussed below, the federal Rule of Reason, with over a century of analysis, is far more inclusive of relevant factors and arrives at a more well-considered result.

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<sup>30</sup> *Crye Precision LLC v. Bennettsville Printing*, 755 F. App’x 34, 36–37 (2d Cir. 2018).

<sup>31</sup> *See, e.g., DAR & Assocs.*, 37 F. Supp. 2d at 197 (“Courts analyze these types of covenants under a simple rule of reason, balancing the competing public policies in favor of robust competition and freedom to contract.”); *Miller*, 2020 WL 6875255 at \*6.

<sup>32</sup> In *Miller*, the court determined that it need not decide whether the simple rule of reason is the proper framework because the agreement was facially unreasonable. 2020 WL 6875255 at \*6.

<sup>33</sup> *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC.*, 249 A.3d 918 (Pa. 2021).

<sup>34</sup> RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. L. INST. 1981); *see also Beemac*, 249 A.3d 918. To keep things straight, I will capitalize the federal Rule of Reason test, my suggested approach. The rule of reason in lowercase refers to any rule of reason test other than the federal Rule of Reason.

<sup>35</sup> *See* discussion *infra* Part III.

Admittedly, a basic reasonableness approach is not far off the mark; it is simply the wrong path (through the land of restrictive covenants) leading to a partially correct result.<sup>36</sup> To say that the Rule of Reason is “far superior” to bucket two would be an overstatement—the Rule of Reason is simply grounded in the correct “restraint of trade” jurisprudence and is more inclusive, taking into account more information to arrive at a more thoughtful conclusion. Once courts widen their gaze and reframe their perception as to what a no-hire provision is at its core—a restraint on trade—then a clear path emerges, leading directly to the Sherman Act and the Rule of Reason.<sup>37</sup>

## II. *PITTSBURGH LOGISTICS SYSTEMS, INC. v. BEEMAC TRUCKING, LLC*

As part of illustrating my suggested test, and because this case was the impetus for drafting this Note, I will review the facts and procedural posture of *Beemac*, followed by a recitation and critique of the superior court’s reasoning, the superior court’s dissent, and finally, the Pennsylvania Supreme Court’s reasoning.<sup>38</sup>

### A. *Factual Background and Procedural Posture*

Pittsburgh Logistics Systems, Inc. (“PLS”) is a third-party logistics provider, connecting shippers and those with goods to ship.<sup>39</sup> PLS describes its business model through a hypothetical transaction in its brief: (1) a customer retains PLS to ship goods somewhere; (2) a PLS employee determines which type of truck is proper and the best shipping route; (3) that employee finds a “reliable trucking compan[y];” and then (4) PLS arranges shipment with that company or carrier.<sup>40</sup> Beemac Trucking, a

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<sup>36</sup> I consider any other reasonableness test the same as fitting a square peg in a round hole. Surely, where the diagonal of the square is smaller than the diameter of the circle, the square peg will fall right through, but it is not the right peg, is it?

<sup>37</sup> See discussion *infra* Part IV.

<sup>38</sup> I include each court’s reasoning because it elucidates the struggle that courts have in approaching this issue of first impression. The discussion of rationales will contextualize other courts’ approaches, show the inconsistency between even courts of the same state, and help to understand why the Rule of Reason test offers a clean, rational, and reasonable solution. Because the superior court’s reasoning is extremely similar to and dependent upon the trial court’s reasoning, I will not break the trial court into a separate section.

<sup>39</sup> *Beemac*, 249 A.3d at 920–21.

<sup>40</sup> *Pittsburgh Logistics Sys. v. BeeMac Trucking, LLC*, 202 A.3d 801, 803 (Pa. Super. Ct. 2019).

shipping company, entered into a Motor Carriage Services Contract (“MCSC”) with PLS as a non-exclusive shipper.<sup>41</sup> Section 14.6 of the MCSC is the no-hire provision:

CARRIER [Beemac] agrees that, during the term of this Contract and for a period two (2) years after the termination of this Contract, neither CARRIER nor any of its employees, agents, independent contractors or other persons performing services for or on behalf of CARRIER in connection with CARRIER’S obligations under this Contract will, directly or indirectly, hire, solicit for employment, induce or attempt to induce any employees of PLS or any of its Affiliates to leave their employment with PLS or any Affiliate for any reason.<sup>42</sup>

During the term of the contract, PLS alleged that four of its employees quit their employment with PLS and went to work for Beemac.<sup>43</sup> PLS brought suit against Beemac and the former employees, “seeking an injunction preventing Bee[m]ac from employing any former employees and to prevent Bee[m]ac from soliciting business directly from other entities that had done business with PLS.”<sup>44</sup> The trial court granted partial relief, “enjoining Beemac from employing the former PLS employees and soliciting PLS customers pending a hearing.”<sup>45</sup> After that hearing, the trial court vacated its order, finding that no-hire provisions should be void as against public policy.<sup>46</sup> From that order, PLS appealed to the superior court, where a three-judge panel affirmed the trial court’s decision that the no-hire provision was void before the court granted a rehearing *en banc*.<sup>47</sup> The superior court affirmed *en banc* under a “‘highly deferential’ standard of review . . . examin[ing] the record to determine if [the trial court had] any apparently reasonable grounds for [its] action.”<sup>48</sup> The Pennsylvania Supreme Court granted allocatur and affirmed, though

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<sup>41</sup> 249 A.3d at 921.

<sup>42</sup> *Id.* The MCSC also contained a non-solicitation provision, *see id.*, but it is irrelevant to and will not be discussed in any meaningful way in this Note.

<sup>43</sup> *Id.*

<sup>44</sup> 202 A.3d at 803. The procedural nuances of the cases are irrelevant.

<sup>45</sup> 249 A.3d at 921.

<sup>46</sup> *Id.* at 922–23.

<sup>47</sup> *Id.* at 923.

<sup>48</sup> 202 A.3d at 804 (citing *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1000 (Pa. 2003)). Judge Bowes authored a dissenting opinion. *See id.* at 809 (Bowes, J., dissenting).

with different reasoning.<sup>49</sup> In sum, the trial court and superior court found the provision unenforceable as against public policy, and the state supreme court found the provision to be unreasonable under their newly adopted test.

### B. Superior Court

#### 1. Majority Reasoning

After stating the facts and the “highly deferential” standard for reviewing the grant or denial of a preliminary injunction, the majority (i) quickly ran through the elements of a preliminary injunction;<sup>50</sup> (ii) summarized the trial court’s reasoning, including reproducing seven paragraphs of the trial court’s opinion verbatim;<sup>51</sup> and then (iii) cited several opinions of various state<sup>52</sup> and federal courts<sup>53</sup> to confirm that the trial court’s reasoning was based on “reasonable grounds.”<sup>54</sup>

Because enforceability of no-hire provisions is an issue of first impression in Pennsylvania,<sup>55</sup> the trial court and the superior court majority both recognized that they may look to other jurisdictions.<sup>56</sup> The court cited with approval the portion of the trial court opinion comparing cases in favor of prohibiting no-hire provisions<sup>57</sup>

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<sup>49</sup> 249 A.3d at 920.

<sup>50</sup> 202 A.3d at 804.

<sup>51</sup> *Id.* at 804–06.

<sup>52</sup> *Id.* at 806 (citing *Heyde Cos. v. Dove Healthcare, LLC*, 654 N.W.2d 830 (Wis. 2002); *Texas Shop Towel, Inc. v. Haire*, 246 S.W.2d 482 (Tex. Civ. App. 1952); *VL Sys., Inc. v. Unisen, Inc.*, 61 Cal. Rptr. 3d 818 (Cal. Ct. App. 2007); *H&M Com. Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 805 N.E.2d 1177 (Ill. 2004)).

<sup>53</sup> The court cites *Richards Energy Compression, LLC v. Dick Glover, Inc.*, No. 13cv0640 WJ/SMV, 2013 WL 12147626 (D.N.M. Sept. 16, 2013) (memorandum opinion), because of its discussion of other state cases, including *Haire*. 202 A.3d at 807.

<sup>54</sup> *Id.* at 806–09.

<sup>55</sup> *Id.* at 804. While it may be a case of first impression in Pennsylvania state court, the dissent correctly points out that the federal Middle District of Pennsylvania had already encountered this question. *See GeoDecisions v. Data Transfer Sols., LLC*, No. 1:10–CV–2180, 2010 WL 5014514 (M.D. Pa. Dec. 3, 2010).

<sup>56</sup> 202 A.3d at 804, 806, 807 n.8. The dissent similarly noted that “[a]lthough the decisions of the federal district courts are not binding on this Court, we may ‘utilize the analysis in those cases to the extent we find them persuasive.’” *Id.* at 811 n.4 (citing *Umbelina v. Adams*, 34 A.3d 151, 159 n.2 (Pa. Super. Ct. 2011)).

<sup>57</sup> The court cites *Heyde Cos. v. Dove Healthcare, LLC*, 654 N.W.2d 830 (Wis. 2002), and *VL Sys., Inc. v. Unisen, Inc.*, 61 Cal. Rptr. 3d 818 (Cal. Ct. App. 2007), as examples of cases finding no hire provisions void against public policy. *See* 202 A.3d at 806.

with cases finding no-hire provisions as permissible partial restraints of trade.<sup>58</sup> However, the superior court majority ultimately found persuasive the reasoning of both *Texas Shop Towel, Inc. v. Haire*<sup>59</sup> and *Heyde Cos. v. Dove Healthcare, LLC*,<sup>60</sup> as both cases captured the “essence of the trial court’s reasoning.”<sup>61</sup> The majority cited to *Richards Energy Compression, LLC v. Dick Glover, Inc.*,<sup>62</sup> a federal case out of New Mexico, that summed up both *Haire* and *Heyde*. Those cases were cited primarily for the proposition that an employee’s involuntary cession of their rights by a third party, possibly without the employee’s knowledge, is indefensible.<sup>63</sup>

In addition to approving of the *Richards Energy* court’s summary of *Haire* and *Heyde*, the majority incorporated into its reasoning a previous case involving the enforceability of PLS’s noncompete with its own employees.<sup>64</sup> There, the court determined that PLS’s noncompete provision was “unenforceable as being oppressive or an attempt to foster a monopoly, thereby demonstrating unclean hands on the part of PLS.”<sup>65</sup> The majority believed “[i]t would be incongruous to strike the employees’ restrictive covenant, finding PLS to have had unclean hands, yet allow PLS to achieve the same result via the contract between companies.”<sup>66</sup> Essentially, the majority seemed uneasy about approving of a contractual provision that had a similar breadth and effect to the “overbroad and oppressive” noncompete. Restated, the court felt that since PLS had been found to have unclean hands regarding the noncompete provisions with its employees, it must also have had unclean hands regarding the no-hire provision between companies, and the use of a more onerous

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<sup>58</sup> The dissent cites *ex parte* *Howell Eng’g & Surveying, Inc.*, 981 So. 2d 413 (Ala. 2006), and *H&M Com. Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 805 N.E.2d 1177 (Ill. 2004), as examples of cases that properly utilize the reasonable restraint upon trade analysis for no-hire provisions. *See* 202 A.3d at 811.

<sup>59</sup> *Texas Shop Towel, Inc. v. Haire*, 246 S.W.2d 482 (Tex. Civ. App. 1952). *Haire* arose in the context of the sale of a business. *See id.*

<sup>60</sup> *Heyde*, 637 N.W.2d 437.

<sup>61</sup> 202 A.3d at 801, 807.

<sup>62</sup> *Richards Energy Compression, LLC v. Dick Glover, Inc.*, No. 13cv0640 WJ/SMV, 2013 WL 12147626 (D.N.M. Sept. 16, 2013).

<sup>63</sup> 202 A.3d at 807–08 (quoting 2013 WL 12147626 at \*3).

<sup>64</sup> 202 A.3d at 807 (citing *Pittsburgh Logistics Sys., Inc. v. Ceravolo*, No. 135 WDA 2017, 2017 WL 5451759 (Pa. Super. Ct. Nov. 14, 2017)).

<sup>65</sup> *Id.* (citing *Ceravolo*, 2017 WL 5451759 at \*5).

<sup>66</sup> 202 A.3d at 807.

restriction than was required to protect its legitimate interest supported this conclusion.<sup>67</sup>

The trial court and the majority both relied heavily on public policy implications, finding that the no-hire provision would “prevent[] persons from seeking employment with certain companies without receiving additional consideration”<sup>68</sup> and “essentially force[d] a non[]compete agreement on employees . . . without their consent, or even knowledge, in some cases.”<sup>69</sup> This point seems to be the most persuasive to them, as the majority and the trial court believed that a noncompete prohibits the exact same conduct as a no-hire, the difference being that noncompetes provide employees consideration.<sup>70</sup>

In summary, the majority relied on the following rationales to make their decision: (1) the provision “exceed[ed] the necessary protection PLS need[ed] to secure its business”<sup>71</sup> and protect misappropriation of its client information as it prohibited *all* PLS employees from working for *any* PLS client who is bound by the no-hire;<sup>72</sup> (2) PLS had previously been found to have had unclean hands with respect to a noncompete, and it would be wrong to allow PLS to achieve the same goal through a different method; (3) the lack of employee knowledge regarding the no-hire provision offends public policy, as well as the lack of consideration given to employees who are effectively bound by that provision in the vein of a noncompete; and (4) in light of the non-solicitation provision and noncompete, the no-hire was superfluous.

## 2. Problems with Majority Reasoning

I have already addressed the problem with appropriating noncompete jurisprudence as well as the locus of discussion being on the effect on the employee, so I will not repeat myself here.<sup>73</sup> The two other concerns I have with the majority’s

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<sup>67</sup> *Id.* The “legitimate interest” was not at issue, as the court did believe that client information is a legitimate interest. *Id.* at 806 (“Courts have held that a business’s customers are a protectable interest.”) (citing *Sidco Paper Co. v. Aaron*, 351 A.2d 250 (Pa. 1976)).

<sup>68</sup> 202 A.3d at 804.

<sup>69</sup> *Id.* at 806.

<sup>70</sup> *Id.* at 808–09.

<sup>71</sup> *Id.* at 806.

<sup>72</sup> *Id.* at 805. The language prevents “Carrier” from hiring “any employees of PLS,” without limitation. *See id.* at 803.

<sup>73</sup> *See* discussion *supra* Part I.C.



reasoning have to do with the extension of PLS's "unclean hands"<sup>74</sup> and the idea that the no-hire is superfluous in light of the noncompete and nonsolicitation.<sup>75</sup>

The trial court had found the noncompete in PLS's employment agreements to be "unenforceable as being oppressive or an attempt to foster a monopoly, thereby demonstrating unclean hands on the part of PLS."<sup>76</sup> The superior court majority followed this quote with a problematic extension: "It would be incongruous to strike the employees' restrictive covenant, finding PLS to have had unclean hands, yet allow PLS to achieve the same result via the contract between companies."<sup>77</sup> The majority prematurely disallowed the possibility that PLS sought to oppress its employees via its noncompete while simultaneously reasonably protecting its interests through the no-hire provision. Even if we assume, *arguendo*, that the no-hire provision and the noncompete seek to protect the same legitimate business interest, a finding of unclean hands in one does not preclude a finding of reasonability in the other.

I am not suggesting that this factor be thrown out to make way for my suggested test. Rather, the finding of unclean hands could be used as evidence of intent under the Rule of Reason. That evidence is not dispositive, but the Rule of Reason considers the intent of the parties in implementing the alleged restraint, and evidence of a party's intent to oppress in their employment agreements is certainly relevant to their intent in entering into a restraint that has a direct effect on those same employees. However, it is not because the result would be "incongruous"—that is an entirely ends-oriented approach. In reality, while the Rule of Reason does consider results, intent matters. The court accepted that PLS had a legitimate interest to protect, which in this case was its client list (its entire book of business, the only thing keeping it in business perhaps), so it follows that PLS would try to protect it

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<sup>74</sup> 202 A.3d at 807.

<sup>75</sup> *Id.* at 806. I do have a third concern about the employee's knowledge of the no-hire. Since we know that the consequence of a no-hire is to bind the employers, not employees, and that the effects of the no-hire (including those on the employee) will be analyzed under the Rule of Reason test, it is hard to defend reliance on the "lack of knowledge," as that does not make the effect any more or less anticompetitive. It feels like a red herring to chip away or tug at the conscience of the reader by describing the effect as a clandestine attempt to oppress. There appears to be no legal support for the idea that lack of knowledge contributes to any factor, and courts cite none. I suppose this might be relevant under the Rule of Reason's inquiry into the parties' intent if the party were so careless as to tout the employees' lack of knowledge as an inducement for using the restraint. This concern, however, is outside the scope of this Note.

<sup>76</sup> *Id.* at 807.

<sup>77</sup> *Id.*

with multiple tools and from multiple angles, such as a noncompete in their employment agreements and no-hire provision ancillary to certain contractual arrangements.

The court also found the no-hire clause to be superfluous in light of the noncompete and non-solicitation provisions.<sup>78</sup> The trial court held that “the no-hire provision was overly broad in that the enforceable no-solicitation provision . . . sufficiently protected PLS from the loss of its clients . . .”<sup>79</sup> The court cites no authority for the proposition that “redundancy” renders a contractual provision unenforceable, and this position is untenable. First, a non-solicitation provision does not produce the same result as a no-hire provision—a no-hire prevents the company from hiring a specific employee, and a non-solicitation prevents attempted recruitment of that employee. If the employee applies to the company bound by the no-hire without that company first soliciting them, there is nothing preventing that company from hiring that employee under only the non-solicitation, whereas a no-hire would prevent exactly that. Further, even the sum of a noncompete and a non-solicitation provision could leave a company vulnerable where a no-hire provision would protect the company.<sup>80</sup> As such, we cannot make the assumption that an employer’s interests are sufficiently protected by limiting their options to either a noncompete or a non-solicitation, or both.

It bears repeating that the reasonability of one method of protecting a legitimate business purpose does not speak to the reasonability of another, and the existence of multiple methods of protection does not itself beg for reduction to singularity. Rather, the opposite is arguably true—more methods of protection could provide

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<sup>78</sup> *Id.* at 806.

<sup>79</sup> *Id.* at 804.

<sup>80</sup> A noncompete provision generally prohibits an employee from seeking employment with a competitor for some period of time after that employee’s employment ends. A non-solicitation provision prohibits one company from soliciting another company’s employees for employment for the duration of a contract and for some period of time thereafter. Suppose company A, operating in a distinct industry, enters into a contract with company B who operates in a separate yet related industry, not technically a direct competitor but where the knowledge and training that company A offers could transfer to employment at company B. The contract between A and B contains a non-solicitation provision, and both companies’ employees have signed noncompetes. If employee 1 at company A wanted to take their talents to company B, the noncompete, which limits employee 1 from working for a competitor, could be ineffective because company B is not a competitor. The non-solicitation provision only requires that company B not “make the first move” in hiring employee 1, but it would be ineffective at stopping employment altogether—employee 1 would simply need to reach out to company B to evade the non-solicitation provision. A no-hire provision would cover this scenario that slips between the cracks of the noncompete-non-solicitation sandwich.

employers or vendors more flexibility in how they want to structure their agreements. And, as long as the appropriate framework analyzes their intent in effectuating the restraint as well as the actual anticompetitive effects to determine its reasonability (as does the Rule of Reason), there will be sufficient boundaries on the ability of companies to oppress their employees.

### 3. Superior Court Dissent and *GeoDecisions*

Rather than applying the highly deferential standard that the superior court majority applied, Judge Bowes believed plenary review was proper, stating that “[t]he legal effect or enforceability of a contract provision presents a question of law accorded full appellate review and is not limited to an abuse of discretion standard.”<sup>81</sup> Because of this plenary review, she believed that PLS had demonstrated likely success on the merits (i.e., that the no-hire was enforceable), and it was, therefore, improper to deny the preliminary injunction.<sup>82</sup>

The primary authority Judge Bowes relied on was the federal decision out of the Middle District of Pennsylvania in *GeoDecisions v. Data Transfer Solutions, LLC*.<sup>83</sup> The *GeoDecisions* court applied Pennsylvania state law to a no-hire provision, determining that the proper characterization was not as a restrictive covenant but as a restraint on trade.<sup>84</sup> The court then went on to state that restraints of trade are void against public policy as a general rule but will be found enforceable in Pennsylvania if: “(1) it is ancillary to the main purpose of a lawful transaction; (2) it is necessary to protect a party’s legitimate interest; (3) it is supported by adequate consideration; and (4) it is reasonably limited in both time and territory.”<sup>85</sup> Judge Bowes interpreted this as a modified reasonableness test and felt that the no-hire provision at bar was reasonable, and thus it should be enforced.<sup>86</sup>

The dissent further disagreed about the majority’s public policy reasoning, citing a Pennsylvania Supreme Court decision as support for the idea that public

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<sup>81</sup> 202 A.3d at 810 (Bowes, J., dissenting) (citing *Midwest Fin. Acceptance Corp. v. Lopez*, 78 A.3d 614, 624 (Pa. Super. Ct. 2013)).

<sup>82</sup> *Id.* at 809–10.

<sup>83</sup> *GeoDecisions v. Data Transfer Sols., LLC*, No. 1:10-CV-2180, 2010 WL 5014514 (M.D. Pa. Dec. 3, 2010).

<sup>84</sup> *Id.* at \*3.

<sup>85</sup> *Id.* at \*10–\*11. Recall, however, that this test is identical to that of the Pennsylvania noncompete framework. *See supra* note 23 and accompanying text.

<sup>86</sup> 202 A.3d at 812–13 (Bowes, J., dissenting).

policy reasoning should be grounded in law and precedent, “not [arise] from general considerations of supposed public interest.”<sup>87</sup> Particular consternation surrounds the majority’s conclusion that employees were not able to “explor[e] alternate work opportunities in a similar business,” and the dissent notes that the prohibition is limited to employment with the signatory and its affiliates.<sup>88</sup> All-in-all, the dissent believes the restraint was reasonable and properly limited, and Pennsylvania supports enforcing provisions entered into at arm’s length.

#### 4. Problems with the Superior Court Dissent

Once again, I have addressed that comparing no-hires to noncompetes is incorrect. Reliance on *GeoDecisions* is not necessarily improper, but I would like to take a look at the four-prong test, then at one particular point made by the dissent. Prong one is called the “ancillary rule,” and I discuss it as part of drawing the line to the Rule of Reason.<sup>89</sup> Essentially, the *GeoDecisions* court surveyed state law on enforcing what it termed “restraints of trade”<sup>90</sup> and cited *Jacobson & Co. v. International Environmental Corp.*<sup>91</sup> for the proposition that a restraint which is ancillary to a legitimate transaction will be upheld provided it is reasonable.<sup>92</sup> This “ancillary rule” is simply a filtering mechanism, allocating naked agreements to one side and ancillary agreements to the other. Naked no-hire agreements, as discussed below, are considered per se illegal,<sup>93</sup> so the ancillary rule merely provides a quick exit for restraints that are illegal regardless of their reasonability; it serves no other purpose than to determine which test applies—the per se test or the Rule of Reason.<sup>94</sup>

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<sup>87</sup> *Id.* at 813 (citing *Safe Auto Ins. Co. v. Oriental-Guillermo*, 170 A.3d 1170, 1175 (Pa. Super. Ct. 2017)).

<sup>88</sup> *Id.*

<sup>89</sup> See discussion *infra* Part III.

<sup>90</sup> Therein lies another problem with bundling “restrictive covenants” and “restraints of trade”—when one court is looking for authority on one, they will necessarily find cases that include both concepts. So, even though the *GeoDecisions* court decided no-hire provisions were restraints of trade, the case law they cite deals with restrictive covenants, and thus falls into bucket one.

<sup>91</sup> *Jacobson & Co. v. Int’l Env’t Corp.*, 235 A.2d 612 (Pa. 1967).

<sup>92</sup> *GeoDecisions v. Data Transfer Sols., LLC*, No. 1:10-CV-2180, 2010 WL 5014514, at \*10 (M.D. Pa. Dec. 3, 2010). *Jacobson* involved a restrictive covenant in an employment agreement, showing once again the conflation of “restrictive covenants” and “restraints of trade.” *Jacobson*, 235 A.2d at 614.

<sup>93</sup> See discussion *infra* Part III.

<sup>94</sup> Regardless of whether the DOJ uses the term “filtering” to describe the ancillary rule, there is support for this view. See Polden, *supra* note 14, at 601 (“According to the Antitrust Division, the issue of ‘ancillarity’—whether or not the restraint occurred as a part of a transaction the primary purpose of which is procompetitive, is fundamental to the ultimate decision to apply the per se or rule of reason, because

We recognize prongs two and four from the basic noncompete framework, our first bucket discussed above.<sup>95</sup> All the issues previously discussed regarding bucket one apply here as well. And finally, prong three is simply a basic tenet of contract law—the agreement must be supported by consideration.<sup>96</sup> So, the *GeoDecisions* “test” consists of a filtering mechanism followed by two points appropriated from noncompete jurisprudence and one of the most basic requirements of all contracts. Put another way, the ultimate test that this federal district court came up with when presented with an issue of first impression and after surveying Pennsylvania law is the exact same test that Pennsylvania courts employ in their noncompete cases.

The final issue with the dissent is its assertion that the restriction upon the employee only applies to the signatory and its affiliates,<sup>97</sup> implying that the restriction is not overly oppressive on the employee; they are only prohibited from working for one employer. Two problems with this: first, that assertion is true in isolation, but should PLS insist on no-hire provisions in all of its contracts with shippers, then the no-hire provisions would restrict the employee’s choice not by one, but by an amount equal to the number of shippers that PLS contracts with, further reducing labor market competition;<sup>98</sup> and second, that assertion is

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“there are two ways for a no-poach agreement to be subject to the rule of reason and not the per se rule: verticality and ancillarity.” (citing Michael Murray, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Just., Presentation at the Santa Clara University Law Review Symposium: Antitrust Enforcement in Labor Markets: The Department of Justice’s Effort (Mar. 1, 2019), <https://www.justice.gov/opa/speech/file/1142111/download> [<https://perma.cc/8DBJ-MM6C>])).

<sup>95</sup> See discussion *supra* Part I.C.1.

<sup>96</sup> *GeoDecisions*, 2010 WL 5014514, at \*10.

<sup>97</sup> *Pittsburgh Logistics Sys., Inc. v. BeeMac Trucking, LLC*, 202 A.3d 801, 813 (Pa. Super. Ct. 2019) (Bowes, J., dissenting).

<sup>98</sup> Similarly, if every firm had no-hires in their contracts as well, employment competition everywhere would be restrained and reduced. *Cf. Hanks v. Powder Ridge Rest. Corp.*, 885 A.2d 734, 752–53 (Conn. 2005) (Norcott, J., dissenting) (discussing the *Tunkl* factors and arguing that an express agreement exculpating a snowtubing facility from liability due to their own negligence was not violative of public policy in part because prospective snowtubers could simply decide to not participate). The argument is that if you do not want to sign a waiver exculpating the entity and employees from liability stemming from their own negligence, then you can go elsewhere. However, if every entertainment venue has that waiver requirement, then you *cannot* simply “go elsewhere”—you must accede. The argument is no more convincing if narrowed to the specific activity, as even if the prospective participator decided to try a different activity, the purveyors of that new activity also have the right (and arguably the incentive) to have their own waivers of negligence liability. If this were to happen in the no-hire context, the effects would be palpable and disastrous for labor market competition, and by extension, wages of those employees.

undermined by the existence of a noncompete in their employment agreement. Should an employee be faced with enforceable noncompete and no-hire provisions with every firm their employer contracts with, their list of possible future employers becomes thinner and thinner. So, the assertion that the no-hire only prohibits the employee from seeking employment with the signatory and its affiliates becomes less persuasive.

### C. *Pennsylvania Supreme Court's Opinion*

#### 1. Analysis

Pennsylvania's high court surveyed several cases from varying jurisdictions, most of which had been cited earlier in the procedural posture.<sup>99</sup> The court summarized three cases where the no-hire provisions were held unenforceable<sup>100</sup> followed by three cases where courts had found no-hire provisions enforceable.<sup>101</sup> Several patterns emerged on each side. Courts that held the no-hire provisions unenforceable generally focused on the employees' lack of knowledge of the no-hire's existence,<sup>102</sup> the lack of consideration to and consent of the affected employee,<sup>103</sup> and the direct negative effect on an employee's right to make choices about their employment,<sup>104</sup> all arguments that we have already addressed. Courts that held no-hire provisions to be enforceable looked to whether there were legitimate

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I am sure that most readers would agree that as a general policy, we do not want to confine individuals to their homes, doomed to never participate in a fun activity again if they do not want to assume the risk that the activity purveyors were negligent in their duties. In a similar vein, we likely do not want to allow employees to have to change careers every time they want to move to a new employer.

<sup>99</sup> *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC*, 249 A.3d 918, 924–30 (Pa. 2021).

<sup>100</sup> *Id.* at 924–26 (citing *Heyde Cos. v. Dove Healthcare, LLC*, 654 N.W.2d 830 (Wis. 2002); *VL Sys., Inc. v. Unisen, Inc.*, 61 Cal. Rptr. 3d 818 (Cal. Ct. App. 2007); *Texas Shop Towel, Inc. v. Haire*, 246 S.W.2d 482 (Tex. Civ. App. 1952)).

<sup>101</sup> *Id.* at 926–30 (citing *Therapy Servs., Inc. v. Crystal City Nursing Ctr., Inc.*, 389 S.E.2d 710 (Va. 1990); *H&M Com. Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 805 N.E.2d 1177 (Ill. 2004); *GeoDecisions*, 2010 WL 5014514).

<sup>102</sup> *See id.* at 925 (discussing *Heyde*, 654 N.W.2d 830); *see also id.* at 926 (“[I]t is vastly different [from a voluntary surrender of rights] when an employee is placed under servitude by a contract . . . about which [they] may know nothing.”) (quoting *Haire*, 246 S.W.2d at 484).

<sup>103</sup> *See id.* at 924 (discussing *Heyde*, 654 N.W.2d 830); *see also id.* at 926 (discussing *VL Systems*, 61 Cal. Rptr. 3d 818).

<sup>104</sup> *Id.* at 925 (discussing *Heyde*'s rationale that because the no-hire affected “the fundamental right of a person to make choices about his or her own employment,” it was contrary to public policy (quoting *Heyde*, 654 N.W.2d at 836)).

business interests sought to be protected by the no-hire,<sup>105</sup> the breadth of the no-hire as compared to the legitimate business interest,<sup>106</sup> and whether the no-hire would be injurious to the public.<sup>107</sup> Again, we have seen these considerations before.

The *Beemac* court then chronicled each parties' arguments, largely tracking the salient points of each of the cases discussed in the previous section of the opinion.<sup>108</sup> The court also discussed the DOJ's feelings on no-hire provisions as well as Pennsylvania Attorney General Josh Shapiro's recent settlement regarding no-poach agreements in franchise agreements.<sup>109</sup>

Once the court recounted both arguments, the court then laid out two standards of review<sup>110</sup> before getting to the analysis. With respect to the "tests" that the court discussed, there is some initial confusion due to the way the opinion is laid out. Essentially, the court combined the ancillary rule, a balancing test from a noncompete case,<sup>111</sup> other noncompete or restrictive covenant-based factors<sup>112</sup> and the Restatement's rule of reason.<sup>113</sup> It is hard to tell what the court meant when it said it "will apply the foregoing reasonableness test that applies to ancillary restraints on trade."<sup>114</sup> But based on its brief analysis, it seems that the court chose to adopt Section 188 of the Restatement, looking first to whether the agreement had imposed a restraint and whether it was ancillary to a valid transaction, and then invalidating that restraint as unreasonable where one or both of the following were present:

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<sup>105</sup> See, e.g., *id.* at 927 (discussing *Therapy Servs.*, 389 S.E.2d 710).

<sup>106</sup> See *Beemac*, 249 A.3d 918; see also *id.* at 928 (discussing *H&M*, 805 N.E.2d 1177).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 930–35.

<sup>109</sup> *Id.* at 933.

<sup>110</sup> *Id.* at 934–35 (stating first the highly deferential standard when reviewing the grant or denial of a preliminary injunction and then a *de novo* standard when "assessing whether the common pleas court acted properly").

<sup>111</sup> *Hess v. Gebhard & Co.*, 808 A.2d 912, 920 (Pa. 2002) ("In determining whether to enforce a non-competition covenant, this Court requires the application of a balancing test whereby the court balances the employer's protectible business interests against the interest of the employee in earning a living in his or her chosen profession, trade or occupation, and then balances the result against the interest of the public." (citing *Sidco Paper Co. v. Aaron*, 351 A.2d 250 (Pa. 1976)).

<sup>112</sup> *Beemac*, 249 A.3d at 935.

<sup>113</sup> RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. L. INST. 1981).

<sup>114</sup> 249 A.3d at 935.

(a) whether that restraint was “greater than is needed to protect the promisee’s legitimate interest,” or (b) whether both the “likely injury to the public” and the “hardship [caused] to the promisor” outweighed the “promisee’s need.”<sup>115</sup>

Following their own test, the court quickly held both that the no-hire provision was ancillary and that it was a restraint of trade, affecting labor market competition.<sup>116</sup> The court then recognized that “PLS had a legitimate interest in preventing its business partners from poaching its employees, who had developed specialized knowledge and expertise in the logistics industry during their training at PLS.”<sup>117</sup> But, as quickly as those findings were made, the court held that the “no-hire provision is both greater than needed to protect PLS’s interest and creates a probability of harm to the public.”<sup>118</sup> The court was particularly troubled by the fact that the no-hire affected all PLS employees, “regardless of whether [those] employees had worked with Beemac during the term of the contract,”<sup>119</sup> as well as the effect on employment mobility and the employees’ livelihoods.<sup>120</sup>

Altogether, the analysis portion of the opinion accounts for less than three pages of the total seventeen and does not incorporate the discussion of other jurisdictions’ approaches.<sup>121</sup> No case from a jurisdiction outside Pennsylvania is discussed or cited in the final analysis section, and the court principally relied on its own “balancing test” arising out of noncompete/restrictive covenant jurisprudence as well as the Restatement’s rule of reason,<sup>122</sup> which as discussed, is essentially the ancillary rule plus a balancing test of its own.

## 2. Problems with Supreme Court Reasoning

I will focus on three problems that are novel to this discussion. The first problem with this opinion is the fact that it recognizes that the DOJ considers naked

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<sup>115</sup> *Id.* at 935.

<sup>116</sup> *Id.* at 935–36.

<sup>117</sup> *Id.* at 936 (citing *Morgan’s Home Equip. Corp. v. Martucci*, 136 A.2d 838 (Pa. 1957)).

<sup>118</sup> *Id.* at 936.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* The court also mentioned the employees’ lack of knowledge and the lack of consideration given to those employees. *Id.*

<sup>121</sup> *Id.* at 934–36.

<sup>122</sup> *Id.* at 935.



no-poach agreements to be per se illegal under the Sherman Act,<sup>123</sup> but the court does not recognize that the implication is that these restraints fall within the ambit of the Sherman Act. If *naked* no-poach agreements are per se illegal, are *ancillary* agreements per se illegal? If not, how would a court determine its enforceability other than the Rule of Reason test, the only other option or framework under the Sherman Act? This harks back to the ancillary rule as a filtering mechanism—the ancillary rule is a pinball flipper, knocking the pinball (the particular case involving a no-hire provision) either to the right, to be declared per se illegal under the Sherman Act, or to the left, to face judgment under the Rule of Reason.<sup>124</sup> That is the entire purpose of the ancillary rule.

In a similar vein, the court recognized that “[t]he no-hire provision is a restraint on trade because the two commercial entities agreed to limit competition in the labor market by promising to restrict the employment mobility of PLS employees.”<sup>125</sup> However, the court once again declined to connect “restraint of trade” and “limit competition” to the established framework under the Sherman Act, the most natural conclusion when one hears those two phrases in tandem.<sup>126</sup> The court itself reproduced Section 1 of the Sherman Act in footnote 4<sup>127</sup> but failed to recognize its applicability, or at least failed to make the distinction between the Rule of Reason and the rule of reason.

Aside from those missed opportunities to draw the line to the Rule of Reason, another problem stems from the rule of reason that the court ended up adopting. The Restatement states its rule as the following:

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<sup>123</sup> *Id.* at 932–33.

<sup>124</sup> See *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 689 (1978) (“The Rule of Reason . . . has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction[.]”). There is technically a middle ground, see *infra* note 137, but it is not relevant for this Note.

<sup>125</sup> 249 A.3d at 936.

<sup>126</sup> This section of the opinion was a series of missed opportunities. Cf. Zaron Frumin, *Brian Regan 25th Appearance Letterman—Nov 2012*, YOUTUBE (Dec. 1, 2013), <https://www.youtube.com/watch?v=fqjDCCuG1FQ> [<https://perma.cc/JMF7-YEPS>] (“My name is ‘Fiedler,’ I’m going to be on the roof. [beat] ‘Fiedler Roofing Company!’”). So close.

<sup>127</sup> *Beemac*, 249 A.3d at 933 n.4.

A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if

- (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or
- (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.<sup>128</sup>

This section of the Restatement uses the term “restraint,” but the examples in subsection (2) are all examples of noncompetes in different settings.<sup>129</sup> Concordantly, while the *Beemac* court adopts this test, it states that “the DOJ . . . advocated for the rule of reason to apply to ancillary restraints on trade,”<sup>130</sup> and that this approach “is consistent with the [DOJ’s] approach to enforcing federal antitrust law.”<sup>131</sup> The former quote is true (though I fear misinterpreted by the court), but the latter quote is false. The DOJ has advocated for the Rule of Reason for ancillary restraints.<sup>132</sup> However, the Restatement’s rule of reason is not the test for which the DOJ advocates—the DOJ advocates the *federal* Rule of Reason. While the Restatement’s rule of reason is perhaps not inconsistent, it is not the same, and the Pennsylvania court’s recognition that the Sherman Act applies<sup>133</sup> and that the DOJ suggests a solution is confusing given their choice to not use the DOJ’s solution.

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<sup>128</sup> RESTATEMENT (SECOND) OF CONTRACTS § 188(1) (AM. L. INST. 1981).

<sup>129</sup> Subsection (2) states:

Promises imposing restraints that are ancillary to a valid transaction or relationship include the following:

- (a) a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of the business sold;
- (b) a promise by an employee or other agent not to compete with his employer or other principal;
- (c) a promise by a partner not to compete with the partnership.

*Id.* § 188(2). As previously discussed, the word “noncompete” does not encompass all agreements to limit competition—noncompete has developed as a term of art in the employment context. *See* discussion *supra* note 13. Recall further that we are not talking about employment; this is about competition in the labor market, and we need not be more specific than “restraint of trade” when referring to the no-hire provision.

<sup>130</sup> *Beemac*, 249 A.3d at 935 n.8 (citing HR GUIDANCE, *supra* note 5).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> For a discussion on the Sherman Act application to the States and possible preemption, see HOVENKAMP, *supra* note 6, at 597–99.

### III. FEDERAL ANTITRUST LAW AND THE RULE OF REASON

Section 1 of the Sherman Act makes illegal “every contract, combination . . . or conspiracy, in restraint of trade . . . .”<sup>134</sup> I will not belabor the background of the Sherman Act, nor will I dive into every nuance of the Rule of Reason test.<sup>135</sup> It is enough for this Note to recount the basics.

Because the Supreme Court determined that the Sherman Act intended only to codify the common-law prohibition on unreasonable restraints of trade, there arose two primary categories or analytical frameworks: (1) the per se test or category, acting as a repository for restraints that have a nature and effect that are “so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality”;<sup>136</sup> and (2) the Rule of Reason test.<sup>137</sup>

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<sup>134</sup> 15 U.S.C. § 1 (1890). In the years following the enactment of the Sherman Act, the Supreme Court realized that a literal reading of the Act’s expansive mandate was untenable—the plain meaning of the statute simply encompassed too much, as almost every contract can be framed as restraining trade in some way. *See* *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (“This Court has not taken a literal approach to this language . . . .”). Thus, rather than apply a strict prohibition of all restraints on trade, the Court determined that the Act only sought to codify the common law rule prohibiting unreasonable restraints on trade. *See* *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). For a recitation of the development of the Rule of Reason, see Alexander M. Bickel & Benno C. Schmidt, *The Judiciary and Responsible Government, 1910-21*, in 9 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 86–199 (1984).

<sup>135</sup> In his Article, “The Four-Step Rule of Reason,” Michael Carrier lays out a four-step burden shifting framework, where the plaintiff must show an anticompetitive effect in order to shift the burden to the defendant to show a procompetitive justification followed by a shift back to the plaintiff to show less restrictive means. Michael A. Carrier, *The Four Step Rule of Reason*, 33 ANTITRUST MAG. 50, 51–52 (2019), <https://www.antitrustinstitute.org/wp-content/uploads/2019/04/ANTITRUST-4-step-RoR.pdf> [<https://perma.cc/8NMV-53SU>]. The fourth step is a balancing of those justifications. *Id.* at 52. The procedural nuances are irrelevant for my purpose in authoring this Note.

<sup>136</sup> *Texaco*, 547 U.S. at 5 (quoting *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 692 (1978)). Price fixing, bid rigging, and market or customer allocations are prototypical examples of per se illegal restraints. Carrier, *supra* note 135, at 50.

<sup>137</sup> There is a sort of middle ground between condemning a practice as a violation and running through an extensive analysis that comes with the Rule of Reason test, and that is the “quick look analysis.” *See generally* *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999). Essentially, the quick look is a peek into the record to confirm that the challenged action is so anticompetitive in nature that it must be a violation of antitrust laws and cannot be rescued by any alleged procompetitive benefits. For my purposes in writing this Note, the quick look analysis is not necessary. Truthfully, and pragmatically, unless an analysis has already been done regarding a restraint’s anticompetitive effects and procompetitive benefits, it is impossible to say for sure that the per se rule or quick look should apply. *See id.* at 779 (“We have recognized . . . that ‘there is often no bright line separating *per se* from Rule of Reason analysis,’ since

The Rule of Reason test was first articulated in *Standard Oil Co. v. United States*<sup>138</sup> and was refined over the next several decades.<sup>139</sup> Where a restraint of trade is not one “whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality,”<sup>140</sup> the court will generally run through the Rule of Reason test to determine whether the restraint is reasonable.<sup>141</sup> In 1918, Justice Brandeis gave us an outline of the Rule of Reason framework:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the fact peculiar to the business . . . ; its condition before and after the restraint was imposed; the *nature* of the restraint and its *effect*, actual or probable. The *history* of the restraint, the evil believed to exist, the *reason for adopting the particular remedy*, the *purpose* or end sought to be attained, are all relevant facts.<sup>142</sup>

The Rule of Reason is focused on balancing the anticompetitive effects against the procompetitive benefits of a challenged restraint, taking into account “the history of the restraint[] and the reasons why it was imposed.”<sup>143</sup> Other factors can include “specific information about the relevant business” and “the restraint’s . . . nature[]

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‘considerable inquiry into market conditions’ may be required before the application of any so-called ‘*per se*’ condemnation is justified.” (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 110 n.26 (1984)).

<sup>138</sup> *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

<sup>139</sup> For both a deeper dive into the development of antitrust jurisprudence as well as a treasure trove of relevant citations, see Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985). I will address a few cases, but I need not chronicle a century’s worth of cases.

<sup>140</sup> *Nat’l Soc’y of Pro. Eng’rs*, 435 U.S. at 692.

<sup>141</sup> *Texaco*, 541 U.S. at 5. If the challenged restraint is relatively close to a *per se* category, the court may engage in a “quick look” analysis. See *supra* note 137.

<sup>142</sup> *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (emphasis added). In *Board of Trade*, the Board operated a commercial grain exchange with 1,600 members. *Id.* at 235. The Board adopted a rule where members were prohibited from setting prices for certain grain sales in the hours between trading sessions, that is, after the close of one session and before the opening of the next. *Id.* at 237. In reversing the decisions of the lower courts, Justice Brandeis analyzed the nature of the rule, its scope, and its effects on competition. *Id.* at 239–41. The Court also held that it was error for the district court to strike “allegations concerning the history and purpose” of the challenged conduct. *Id.* at 237–39.

<sup>143</sup> *Nat’l Soc’y of Pro. Eng’rs*, 435 U.S. at 692.

and effect,”<sup>144</sup> as well as the market power of the entities involved.<sup>145</sup> The Rule of Reason is designed to “distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”<sup>146</sup> Essentially, the Rule of Reason should be “a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate”<sup>147</sup> and “assess the combination’s actual effect.”<sup>148</sup> Should courts look for a tabulated test, we could take these statements to create three separate yet interrelated inquiries: (1) the intent of the parties and the purpose of the restraint; (2) the history and nature of the restraint; and (3) a balancing of the procompetitive benefits against the anticompetitive effects, taking into account market

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<sup>144</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

<sup>145</sup> *See id.* at 886; *see also* *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984); *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 45–46 (2006).

The Supreme Court has defined market power as “the power to control prices or exclude competition.” *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391–92 (1956). Hovenkamp calls this definition “imprecise and incomplete,” instead defining market power as “a firm’s ability to increase profits by reducing output and [charging a supracompetitive] price for its product.” HOVENKAMP, *supra* note 6, at 60; *see also* William M. Landes & Richard Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981) (“The term ‘market power’ refers to the ability of a firm . . . to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded.”).

In the case of employment competition, where the competition is for laborers, the concern is over a monopsonist employer “purchasing” labor at a lower price than they would have to in a perfectly competitive market. *See, e.g.*, HOVENKAMP, *supra* note 6, at 15–18; OECD, *COMPETITION IN LABOUR MARKETS* 14 (2020), <https://www.oecd.org/competition/competition-in-labour-markets-2020.pdf>. Thus, a market power analysis might include such factors as the number of similar employers in the surrounding geographic area, labor supply elasticity, the ability of an employee to “pivot” into a related or different industry, the industry size, the number of total employees held by each employer involved in the restraint, and relatedly, perhaps, the relative supply and demand of laborers in the industry and geographic area.

<sup>146</sup> *Leegin*, 551 U.S. at 886. Recall that here, the “consumer” is the laborer, the employees.

<sup>147</sup> *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 191 (2010).

<sup>148</sup> *Copperweld*, 467 U.S. at 768; *see also Leegin*, 552 U.S. at 886.

information.<sup>149</sup> However, the test is not meant to be mechanical but instead is intended to be fact-intensive, fact-inclusive, and flexible.<sup>150</sup>

As of today, the Department of Justice (“DOJ”) considers naked no-poach agreements to be per se illegal,<sup>151</sup> whereas ancillary no-hire provisions are not.<sup>152</sup> In recent years, the DOJ has been preparing to prosecute naked no-poach agreements.<sup>153</sup> A joint FTC-DOJ report points out that this per se designation applies to agreements that are “separate from or not reasonably necessary to a larger legitimate collaboration” and does not apply to “[l]egitimate joint ventures.”<sup>154</sup> In its guidance, the FTC and DOJ compare naked no-hire agreements to “hardcore cartel conduct.”<sup>155</sup> Making good on its plans, the DOJ filed its first criminal no-poach charges in January of 2021 against a “surgical outpatient services company.”<sup>156</sup>

Pennsylvania’s Attorney General, Josh Shapiro, shares the DOJ’s disdain for no-hire provisions. He led a fourteen-state settlement with Dunkin’, Arby’s, Five Guys, and Little Caesars, where the restaurants agreed to stop putting no-poach

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<sup>149</sup> In this Note, I ignore any procedural aspect of presenting evidence on each point. There are discussions revolving around a three-step burden-shifting analysis culminating in a balancing test that comes from *Bd. of Trade v. United States*, 246 U.S. 231 (1918) and *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). See Michele Floyd, *Standards to Assess the Legality of Conduct in Antitrust Cases*, SACKS RICKETTS & CASE LLP (2020). I do not find it useful to go through this and muddy the waters of what is essentially a three-prong consideration into the anticompetitive effects and countervailing procompetitive benefits of an alleged restraint on trade, informed with the intent of the parties and the nature or history of the restraint.

<sup>150</sup> See *Am. Needle*, 560 U.S. at 203.

<sup>151</sup> HR GUIDANCE, *supra* note 5.

<sup>152</sup> Because I do not consider naked no-hire agreements in this Note, it is enough to say that the per se test does not currently apply to ancillary no-hire provisions and may be disregarded for our purposes—I focus solely on the Rule of Reason.

<sup>153</sup> HR GUIDANCE, *supra* note 5. The “preparation” includes filing several statements of interest. See, e.g., Statement of Interest of the United States, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464 (W.D. Pa. 2019) (No. 2:18-MC-00798-JFC); Statement of Interest of the United States, *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2019 WL 4674758 (M.D.N.C. Mar. 7, 2019) (No. 1:15-CV-462).

<sup>154</sup> HR GUIDANCE, *supra* note 5.

<sup>155</sup> *Id.* at 4.

<sup>156</sup> Ben Remaly, *DOJ Brings First Criminal No-Poach Case*, GCR (Jan. 8, 2021), <https://globalcompetitionreview.com/gcr-usa/departement-of-justice/doj-brings-first-criminal-no-poach-case>. But see Bryan Koenig, *DOJ Can’t Criminalize No-Poach Pacts, Chamber Says*, LAW360 (Apr. 5, 2021, 11:20 PM), <https://www.law360.com/articles/1372181/doj-can-t-criminalize-no-poach-pacts-chamber-says> (discussing constitutional concerns arising out of the DOJ’s condemnation of no-poaching agreements).

provisions in their franchise agreements and to remove the no-poach clauses from their current franchise agreements.<sup>157</sup> The structure of those agreements prohibited franchise owners from hiring employees of other franchises under the same corporate name, *e.g.*, a Little Caesars franchise owner agrees with Little Caesars' corporate headquarters to not hire the employees of a different Little Caesars franchise.<sup>158</sup>

As mentioned, I do not address naked no-poach agreements in this Note; however, this does not render the DOJ's guidance useless. Their stance serves as indirect support for the characterization of no-hire provisions as restraints of trade,<sup>159</sup> foreshadows future development of this area of the law, and supports the use of reasonability as a touchstone for enforceability where the restraint is not naked.

The situation that Shapiro targets—no-poach provisions contained within franchise agreements—adds a complication. In those agreements, there are special characteristics that are not present in the scenario on which I focus: the franchisees sharing a common corporate name, identity, and goodwill. As much as franchise locations are their own businesses with their own managers, those special characteristics inextricably link those “independent” franchises together in a way that other companies are not.<sup>160</sup> This difference does not render Shapiro's approach irrelevant. The fact that these agreements seem to affect low-wage workers could be evidence of intent or purpose, a relevant factor in the Rule of Reason. A franchisor may also be incentivized to prevent intra-brand competition for labor to avoid having higher wages brought on by a larger pool of potential future employers for the franchise's employees; the incentives at play would be part of the analysis and would bear on the restraint's reasonability.

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<sup>157</sup> AG Press Release, *supra* note 12.

<sup>158</sup> Matthew Perlman, *Little Caesars Ducks Ex-Manager's No Poach Suit*, LAW360 (July 30, 2019, 6:45 PM), <https://www.law360.com/articles/1183377/little-caesars-ducks-ex-manager-s-no-poach-suit>.

<sup>159</sup> The characterization of naked no-hire agreements as “hardcore cartel conduct” harks back to my comparison and contrast of restraints of trade and restrictive covenants. *See supra* note 13 and accompanying text.

<sup>160</sup> The more a franchisor attempts to “control” franchisees, the less convincing the “independent franchisee” argument is. Prohibiting a subset of the workforce from being hired is quite intrusive and controlling.

#### IV. THE CASE FOR UTILIZING THE RULE OF REASON FRAMEWORK

As should be apparent from the discussion above, the area of no-hire provision interpretation begs for guidance. The Rule of Reason test offers a useful, efficient, fair, and reasonable framework for interpreting no-hire provisions, and while New York and Pennsylvania have gotten close to supporting this view, most other jurisdictions have not.<sup>161</sup> In order to provide a sense of settlement to this area, and in order to assist the lower courts in addressing these issues, courts should adopt the federal Rule of Reason test that has been developed over the past century; the test's purpose, its flexibility, and its numerous factors for consideration makes it not only the superior choice but also the most rational and least invasive choice.

There are two ways to connect the interpretation of no-hire provisions to the Rule of Reason. The first requires only two links in the chain. The second requires a journey through Pennsylvania cases that cite a case, *Addyston Pipe*, that was integral in developing the Rule of Reason that was first articulated in *Standard Oil*.

##### A. *Drawing the Simple Line to the Rule of Reason*

The simplest line connecting the interpretation of no-hire provisions to the Rule of Reason is only two links long. The first link requires that no-hire provisions be properly characterized as restraints of trade. The second link is recognizing that the Sherman Act makes illegal all unreasonable restraints of trade and it has a test to determine the reasonability of a particular restraint—the Rule of Reason. It really is that simple.

##### B. *Drawing Another Line to the Rule of Reason*

Drawing another connection between the Rule of Reason and no-hire provision interpretation involves a more convoluted route, but it is not as attenuated as it may

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<sup>161</sup> There is more support for antitrust enforcement in this area in recent years. See Polden, *supra* note 14, at 582 (“This is a positive development because enforcement of antitrust law in [the labor and employment] markets has been neglected and the growing national concern about limits on worker mobility, wages, and economic prosperity requires greater attention, perhaps even by federal competition law and policy.”). Professor Polden’s Article is an extremely useful piece to get a sense of the DOJ’s approach and their actions thus far. He argues for stronger antitrust enforcement, *see id.* at 613–14, but his article is not limited to ancillary no-hire provisions. Without conflicting with his conclusion and without limiting it, I believe that since it is not clear that states even recognize the availability of antitrust law as a solution to their lack of precedent problem, that is the starting point for ensuring “the growth of competition for workers,” including “workers’ access to new jobs, higher paying jobs, and more career opportunities.” *Id.* at 613.



appear. This route requires tracing Pennsylvania case citations back to a case that pre-dates the articulation of the Rule of Reason but was integral to its development.

### 1. No PA State Law Directly on Point

The first step in making our way to the Rule of Reason is acknowledging, as the courts in *Beemac* and *GeoDecisions* did, that there is no state law in Pennsylvania directly on point.<sup>162</sup> As such, and as both courts further recognize, it is appropriate to look to other jurisdictions (including federal law) for guidance.<sup>163</sup> Below, I follow the trail of citations back to a seminal antitrust case from the 1800s.

### 2. State Law Cited by Pennsylvania Courts Leads Back to *Addyston Pipe*

After recognizing that no state law speaks directly on point, the next step in our journey to the Rule of Reason focuses on where Pennsylvania courts have ended up in their search for guidance. The state high court opinion and the superior court majority both quote the trial court opinion which cites *Jacobson & Co. v. International Environmental Corp.*<sup>164</sup> as Pennsylvania Supreme Court precedent for several propositions: (1) that “at common law . . . contracts in restraint of trade made independently of a sale of a business or contract of employment are void as against public policy regardless of the . . . consideration exchanged”; (2) certain restrictive covenants may be valid “if they are ancillary to the main purpose of the contract”; (3) the restrictive covenant “must be inserted only to protect one of the parties from injury which, in the execution of the contract or enjoyment of its fruits, [they] may suffer from the unrestrained competition of the other”; and (4) the “main purpose of the contract must suggest the measure of protection needed.”<sup>165</sup> The first proposition above from *Jacobson* is a direct quote from *Morgan’s Home Equipment Corp. v.*

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<sup>162</sup> Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC, 249 A.3d 918, 924 (Pa. 2021); *GeoDecisions v. Data Transfer Sols., LLC*, No. 1:10-CV-2180, 2010 WL 5014514, at \*3 (M.D. Pa. Dec. 3, 2010).

<sup>163</sup> *Beemac*, 249 A.3d at 924; *GeoDecisions*, 2010 WL 5014514 at \*3.

<sup>164</sup> *Jacobson & Co. v. Int’l Env’t Corp.*, 235 A.2d 612 (Pa. 1967).

<sup>165</sup> Pittsburgh Logistics Sys., Inc. v. BeeMac Trucking, LLC, 202 A.3d 801, 805 (Pa. Super. Ct. 2019) (citing *Jacobson*, 235 A.2d at 617).

*Martucci*,<sup>166</sup> which itself is drawn from *United States v. Addyston Pipe & Steel Co.*<sup>167</sup> The rest of the above propositions from *Jacobson* come from *Addyston Pipe*.<sup>168</sup>

The *GeoDecisions* court cites *Jacobson* as background for the “ancillary rule”<sup>169</sup> and as the baseline rule of limiting restraints of trade to the sale of a business and employment contracts that have subsequently been liberally construed.<sup>170</sup> Since the same passage of *Jacobson* is cited in both *GeoDecisions* and *Beemac*, the line is the same—all roads lead to *Addyston Pipe*. But there are even more trails of citations that lead back to *Addyston Pipe*.

In articulating its four-prong test,<sup>171</sup> the *GeoDecisions* court cites *Volunteer Firefighter Insurance Services, Inc. v. Cigna Property and Casualty Insurance Agency*,<sup>172</sup> a noncompete case, which itself cites *Lektro-Vend Corp. v. Vendo Co.*,<sup>173</sup> another noncompete case, as well as *Piercing Pagoda, Inc. v. Hoffner*,<sup>174</sup> yet another noncompete case. *Lektro-Vend* cites to several seminal cases in antitrust jurisprudence, including *National Society of Professional Engineers v. United States*, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, and *Addyston Pipe*.<sup>175</sup> *Piercing Pagoda*

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<sup>166</sup> *Morgan’s Home Equip. Corp. v. Martucci*, 136 A.2d 838 (Pa. 1957).

<sup>167</sup> *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff’d as modified*, 175 U.S. 211 (1899). The relevant facts for the purposes of this Note can be summed up in one sentence—several pipe manufacturers agreed to fix prices for cast-iron pipe and argued that since the fixed prices were reasonable, they should be upheld as enforceable. *Id.* at 291–92.

<sup>168</sup> *Jacobson*, 235 A.2d at 617.

<sup>169</sup> *GeoDecisions v. Data Transfer Sols., LLC*, No. 1:10–CV–2180, 2010 WL 5014514, at \*4 (M.D. Pa. Dec. 3, 2010) (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 186, 188 (AM. L. INST. 1981)). Recall that we discussed the ancillary rule as nothing more than a filtering mechanism. *See* Part II.B.3.

<sup>170</sup> *Id.* at \*11–12. The *Beemac* supreme court opinion notes that the “liberal construction” is disputed, but it does not resolve this dispute. *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC*, 249 A.3d 918, 934 (Pa. 2021).

<sup>171</sup> *See* discussion *supra* Part II.A.3.

<sup>172</sup> *Volunteer Firemen’s Ins. Servs., Inc. v. CIGNA Prop. & Cas. Ins. Agency*, 693 A.2d 1330, 1337 (Pa. Super. Ct. 1997).

<sup>173</sup> *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981).

<sup>174</sup> *Piercing Pagoda, Inc. v. Hoffner*, 351 A.2d 207 (Pa. 1976).

<sup>175</sup> The *Lektro-Vend* court cites *National Society of Professional Engineers* and *Continental T.V.* for the proposition that restraints not in the per se category must be analyzed under the Rule of Reason. *Lektro-Vend*, 660 F.2d at 265. It cites *Addyston Pipe* for the ancillary rule. *Id.*

cited *Addyston Pipe* for the ancillary rule,<sup>176</sup> and it cites *Jacobson* (which leads back to *Addyston Pipe*) as well as *Morgan's Home Equipment Corp. v. Martucci*,<sup>177</sup> another noncompete case that itself cites back to *Addyston Pipe* for the ancillary rule.<sup>178</sup>

In short, all roads lead back to *Addyston Pipe*, and the tests cited and appropriated into the no-hire space all come from noncompete jurisprudence. This leads us to the third link in the Rule of Reason chain: *Addyston Pipe* and its role in the development of the Rule of Reason Test.

### 3. *Addyston Pipe* is a Stepping-Stone to the Rule of Reason Test

Although the Rule of Reason test was not articulated until 1911,<sup>179</sup> *Addyston Pipe* was an integral opinion in the early days of the Supreme Court's jurisprudence interpreting the Sherman Act that leads directly to *Standard Oil* and the Rule of Reason test.<sup>180</sup> Although Judge Taft's Sixth Circuit opinion in *Addyston Pipe* is cited for its articulation of the "ancillary restraint doctrine,"<sup>181</sup> the word "ancillary" is not found in the Supreme Court's opinion affirming the result.<sup>182</sup> The Court considered whether prices fixed by the pipe manufacturers were reasonable and concluded that "the effect of the combination was to enhance prices beyond a sum which was *reasonable*."<sup>183</sup> The fact that the Court considered the reasonable nature of the prices

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<sup>176</sup> *Piercing Pagoda*, 351 A.2d at 211.

<sup>177</sup> *Morgan's Home Equip. Corp. v. Martucci*, 136 A.2d 838 (Pa. 1957).

<sup>178</sup> *Id.* at 845.

<sup>179</sup> See discussion *supra* Part III.

<sup>180</sup> It is not lost on me that *Addyston Pipe* is a Sixth Circuit case. It was subsequently affirmed by the Supreme Court, and in its opinion, the Court talked about the reasonableness of the restraint rather than focusing on the ancillary doctrine. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 235, 237-38 (1899).

<sup>181</sup> *Id.*

<sup>182</sup> *Addyston Pipe*, 175 U.S. 211. The phrase "direct restraint" is found three times in the opinion. *Id.* at 235, 241, 245. "Reasonable" or "unreasonable" is found ten times as it relates to the price or profit from the combination. See *id.* at 235, 237-38.

<sup>183</sup> *Id.* at 238 (emphasis added).

and the conduct is seemingly in conflict with Judge Taft's conclusion that direct (non-ancillary) restraints are unenforceable regardless of their reasonability.<sup>184</sup>

Even if not in direct conflict, the Supreme Court did not feel the need to rely upon the strict dichotomy between "direct" and "ancillary" restraints. This interpretation comports with the Supreme Court's discussion in *Standard Oil* surrounding the Rule of Reason; the Court took the view that the "light of reason" was implicit in previous Sherman Act decisions where "the nature and character of the contract or agreement in each case was fully referred to and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibitions of the statute."<sup>185</sup>

*Addyston Pipe* was a step in the formulation of the Rule of Reason, and as such, the propositions for which it is cited in *Jacobson* (and therefore *Beemac* and *GeoDecisions*), while not necessarily "incorrect," are incomplete. The Rule of Reason, developed after *Addyston Pipe* but with *Addyston Pipe* in mind, purports to prohibit only those restraints that unreasonably restrain competition. In its application, the Rule of Reason considers equity, fairness, the above factors,<sup>186</sup> and various other incentives at play in the markets at issue to allow "beneficial" restraints—those whose procompetitive benefits outweigh their anticompetitive effects—to be enforced. The "ancillary restraint" doctrine from *Addyston Pipe* is an underdeveloped tool, unable to handle any problems surrounding the interpretation of no-hire provisions other than its filtering function. The logical solution is to look to the terminus of common law development following *Addyston Pipe*—the Rule of Reason framework in *Standard Oil*.

Further, in the context of *Beemac*, the ancillary rule only serves as a filtering mechanism—if a restraint is not ancillary, it is direct and therefore per se illegal; if the restraint is ancillary, the next question is the reasonableness of the restraint, and the ancillary rule should serve no purpose in that inquiry. This "pinball flipper" function is the role for which it is best suited, pointing all ancillary restraints toward the Rule of Reason.

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<sup>184</sup> Even if not in conflict, the Supreme Court seems to have realized that the "ancillary" nature of the restraint is not the whole picture, and in today's reality, it acts to filter probable per se violations from toss-up violations (i.e., ones that need the full analysis of reasonability under the Rule of Reason to determine their enforceability).

<sup>185</sup> *Standard Oil Co. v. United States*, 221 U.S. 1, 64 (1911).

<sup>186</sup> See discussion *supra* Part III.

## V. APPLICATION OF THE RULE OF REASON TO *BEEMAC*

Now that we have fleshed out the connection between the Rule of Reason test and no-hire provisions, I will briefly show how it could be applied to *Beemac*. This application will be incomplete because there are factual questions that would need to be further and fully developed that were not.

The first consideration is PLS's *intent* in implementing the restraint and the overall purpose of that restraint. The trial court and superior court majority gave particular weight to the previous finding of PLS's unclean hands.<sup>187</sup> This fact undoubtedly goes to intent, and the weight it should be given is discretionary. Assuming that evidence of the prior suit and its judgment against PLS could be admitted,<sup>188</sup> and given that it would be logical for PLS to protect its legitimate business interests with multiple safeguards,<sup>189</sup> I would not give this factor *dispositive* weight. The intent behind one provision does not necessarily bear on the intent of another, nor does the reasonability of one necessarily inform the reasonability of another without additional evidence. To the extent they are admissible, internal communications of officers or directors or upper management could be relevant to PLS's subjective intent and whether they were trying to further oppress their employees. Also, as raised by the Pennsylvania Supreme Court, the number of employees affected could be an indication of intent (though again, not dispositive)—where the no-hire applies to *all* of the promisee's employees, regardless of their knowledge of the interests or information sought to be protected, it may be more likely that the firm intended to oppress.

The trial court also found that the "ultimate purpose" of the provision was to protect PLS "from the loss of its clients."<sup>190</sup> If this is taken as true, then this fact is relevant and counterbalances the unclean hands factor. While protection from loss of clients is a legitimate business purpose,<sup>191</sup> perhaps the existence of less-restrictive means could be indicative of an ulterior motive behind implementing the restraint, even where those less-restrictive means are not required to be taken. In other words,

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<sup>187</sup> See discussion *supra* Part II.C.1.

<sup>188</sup> I do not address this evidentiary issue, and I do not assume that this fact's presence in the record necessarily means that the Pennsylvania (or federal) rules of evidence permit its introduction.

<sup>189</sup> See discussion *supra* Part II.B.2.

<sup>190</sup> Pittsburgh Logistics Sys., Inc. v. BeeMac Trucking, LLC, 202 A.3d 801, 804 (Pa. Super. Ct. 2019).

<sup>191</sup> See, e.g., Sidco Paper Co. v. Aaron, 351 A.2d 250, 254, 257 (Pa. 1976) (holding that customer goodwill and customer relationships are protectable interests).

choosing a more restrictive means for protecting its own interests may in turn work against the chooser and lean against a finding of enforceability.<sup>192</sup> The argument would continue that instead of choosing adequate protection, PLS chose to burden its employees more to its own benefit. As part of collecting more evidence, PLS could testify as to why they chose the no-hire as opposed to a less restrictive means of protecting their client list or any other interest that they allege they were protecting.

Analyzing the nature or character of the restraint and its history has historically been ethereal, seemingly a combination of the judge's own perception as to what the alleged restraint amounts to as well as factors specific to the business or company at issue.<sup>193</sup> Further, it seems that the character of a restraint is easily muddled with the analysis of anticompetitive effects; I understand the nature or character of the restraint to be its *propensity* to cause anticompetitive effects, not the *actual* anticompetitive effects.<sup>194</sup> Framed that way, the character of a no-hire provision is one that necessarily leads to a reduction of competition in the labor market. There is no situation where two companies could agree to not hire each other's employees without affecting labor market competition; perhaps where there are a large number of firms to which an employee could move, the effect on labor market competition would be negligible. But, however small, the effect is necessarily a reduction or restriction. Thus, a no-hire's propensity to cause at least that anticompetitive effect is unavoidable and inherent in the restraint. A court could hear testimony on that,

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<sup>192</sup> Michael Carrier concludes his article by stating: "Just because a plaintiff cannot show a less restrictive alternative or lack of reasonable necessity does not mean it cannot show that a restraint's anticompetitive effects outweigh its procompetitive justifications." Carrier, *supra* note 135, at 54. This is part of the reason I do not dwell on his four-part burden shifting test and do not put too much stock in having "less restrictive means" as a firm element. The entire purpose of the Rule of Reason is to allow beneficial restraints to be enforced and stop those which are unreasonable, and the number of alternatives, even if they have varying levels of restriction, do not necessarily make a more restrictive means unreasonable. See discussion *supra* Part III. The focus must be on the anticompetitive effects and the procompetitive benefits, not the existence of other means *by itself*.

<sup>193</sup> See *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 692–93, 696 (1978) (describing the character of the restraint through an ends-oriented analysis as well as the nature of competition in general in professional services markets). The fact that judicial experience serves to support the analysis makes it all the more important that the characterization of a no hire be as a restraint of trade—how can judges get experience if they do not recognize restraints of trade and analyze their effects properly?

<sup>194</sup> The Court in *National Society of Professional Engineers* took an ends-oriented approach to the character analysis, finding that "an agreement among competitors to refuse to discuss prices with potential customers until after negotiations" operated as "an absolute ban on competitive bidding." *Id.* at 692.

and parties could hire experts to expound upon that point as well as on the history of no-hire provisions in general.

As mentioned, the anticompetitive effects include a decrease in labor market competition, as well as the inevitable converse that employees involved in the arrangement have their pool of possible future employers decreased by an amount equal to the number of employers subject to the no-hire provision, which inhibits the free flow of labor to some degree. The provision does not prevent future employment with every similar employer (unless PLS contracted with every possible future employer in the industry within the time period of prohibition), nor does the existence of the provision necessarily mean that it will make it through the negotiation phase with the contracting party.<sup>195</sup>

Another anticompetitive effect flowing directly from the decrease in labor market competition is the possible reduction in wages.<sup>196</sup> When firms agree to not hire each other's employees, that reduction in competition for those employees means that wages for those employees do not feel the pressure of competition. Even where one firm raises their wages, the other firm has no incentive to raise wages to retain their employees—the firm with the higher wages is bound to not hire the lower-wage workers. Participants in the no-hire arrangement are able to keep wages lower than they would be in a perfectly competitive market, which is, unsurprisingly, anticompetitive. Of course, the anticompetitive effects last only as long as agreed, and that time period must be evaluated on a reasonableness scale.<sup>197</sup>

The primary procompetitive benefit of a no-hire is that it allows firms to work together and “loan out” their employees with specialized knowledge<sup>198</sup> to create

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<sup>195</sup> Presumably, Beemac Trucking could have negotiated to remove or pare down the no-hire provision. We should be careful to act as a crutch for poor negotiation tactics or decisions given the policy of favoring arms-length transactions and the freedom to contract. *See* John B. Conomos, Inc. v. Sun Co., 831 A.2d 696, 708 (Pa. Super. Ct. 2003) (“Absent fraud or unconscionability, courts should not set aside terms on which sophisticated parties agreed.”). The superior court dissent of the *Beemac* saga cites this case and notes the lack of record evidence of fraud or unconscionability allegations with respect to *Beemac*. 202 A.3d at 810 (Bowes, J., dissenting).

<sup>196</sup> *See* Polden, *supra* note 14, at 591.

<sup>197</sup> It is worth repeating that this is a negotiable term. One party proposes a no-hire lasting for two years, the other party proposes no no-hire provision at all, and they settle with a narrowly tailored six-month provision or something in between.

<sup>198</sup> Query whether this rationale is as pervasive in the case of laborers who do not require a high level of education. *See, e.g.*, AG Press Release, *supra* note 12 (settlement to prevent no-poach agreements applying to fast food workers).

value in their working relationship with another firm without the fear of losing those employees to that firm.<sup>199</sup> Protecting proprietary information, trade secrets, or employees who have access to (or knowledge of) that proprietary information is a legitimate interest in most cases. As a matter of policy, we want companies to be confident that their more specialized employees will be able to offer the other company the benefit of their training and knowledge without being exposed to the risk of having that training or knowledge “stolen” by the other company.<sup>200</sup> The same rationale applies to customer information, as protecting relationships with customers and a business’s overall goodwill is reasonable and important; we do not necessarily want to encourage free riding.<sup>201</sup> And, in the case of *Beemac*, the client list was arguably PLS’ only real asset or contribution to the market, so their interest in protecting that would likely be extremely high.

Other relevant factors include: the number of similar employers in the surrounding geographic area and the size of the industry,<sup>202</sup> labor supply elasticity<sup>203</sup> and the ability or willingness of an employee to find a job in a related or different industry,<sup>204</sup> the employers’ market power,<sup>205</sup> the relative sophistication of the

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<sup>199</sup> This benefit is similar to the benefits of a non-solicitation and possibly a noncompete, though generally a noncompete does not encourage competitor-firms to work together—they are still competitors.

<sup>200</sup> On the other hand, perhaps certain industries or markets cannot tolerate a firm whose entire business is built on keeping its clients, their only asset, secret.

<sup>201</sup> The “free rider” problem is simultaneously the most basic economic problem and the most pervasive.

<sup>202</sup> In an area with a surplus of firms in the same industry, the concern over restriction of labor market competition or employee choice wanes—being able to work for nineteen firms instead of twenty because there is a no-hire with one firm does not really concern us. But, if there are only two firms within a 250-mile radius for whom the laborer could reasonably work, that anticompetitive restraint on competition is not beneficial and does quite a bit more harm.

<sup>203</sup> Labor supply elasticity “measures the extent to which labour supply responds to a change in the wage rate in a given time period.” *Elasticity of Labour Supply (Labour Markets)*, TUTOR2U: ECONOMICS, <https://www.tutor2u.net/economics/reference/elasticity-of-labour-supply> [<https://perma.cc/J3RS-4UTP?view-mode=server-side>] (last updated Apr. 7, 2019).

<sup>204</sup> A laborer may be unwilling to make a change for any number of reasons; it might be worth considering that a low-wage worker in a job that does not require a degree or specialized skill might not want to be jumping around multiple industries that also do not require a degree or specialized skill, even if by definition those positions should be more elastic.

<sup>205</sup> The antitrust laws are probably more concerned with firms that have more market power as opposed to smaller firms. See Landes & Posner, *supra* note 145.



employees and the amount of specialized knowledge they possess,<sup>206</sup> and the relative supply and demand of laborers in the industry and geographic area.<sup>207</sup>

In the case of *Beemac*, we would need facts to determine how large the shipping industry is in western Pennsylvania, as well as the market for shipping brokers (or third-party logistics providers) that are similar to PLS. From there, information about the number of similar or related firms in the area would show the likelihood that PLS employees could find other suitable work even where some firms are bound by the no-hire. The number of these companies to which the noncompete applies would also be relevant information, because if employees are prevented from working with every other possible firm in that industry in the geographic area, then the number of available firms is *functionally* zero.

Further, information regarding the supply and demand of laborers in the shipping industry or third-party logistics industry in western Pennsylvania would help show that PLS employees could, if desired, find gainful employment in their industry without intense hardship.<sup>208</sup> The sophistication or specialized training required for employees of a shipping broker remains to be seen as well. The position (i.e., the title or role) of each employee affected by the no-hire would be relevant to allow an individual evaluation of the no-hire's effect on each employee. If the employee is one that receives little training directly from PLS, or if positions have varying levels of knowledge of the client list, then that could factor into the reasonableness; an employee with no knowledge of PLS's clients or with no access to other sensitive information really should not be restricted in their search for employment based on the justification of protecting sensitive information.

Lastly, although I have made clear that no-hire provisions are not to be characterized as restrictive covenants, the idea of a reasonable limitation in geography and time could factor into either the analysis of intent (the longer the

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<sup>206</sup> This factor has to do with points raised earlier; that as a matter of public policy, laborers need to remain elastic and uninfringed. Generally, the less training required and the lower wage, the more free flowing we want those laborers to be. We do not want the working class to be inelastic and unable to move around, in part so that there is sufficient competition to keep wages sufficiently high. Query whether that works in reality.

<sup>207</sup> See *Therapy Servs., Inc. v. Crystal City Nursing Ctr., Inc.*, 389 S.E.2d 710, 712 (Va. 1990) (reasoning that the occupational therapists were in low supply and high demand in Northern Virginia, so those occupational therapists subject to the no-hire could still have found work). Query whether the "high demand" would be affected by any noncompete; do the occupational therapists actually have the ability to work in any of those firms, or would they be barred by a noncompete?

<sup>208</sup> See *id.* ("The evidence indicated that in the Northern Virginia area, therapists were in low supply and in high demand and, thus, should they choose to leave Therapy Services' employ, they could secure like positions in the area.").

duration and the wider the geographic scope, the more likely it is that the employer intended to oppress its employees and reduce labor market competition). It could also factor into an evaluation of the anticompetitive effects and how far-reaching they are. The record should be more developed regarding the sophistication of the industry and how often client information changes or turns over, but given the brief introduction we have into PLS' process as a transportation broker, two years seems beyond what is necessary to protect that information.

In sum, this restraint in *Beemac* seems unduly burdensome to the laborers in that market, and on balance, seems unreasonable. While there is a legitimate interest sought to be protected, and while we do not have a fully developed record on some of the factors listed above, the no-hire provision simply reduces competition to such a degree that it is unreasonable. Further, it seems that PLS' intent was, at best, careless, and at worst, monopsonistic and hostile. Along with a no-hire's inherent character to restrain labor market competition, these factors lean against enforcement of the no-hire provision in my view.

## VI. CONCLUSION

The enforceability of ancillary no-hire provisions presents a question of first impression in many jurisdictions, all of which look to others for guidance. Though there are essentially four "buckets of interpretation" that courts end up in, most of them simply adopt their jurisdiction's noncompete framework, incorrectly categorizing no-hire provisions as restrictive covenants or "non-competes in disguise." This approach mistakenly uses the effect on the employee to drive categorization, and it is deficient in the factors it considers in arriving at its conclusion.

Federal antitrust jurisprudence offers a clear and sensible solution—the Rule of Reason test. No-hire provisions are properly categorized as restraints of trade, as they are horizontal arrangements between firms to reduce labor market competition. The Sherman Act makes illegal all unreasonable restraints of trade, and the primary test for deciding reasonability is the Rule of Reason test. The DOJ recognizes that naked no-poach agreements are per se illegal under the Sherman Act, and given that the "ancillary rule" filters naked (unenforceable) agreements from ancillary (enforceable only if reasonable), the logical extension is that ancillary no-hire agreements require Rule of Reason treatment. Further, most of the cases cited by the Pennsylvania courts in their review of *Beemac* lead back to antitrust jurisprudence in one way or another.

Pennsylvania and New York have been the closest to adopting the Rule of Reason, but their tests (also dubbed "rules of reason") lack the fact-intensive analysis and the flexibility that the federal Rule of Reason offers. No jurisdiction has successfully drawn the line to the Rule of Reason, even after recognizing the DOJ's approach, the effect on competition, and the Sherman Act's application to naked no-

hire agreements. As the most logical framework, considering the most relevant factors to come to a thoughtful conclusion, the Rule of Reason test should be the primary framework applied to determine the reasonability, and thus the enforceability, of ancillary no-hire provisions.