

# Non-Compete Agreements With Step-Down Provisions

## Will Arizona Courts Enforce Them?

A client walks into your office, throws an employment agreement on your desk and asks, “Is the covenant not to compete in there enforceable?”

After fixing the damage to your desktop “filing system” caused by the flight of the agreement, you skim to the non-compete section and identify what is referred to as a “step-down provision.” The non-compete provides alternative time and area restrictions. But which one applies?

You are aware that a covenant not to compete must be reasonably limited as to time and territory.<sup>1</sup> You also recall that Arizona courts have repeatedly approved use of the blue-pencil rule, whereby a court is empowered to cross out overbroad, unreasonable provisions in an agreement, while keeping in place less onerous, enforceable provisions.

Whether you are representing the employee or employer, the client’s next question is obvious: “Which provisions are enforceable?” The client also asks, “Is there any way a court will find the entire covenant void?”

The answers are not obvious, and you finally give the response learned on the first day of law school: “It depends.”

A covenant not to compete is generally enforceable as long as it is no broader than necessary to protect an employer’s legitimate business interests.<sup>2</sup> The burden is on the employer to prove the extent of its protectible interests. If an employer cannot do so, the entire covenant will be deemed unenforceable.

Employers continue to use non-competition clauses regularly. In an effort to take advantage of Arizona’s adoption of the blue-pencil rule, Arizona employers frequently include step-down provisions within their non-competition clauses. By including grammatically separate restraints, the employer attempts to guarantee at least

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some protection. There is no definitive test to determine which provisions are enforceable. Indeed, for a number of reasons, a court could actually find the entire non-compete void.<sup>3</sup>

This article discusses the use of step-down provisions within non-competition agreements in the employer/employee context. Although no Arizona court has ruled directly on the enforceability of step-down provisions, previous decisions in Arizona and other jurisdictions provide some guidance.

### What Do "Step-Down Provisions" Look Like?

A hypothetical step-down provision might provide:

1. **NONCOMPETITION.** For the **TIME PERIOD** set forth in paragraph 2, Employee shall not, directly or indirectly, own, manage, operate, participate in or finance any business venture that competes with the Company within the **AREA**, set forth in paragraph 3.
2. **TIME PERIOD.** **TIME PERIOD** for purposes of paragraph 1 shall mean the period beginning as of the date of Employee's employment with the Company and ending on the date of death of the employee; provided, however, that if a court determines that such period is unenforceable, **TIME PERIOD** shall end five (5) years after the date of termination; provided, however, that if a court determines that such period is unenforceable, **TIME PERIOD** shall end six (6) months after the date of termination.<sup>4</sup>
3. **AREA.** **AREA** for purposes of paragraph 1 shall mean: the planet Earth provided; however, if a court determines such a geographic scope is unenforceable, **AREA** shall mean the United States; provided however, if a

court determines such a geographic scope is unenforceable, **AREA** shall mean the City of Tucson.<sup>5</sup>

4. In the event any provision of the Agreement is deemed unenforceable, it shall be severed and the balance of the Agreement shall be enforced.

### The Blue-Pencil Rule

Arizona courts have analyzed a variety of non-compete agreements to determine enforceability. Most recently, the Arizona Supreme Court in *Valley Medical Specialists v. Farber*<sup>6</sup> and the Arizona Court of Appeals in *Varsity Gold, Inc. v. Porzio*<sup>7</sup> ruled, *inter alia*, that Arizona courts could not rewrite unenforceable restrictive covenants to make them reasonable. In both decisions, however, it was acknowledged that Arizona courts could "blue-pencil," or cross out, restrictive covenants, eliminating grammatically severable, unreasonable provisions, thereby preserving the valid portions of the agreement.

In *Farber*, the Arizona Supreme Court addressed the enforceability of a non-compete clause in the context of medical specialists. The clause at issue prohibited the departing physician from practicing medicine within a five-mile radius of any of three specific clinic locations for a period of three years.<sup>8</sup> The contract also had a clause that allowed a court, if necessary, to reform and amend the non-compete provision to make it enforceable.<sup>9</sup>

The Court held the non-competition provision unenforceable because both the geographic scope and duration provisions were unreasonable.<sup>10</sup> The Court further held the appellate court erred by employing the contracts' reformation clause<sup>11</sup> to rewrite the non-compete provision "in an attempt to make it enforceable."<sup>12</sup> The Court explained that under Arizona law, courts may blue-pencil a restrictive

covenant by eliminating grammatically severable, unreasonable provisions, but they are prohibited from adding or rewriting provisions.<sup>13</sup>

In *Varsity Gold*, the non-competition clause prohibited the employee from "competing with Varsity in 'the state of Pennsylvania or any contiguous state.'"<sup>14</sup> The agreement also contained a provision permitting the court to "reform the geographic and time restrictions if it finds them to be unreasonable and unenforceable."<sup>15</sup> The trial court found the non-competition provision unenforceable, and amended the geographic scope to the south Pittsburgh area for the duration of one year.<sup>16</sup> The trial court ruled the *Farber* decision allowed it to reform the restrictive covenant as long as it was not "significantly different from that created by the parties." The Arizona Court of Appeals rejected this reasoning.<sup>17</sup>

Relying on *Farber*, the *Varsity Gold* Court stated that any judicial reformation of a restrictive covenant beyond implementation of the blue-pencil rule "is a 'significant' modification of that provision that cannot be tolerated."<sup>18</sup> The court further held, "Although we will tolerate ignoring severable portions of a covenant to make it more reasonable, we will not permit courts to add terms or rewrite provisions."<sup>19</sup>

### Step-Down and the "In Terrorem" Effect

As noted previously, under both *Farber* and *Varsity Gold*, Arizona courts may eliminate grammatically severable, unreasonable terms in a non-compete provision, but they may not add contractual provisions or rewrite them.<sup>20</sup> It is still not entirely clear, however, whether step-down provisions currently being used by some employers (and drafted by some attorneys) were within the *Farber* and *Varsity Gold* Courts' contemplation.



## Non-Compete Agreements

In *Varsity Gold*, the court stated that the *in terrorem* effect on departing employees provides one reason unreasonable terms could not be reformed and enforced:

By simply authorizing a court to rewrite unreasonable restrictions, an employer may relieve itself of crafting a reasonable restriction with the added benefit that the parting employees may adhere to an onerous covenant. ... [E]ven unenforceable covenants have an *in terrorem* effect on departing employees. Realizing this reality ... employers may create ominous covenants, knowing that if the provisions are contested, courts will modify the agreement to make it enforceable.<sup>21</sup>

Similarly, the *Farber* Court acknowledged that allowing courts the latitude to “blue-pencil” non-compete agreements creates inherent public policy risks.

Even the blue-pencil rule has its critics. For every agreement that makes its way to court, many more do not. Thus, the words of the covenant have an *in terrorem* effect on departing employees. Employers may therefore create ominous covenants, knowing that if the words are challenged, the courts will modify the agreement to make it enforceable.<sup>22</sup>

In light of the language in *Varsity Gold* and *Farber*, there appears to be very little difference between using the blue-pencil rule on step-down provisions or a reformation provision to the entire covenant as it relates to the “*in terrorem*” effect on departing employees. As demonstrated in the hypothetical step-down provision above, employers still could draft onerous restrictions on employees. If an employee has the temerity to resist, the step-down provision attempts to “insure” that some limited restriction will survive.<sup>23</sup>

Thus, the employer would essentially

be in the very advantageous “Heads, I win—Tails, you lose” position. This is exactly the situation the courts in *Farber* and *Varsity Gold*, at least in part, sought to avoid. At minimum, this problem raises significant public policy considerations.

### Lesser Alternatives and Unenforceable Restraints

A restrictive covenant can be no broader than the employer’s legitimately protected interests.<sup>24</sup> As a general rule, any restraint greater than is necessary to protect the employer’s legitimate interests is unreasonable<sup>25</sup>:

Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable and void, on the ground of public policy, as being injurious to the interests of the public.<sup>26</sup>

The purpose of a step-down provision is to ensure the survival of at least some minimum restraint on the employee. Use of alternative restraints of staggered scope raises issues of contract formation, interpretation and enforcement. If the least restrictive time and area provisions will sufficiently protect the employer’s legitimate interests, the broader provision (or the entire covenant) may be deemed oppressive and therefore unenforceable.

### Contract Formation Problems

A binding contract requires a meeting of the minds and mutual assent as to all material terms.<sup>27</sup> It is debatable whether there can be a meeting of the minds when alternative time and area provisions in the agreement expressly require determination by a court.<sup>28</sup>

A contract also must be definite and certain so that the liability of the parties may be exactly fixed.<sup>29</sup> A contract does not exist if the obligation is so indefinite and uncertain as to its terms and requirements that it is impossible to state with certainty the obligations involved.<sup>30</sup> If one or more terms of the claimed contract are uncertain

or left for later resolution, then whether the parties intended to be bound is uncertain.<sup>31</sup>

For example, a contract to pay \$50,000, or \$500, or \$5 (as determined by the court to be reasonable) should usually be too indefinite to enforce.<sup>32</sup> Therefore, a contract providing for a range of performances to be eventually determined by a court, such as the alternatives provided for in a step-down provision, arguably verges on failure to agree. The Georgia Court of Appeals refused to apply the blue-pencil rule and held a covenant not to compete unenforceable because the extent of the restriction was not determinable until the time of termination.<sup>33</sup>

A court cannot impose a contract on the parties<sup>34</sup> or make a contract the parties never intended.<sup>35</sup> Unlike some other states, Arizona does not allow a court to modify the contract and enforce “reasonable” terms not agreed upon by the parties.<sup>36</sup>

Whether a contract with alternative restrictive covenants can form the basis of a valid contract is debatable. Often the employee is not in as strong a negotiating position as the employer. Did a meeting of the minds or mutual assent to alternative time and area restrictions in a step-down provision exist?

Perhaps there is no “golden rule” for these situations, and courts will have to review each covenant on a case-by-case basis.

### Contract Interpretation Problems

The rules of contract interpretation seek to determine the intent of the parties.<sup>37</sup> When a step-down provision is used, the employer may intend to enforce the broadest terms. The employee may expect no enforcement, or make use of only the narrowest restraint. Deletion of portions of the agreement to create an “intermediate” reasonable restraint may not approximate either party’s intent. “By some occult process, the courts that have adopted this [blue-pencil] rule have convinced themselves that enforcement without the aid of a blue-pencil would be making a new contract for the parties while enforcement in



the wake of a blue-pencil is not.”<sup>38</sup>

An employer will argue step-down provisions do not call for the court to modify or otherwise add terms to an agreement. Rather, the parties specifically agreed to the alternatives set forth in the step-down provision and, if disputed, agreed to be bound by a court’s ultimate determination regarding the scope of a particular restriction’s reasonableness.<sup>39</sup> A court should consider such an argument, however, only if the employer can show the employment agreement, as a whole, was drafted in good faith.<sup>40</sup>

A court must also consider whether the employer’s interests justify the restraint. Where only a limited restraint is justified, inclusion of broad restraints is oppressive and can be viewed as lacking good faith.

## The Blue-Pencil Rule in Other States

The potential for overreaching by the employer has caused courts in other states to abandon the blue-pencil rule.

Under Georgia law, invalidity of one non-competition covenant invalidates all non-competition covenants; otherwise, “employers can fashion truly ominous covenants with confidence they will be pared down and enforced. ... This smacks of having one(’s) employee’s cake and eating it too.”<sup>41</sup> The Alaska Supreme Court rejected mechanical application of the blue-pencil rule<sup>42</sup> and allowed reformation of a covenant drafted in good faith.<sup>43</sup> A New York court refused to use the blue-pencil rule to enforce an employment covenant that “overreaches.”<sup>44</sup>

The Restatement (Second) of Contracts rejects the blue-pencil rule as “contrary to the weight of authority.”<sup>45</sup> An overbroad contract term, if obtained in good faith in accord with reasonable standards of fair dealing, can be modified and enforced.<sup>46</sup> Arizona courts have already recognized “a covenant executed other than in good faith would be subject to attack on that basis alone.”<sup>47</sup> While some step-down provisions may be enforced if drafted and agreed upon in good faith, a strategy of guaranteeing a “win” with a lesser restraint<sup>48</sup> while deterring employees from exercising their rights would be suspect conduct under the

good faith standard.<sup>49</sup>

Any type of restrictive covenant intended to coerce employees is arguably antithetical to fair business practices. Indeed, knowingly asserting an overbroad and unenforceable restrictive covenant should be deemed fundamentally dishonest and unfair.<sup>50</sup> A nonnegotiable step-down provision as a standard contract term might not be supported by the required good faith.

## Other Defenses to Contract Enforcement

### 1. Unconscionability

Step-down provisions also raise questions about unconscionability.<sup>51</sup>

The concept of unconscionability was meant to counteract two generic forms of abuse. First, procedural unconscionability addresses deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms. The imposed-upon party must have meaningful choice about whether and how to enter into the transaction.<sup>52</sup> Second, substantive unconscionability addresses contract terms themselves. Terms that are unreasonably favorable to the more powerful party impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; those terms will not be enforced. Where enforcement would be unconscionable, the court may deem the contract voidable for unilateral mistake.<sup>53</sup>

Procedurally, the contract must conspicuously call attention to disadvantageous terms.<sup>54</sup> Substantively, the contract cannot be unjust or oppressive.<sup>55</sup> An unconscionable term is one a reasonable man would not make and an “honest and fair man would not accept.”<sup>56</sup>

Step-down provisions seem to raise both procedural and substantive unconscionability issues. Procedurally, employees could argue that they had no meaningful choice about whether to enter into the step-down provision. Substantively, alternative terms restricting an employee’s future ability to compete in the marketplace raise questions about an employee’s reasonable expectations and the potential harshness of the terms.<sup>57</sup>

### 2. The Implied Covenant of Fair Dealing

Under Arizona law, every contract has an implied covenant of good faith and fair dealing.<sup>58</sup> That covenant prohibits “a party from doing anything to prevent other parties to the contract from receiving the benefits and entitlements of the agreement.”<sup>59</sup> A breach of the obligation of good faith and fair dealing arises if a party:

1. Exercises its discretion “in a way inconsistent with [the other] party’s reasonable expectations” or
2. Acts “in ways not expressly excluded by the contract’s terms but which nevertheless bear adversely on the [other] party’s reasonably expected benefits of the bargain.”<sup>60</sup>

Does an employer’s inclusion of a step-down non-compete provision amount to a breach of its obligation of good faith and fair dealing? A contract that recites an employee’s blanket disqualification from future employment by all competitors clearly risks unenforceability by invocation of the emerging good-faith case law.<sup>61</sup>

Is the same true of partial restrictions, the full scope of which is to be determined by a court? What about the employee who does not challenge the most restrictive prohibitions? Simply put, can good faith and step-down provisions coexist, or are they mutually exclusive?

## Conclusion

It is debatable whether the step-down provisions in non-competition provisions are valid. The *in terrorem* effect that step-down provisions have on departing employees creates an argument for imposing a good-faith test for use of the blue-pencil rule. The employer’s offer of lesser alternatives may be a type of admission that the broader restrictions are not needed to protect the employer’s legitimate interests, and therefore, per se oppressive and invalid. Although Arizona courts generally attempt to preserve valid contracts, the use of step-down provisions also raises certain fundamental contract issues regarding,

among other things, formation, interpretation and good faith.

Until the issue of step-down provisions is determined by an Arizona court, parties should, first and foremost, eschew standard-form employment agreements. There is no “one-size-fits-all” solution. Employers also should consider whether their interests can be protected by some other type of restrictive covenant, such as non-solicitation or non-disclosure provisions. Whatever alternative is chosen, both parties, particularly employers, should consider thoughtfully tailoring all restrictive covenants in a manner that specifically addresses the specific situation. 

## endnotes

1. See *Snelling and Snelling, Inc. v. Dupay Enterprises, Inc.*, 609 P.2d 1062, 1064 (Ariz. Ct. App. 1980).
2. This article focuses on non-compete agreements. Other restrictive covenants are also used to protect the employer’s trade secrets and customer relationships. See, e.g., Competition §§ 41 cmts. d and g and 42 cmts. a and b; 15 ARTHUR L. CORBIN ET AL., CORBIN ON CONTRACTS § 80.16 (1993). Nondisclosure and nonsolicit provisions can be narrowly targeted to employer interests in protecting confidential information or customer goodwill. *Hilbo, Rogal & Hamilton Co. of Arizona v. McKinney*, 946 P.2d 464, 467 (Ariz. Ct. App. 1997) (employer has protectible interest in maintaining customer relationship). A non-compete provision should be supported by concerns not addressed by these narrower restraints. For example, if the trade secret is used to manufacture a product and its use cannot be determined by examination of the product itself, then a nondisclosure may be impossible to administer. If a competitor is already servicing a customer, diversion of trade secrets and customer goodwill created at the employer’s expense will be difficult to detect. In these situations, a non-compete may be warranted. Arizona courts have generally directed more scrutiny to non-competition covenants than nondisclosure or nonsolici-



- tion provisions. See *McKinney*, 946 P.2d at 467.
3. A severability clause can properly be invoked to preserve a nondisclosure or nonsolicitation provision even if a separate non-compete is deemed unenforceable. See, e.g., 1 Drotler, *Intellectual Property Law: Commercial Creature and Industrial Property* § 4.05[4]; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 cmt. d.
  4. See Annotation, *Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Duration of Restriction*, 41 A.L.R.2d 15 (1955).
  5. A geographic restriction defining the area of competition as the entire world has been upheld occasionally. See *Business Intelligence Servs. Inc. v. Hudson*, 580 F. Supp. 1068 (S.D.N.Y. 1984). See *Sigma Chem. Co. v. Harris*, 794 F.2d 321, 374-75 (8th Cir. 1996), *contra Hartman v. W. H. Odell & Assoc., Inc.*, 450 S.E.2d 912 (N.C. Ct. App. 1994); *Firearms Training Sys. v. Sharp*, 445 S.E.2d 538 (Ga. Ct. App. 1994); see Annotation, *Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Territorial Extent of Restriction*, 43 A.L.R.2d 94 § 129 (1955). Use of the Internet expands the reasonable geographic scope of a non-compete; see, e.g., *National Bus. Serv. v. Wright*, 2 F. Supp. 2d 701 (E.D. Pa. 1998) (nationwide).
  6. *Valley Med. Specialists v. Farber*, 982 P.2d 1277 (Ariz. 1999).
  7. *Varsity Gold, Inc. v. Porzio*, 45 P.3d 352 (Ariz. Ct. App. 2002).
  8. *Farber*, 982 P.2d at 1285.
  9. *Id.* at 1286 n.2.
  10. *Id.* at 1285.
  11. If a portion of a covenant not to compete is deemed to be unreasonable, the entire covenant is unenforceable unless the covenant indicates, by its terms, that the unreasonable portion is severable. See *Oliver/Pilcher Ins. Inc. v. Daniels*, 715 P.2d 1218 (Ariz. 1986); *Snelling & Snelling*, 609 P.2d at 1064-65; *Amex Distrib. Co., Inc. v. Mascari*, 724 P.2d 596, 601 (Ariz. Ct. App. 1986). A severability clause permits the court to invoke the “blue-pencil” rule to delete invalid provisions and enforce the remaining terms if possible. A step-down provision seeks to make the “possible” inevitable. See D. Bray, *Drafting Enforceable Covenants Not To Compete*, ARIZ. ATT’Y, Feb. 1996, at 22, 2 (“Such a cutback provision would virtually guarantee that at least some portion of the covenant would be enforced against the employee.” ... “[S]uch a ... cutback provision virtually guarantees the employer a win.”).
  12. *Farber*, 982 P.2d at 1286.
  13. *Id.*
  14. *Varsity Gold*, 45 P.3d at 356.
  15. *Id.*
  16. *Id.* at 358.
  17. *Id.*
  18. *Id.*
  19. *Id.*
  20. *Farber*, 982 P.2d at 1285; *Varsity Gold*, 45 P.3d at 359.
  21. *Varsity Gold*, 45 P.3d at 359. Other courts express similar policy concerns for reforming and enforcing restrictive covenants: Many, perhaps most, employees would honor these clauses without consulting counsel or challenging the clause in court, thus directly undermining the statutory policy favoring competition. Employers would have no disincentive to use broad, illegal clauses if permitted to retreat to a narrow, lawful construction in the event of litigation. *Kolani v. Gluska*, 75 Cal. Rptr. 2d 257 (Cal. Ct. App. 1998); See also *Webcraft Tech. Inc. v. McCaw*, 674 F. Supp. 1039, 1047 (S.D.N.Y. 1987) (“Too great a readiness on the part of courts to preserve the valid portions of overbroad restrictions would induce employers to draft such restrictions overbroadly, intimidating the sales force by the ostensible terms of the written contract and relying on courts to enforce the valid portion against an employee who is not intimidated.”).
  22. *Farber*, 982 P.2d at 1286 (citations omitted).
  23. Little legal precedent addresses the enforceability of step-down provisions. This suggests that despite wide use of these provisions, they are not being challenged by employees. Arguably, this is an indication that the *in terrorem* is real, and working. For a discussion of Canadian law, see R. Brait, *The Use of Restrictive Covenants in the Employment Contract*, 6 QUEEN’S L.J. 414, 441 (1981) (recommending use of a “step type” provision and a severability clause, but warning “the widest restraints in such an arrangement should not go beyond reasonable bounds” or the entire covenant may be held invalid).
  24. See *Bed Mart v. Kelley*, 45 P.3d 1219, 1221 (Ariz. Ct. App. 2002); *Farber*, 982 P.2d at 1281.
  25. See RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a (1981); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 cmt. d (1995). Also, several Arizona cases suggest a covenant not to compete may apply only for the period necessary to hire and train a replacement. See *Bed Mart*, 45 P.2d at 1219; *Bryceland v. Northey*, 722 P.2d 36 (Ariz. Ct. App. 1989); *Mascari*, 724 P.2d 596, 604 (Ariz. Ct. App. 1986).
  26. *Farber*, 982 P.2d at 1281 (citations omitted).
  27. See 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 4:1 (5th ed. 2000).
  28. See *Farber*, 982 P.2d at 1286 (provisions in the agreement shall be reformed and amended to be enforceable to the fullest extent permissible not effective); *Varsity Gold*, 45 P.2d at 352; *accord*, *Product Action Int’l Inc. v. Mero*, 277 F. Supp. 2d 919, 929 (S.D. Ind. 2003) (term permitting enforcement “to the extent permitted by law” not effective. “By adding a magic phrase so that the overly broad restrictions may be enforced ‘to the extent permitted by law,’ the parties would delegate to the courts the task of drafting reasonable agreements.”); *Better Living Components, Inc. v. Coleman*, 2005 WL 771592 (Va. Cir. Ct. April 6, 2005) (“[D]oes the judiciary want to become the employer’s scrivener?”).
  29. *Hill-Shafer P’Ship v. Chilson Family Trust*, 799 P.2d 810 (Ariz. 1990); *K-Line Builders, Inc. v. First Fed. Sav. & Loan Ass’n*, 677 P.2d 1317 (Ariz. Ct. App. 1983); *Pyeatte v. Pyeatte*, 661 P.2d 196, 200 (Ariz. Ct. App. 1983).
  30. *Rogus v. Lords*, 804 P.2d 133 (Ariz. Ct. App. 1991); *Pyeatte*, 661 P.2d at 201.
  31. *Savoca Masonry Co., Inc. v. Homes & Son Constr. Co., Inc.*, 542 P.2d 817 (Ariz. 1975). See RESTATEMENT (SECOND) OF CONTRACTS § 33(3).
  32. Cf. *State v. Phillips*, 733 P.2d 1116 (Ariz. 1987) (specific amount of restitution required to create enforceable plea agreement).
  33. *Harville v. Gunter*, 495 S.E.2d 862 (Ga. Ct. App. 1998).
  34. See *Oliver/Pilcher Ins.*, 715 P.2d at 1221.
  35. *Isaak v. Massachusetts Indemn. Life Ins. Co.*, 623 P.2d 11, 14 (Ariz. 1981); *Nelson v. Rice*, 12 P.3d 238, 241 n.1 (Ariz. Ct. App. 2000); *CAE Vanguard, Inc. v. Newman*, 518 N.W.2d 652 (Neb. 1994).
  36. Cf. *AN Deringer, Inc. v. Strough*, 103 F.3d 243 (2d Cir. 1996) (modern trend favors judicial reformation—Vermont law). Annotation, *Enforceability, Insofar as Restrictions Would be Reasonable, of Contract Containing Unreasonable Restrictions on Competition*, 61 A.L.R. 3d 397 (1975).
  37. *Henderson v. Jacobs*, 239 P.2d 1082 (Ariz. 1952); *United California Bank v. Prudential Ins. Co. of Am.*, 681 P.2d 390 (Ariz. Ct. App. 1983).
  38. 15 CORBIN ET AL., *supra* note 2, § 80.26 at 186-87.
  39. See *Smart Corp. v. Grider*, 650 N.E.2d 80, 83-84 (Ind. Ct. App. 1995) (“Simply put, if practicable, unreasonable restraints are rendered reasonable by scratching out any offensive clauses to give effect of the parties’ intentions.”).
  40. See, e.g., *Data Mgmt. Inc. v. Greene*, 757 P.2d 62, 66 (Alaska 1988).
  41. *AmeriGas Propane LP v. T-Bo Propane, Inc.*, 972 F. Supp. 685 (S.D. Ga. 1997) (quoting Blake, *Employee Agreements not to Compete*, 73 HARV. L. REV. 625 (1960)). See also *Palmer & Cay, Inc. v. Marsh & McClellan Cos., Inc.*, 404 F.3d 1297 (11th Cir. 2005) (applying Georgia law). There, the court refused to blue-pencil an invalid non-compete provision to save the remaining, acceptable portions of the restrictive covenant. Perhaps more intriguing, the court also ruled that the district judge’s declaratory judgment wiping out the agreement had nationwide force.
  42. A covenant not to compete “anywhere in England” would be void, but a promise not to compete “in London or anywhere else in England” would be enforceable as to London because “anywhere else in England” could be “blue-penciled.” *Data Mgmt. Inc.*, 757 P.2d at 66.

43. *Id.*
44. *Earthweb Inc. v. Schlack*, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999), *aff'd after remand*, 2000 WL 1093320 (2d Cir. 2000).
45. RESTATEMENT (SECOND) OF CONTRACTS § 184 (1981) reporter's note. The RESTATEMENT accepted the blue-pencil rule. RESTATEMENT OF CONTRACTS § 518 (1932). The blue-pencil rule is now more frequently used in connection with restrictions ancillary to the sale of a business. See Note, *Validity of Covenants Not to Compete: Common Law Rules and Illinois Law*, 1978 U. ILL. L. REV. 249.
46. RESTATEMENT (SECOND) OF CONTRACTS § 184(2) cmt. b:  
[A] court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable. The fact that the term is contained in a standard form supplied by the dominant party argues against aiding him in this request.
47. *Mascari*, 724 P.3d at 605 n.6. See *Lassen v. Benton*, 346 P.2d 137, 140 (Ariz. 1959), *modified*, 347 P.2d 1012 (Ariz. 1959).
48. See *Bray*, *supra* note 11.
49. “[I]t is arguable that inserting an unreasonably broad provision itself constitutes a form of bad faith, especially when the covenantee has had the benefit of legal counsel, since he will (presumably) know that, if the clause is held to be unreasonable, he will still get a reasonable restriction.” 6 WILLISTON, *supra* note 27, § 13:22 at 825-26. “In other words, some courts would refuse to enforce a covenant if it were clear that a strong bargaining party included an overbroad and therefore unreasonable provision in the agreement knowing that the provision would be unenforceable but seeking to, in effect, trick the other party into believing that the overbroad provision was enforceable.” 15 CORBIN ET AL., *supra* note 2, § 80.26 at 186-87.
50. *Id.*
51. See, e.g., *Data Mgmt. Inc.*, 757 P.2d at 62 (referring to UCC provision on unconscionable contracts in enforcing a non-compete); *Baker v. Starkey*, 144 N.W.2d 889 (Iowa 1966) (unenforceable restrictive covenant will not be enforced).
52. See 8 WILLISTON, *supra* note 27, § 18:10.
53. RESTATEMENT (SECOND) OF CONTRACTS § 153. Recent Arizona cases addressing adhesion contracts invoke the related doctrine of “reasonable expectations” of the non-drafting party to avoid unexpectedly harsh terms in the transaction. *Maxwell v. Fidelity Fin. Serv. Inc.*, 907 P.2d 51 (Ariz. 1995). See *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388 (Ariz. 1984).
54. *Philadelphia Indem. Ins. Co. v. Barerra*, 21 P.2d 395 (Ariz. 2001).
55. *Maxwell*, 907 P.2d at 60; *Broemmer v. Abortion Serv. of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992).
56. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b.
57. The Arizona Court of Appeals has held that a restrictive covenant in an adhesion contract was not unconscionable, but that decision was vacated. *Oliver/Pilcher Ins.*, 715 P.2d at 1222, *vacated*, 715 P.2d 1218 (Ariz. 1986). The burden of proof in such cases is high, and the court will not simply relieve a party of a bad bargain. *Nelson v. Rice*, 12 P.2d at 243. See *Consumers Int'l Inc. v. Sysco Corp.*, 951 P.2d 897 (Ariz. Ct. App. 1998).
58. *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12 (Ariz. 2002).
59. See *Rawlings v. Apodaca*, 726 P.2d 565, 569-70 (Ariz. 1986).
60. *Bike Fashion Corp. v. Kramer*, 46 P.3d 431, 435 (Ariz. Ct. App. 2002). Generally the implied covenant cannot contradict an express term of the contract. *Id.*; *Kuehn v. Stanley*, 91 P.3d 346 (Ariz. Ct. App. 2004). This limit may have no application when one party seeks application of the broadest scope of the step-down provision and the employee seeks application of the narrowest scope (or a ruling of unenforceability).
61. Arizona also recognizes the tort of unfair competition. See *Fairway Constr. Inc. v. Ahern*, 970 P.2d 954 (Ariz. Ct. App. 1998). The purpose of the tort is “to prevent business conduct that is ‘contrary to honest practice in industrial or commercial matters.’” *Id.* (quoting *American Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 14 (5th Cir. 1974)). Invoking an unenforceably broad covenant is contrary to honest business conduct. See *supra* note 41. Where an employer enters into an agreement not to compete, perhaps principles of fair competition apply. Moreover, specific performance of a contractual restraint requires a form of injunctive relief. The party seeking equitable injunctive relief must act in good faith and equitably. *The Power P.E.O., Inc. v. Employees Ins. of Wausau*, 38 P.3d 1224, 1228 (Ariz. Ct. App. 2002).