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CONTRACT LAW—To Compete or Not to Compete; Pope v. Rosenberg, 2015 WY 142, 361 P.3d 824 (Wyo. 2015)

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Case Note

CONTRACT LAW—To Compete or Not to Compete; *Pope v. Rosenberg*, 2015 WY 142, 361 P.3d 824 (Wyo. 2015)

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I. Introduction

The foundation of modern contract law began in the nineteenth century and was based on the principle that any economic benefit given away by someone should not go uncompensated.[1] During the same century, principles of contract law developed from dispute resolution relating to the enforcement and interpretation of contracts.[2] Contracts and their enforcement are essential to any society.[3] Without the function of a contract, the fundamental fabric of society begins to break down.[4] Contract development is taken very seriously due to the necessity of contracts to the fabric of society and the high costs involved in drafting them.[5]

As society progresses, the development of contract law within that society also changes.[6] This progression and further development of contract law leads

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[1] Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. Pitt. L. Rev. 839, 843 (1999).

[2] John Edward Murray, Murray on Contracts § 8 (5th ed. 2011).

[3] Corbin on Contracts § 10.1 (Joseph M. Perillo, rev. ed. 2016).

[4] Corbin, *supra* note 3, § 12.1.

[5] Tina L. Stark et al., Negotiating and Drafting Contract Boilerplate § 12.1 (2003).

[6] K. M. Sharma, *From "Sanctity" to "Fairness": An Uneasy Transition in the Law of Contracts,* 18 N.Y.L. Sch. J. Int'l Comp. L. 95, 96–8 (1999).

to additional complexity in drafting contracts.[7] Some argue that the complexity of contract drafting is "because of the uncertainty about the contractual environment."[8] Therefore, as the future of contract law varies, the complexity of contracts increases.[9] A court's interpretation of any contract, based on the rules of contract interpretation and relevant policy considerations, influences this entire process.[10] Specifically, judicial uncertainty can add to the amount of complexity in drafting contracts.[11]

A perfect example of this can be found in the case *Pope v. Rosenberg*.[12] In this case, the co-owner of an accounting firm sold her business to a buyer, and the contract for the sale included a covenant not to compete (CNC).[13] The CNC in this case, prohibited the co-owners from working for any of the firm's clients, with accompanying conditions, for five years.[14] However, after the sale, one of the firm's most prominent clients dropped the firm's services and employed the former co-owner prior to the completion of the five-year period.[15] Based on this employment and the specific services provided by the former co-owner to the prior client, the new owner of the firm withheld the payment on its promissory note to the previous owner.[16] In the resulting litigation, both the district court and the Wyoming Supreme Court held that the prior co-owner, Rosenberg, did not violate the CNC clause of the contract.[17] The Wyoming Supreme Court based its holding on its interpretation of the contract, specifically the phrase "client of the practice" and how the definition of the word "is" caused that phrase to be interpreted.[18]

The Wyoming Supreme Court's holding in *Pope v. Rosenberg* unnecessarily added complications to the drafting of CNC clauses by interpreting around the clear language of a CNC in the sale of a business.[19] While seemingly

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[7] Sharma, *supra* note 5, at 112.

[8] Karen Eggleston, *Simplicity and Complexity in Contracts* 1, 13 (John M. Olin Program in Law and Economics Working Paper No. 93, 2000), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1452&context=law_and_economics.

[9] *Id.*

[10] *See id.* at 26.

[11] *Id.* at 27.

[12] Pope v. Rosenberg, 2015 WY 142, ¶ 36, 361 P.3d 824, 835 (Wyo. 2015).

[13] *Id.* ¶ 4, 361 P.3d at 827. The term CNC is synonymous with non-compete agreements, anti-competitive clause or anything else that would denote an agreement for one party to refrain from competing with another in an industry for a geographical and chronological defined period.

[14] *Id*, 361 P.3d at 827.

[15] *Id.* ¶¶ 6–8, at 827–28.

[16] *Id.* ¶ 11, 362 P.3d at 828.

[17] *Id.* ¶ 36, 361 P.3d at 834.

[18] *Id.* ¶ 33, 361 P.3d at 832–33.

[19] *Pope,* ¶ 36, 361 P.3d at 834.

inconsequential, this added complexity extends to the level of commerce in which CNCs are necessary by deterring transactions that require CNCs.[20] Section I of this note provides an introduction to the formation and usefulness of CNCs.[21] Section II of this note develops the history of CNCs and the adoption of them by courts.[22] Specifically, Section II will explore the adoption of CNCs abroad and in the United States, as well as the function of CNCs in Wyoming.[23] The case, *Pope v. Rosenber*g, is discussed in Section III, including the court's analysis and holding.[24] Section IV discusses the court's holding as it relates to the proposed ramifications of its holding.[25] More narrowly, this section will examine how the court incorrectly focused on the interpretation of the CNC to skirt the clear language.[26] The section concludes with a discussion of the ramifications of the holding in the case, *Pope v. Rosenberg*, as it relates to the practice of law for attorneys in Wyoming.[27]

II. BACKGROUND

CNCs can be a highly beneficial aspect of any contract with the purpose of protecting certain business interests.[28] A CNC can open the door for business transactions that otherwise would not take place.[29] For example, if a person seeks to invest in an employee's education but is concerned that the employee might take the education that is received to a competitor, a CNC can relieve that apprehension by nullifying that possibility.[30] However, CNCs in contracts must meet certain requirements and can be difficult to construct, therefore, sometimes they are invalidated by courts.[31]

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[20] *See infra* note 155 and accompanying text.

[21] *See supra* notes 2–27 and accompanying text.

[22] *See infra* notes 28–46 and accompanying text.

[23] *See infra* notes 28–46 and accompanying text.

[24] *See infra* notes 47–89 and accompanying text.

[25] *See infra* notes 90–148 and accompanying text.

[26] *See infra* notes 90–148 and accompanying text.

[27] *See infra* notes 90–148 and accompanying text.

[28] Glenn S. Draper, *Enforcing Lawyers' Covenants not to Compete*, 69 WASH. L. REV. 161, 164 (1994); Francis M. Dougherty, *Enforceability of Sale-of-Business Agreement not to Compete Against Nonsigner or Nonowning Signer*, 60 A.L.R. 4th 294, § 2(a) (1988); JONATHAN L. SULDS, 1-4 NEW YORK EMPLOYMENT LAWS § 4.03 (2d ed. 2016).

[29] Robert W. Gomulkiewicz, *Leaky Covenants-Not-to-Compete As the Legal Infrastructure for Innovation*, 49 U.C. DAVIS L. REV. 251, 253 (2015).

[30] *Id.* at 253.

[31] *See* Kenneth J. Vanko, "*You're Fired! And Don't Forget Your Non-Compete . . .": The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COMM. L.J. 1, 3 (2002) (giving the requirements for a typical CNC to be valid).

A. Covenants not to Compete

Early in the development of CNCs, courts viewed them as invalid restrictions on trade.[32] One of the first cases involving a CNC dealt with a master dyer and an apprentice.[33] In their agreement, the apprentice agreed to avoid practicing in the master's town for six months.[34] This case is dated 1414, and the court ultimately refused to issue the injunction sought, suggesting the CNC was illegal.[35] After several more cases involving this issue, CNCs remained invalid for approximately two hundred more years.[36] Two economic factors that contributed to this view at the time were "medieval apprenticeship systems" and a "deep labor shortage . . ." both of which influenced courts in their analyses of CNCs.[37]

As the apprenticeship system gave way to the market economy, the idea that individuals are free to contract gained momentum.[38] This led to a case in 1711, *Mitchel v. Reynolds*, which began the recognition of CNCs.[39] Interestingly, *Mitchel* also involved the transfer of interests in a business, a bakery, in which the transferor agreed not to compete within a geographical region with the transferee.[40] The *Mitchel* Court determined that the test for CNC clauses was the reasonableness of the clause, and this test was adopted in the United States in a similar manner.[41] Today, CNCs are becoming more prominent, especially in post-employment contracts as they relate to the upper management of a company.[42]

B. Wyoming Covenants not to Compete

In Wyoming, the reasonableness test, which a majority of states adopted, applies to CNCs.[43] Specifically, the Wyoming courts apply Restatement (Second) of Contracts § 188, which states:

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[32] Cathy Packer & Johanna Cleary, *Rediscovering the Public Interest: An Analysis on the Common Law Governing Post-Employment Non-Compete Contracts for Media Employees*, 24 CARDOZO ARTS & ENT. L.J. 1073, 1073, 1078 (2007).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 1079–1080.

[38] *See id.* at 1080–81 ("[CNCs] social architecture changed as England's economic system changed.").

[39] *Id.* at 1081.

[40] *Id.*

[41] *Id.* at 1082.

[42] Mark A. Glick et al., The Law and Economics of Post-Employment Covenants: A Unified Framework, 11 GEO. MASON L. REV. 357, 357 (2002).

[43] Christopher D. Goble, You Can't Take it With You: Enforcing Noncompetition Agreements Between Law Firms and Withdrawing Attorneys, 30 LAND & WATER L. REV. 179, 184 (1995). The

> 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. (2) 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.[44]

In Wyoming, although there have been some variations to the weight of the factors which render a CNC invalid, the reasonableness principle has remained constant.[45] Any CNC found unreasonable by a court in Wyoming, whether for employment or the sale of a business, is invalid.[46] With this premise in mind, this case note will discuss *Pope v. Rosenberg*.

III. PRINCIPLE CASE

A. Factual Background

In *Pope v. Rosenberg*, Rosenberg and her partner both owned an accounting firm, which they contracted to sell to Pope.[47] The parties completed the transaction and Rosenberg provided financing, in part, through a promissory note from Pope for the sale.[48] In the contract to sell, Pope executed a CNC clause.[49] This clause prohibited:

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first Wyoming case dealing with covenants not to compete involved a dispute in an employment contract for a mechanical repair shop. Ridley v. Krout, 63, Wyo. 252, 252, 180 P.2d 124, 125 (Wyo. 1947). In this case, the court articulates the reasonableness test for which it analyzes covenants not to compete. *Id.* at 127.

[44] Hopper v. All Pet Animal Clinic, 861 P.2d 531, 540 (Wyo. 1993); RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW. INST. 1981).

[45] *See e.g.*, Pope v. Rosenberg, 2015 WY 142, ¶ 18, 361 P.3d 824, 829 (Wyo. 2015); Oliver v. Ouwyn, 2013 WY 70, ¶ 8, 303 P.3d 1119, 1123 (Wyo. 2013); RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW. INST. 1981).

[46] *See* Hopper v. All Pet Animal Clinic, 861 P.2D 531, 540 (Wyo. 1993); RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW. INST. 1981).

[47] Pope v. Rosenberg, 2015 WY 142, ¶ 3, 361 P.3d 824, 826 (Wyo. 2015).

[48] *Id.*

[49] *Id.* ¶ 4, 361 P.3d at 826–27.

> . . . For a period of five (5) consecutive years from the closing date, the seller . . . agrees to not directly nor indirectly:
>
> A. Compete with the buyer or engage in the practice of public accounting within 100 miles of the present location of the practice purchased;
>
> B. Aid or assist anyone else, except buyer, to do so within these limits;
>
> C. Solicit in any manner or provide any public accounting services for any past or present clients or solicit or hire any employees of the practice;
>
> D. Have any interest in a public accounting practice within these limits;
>
> E. Request or advise any present or future clients to withdraw or cancel its business with the buyer.
>
> . . .
>
> Nothing contained herein is intended to prohibit the seller from employment as a controller, bookkeeper, CFO, Treasurer, or similar function with a private company or government entity, so long as it is not a client of the practice.[50]

Upon transferring the accounting firm to Pope, Rosenberg placed her certified public accountant (CPA) license on hold presuming that she would no longer require the use of the license.[51] After the sale, one of the firm's clients, a fire district (District), withdrew its business from the firm.[52] This same client hired Rosenberg as an office administrator.[53] Rosenberg, then, reinstated her CPA license, allegedly, to make her signature on documents appear more official in her capacity as the District's office manager.[54] Admittedly, Rosenberg began performing a role as an accountant for the District, which would constitute a breach of the CNC if the District was still a client of the original accounting firm.[55]

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[50] *Id.* ¶ 4, 361 P.3d at 827.

[51] *Id.* ¶ 5, 361 P.3d at 827.

[52] *Id.* ¶ 6, 361 P.3d at 827.

[53] *Id.* ¶ 5, 361 P.3d at 827.

[54] *Id.* ¶ 10, 361 P.3d at 828.

[55] *Id.* ¶ 24, 361 P.3d at 831.

After realizing the extent of Rosenberg's employment with the District, Pope withheld payment on the promissory note based on a clause in the contract that allowed Pope to do so upon a breach.[56] Since Pope withheld payment, Rosenberg filed a suit to enforce the promissory note.[57] The district court found that Rosenberg did not breach the CNC, based on its interpretation of the contractual agreement.[58] Specifically, the district court found the work that Rosenberg was performing for the District fell within an exception in the CNC; therefore, the court granted summary judgment for Rosenberg.[59] Pope appealed to the Wyoming Supreme Court.[60]

B. Court's Analysis and Holding

The Wyoming Supreme Court began its analysis by distinguishing the different level of scrutiny for CNCs with respect to employment contracts and CNCs in the sale of businesses.[61] The court clarified that CNCs in the sale of businesses are less strictly analyzed for validity based on the presumed sophistication level of the parties to the sale.[62] However, the court added that CNCs in the sale of a business must still be reasonable.[63] In this case, the facts fail to clarify whether this is an employment CNC or a CNC involving the sale of a business.[64] The court's analysis, however, indicates that it treated this as a CNC involving the sale of a business.[65]

After stating the premises for the validity of CNCs, the court determined that the entire ruling hinged on the definition of the phrase "client of the practice."[66] The issue was whether the definition of "client of the practice" only prohibited Rosenberg's employment with current clients of the practice, or if the prohibition also extended to any entity that had previously been a client of the firm.[67] The court, then, proceeded to interpret the contract, specifically the CNC clause.[68] The court listed the rules for contract interpretation, which included: (1) applying the "meaning which that language would convey to reasonable persons at the time

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[56] *Id.* ¶ 11, 361 P.3d at 828.

[57] *Id.* ¶¶ 11–12, 361 P.3d at 828.

[58] *Id.* ¶ 13, 361 P.3d at 828.

[59] *Id.* 361 P.3d at 828.

[60] *Id. ¶ 14, 361 P.3d* at *829.*

[61] *Id.* ¶¶ 16–18, 361 P.3d at 829.

[62] *Id.* ¶ 17, 361 P.3d at 829.

[63] *Id.* ¶ 18, 361 P.3d at 829.

[64] *See id.* ¶ 18, 361 P.3d at 829.

[65] *See id.* ¶ 19, 361 P.3d at 830.

[66] *Id.* ¶ 25, 361 P.3d at 831.

[67] *Id.* 361 P.3d at 831.

[68] *Id.* 361 P.3d at 831.

and place of its use," (2) reading the document as a whole and using other parts of the document to interpret itself, and (3) avoiding an interpretation of any provision of the contract that would render another provision meaningless.[69]

Using a de novo standard of review, the court first found that the type of job that Rosenberg undertook was within the exception laid out in the last provision of the CNC, if she was not doing work for a "client of the practice."[70] Specifically, the court found that the type of work was similar to "a controller, bookkeeper, CFO, Treasurer, or similar function."[71]

The court also analyzed whether the contract permitted Rosenberg to work for an entity that was previously a "client of the practice," or whether the CNC prohibited this type of employment.[72] Although the court agreed that in other places in the contract the phrase "client of the practice" meant clients at the time of the contract's execution as well as future clients, the court refused to apply this same meaning for the CNC clause.[73] The court made this decision by focusing on the definition of the word "is."[74] Applying the dictionary definition of the term, the court found that it meant the present state of "be" or "to be."[75] This definition of the word "is" led the court to find that the CNC clause only prohibited Rosenberg from working for clients who were presently clients of the practice.[76] The court then tied this interpretation to the "nature of the clause" and concluded that Rosenberg did not breach the provision as a whole.[77]

Finally, the court discussed language that the parties could have included in their agreement that would have avoided the litigation in this case.[78] A lack of clarifying language coupled with a lack of damage to Pope seem to fully justify the court in its holding that no breach of the CNC occurred.[79] Though never explicitly stated, the court indicated its decision was based on what was fair to

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[69] *Id.* ¶ 20, 361 P.3d at 829. The court lists several more rules, however this case note only lists the three that relate to the discussion in the analysis section. *See infra* note 115–117 and accompanying text.

[70] *Id.* ¶ 25, 361 P.3d at 831.

[71] *Id.* ¶ 26, 361 P.3d at 831.

[72] *Id.* ¶ 25, 361 P.3d at 832.

[73] *See id.* ¶¶ 25–28, 361 P.3d at 831–32 (stating that the CNC prohibits employment with an entity which is, at that time, a "client of the practice.").

[74] *Id.* ¶ 28, 361 P.3d at 832.

[75] *Id.* (citing *Is,* WEBSTER'S NEW DICTIONARY AND THESAURUS (1989); see also *Is,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002)).

[76] *Pope*, ¶ 32, 361 P.3d at 832.

[77] *Id.* ¶ 30, 361 P.3d at 832.

[78] *Id.* ¶ 32, 361 P.3d at 832.

[79] *See id.* ¶¶ 32–35, 361 P.3d at 832–34.

the parties.[80] Further, the court concluded that because the parties could have agreed in advance to clarifying language, a reasonable interpretation required the conclusion that the contract was not breached.[81] Altogether, the interpretation, the lack of clear language, and the policies behind the outcome led the court to conclude that the district court correctly awarded summary judgment to Rosenberg because she had not breached the CNC.[82]

C. Dissent

In *Rosenberg*, Justice Fox wrote a dissent, joined by Justice (Ret.) Kite, to emphasize their view on the interpretation of the contract.[83] The dissent argued that good will plays a critical part in the sale of a business of this nature and that Pope intended for the CNC to protect the business's good will.[84] Further, the dissent discussed the majority's erroneous use of the rules of contract interpretation.[85] The dissent found that the totality of the circumstances "compel the conclusion that the intent of the parties at the time the agreement was made was to prohibit Ms. Rosenberg from" her employment with the firm's client.[86] Therefore, the dissent argued that the majority should have interpreted the contract to prohibit Rosenberg's employment with the firm.[87]

In summary, the court in *Rosenberg* applied the rules of contract interpretation, analyzed the general fairness of the CNC clause and found Rosenberg did not breach the contract.[88] After *Rosenberg*, transactional attorneys must consider how the Wyoming Supreme Court might analyze future litigation in contract disputes. The decision by the court in this case, gives some insight into this issue, but additionally leaves some gaps for how contracts can and should be interpreted by a court.[89] This article will now discuss these gaps and their ramifications on transactional attorneys in the state.

IV. ANALYSIS

By interpreting around the clear language of a CNC in the sale of a business, the Wyoming Supreme Court unnecessarily added complications

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[80] *Pope*, ¶ 34, 361 P.3d at 834; *See infra* notes 101–102 and accompanying text.

[81] *See Pope,* ¶¶ 32–35, 361 P.3d at 832–34.

[82] *Id.* 361 P.3d at 832–34.

[83] *Id.* ¶ 37, 361 P.3d at 834 (Fox, J. dissenting).

[84] *Id.* ¶ 41, 361 P.3d at 834.

[85] *See id.* ¶ 49, 361 P.3d at 837 (arguing that the holding in the case contravenes the principle of avoiding interpretations of a contract that would render a provision meaningless).

[86] *Id.* ¶ 44, 361 P.3d at 835.

[87] *Id.* ¶ 51, 361 P.3d at 836.

[88] *See supra* notes 76–77.

[89] *See infra* notes 90–148 and accompanying text.

to the drafting of CNCs in contracts. Additionally, the court's interpretation nullifies the protection sought by Pope in executing the CNC with Rosenberg.[90] In subsection A, this note will discuss how reasonableness played a role in the court's analysis and how it should have affected the court's opinion.[91] Subsection B will explore the role of contract interpretation and its erroneous application in this case.[92] Finally, subsection C of the analysis will illustrate the ramifications of the court's holding in *Rosenberg*.[93] These ramifications include, the increased complexity in contract drafting, uncertainty as to contract interpretation an therefore, an increase in litigation over CNC clauses, and a general decrease in commerce activity associated with CNCs.[94]

A. The Court's Opinion and the Reasonableness of the Clause

First, the reasonableness and fairness of the CNC clause in this case uniquely influenced the court. The court began its opinion by setting the different standards for CNC clauses in employment settings versus in the sale of businesses.[95] The court mentioned that in a sale of a business scenario, CNCs are less strictly construed.[96] In other words, CNC clauses in the sale of a business may be broader in their reach and scope, than CNC clauses related to employment. This is consistent with Wyoming case law.[97] While this is the correct frame for analyzing the CNC clause in this case, the court failed to address the issue until later in the case.[98]

Although reasonableness was not the focus of the court's opinion, the court indicated that the reasonableness of the CNC was a part of its decision.[99] After a lengthy discussion of the interpretation of the language of the contract, the court referred back to what validates a CNC which includes: protecting a legitimate interest, reasonableness in scope, and reasonable hardship on the party against whom it is enforced.[100] Regarding Rosenberg's employment with the former client, the court stated that it failed to see a legitimate interest for Pope to protect.[101]

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[90] *See infra* notes 136–137 and accompanying text.

[91] *See infra* notes 95–113 and accompanying text.

[92] *See infra* notes 114–139 and accompanying text.

[93] *See infra* notes 140–159 and accompanying text.

[94] *See infra* notes 140–159 and accompanying text.

[95] Pope v. Rosenberg, 2015 WY 142, ¶¶ 16–18, 361 P.3d 824, 829 (Wyo. 2015).

[96] *Id.*

[97] Holland v. Holland, 2001 WY 113, ¶ 20, 35 P.3d 409, 415 (Wyo. 2001); Ridley v. Krout, 63 Wyo. 252, 264, 180 P.2d 124, 127 (Wyo. 1947).

[98] *Pope*, ¶¶ 34–35, 361 P.3d at 834–35.

[99] *Id.*

[100] *Id.* ¶ 33, 361 P.3d at 833.

[101] *Id.* ¶¶ 33–34, 361 P.3d at 833–34.

The court further concluded that prohibiting Rosenberg's employment with the former client would place her under unreasonable hardship.[102] Both of these factors, if significant enough, would invalidate a CNC.[103] However, while giving heavy weight to the interpretation of the contract, the court waited until the end of its discussion to mention these otherwise deciding factors in cases dealing with CNCs.[104]

Finally, the language in the decision discussing Pope's damages indicated that the court did what it believed was fair.[105] Near the end of the court's opinion, it stated that Pope did not receive any damages, noting that this further supported the court's reasoning.[106] However, the receipt of damages has nothing to do with the validity of a CNC,[107] nor was it in dispute in this case.[108] The court reasoned that Rosenberg's employment with the District did not harm Pope in any way because the client for whom Rosenberg was working no longer retained the services of Pope.[109] Therefore, although not directly addressed as such, fairness seems to have influenced the court's opinion.

Additionally, as mentioned earlier, the court incorrectly used the reasonableness test of CNCs in its analysis towards the end of its holding.[110] The majority of the court's opinion discussed the interpretation of the contract executed by Pope and Rosenberg with little regard for the reasonableness and fairness of the CNC.[111] The court only mentioned the reasonableness and fairness of the contract in a brief comment at the end of the opinion.[112] If the reasonableness of the contract was at issue, then the court should have further developed the reasonableness test in its analysis. Ultimately, if either reasonableness or fairness was intended to be expressly apart of the court's decision, it should have been the focus, not merely a passing comment. Finally, if the court was determined to interpret around the CNC, the court should have used the reasonableness test

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[102] *Id.* ¶ 33, 361 P.3d at 833.

[103] *See supra* notes 44–45 and accompanying text.

[104] *Pope*, ¶¶ 34–35, 361 P.3d at 833–34.

[105] *See id.* ¶¶ 34–35, 361 P.3d at 833–34 ("[D]istrict court's interpretation of the key clause is thus supported by . . . the *policies* which would drive its construction if it were not clear." (emphasis added)).

[106] *Id.* ¶¶ 34–35, 361 P.3d at 833–34.

[107] *See* Restatement (Second) of Contracts § 188 (Am. Law. Inst. 1981).

[108] *Pope*, ¶ 19, 361 P.3d at 830.

[109] *Id.* ¶¶ 34–35, 361 P.3d at 833–34.

[110] *See supra* notes 99–103 and accompanying text.

[111] *See supra* note 66 and accompanying text.

[112] *Pope*, ¶¶ 34–35, 361 P.3d at 833.

and found the CNC invalid.[113] Therefore, in this case, the court erroneously utilized both, reasonableness and fairness factors.

B. The Court's Erroneous Use of the Rules of Contract Interpretation

The second and most important issue on which the court focused was the interpretation of the contract, specifically the CNC.[114] In its opinion, the court relied on the rules of contract interpretation to find that the contract permitted the type of employment Rosenberg entered into with the District.[115] In the case, the court mentioned the necessary rules for contract interpretation.[116] Wyoming case law on the subject has developed each of these rules and they were correctly stated by the court in this case.[117]

For the first rule of contract interpretation, the court mentioned the contract must be interpreted in the same way that reasonable people would interpret it at the time of formation.[118] However, in this case, the court found that reasonable persons would conclude that "client of the practice" only meant current clients, yet it failed to provide an adequate explanation for such a conclusion.[119] The most that the court attributed to this outcome is the grammatical assembly of the words and the definition of the word "is" to mean current clients, instead of the firm's current clients and clients at the time of signing.[120] As discussed below, this definition of the word "is" was subject to multiple interpretations, and therefore, not a reasonable definition by the court to supports its interpretation.[121]

Additionally, the court reasoned that its interpretation was a reasonable interpretation because (1) the contract gives Rosenberg more freedom in year six as a CPA than as an office manager in year three (an area where there is no dispute by either party), and (2) that Pope was not damaged by Rosenberg's employment.[122] Neither of these conclusions addressed what a reasonable person in either of the

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[113] *See* Holland v. Holland, 2001 WY 113, ¶ 13, 35 P.3d 409, 414 (Wyo. 2001); Ridley v. Krout, 63 Wyo. 252, 264, 180 P.2d 124, 127 (Wyo. 1947); *See* Restatement (Second) of Contracts § 188 (Am. Law. Inst. 1981).

[114] *Pope*, ¶ 20, 361 P.3d at 830.

[115] *Id.* ¶¶ 28–33, 361 P.3d at 832–33.

[116] *Id.* ¶ 20, 361 P.3d at 830.

[117] *See* Whitney Holding Corp. v. Terry, 2012 WY 21, ¶ 18, 270 P.3d 662, 667 (Wyo. 2012); Claman v. Popp, 2012 WY 92, ¶ 28, 279 P.3d 1003, 1013 (Wyo. 2012); Ultra Res., Inc., v. Hartman, 2010 WY 36, ¶ 22, 226 P.3d 889, 905 (Wyo. 2010); Scherer v. Laramie Reg'l Airport Bd., 2010 WY 105, ¶ 11, 236 P.3d 996, 1003 (Wyo. 2010).

[118] *Pope*, ¶ 20, 361 P.3d at 830.

[119] *See id.* ¶ 20, 29, 361 P.3d at 830, 832.

[120] *Id.* ¶ 28, 361 P.3d at 832.

[121] *See infra* notes 125–128 and accompanying text.

[122] *See Pope,* ¶¶ 34–35, 361 P.3d at 833–34.

parties' positions would have concluded the contract meant at the time of signing. Rather, both conclusions address the reasonableness of the CNC itself, which as discussed earlier, was also erroneous.[123] Therefore, it must be concluded that the court established its reasonable person interpretation of the contract either on an arbitrary basis or simply as a post hoc rationalization of what it found to be fair. Both rationales are incorrect for an application of this rule and undermine the intent of at least one of the parties involved.

In applying the second rule of contract interpretation, the court stated that the contract should be used to interpret itself.[124] However, for the contract in this case, the court failed to give a consistent definition of the phrase "client of the practice."[125] Throughout the document, the phrase "client of the practice" had the same interpretation, specifically, all current clients and clients at the time of the signing of the contract.[126] In spite of this consistent definition, the court found that in the CNC, "client of the practice" did not extend to clients at the time of signing and was limited to only the current clients at the time of litigation.[127] The only explanation the court gave to its definition was the present tense use of the term "is," which limited the definition of "client of the practice" to current clients.[128] Therefore, the court gave the phrase a different definition, which was inconsistent with the use of the same phrase throughout the contract.[129] In compliance with the above stated rule of contract interpretation, the court should have interpreted the phrase "client of the practice" consistently and should have found that this phrase extends to clients at the time of signing similar to the use of the same phrase in other areas of the contract.

Finally, the court recognized that no provision of the contract should be interpreted to render any other provision meaningless as a third rule for contract interpretation.[130] This principle of contract interpretation, though accurate,

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[123] *See supra* notes 105–109 and accompanying text.

[124] *Pope*, ¶ 20, 361 P.3d at 830.

[125] *Id.* ¶ 32, 361 P.3d at 832.

[126] Brief for Appellant at 6, 2015 WY 142, 361 P.3d 824 (Wyo. 2015) (No. S–14–0291), 2015 WL 1056234, at 7.

[127] *Pope*, ¶ 28, 361 P.3d at 832. In this case, current clients refers to the clients of the firm when the litigation started. This definition did not include clients at the time of the signing of the contract to for the purchase of the firm by Pope. Pope's argument was that the term "client of the practice" should extend to the clients the firm had at the time of the signing of the contract to purchase the firm. *See* Brief for Appellant at 17, 2015 WY 142, 361 P.3d 824 (Wyo. 2015) (No. S-14-0291), 2015 WL 1056234 at 15.

[128] *Pope*, ¶ 28, 361 P.3d at 832.

[129] *Pope*, ¶ 45, 361 P.3d 835 (Fox, J. dissenting); Brief for Appellant at 18, 2015 WY 142, 361 P.3d 824 (Wyo. 2015) (No. S-14-0291), 2015 WL 1056234 at 18.

[130] *Pope*, ¶ 20, 361 P.3d at 830 (citing Scherer v. Laramie Reg'l Airport Bd., 2010 WY 105, ¶ 11, 236 P.3d 996, 1003 (Wyo, 2010)).

did little to affect the decision of the court in this case.[131] The court accurately stated this rule and others, but did not adhere to them in its interpretation of the contract.[132] Based on the court's interpretation, the part of the contract that was contingent upon the phrase "client of the practice" indirectly served no purpose for clients who simply terminate the firm's services.[133] Courts in Wyoming are and should be reluctant to interpret parts of a contract in such a way as to render other provisions meaningless.[134] Therefore, the court should have used this rule to interpret the phrase "client of the practice" to include clients at the time of the signing of the contract.

Further, the court's interpretation of the phrase "client of the practice" is not only up for reasonable dispute, as evident by the dissent and the litigation itself, but it is also not a reasonable definition of the term.[135] If Pope only intended to protect against competition from Rosenberg with any current clients, and not the clients present at the time of signing, Pope's firm would not have any real protection at all.[136] All that it would take for Rosenberg to work in competition is for a client to terminate its services with the firm and rehire Rosenberg.[137] Therefore, this interpretation was not reasonable and certainly disputable. Thus, the court should not have interpreted the contract in the manner it did based on this rule of contract interpretation.

In conclusion, even though the court listed the correct rules of contract interpretation, the court incorrectly applied these rules and ultimately reached an incorrect result.[138] If the court was convinced that the CNC in this case was unreasonable or should have been invalid, then the court should have focused on that issue. However, the court incorrectly used the rules of contract interpretation to reach what it seemingly found to be a reasonable or fair decision.[139] Therefore,

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[131] *See Pope*, ¶¶ 20, 49, 361 P.3d at 830, 836. (Fox, J., dissenting) (finding the phrase "client of the practice" in the CNC to have a different definition than the same phrase elsewhere in the document).

[132] *Id.*

[133] *Pope*, ¶ 49, 361 P.3d at 836 (Fox, J., dissenting); Brief for Appellant at 20, 2015 WY 142, 361 P.3d 824 (Wyo. 2015) (No. S-14-0291), 2015 WL 1056234 at 22.

[134] *See* Scherer v. Laramie Reg'l Airport Bd., 2010 WY 105, ¶ 11, 236 P.3d 996, 1003 (Wyo. 2010); Arnold v. Ommen, 2009 WY 24, ¶ 40, 201 P.3d 1127, 1138 (Wyo. 2009); Wyo. Game & Fish Comm'n v. Mills Co., 701 P.2d 819, 822 (Wyo. 1985).

[135] *Id.* ¶ 49, 361 P.3d at 836 (Fox, J., dissenting).

[136] *Pope*, ¶ 49, 361 P.3d 836 (Fox, J., dissenting); Brief for Appellant at 20, 2015 WY 142, 361 P.3d 824 (Wyo. 2015) (No. S-14-0291), 2015 WL 1056234;

[137] *Pope*, ¶ 49, 361 P.3d 836 (Fox, J., dissenting); Brief for Appellant at 20, 2015 WY 142, 361 P.3d 824 (Wyo. 2015) (No. S-14-0291), 2015 WL 1056234.

[138] *See supra* notes 118–134 and accompanying text.

[139] *Id.* ¶ 34, 361 P.3d at 833.

the court, with its ultimate decision in mind, appears to have used the rules of contract interpretation as a post hoc rationalization to meet that decision, and its decision has ramifications for Wyoming practitioners.

C. Ramifications of the Court's Holding

The court's holding in *Pope v. Rosenberg* has several ramifications on the function of transactional attorneys in Wyoming. These ramifications include: (1) further complications and language to add to CNC clauses in contracts, (2) uncertainty about when the court will arbitrarily adversely interpret seemingly clear language in a CNC clause, (3) an increase in contract disputes, and (4) less willingness to enter into CNCs, reducing potential opportunities for the sale of business and employment to which CNCs are essential.

First, based on the court's opinion, transactional attorneys must consider additional language in the contracts they draft to avoid this situation.[140] When drafting contracts, attorneys rely on judicial certainty.[141] When a court's interpretation of an issue upends judicial certainty, attorneys must adjust their drafting for their contracts to remain effective.[142] In the present case, the court stated that the CNC could have contained the correct language to prohibit any litigation by clearly representing to both parties what the CNC allowed.[143] However, this advice from the court offers little help or consolation to the losing party. It is reasonable to assume that neither party envisioned litigation when they entered into the CNC. Realistically, both parties likely presumed, prior to their litigation, that the language already clearly contained the appropriate language. The court could always easily point out additional language needed to avoid litigation.[144] Yet, the court failed to consider how its holding in this case further complicates drafting contracts. In light of *Rosenberg*, attorneys now need to consider what additional language CNCs should contain to not only avoid a similar situation but also to avoid further litigation related to a court's various interpretations.[145] This result will only add to the complexity and language that CNCs contain, including the language the court spelled out in this case.[146] As the need for additional complexity and language in CNCs increases, so will the time and expenses of contract drafting for all parties involved.

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[140] *Id.* ¶ 32, 361 P.3d at 832.

[141] Diana Lourdes Dick, *Confronting the Certainty Imperative in Corporate Finance Jurisprudence*, 2011 UTAH L. REV. 1461, 1466, (2011).

[142] *Id.*

[143] *Pope*, ¶ 32, 361 P.3d at 832.

[144] *Id.*

[145] *Id.* ¶ 49, 361 P.3d at 836.

[146] *Id.* ¶ 32, 361 P.3d at 832.

The second ramification resulting from the court's holding is a lack of certainty as to how courts in Wyoming will interpret CNCs in contracts.[147] As discussed previously, one of the factors that causes contract complexity is judicial uncertainty.[148] In this case, the court incorrectly used the rules of contract interpretation to reach a result that Pope's contract drafters could not have foreseen. In other words, when Pope was drafting the CNC, he reasonably thought the language was clear as to what the CNC authorized and what it did not. After all, if Pope, as a sophisticated party, did not think the language was clear, he likely would have changed the language to make it clear.[149] However, the court found the CNC allowed an action by Rosenberg that Pope thought the CNC clearly prohibited.[150] This contrary finding by the court only adds to the uncertainty as to how courts in Wyoming will interpret CNCs, further complicating the drafting of CNCs.[151] Ultimately, the lack of certainty as to a court's interpretation of CNC clauses is the stepping stone to the final two ramification resulting from this case.

A third ramification of the court's decision is an increase in litigation reducing judicial economy. In other words, there will be an increase in litigation over the language in a contract as parties to a contract see the way the court interpreted the language of the contract in this case.[152] Formal methods of judicial interpretation are in place to reduce litigation and promote judicial economy.[153] Therefore, when a court diverts from the correct use of these methods, judicial dockets fill up.[154] By diverting from the correct use of the rules of contract interpretation in *Rosenberg*, courts in the state of Wyoming can expect a decrease in judicial economy.

Finally, the uncertainty created by the *Rosenberg* court will discourage business deals that depend on CNCs, specifically when drafters rely on the formal rules of

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[147] *See generally* Juliet P. Kostritsky, *Interpretive Risk and Contract Interpretation: A Suggested Approach for Maximizing Value*, 2 ELON. L. REV. 109, 113 (2011) ("[C]ourts overstep when they resort to interpreting contracts by overriding the parties' chosen means . . . to implement specific objectives as a form of *ex post* equitable adjustment.").

[148] *See supra* note 8 and accompanying text.

[149] *See* Brief for Appellant at 17, 2015 WY 142, 361 P.3d 824 (Wyo. 2015) (No. S-14-0291) at 18, 2015 WL 1056234 (pointing out the only clients the firm considered during the sale were the ones at the time of signing).

[150] *See Pope*, ¶ 35, 361 P.3d at 834 (finding the district court's interpretation of the CNC against Pope correct).

[151] *See supra* note 141 and accompanying text.

[152] *See generally*, Daniel D. Barnhizer, *Context as Power: Defining the Field of Battle for Advantage in Contractual Interactions*, 45 WAKE FOREST L. REV. 607, 612 (2010) ("Courts, whether adopting high-context or low-context contract dispute resolution strategies ('HCS' and 'LCS,' respectively), must limit the scope of contextual inquiry, even if only for judicial economy.").

[153] *Id.* at 612.

[154] *See id.*

contract interpretation.[155] In the law of contracts, those relying on a promise must be able to expect the fulfillment of that promise.[156] Without judicial certainty, contract drafters must face the possibility that the rules of contract interpretation, as developed by Wyoming case law, will not be applied to the interpretation of certain contracts. Contract drafters will also be concerned that certain competition they sought to avoid, is still permissible despite their CNCs. Both valid, potential concerns will discourage business situations in which CNCs are essential and as a result, commerce in general.

These four ramifications from the court's holding in *Rosenberg* are issues that cannot be ignored by transactional attorneys. Understanding the potential need for additional language in a contract with a CNC may prevent future litigation.[157] Realizing a lack of judicial certainty related to the interpretation contracts, in general, and specifically, CNCs, may cause businesses to restructure their transactions in an effort to avoid the need for CNCs.[158] Finally, the Wyoming Supreme Court should consider how its decision might increase litigation related to the interpretation of contracts and CNCs.[159] Any transactional attorney must carefully consider each contractual transaction in light of these ramifications from the holding in *Rosenberg*.

V. CONCLUSION

Based on its holding in *Pope v. Rosenberg*, the Wyoming Supreme Court unnecessarily added complications to the drafting of non-compete clauses in contracts by interpreting around the clear language of a non-compete clause in the sale of a business.[160] To promote commerce, and otherwise improbable business decisions, contract drafters must be able to predict how courts will interpret the language of the contracts they draft.[161] According to *Murray on Contracts,* "Contract[s] determine[] how persons and resources are brought together in the productive and allocation processes."[162] Therefore, contracts, in general, are essential to the economy of a society.[163] With decisions as in *Rosenberg*, contract

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[155] *See* Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 370 (1995) ("[T]he loser in this scenario is, . . . the resulting benefits of predictability and certainty.").

[156] Corbin on Contracts § 1.1 (Joseph M. Perillo, rev. ed. 2016).

[157] *See supra* note 141 and accompanying text.

[158] *See supra* note 155 and accompanying text.

[159] *See supra* note 152 and accompanying text.

[160] *See supra* notes 141–157 and accompanying text

[161] CORBIN, *supra* note 156, § 1.1.

[162] JOHN EDWARD MURRAY, MURRAY ON CONTRACTS § 5 (5th ed. 2011).

[163] *Id.*

drafting becomes more difficult and complex.[164] In *Rosenberg*, the court seemed to fail to consider the ramifications of its decision to decide what it, no doubt, thought was reasonable. By concluding that Rosenberg's action did not violate the CNC, the court nullified the very purpose of the clause. The court's decision in *Rosenberg* further complicates the drafting of CNCs in Wyoming and discourages business situations which rely on CNCs.

[164] *See supra* notes 140–159 and accompanying text.