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INVALIDITY OF COVENANTS NOT TO COMPETE IN CALIFORNIA AFFECTS EMPLOYERS NATIONWIDE

Sheri Wardwell¹

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Abstract

In *Edwards v. Arthur Andersen LLP*, the Supreme Court of California rejected the Ninth Circuit Court of Appeals' "narrow restraint" exception to California Business and Professional Code section 16600 regarding the unenforceability of covenants not to compete (CNCs). *Edwards* affirms that, unless the agreement falls within a statutory exception, CNCs in employment agreements are invalid as a matter of law in California because of California's strong interest in protecting employee mobility as codified in section 16600. Despite California's strong public policy against CNCs, an employee who wins the race to a California courthouse may not necessarily benefit from section 16600 if the employee was not a California resident or employed by a Californian employer at the time she agreed to a CNC. This Article evaluates California law and the resolution of the conflict of law issues that arise between California and other states more willing to enforce CNCs.

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<1>While states generally disfavor covenants not to compete (CNCs) because such agreements restrain trade, most states will enforce CNCs in employment contracts² when the restraint on trade is reasonable.³ However, the State of California has adopted a restrictive policy regarding CNCs.⁴ In *Edwards v. Arthur Andersen LLP*, the California Supreme Court confirmed that CNCs in employment agreements are per se illegal pursuant to section 16600 of the California Business and Professional Code, unless a clear statutory exception exists.⁵ The court's bright-line interpretation expressly overruled the Ninth Circuit Court of Appeals' "narrow restraint" exception, which had permitted enforcement of CNCs as long as the restraint on trade was minimal or limited.⁶

<2>In applying the per se rule, the *Edwards* Court found the CNC, which prevented Edwards from performing accounting services for clients he had worked with during the previous eighteen months of his former employment with Arthur Anderson, restricted Edwards's ability to practice his trade as an accountant and was, therefore, unenforceable.⁷ The CNC was considered an impermissible restraint on Edwards's trade, regardless of his ability to pursue new clients upon his separation from Arthur Anderson. While *Edwards* stands for the proposition that California's strong public policy favors absolutely open competition and employee mobility, regardless of the extent of the restraint, it is unclear the extent to which non-resident employees may take advantage of California's policy to escape enforcement of CNCs that would otherwise be enforceable.

<3>To determine whether California's law, or the law of a state more willing to enforce a CNC, applies to a given case, courts perform a conflict of law analysis. In general, the law of the state with the most substantial connections to a cause of action⁸ and the more material public policy⁹ will control. Where multiple states have substantial connections, California's strong, material public policy against restraining trade appears to weigh against enforcing CNCs. However, other states have equally material public policy interests, such as New York's policy to protect parties' freedom to contract.¹⁰ In light of these competing policies, this Article examines the following: first, California's policy against CNCs; second, California's valid exceptions to the per se invalidity of CNCs; and finally, the state courts' resolution of the conflict of law issues that arise between California and states more willing to enforce CNCs.

Wardwell: Invalidity of Covenants Not to Compete in California Affects Empl
COVENANTS NOT TO COMPETE ARE INVALID AS A MATTER OF LAW IN
CALIFORNIA

<4>California, in general, invalidates CNCs as a result of the state's strong public policy disfavoring restraints on trade and the plain meaning of section 16600 of the California Business and Professional Code.¹¹ Section 16600, as well as its predecessor, section 1673 of the California Civil Code,¹² was adopted to promote open competition and employee mobility.¹³ The policy aims not only to protect an individual's right to pursue the profession, trade or business of his or her choosing, but also to protect an employer's ability to compete for skilled employees.¹⁴

<5>Section 16600 states that "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."¹⁵ California courts have interpreted the plain meaning of section 16600 broadly to hold that *every* contract that restrains either the quantity or quality of trade is unenforceable.¹⁶ In *Edwards v. Arthur Andersen LLP*, the California Supreme Court held that the plain meaning of section 16600, read in light of California's policy against CNCs, characterizes any CNC that restrains even a narrow portion of a person's ability to engage in her profession, trade, or business, as an unenforceable restraint on trade.¹⁷ In so holding, *Edwards* not only rejects reading a rule of reason analysis into the statute, which is consistent with previous California case law,¹⁸ but also rejects the Ninth Circuit's "narrow restraint" exception.¹⁹

<6>In *Edwards*, the defendant employer, Arthur Andersen, argued that a de facto rule of reason should be read into section 16600 to permit reasonable restraints on trade, as long as such restraints do not completely prohibit a trade.²⁰ Arthur Andersen sought to have the statutory term "restrained" be interpreted to mean "prohibited," such that only contracts that completely prohibit an employee in the practice of a profession, trade, or business are invalid.²¹ The California Supreme Court rejected this interpretation of the statute, noting that "section 16600 is unambiguous . . ." and that ". . . if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect."²² The *Edwards* Court concluded that the plain meaning of the term "restrained" must stand to mean that "any limitation" contractually imposed on an employee's trade is

unenforceable.²³ As such, the court rejected Arthur Andersen's assertion that section 16600 includes a de facto rule of reason. Washington Journal of Law, Technology & Arts, Vol. 5, Iss. 5 [2009], Art. 3

<7>In addition, the *Edwards* Court declined to adopt the Ninth Circuit's "narrow restraint" exception to section 16600.²⁴ The Ninth Circuit had previously interpreted California law as providing an exception to the general invalidity of CNCs when a CNC only restrains a small or limited part of a person's trade.²⁵ However, the California Supreme Court was not persuaded by the Ninth Circuit's interpretation.²⁶ Relying on the unambiguous language of section 16600, the court rejected the position that a "narrow restraint" exception could ever be intended by the legislature, because California's policy is clear that CNCs are per se invalid.²⁷ As such, *Edwards* articulates a strong public policy to void any CNC, regardless of whether the restraint is narrowly construed, or only partially prohibits an individual's practice of a trade, business, or profession. The only exceptions to the per se invalidity of CNCs recognized by the California Supreme Court are expressly codified in California's statutory law.

CALIFORNIA'S CODIFIED EXCEPTIONS FOR WHEN A COVENANT NOT TO COMPETE WILL BE ENFORCEABLE

<8>Because California has a per se rule against CNCs, the legislature created exceptions to permit the enforcement of CNCs in circumstances where a business would otherwise be harmed.²⁸ For example, the California Business and Professional Code allows enforcement of a CNC when the covenant involves the sale or dissolution of a corporation,²⁹ partnership or limited liability company.³⁰ This exception protects a newly sold business from being undermined by a past owner who immediately opens a similar business that would unfairly compete with the original business.

<9>A second statutory exception allows enforcement of CNCs that prevent use or disclosure of an employer's trade secrets.³¹ For instance, in *Gordon v. Landau*, the California Supreme Court enforced a one-year CNC preventing a former employee from using the employer's proprietary customer lists, as long as the former employee was not restrained from engaging in his profession.³² The trade secret exception is limited to preventing only the unlawful use or disclosure of a trade secret and does not extend to CNCs that prevent an employee from working for a competitor.³³ Because California courts have only found the trade secret exception applicable where the CNC is limited to protecting an employer's property right to proprietary information, the availability of the trade secret exception has

largely depended on whether the proprietary information qualifies as a trade secret under the Uniform Trade Secret Act.³⁴

RESOLVING CONFLICT OF LAWS

<10> Section 16600 clearly invalidates all CNCs in California whether they are created by a resident employer or created for a resident employee.³⁵ What remains less clear is the effect of section 16600 on a non-resident employer who requests enforcement of a CNC against a non-resident employee who is later hired to work in California. The central issue is whether the former non-resident employee can successfully escape enforcement of an otherwise valid CNC. The following sections of this Article will examine the validity of contractual choice of law provisions and the success of anti-suit injunctions when a non-resident employee seeks to prevent a non-resident employer from enforcing the CNC in a court outside of California.

California Courts May Not Enforce Choice of Law Provisions

<11> When there is a conflict of law, California refers to sections 187 and 188 of the Restatement (Second) Conflict of Laws to determine whether California or a foreign state's laws should apply.³⁶ When there is a valid choice of law provision,³⁷ California will generally apply the chosen state's law³⁸ unless the issue before the court concerns enforcing a CNC.³⁹ Section 187 suggests that a court may disregard a choice of law provision when:

Application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.⁴⁰

<12> The California Supreme Court has interpreted section 187 to mean that a choice of law provision will not be upheld if California's public policy is violated by the application of a foreign state's law, even where the foreign state has a substantial relationship with the parties.⁴¹ Californian courts ask three questions to determine whether a foreign state's law violates California's public policy: (1) whether the foreign state's law is contrary to a fundamental policy of California; (2) whether California has a materially greater interest than the

foreign state, which is also known as the material interest prong; and (3) whether California's interest would be more seriously impaired by enforcement of the foreign state law, which is also referred to as the comparative interest prong.⁴²

<13> For example, in *Application Group, Inc. v. Hunter Group, Inc.*, Hunter Group, a Maryland corporation, sought to enforce an employee's CNC, which included a Maryland choice of law provision, when a former employee moved to California and began working for Hunter's competitor, Application Group.⁴³ The appellate court determined that while the CNC would be enforceable under Maryland law, the three-pronged conflict of law analysis nevertheless required application of California law.⁴⁴ Significantly, the court not only found that California had a greater material interest, but also that California employers would be comparatively more seriously impaired if Hunter Group's CNC was enforced.⁴⁵ The court reasoned that when non-resident employers are free to recruit California employees and California employers are not free to recruit skilled employees from states where CNCs are enforced, California employers are unfairly disadvantaged.⁴⁶ Under the reasoning of *Application Group*, any choice of law provision attached to a CNC will be difficult to enforce in California.⁴⁷

<14> However, California state and federal courts do not appear consistent in enforcing choice of law provisions.⁴⁸ The Ninth Circuit is more likely to uphold a choice of law provision, possibly to avoid forum shopping.⁴⁹ For instance, in *IBM Corp. v. Bajorek*, the Ninth Circuit relied on its "narrow restraint" exception to section 16600 to hold that California's fundamental public policy against CNCs is not violated when a CNC is a limited restraint on an employee's trade.⁵⁰ Because enforcement of such a CNC would not violate public policy, the threshold question in a conflict of laws analysis under the Restatement (Second) of Conflict of Laws section 187 (whether enforcement would violate California's fundamental public policy) was not met.⁵¹ The Ninth Circuit, therefore, held that the choice of law provision must be enforced.⁵²

<15> The California Supreme Court's decision in *Edwards* to overrule the Ninth Circuit's "narrow restraint" exception will, by implication, likely influence the Ninth Circuit's conflict of laws analysis.⁵³ While the enforcement of a CNC is clearly a violation of California public policy after *Edwards*, whether the federal courts will align with California state courts in declining to uphold choice of law provisions remains unanswered. Federal courts may continue to enforce choice of law provisions by

weighing the additional prongs of the conflict of law analysis—the material interest and comparative interest prongs—in favor of a foreign state.

<16> Thus, the holdings in *Edwards* and *Application Group* provide significant hurdles to employers trying to enforce choice of law provisions in California state courts, and possibly federal courts applying California law. The likely invalidity of choice of law provisions may discourage non-resident employers from seeking enforcement of CNCs in California, but employers may still seek a legal remedy in their own state courts.

Winning the Race to a California Courthouse Does Not Ensure Adjudication by a California Court

<17> Because a CNC is likely unenforceable in California, non-resident employees may race to file for a declaratory judgment in California before an employer is able to enforce a CNC in its own state court.⁵⁴ In general, an employee may increase the likelihood of obtaining a judgment from a particular state court by winning the race to the courthouse and requesting the court to issue an anti-suit injunction barring an employer from pursuing claims in a foreign state court. Under the first-to-file rule, a California court that acquires jurisdiction prior to another state's court may proceed with a case exclusively; any subsequent courts, in accordance with judicial comity, may decline jurisdiction over suits concerning the same parties and subject matter.⁵⁵ In addition, to avoid multiplicity of judicial proceedings, a California court may issue an anti-suit injunction, such as a temporary restraining order (TRO) or preliminary injunction, to prevent a defendant from pursuing a lawsuit in a foreign state when a plaintiff has already commenced suit in California.⁵⁶ However, the California Supreme Court has cautioned against the use of a TRO when an employee files suit in California to avoid unfavorable substantive law regarding the enforcement of CNCs and has declined to invoke the first-to-file rule to proceed in CNC cases where a parallel suit is filed in a foreign jurisdiction.⁵⁷

<18> For example, in *Advanced Bionics Corp. v. Medtronic, Inc.*, a Medtronic employee residing in Minnesota agreed to a CNC and to a Minnesota choice of law provision.⁵⁸ After the employee resigned to pursue employment in California with a Californian company and Medtronic competitor, the employee and the competing company, Advanced Bionics, filed suit in California for declaratory judgment to prevent Medtronic from enforcing the CNC.⁵⁹ Medtronic responded by filing a parallel

suit in Minnesota. The California appellate court determined, after conducting a choice of law analysis, that California law should be applied and subsequently issued a TRO preventing the Minnesota action from continuing.⁶¹ On review, the California Supreme Court recognized a court's inherent power to issue a TRO, but held that a TRO could not be used to restrain a former employer from enforcing a CNC in another state's court without violating the principles of judicial restraint and comity.⁶² The court stated that the principles of judicial restraint and comity require an exceptional circumstance to enjoin litigation through a TRO, and that such a circumstance was not present in *Advanced Bionics*.⁶³ In other words, California's public policy against enforcement of CNCs was not sufficient to qualify as an exceptional circumstance to enjoin litigation in a foreign state.⁶⁴

<19>As such, while California courts may proceed with a case under the first-to-file rule and issue TROs when there are parallel suits filed in another jurisdiction, the courts are likely to defer to the jurisdiction of a foreign state when a case concerns the enforcement of a CNC for a non-resident employee and employer.

CONCLUSION

<20>In *Edwards*, the California Supreme Court overruled application of the Ninth Circuit Court of Appeals' "narrow restraint" exception to section 16600. *Edwards* reiterates the rule that CNCs are per se unenforceable unless such covenants fall within an express statutory exception. The unenforceability of CNCs in California affects employers nationwide when former employees seek declaratory judgments in California courts, which are likely to hold CNCs unenforceable regardless of a choice of law provision selecting a state with more favorable treatment of CNCs. However, the holding of *Advanced Bionics* limits the affect of California per se treatment of CNCs by preventing a California court from issuing a TRO to prevent parallel litigation in another state, even where parties filed first in California, or when a conflict of law analysis reveals that California law should be applied. The unavailability of the first-to-file rule and an anti-suit injunction for a former employee seeking declaratory judgment in California implicitly allows a former employer to pursue litigation in a foreign state, at least until a judgment binds the parties.⁶⁵ Ultimately, it may become a race to judgment to determine whether a CNC will be enforced.

- While CNCs are not, in general, enforceable in California, a California court may find a CNC enforceable under one of the statutory exceptions to section 16600, where the CNC is designed to protect: (1) an employer's trade secret; or (2) a newly acquired corporation, partnership, or limited liability company.
- Choice of law provisions designed to apply the law of states that enforce reasonable CNCs are likely unenforceable in California courts because of the state's strong public policy against CNCs.
- Because the Ninth Circuit's "narrow restraint" exception was overruled by *Edwards*, removing suit from state to federal court may not provide the type of leverage it once did. However, the Ninth Circuit may still be more receptive than California state courts to arguments favoring enforcement of a choice of law provision where an employer can demonstrate that: (1) California lacks a materially greater interest; or (2) California would be less impaired than would an employer's home state, if the CNC were to be enforced.
- An employee seeking declaratory judgment in California has the greatest chance of success if the court awards the declaratory judgment before the former employer files suit in another state that treats CNCs more favorably. If an employee suit commences in a California court; nevertheless, a former employer can still improve the likelihood that a CNC will be enforced by commencing a parallel suit in another employer's home state and winning the race to judgment.

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Footnotes

1. Sheri Wardwell, University of Washington School of Law, J.D. program Class of 2010. Thank you to Professor Jane K. Winn of the University of Washington School of Law for her help and guidance during the writing of this Article. Also, thank you to Professor Dwight Drake of the University of Washington School of Law for his thoughtful review of this Article.

2. States applying a common law "rule of reason" to assess enforcement of a CNC are as follows: Alaska (Data Mgmt., Inc. v. Green, 757 P.2d 62, 65 (Alaska 1988)); Arizona (Am. Credit Bureau, Inc. v. Carter, 462 P.2d 838, 840 (Ariz. Ct. App. 1969)); Arkansas (Dawson v. Temps Plus, Inc., 987 S.W.2d 722, 727 (Ark. 1999)); Connecticut (Van Dyck Printing Co. v. DiNicola, 648 A.2d 898, 902 (Conn. Super. Ct. 1993)); Delaware (Faw, Casson & Co. v. Cranston, 375 A.2d 463, 467 (Del. Ch. 1977)); District of Columbia (Ellis v. James V. Hurson Assocs., 565 A.2d 615, 617 (D.C. Cir. 1989); Florida (FLA. STAT. § 542.335); Georgia (Sysco Food Servs. of Atlanta, Inc. v. Chupp, 484 S.E.2d 323, 325 (Ga. Ct. App. 1997); *but see* Ga. Const. Art. III, Sec. VI, Par. V(c)); Hawaii (Technicolor, Inc. v. Traeger, 551 P.2d 163 (Haw. 1976); *see also* The 7's Enters., Inc. v. Del Rosario, 143 P.3d 23, 36 (Haw. 2006)); Idaho (Dick v. Geist, 693 P.2d 1133, 1135 (Idaho Ct. App. 1985)); Illinois (Lawrence & Allen, Inc. v. Cambridge Human Res. Group, Inc., 685 N.E.2d 434, 441 (Ill. App. Ct. 1997)); Indiana (Norlund v. Faust, 675 N.E.2d 1142, 1153 (Ind. Ct. App. 1997)); Iowa (Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 762 (Iowa 1999)); Kansas (Weber v. Tillman, 913 P.2d 84, 89 (Kan. 1996)); Kentucky (Hall v. Willard & Woolsey, P.S.C., 471 S.W.2d 316, 317 (Ky.1971)); Maine (Brignull v. Albert, 666 A.2d 82, 84 (Me. 1995)); Maryland (Ecology Servs., Inc. v. Clym Env't Servs., LLC, 952 A.2d 999, 1007 (Md. Ct. Spec. App. 2008)); Massachusetts (Boulanger v. Dunkin' Donuts Inc., 815 N.E.2d 572, 577 (Mass. 2004)); Michigan (St. Clair Medical, P.C. v. Borgiel, 715 N.W.2d 914, 918-19 (Mich. Ct. App. 2006)); Minnesota (Dynamic Air, Inc. v. Bloch, 502 N.W.2d 796, 799 (Minn. Ct. App. 1993)); Mississippi (Empiregas, Inc. of Kosciusko v. Bain, 599 So.2d 971, 975 (Miss. 1992)); Missouri (Cont'l Research Corp. v. Scholz, 595 S.W.2d 396, 400 (Mo. Ct. App. 1980); Nebraska (Chambers-Dobson, Inc. v. Squier, 472 N.W.2d 391, 397 (Neb. 1991)); Nevada (Camco, Inc. v. Baker, 936 P.2d 829, 833 (Nev. 1997)); New Hampshire (Smith, Batchelder & Rugg v. Foster, 406 A.2d 1310, 1312 (N.H. 1979)); New Jersey (Solari Indus. v. Malady, 264 A.2d 53, 57 (N.J. 1970)); New Mexico (Lovelace Clinic v. Murphy, 417 P.2d 450, 453-54 (N.M. 1966)); New York (Morris v. Schroder Capital Mgmt. Int'l, 7 N.Y.3d 616, 620 (N.Y. 2006));

North Carolina (Chemimetals Processing, Inc. v. Wardwell, Invalidation of Covenants Not to Compete in California Affects Employment, 476 S.E.2d 374, 376 (N.C. Ct. App. 1996)); Ohio (Raimonde v. Van Vlerah, 325 N.E.2d 544, 546-47 (Ohio 1975)); Pennsylvania (Hess v. Gebhard & Co., 808 A.2d 912, 920 (Pa. 2002)); Rhode Island (Durapin, Inc. v. Am. Prods, Inc., 559 A.2d 1051, 1053 (R.I. 1989)); South Carolina (Cafe Assocs., Ltd. v. Gerngross, 406 S.E.2d 162, 164 (S.C. 1991)); Tennessee (Vantage Tech., LLC v. Cross, 17 S.W.3d 637, 644 (Tenn. Ct. App. 1999)); Texas (Tex. Bus. & Com. Code §§15.50-.52 (2001)); Utah (Kasco Servs. Corp. v. Benson, 831 P.2d 86, 95 (Utah 1992)); Vermont (Roy's Orthopedic, Inc. v. Lavigne, 454 A.2d 1242, 1244 (Vt. 1982)); Virginia (New River Media Group, Inc. v. Knighton, 429 S.E.2d 25, 26 (Va. 1993)); Washington (Knight, Vale & Gregory v. McDaniel, 680 P.2d 448, 451-52 (Wash. Ct. App. 1984)); West Virginia (Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 915 (W. Va. 1982)); Wisconsin (WIS. STAT. ANN. § 103.465 (2009)); Wyoming (Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 543 (Wyo. 1993)). *See also* BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (5th ed. 2006).

3. To determine enforceability of a CNC under a "rule of reason" analysis, a court may examine whether the CNC (1) furthers a legitimate interest of an employer, (2) is reasonably necessary to protect the employer, (3) is reasonable in time and place, (4) is supported by adequate consideration, (5) is in the public interest, and (6) poses no undue hardship on the employee. *See* RESTATEMENT (SECOND) OF CONTRACTS §§186-188 (1981).
4. California appears to have one of the nation's strictest public policies against enforcement of CNCs. *See* CAL. BUS. & PROF. CODE § 16600 (West Supp. 2008). Notably, North Dakota also restricts CNCs. *See* N.D. CENT. CODE § 9-08-06 (2008). The following states restrict CNCs by statute, but as interpreted, are more tolerant of enforcing CNCs than California: Alabama (ALA. CODE § 8-1-1 (2009)); Colorado (COLO. REV. STAT. § 8-2-113 (2009)); Louisiana (LA. REV. STAT. § 23:921 (2008)); Montana (MONT. CODE § 28-2-703 (2008)); Oklahoma (OKLA. STAT. tit. 15, §§ 217-219 (2009)); Oregon (OR. REV. STAT. § 653.295 (2009)); South Dakota (S.D. CODIFIED LAWS §§ 53-9-8 to 53-9-11 (2009)). *See also* BRIAN M. MALSBERGER,

5. *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 296 (Cal. 2008).
6. *Id.* at 293 (citing *Campbell v. Bd. Trustees of Leland Stanford Jr. Univ.*, 817 F.2d 499 (9th Cir. 1987)).
7. *Id.* at 291.
8. RESTATEMENT (SECOND) CONFLICT OF LAWS § 188 (1971).
9. RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (1971).
10. *Roesgen v. Am. Home Prods. Corp.*, 719 F.2d 319, 321 (9th Cir. 1983).
11. *Tiedje v. Aluminum Taper Milling Co.*, 256 P.2d 554, 555-56 (Cal. 1956) (holding where any agreement contrary to the plain meaning of Section 16600, or the public policy for open competition, will not support a cause of action in California).
12. CAL. CIV. CODE § 1673 (1872) (repealed 1941) ("Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided [in sections regarding a sale of good will or partnership agreement], is to that extent void"; this statute was enacted in 1872 from Field's Draft, N.Y. CIV. CODE § 833.).
13. *Hill Medical Corp. v. Wycoff*, 103 Cal. Rptr. 2d 779, 783-84 (Cal. Ct. App. 2001). *See also* *Kolani v. Gluska*, 75 Cal. Rptr. 2d 257, 259-60 (Cal. Ct. App. 1998) (noting that it would be against public policy to rewrite, or "blue-line," an otherwise illegal covenant not to compete into a narrow bar on theft of confidential information).
14. *See, e.g., Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573, 577 (Cal. Ct. App. 1994) (citing *Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 255 (Cal. Ct. App. 1968) (stating that "competitors may solicit another's employees if they do not use unlawful means or engage in acts of unfair competition."). Scholars have argued that the invalidity of CNCs is correlated with a more vigorous economy in high technology regions throughout the nation. *See generally* Jason S. Wood, *A Comparison of the Enforceability of Covenants Not to Compete*

(positing that the reason for rapid and continued growth in California's Silicon Valley may partially be attributed to the lack of enforceability of covenants not to compete because employers are able to recruit high-tech employees who share their skills and knowledge with new employers); *see also* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley*, *Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999) (discussing how legal infrastructure contributes to the development of high technology industrial districts); *see also* Christine M. O'Malley, Note, *Covenants Not to Compete in the Massachusetts Hi-Tech Industry: Assessing the Need for a Legislative Solution*, 79 B.U. L. REV. 1215 (1999) (assessing the California model of unenforceability of CNCs relative to the Boston Model and its impact on high-tech industries).

15. CAL. BUS. & PROF. CODE § 16600 (West Supp. 2008). The State of California rejected the common law rule in 1872 when Civil Code sections 1673 to 1675, the predecessors to the Business and Professions Code sections 16600 to 16602, were adopted. *See* *Bosley Med. Group v. Abramson*, 207 Cal. Rptr. 477, 479-80 (Cal. Ct. App. 1984).
16. *See, e.g., Muggill v. Reuben H. Donnelley Corp.*, 42 Cal. Rptr. 107, 109 (Cal. 1965) (finding the CNC illegally restrained the employee from engaging in a lawful business even though the restraint on trade was narrowly tailored to the receipt of a pension and did not prevent the employee from working for another company).
17. *Edwards*, 189 P.3d 285 at 294.
18. *See Muggill*, 42 Cal. Rptr. at 107.
19. *Edwards*, 189 P.3d at 291.
20. *Id.*
21. *Id.* at 289.
22. *Id.* at 292.
23. *Id.*
24. *Id.*

25. *Campbell v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 817 P.2d 499, 502-503 (9th Cir. 1987) (holding that a CNC-type restriction is permissible if only a limited part of a business, trade or profession is restricted). Note that in *Campbell*, the court of appeals relied on two California Courts of Appeals' cases to justify its holding. See *King v. Gerold*, 240 P.2d 710 (Cal. Ct. App. 1952) (holding that, under section 16600, a restraint on a manufacturer, whose license to manufacture a trailer designed by the plaintiff expired, was permissible); see also *Boughton v. Socony Mobil Oil Co.*, 231 Cal. App. 2d 188 (Cal. Ct. App. 1964) (holding that a restriction in a deed to prevent the land from being used as a gasoline service station for a specified time was outside the scope of section 16600; standing for the proposition that a restriction is permissible if only a limited part of a business, trade or profession is restricted).
26. *Edwards*, 189 P.3d at 293 n.5 ("We are not persuaded that *Boughton* or *King* provides any guidance on the issue of noncompetition agreements, largely because neither involved noncompetition agreements in the employment context. However, to the extent they are inconsistent with our analysis, we disapprove.").
27. *Id.*
28. *Vacco Indus., Inc. v. Van Den Berg*, 6 Cal. Rptr. 2d 602, 609 (Cal. Ct. App. 1992) (stating that the legislature took exceptions expressed under the rule of reason and expressly codified those it thought reasonably necessary to protect businesses).
29. CAL. BUS. & PROF. CODE § 16601 (West Supp. 2008). Statute also includes upholding CNCs for shareholders when all the shares are sold. See *Vacco Indus.*, 6 Cal. Rptr. 2d at 609-10; but see *Bosley*, 207 Cal. Rptr. at 479-80 (finding that a sale of options was considered a sham and was not an exception to section 16600).
30. CAL. BUS. & PROF. CODE § 16602 (West Supp. 2008). See *S. Bay Radiology Med. Assocs. v. Asher*, 220 Cal. App. 3d 1074, 1082-83 (Cal. Ct. App. 1990).
31. CAL. CIV. CODE §§ 3426-3426.11 (West 1997) (codifying the UNIFORM TRADE SECRETS ACT §§1-11 (1985)), available at <http://www.leginfo.ca.gov/cgi->

32. See *Gordon v. Landau*, 321 P.2d 456, 459 (Cal. 1958) (holding that a CNC to prevent a former employee from using or disclosing client lists was enforceable where the client list was crucial to the success of the employer's business and was maintained as a secret by the employer; the list was, therefore, considered a trade secret).
33. See *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573, 577 (Cal. Ct. App. 1994); see also *Whyte v. Schlage Lock Co.*, 125 Cal. Rptr. 2d 277, 293-94 (Cal. Ct. App. 2002) (holding that the trade secret exception does not include the doctrine of inevitable disclosure where a court will uphold a CNC, if it is reasonable to believe that the trade secret will be disclosed or used in the course of employment).
34. See CAL. CIV. CODE § 3426.1(d) (West 1997) (A "trade secret means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."). Compare *Gordon*, 321 P.2d at 459 with *Thompson v. Impaxx, Inc.*, 7 Cal. Rptr. 3d 427, 429-30 (Cal. Ct. App. 2003) (finding that a covenant barring a salesperson from soliciting customers was unenforceable when the client list used was not confidential and, therefore, could not be a trade secret).
35. CNCs are unenforceable when the employer is a California resident or performs significant business in California. See, e.g., *Kolani v. Gluska*, 75 Cal. Rptr. 2d 257 (Cal. Ct. App. 1998) (holding a California employer's CNC unenforceable against a California employee). CNCs are also unenforceable if the employee was a California resident when the CNC was signed. See, e.g., *In re Gault South Bay Litig.*, No. C 07-04659 JW, 2008 WL 4065843 (N.D. Cal. Aug. 27, 2008) (finding a foreign corporation's CNC unenforceable against California residents); *Davis v. Advanced Care Technologies, Inc.*, No. Civ S-06-

2449 RRB DAD, 2007 WL 2288298 (E.D. Cal. Aug. 8, 2007) (granting declaratory judgment for a former employee who was based in California despite the employer being based in Connecticut); *Robinson v. Jardine Ins. Brokers Int'l Ltd.*, 856 F. Supp. 554 (N.D. Cal. 1994) (finding a California resident entitled to an injunction preventing former English employer's enforcement of a CNC in United States).

36. See *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1151 (Cal. 1992) (affirming the application of the section 187 of the Restatement (Second) Conflict to determine the enforceability of contractual choice of law provisions and noting that section 187 reflects a strong public policy in favor of enforcing choice of law provisions).
37. As a threshold question, a court must ask whether the choice of law provision is enforceable. Section 187(2)(a) of the Restatement (Second) Conflict of Laws states that a choice of law provision cannot be enforced if "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice." See *S.A. Empresa v. Boeing Co.*, 641 F.2d 746 (9th Cir. 1981) (finding that the parties did not have a substantial relationship to California and Washington law was, therefore, the applicable law when neither party resided in California). *But see Application Group, Inc. v. Hunter Group, Inc.*, 72 Cal. Rptr. 2d 73, 84 (Cal. Ct. App. 1998) (noting that the bar for a "substantial relationship" and "reasonable basis" is set low and holding that an employer being incorporated in Maryland is enough to establish a substantial relationship with the State of Maryland and the mere fact that one of the parties is a Maryland resident is sufficient for there to be a "reasonable basis" for the choice of Maryland law).
38. *Smith, Valentino & Smith, Inc. v. Superior Court*, 551 P.2d 1206, 1209 (Cal. 1976).
39. See *Application Group, Inc.*, 72 Cal. Rptr. 2d at 73.
40. RESTATEMENT (SECOND) CONFLICT OF LAWS § 187(2)(b) (1971). Absent a choice of law provision, section 188 suggests that the appropriate state law to apply is the law from the state with the most significant relationship to the transaction. See also RESTATEMENT

(SECOND) CONFLICT OF LAWS § 188(b) (1971) (A court may consider (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.”).

41. *Nedlloyd Lines*, 834 P.2d at 1151 (adopting a two-part test to determine the enforceability of a choice of law provision where: (1) a foreign law must bear some substantial relationship to the parties of the contract and (2) application of foreign law must not violate a strong public policy of California in order to uphold the choice of law provision in an agreement).
42. *Application Group, Inc.*, 72 Cal. Rptr. 2d at 84.
43. *Id.*
44. *Id.* at 85-88 (finding that (1) Maryland law was contrary to California’s fundamental public policy against covenants not compete, (2) California’s interest in protecting employees’ freedom and mobility along with an employer’s ability to “compete effectively for the most talented, skilled employees in their industries, wherever they may reside” was materially greater than Maryland’s interest in “preventing recruitment of employees [from competitors] who provide ‘unique services,’” and (3) California’s interest is more seriously impaired).
45. *Id.* at 85 (noting that Maryland’s interest in protecting employers from competitor recruitment of skilled employees with unique skills or trade secrets would not be infringed when Hunter Group had sufficient contacts with California and the recruited employees did not possess unique skills or trade secrets).
46. *Id.*
47. See [United Rentals, Inc. v. Pruett](#), 296 F. Supp. 2d 220, 232-33 (D. Conn. 2003) (applying *Application Group, Inc.* to hold that California has a greater material interest than Connecticut when the employee was a California resident formerly working for a company headquartered in Connecticut, and later hired by an employer in California).
48. See Michael J. Garrison & John T. Wendt, *The*

49. *See, e.g.,* Roesgen v. Am. Home Prods. Corp., 719 F.2d 319, 321 (9th Cir. 1983) (warning that the application of California law would encourage forum shopping by allowing employees a “get out of a CNC free card” by moving to California and filing a suit for declaratory judgment); *see also* S.A. Empresa de Viacao Aerea Rio Grandese v. Boeing Co., 641 F.2d 746, 753 (9th Cir. 1981) (holding that Washington had a materially greater interest than California because California’s public policy interest in the protection of its citizens was not violated when the parties were not California citizens).
50. IBM Corp. v. Bajorek, 191 F.3d 1033, 1041 (9th Cir. 1999) (holding that enforcement of a CNC pursuant to New York law would not violate a fundamental policy of California because the covenant did not prevent the former employee from practicing completely within his profession).
51. *Id.*
52. *Id.* at 1042.
53. *See* Edwards v. Arthur Andersen LLP, 189 P.3d 285, 293 (Cal. 2008) (overruling the “narrow restraint” exception as applied in *Bajorek*).
54. 28 U.S.C. § 1738 (2006) (“[R]ecords and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”).
55. 16 CAL. JUR. 3D Courts § 200 (2002). The first to file principle is not mechanical, but merely a presumption that may be rebutted by showing that the race to a courthouse may have been motivated solely by forum-shopping. *See* Toy Biz, Inc. v. Centuri Corp., 990 F. Supp. 328 (S.D.N.Y. 1998).
56. CAL. CIV. CODE § 3423 (West 1997) (providing that a court may not grant a TRO “to stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless this restraint is necessary to prevent a multiplicity of proceedings.”). *See* Spreckels v. Hawaiian Commere

& Sugar Co., 49 P. 353 (Cal. 1897); *but see* Baker v. Wardwell, Invalidation of Covenants Not to Compete in California Affects Empl by Thomas v. General Motors Corp., 522 U.S. 222, 249 (1998) (indicating that an anti-suit injunction may not be given full faith and credit by a foreign state).

57. *See* *Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231, 236-37 (Cal. 2002); *see also* *Google, Inc. v. Microsoft Corp.*, 415 F. Supp. 2d 1018 (N.D. Cal. 2005) (staying California legal proceedings to allow a Washington state suit to proceed even though California's policy interest in the proceedings may have been greater and the suit was first filed in California); *TSMC N. Am. v. Semiconductor Mfg. Int'l Corp.*, 74 Cal. Rptr. 3d 328, 344 (Cal. Ct. App. 2008) (declining to uphold TRO preventing former employer from pursuing litigation in foreign nation); *Biosense Webster, Inc. v. Superior Court*, 37 Cal. Rptr. 3d 759, 766 (Cal. Ct. App. 2006) (holding that a TRO to prevent a California employer from enforcing a CNC in any court outside of Los Angeles was outside the bounds of judicial restraint comity even though the employer had yet to file an action against its former California employee); *but see* *AutoNation, Inc. v. Hatfield*, 186 S.W.3d 576 (Tex. Crim. App. 2005) (upholding TRO restraining employer from pursuing lawsuit against employee in Florida when the employee filed for declaratory judgment in Texas to prevent employer from enforcing CNC in Florida).
58. *Advanced Bionics Corp.*, 59 P.3d at 233.
59. *Id.*
60. *Id.* *See also* *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438 (Minn. Ct. App. 2001) (recognizing that California would typically have jurisdiction under the first-filed rule, the Minnesota court declined to stay parallel proceedings because the first-filed rule could be ignored at the discretion of the trial court without infringing upon principles of comity where a suit was filed in California, in order to have more favorable substantive law applied).
61. *Advanced Bionics Corp. v. Medtronic, Inc.*, 105 Cal. Rptr. 2d 265 (Cal. Ct. App. 2001).
62. *Advanced Bionics Corp.*, 59 P.3d at 235. Note that the California Supreme Court relies on the following cases to support its judgment: *Auerback v. Frank*,

685 A.2d 404, 407 (D.C. 1996) (noting that “the possibility of an ‘embarrassing race to judgment’ or potentially inconsistent adjudications does not outweigh the respect and deference owed to independent foreign proceedings,”), and *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649 (Tex. 1996) (requiring courts to use anti-suits, including TROs, sparingly because of the principle of comity).

63. *Advanced Bionics Corp.*, 59 P.3d at 237; see also *Biosense Webster, Inc. v. Superior Court*, 37 Cal. Rptr. 3d 759, 839 (Cal. Ct. App. 2006).
64. *Advanced Bionics Corp.*, 59 P.3d at 237-38. The court did not elaborate on what circumstances would be considered exceptional in order to overcome judicial restraint and comity. *Id.* The court also explicitly denied using a choice of law analysis in its determination of the appropriateness of a TRO. *Id.* However, in her concurrence, Justice Brown suggested that choice of law analysis is not irrelevant when considering whether the principles of judicial restraint and comity are overcome to use a TRO. *Id.* at 238-39. While the door may be open to overcome judicial restraint and comity, it is unclear which factors must be present to get over the threshold.
65. See, e.g., *id.* at 238.