You’re probably reading the title of this article and saying, “He’s gone bonkers! What does ‘radius’ and Edgar Allan Poe’s poem ‘The Raven’ have to do with restrictive covenants?”

This article is for all you inner mathematicians and geometry aficionados. More to the point, it is for those who draft, interpret and litigate non-compete agreements that contain geographic restrictions. When I heard that Google Earth had launched a new tool to measure distance and area, it sparked memories yonder of an esoteric, but very important, issue that is litigated occasionally in non-compete cases, and now the subject of the twentieth article of this Series.
Many non-compete agreements contain provisions that restrict employees from engaging in certain business activities within a specific geographic area, such as a city, state, or a defined distance from an employer’s business location. In fact, many states that enforce non-competes mandate that the non-competition restrictions have reasonable geographic limitations.

Here are four of the many ways an employer might describe the geographic boundaries of an employee’s post-employment non-compete restrictions:

1. Employee shall not, anywhere in the United States, work at another competing Company.

2. Employee shall not compete against the Company within the defined Territory (defined in another section of the agreement).

3. Employee shall not compete within a 15-mile radius of the Company’s office.

4. Employee shall not sell competing products within 50 miles of the Company’s headquarters.

The first example – anywhere in the United States – is fairly straightforward from a geographical boundary standpoint. Putting aside whether the entire United States would be necessary and reasonable to protect the Company’s legitimate business interests, the employee would be prohibited from working for another company that competes with his or her former employer anywhere in the United States.

In the second example, the geographic scope is a defined “Territory,” which might be clear. It could be ambiguous, however, depending on how the Territory is defined in the agreement. Is the Territory defined as a specific city or state, in which case, the geographic boundary is probably clear? Or, is the Territory definition a bit more amorphous such as, “Any geographic area in which the employee sold or marketed products on behalf of the Company within the one-year period prior to termination of employment”? To complicate matters even further, with the increase of telecommuting and conducting business over the Internet, how should employers define a “Territory” to include protected prohibited activity?

The third example (within a 15-mile radius of the Company’s office) is not as crystal clear as it would first seem. More than 85 years ago, in Johnson v. McIntyre (Pa. 1932), two physicians disputed the meaning of the words “within the radius of fifteen miles” and had this issue decided by the Supreme Court of Pennsylvania. The trial court had agreed with the defendant’s interpretation that these words meant a distance to be computed by the nearest traveled way. The Pennsylvania Supreme Court disagreed and held:

The meaning of the words used to define the territory from which defendant agreed to withdraw is plain, unambiguous, and definitive, easily given practical effect. The distance ‘by the nearest traveled public way or road’ from the Boswell borough line to defendant’s office in Johnstown is 15.4 miles. If the defendant, as his argument implies, intended to describe a district irregular in shape and extent, as dependent
on accessibility by public roads, he should have said so. Such a boundary would necessarily have elements of uncertainty, as there might be dispute about which of several was the nearest traveled public way. These parties expressed themselves clearly in words of plain and simple meaning; that sense is not varied by the context. It is not suggested that there is any mistake about what they intended to say. The court has no power to substitute for ‘a radius of fifteen miles’ the words ‘fifteen miles by the nearest traveled public way or road’ because the context and the circumstances exclude such inference. . . .

Courts in other jurisdictions have reached similar conclusions regarding the meaning of the words “a radius of [X] miles” or “within a [X]-mile radius” in non-compete cases. A court in New Jersey, for example, held that, “[i]f the area in a restrictive covenant is expressed by use of the word ‘radius,’ the proscribed distance should be measured along a direct line. If the parties intend otherwise, it should be clearly expressed.” Scuitier v. Barile (N.J. Ch. Div. 1950); see also Cook v. Johnson (Conn. 1879) (finding ten-mile radius was ten miles in every direction from the center of the village of Litchfield); Thompson v. Allain (Mo. 1964) (explaining the language used in physician non-compete “radius of fifty (50) miles,” without qualification, could not mean road miles); Le Maine v. Seals (Wash. 1949) (line was fixed by a straight line without regard to distance by the nearest traveled route); BJ of Leesburg, Inc. v. Coffman (Fla. Dist. Ct. App. 1994) (“Radius is a common method used in describing areas within which non-competing operations may not be conducted and is capable of being calculated with precision.”).

Thus, it would appear that where an employment agreement uses the term “radius” to describe a geographic restriction, many courts will interpret “radius” consistent with its ordinary meaning in the dictionary – a straight line drawn from the center to the circumference of a circle. This is where perhaps the new Google Earth measurement feature and other similar mapping programs might be a helpful tool for the parties and courts to establish and illustrate the precise geographic boundaries of the restrictions.

Finally, lawyers have been arguing over the meaning of the phrase used in my fourth example (“within [X] miles”) for decades. Does it mean within 50 miles as traversed by vehicle along public highways? See, e.g., Rite-Aid of South Carolina, Inc. v. Cantrell (S.C. Ct. App. 1985) (affirming trial court’s finding that “within three miles” in non-compete was “the distance measured by the most direct road route from the former location”). Or, does it mean within a 50 mile straight line “as the crow [or raven] flies” distance without regard to roads? This issue remains unresolved and continues to be the source of litigation in various states that enforce non-compete agreements.

One final note before I wax poetic about restrictive covenants. If the term “radius” is not included in the non-compete agreement and the geographic restriction is unclear, one concept to keep in mind is the rule of “contra proferentum,” which in contract law generally means that an ambiguous contract clause will be construed against the drafter.

A Tribute to Edgar Allan Poe’s “The Raven” (non-compete style)
Once upon a midnight dreary, while I pondered, weak and weary
About the geographic restrictions in a restrictive covenant,
Over many quaint and curious volume of forgotten judicial lore –
While I nodded (at my computer), nearly napping, suddenly there came a tapping,
As of someone gently rapping, rapping at my law office door.
“‘Tis a client,” I muttered, “tapping at my law office door” –
Deep into that darkness peering, long I stood there wondering, fearing,
Had I used the correct term to describe the geography of that restriction?,
Doubting, dreaming dreams no lawyer ever dared to dream before;
Open here I flung the shutter, with many a flirt and flutter,
In there stepped a stately Raven of the saintly days of yore;
Then this ebony bird beguiling my sad fancy into smiling,
“Though thy crest be shorn and shaven, thou,” I said, “tell me whether the restriction is by road, highway or straight line as you fly,”
Quoth the Raven, “Nevermore.”
The Raven, sitting lonely on the placid bust, spoke only
That one word, as if his soul in that one word he did outpour.
Nothing farther than he uttered – not a feather then he fluttered –
Till I scarcely more than muttered, “Other courts have determined this before —
Then the Raven said “Nevermore.”

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The goal of this Series is to provide a brief overview and some interesting insights and practical pointers when dealing with unique issues that might arise in the context of restrictive covenants. It is not intended to provide and should not be construed as providing legal advice. Each situation is different, including the governing state law. If legal advice is needed, you should seek the services of a qualified attorney who is knowledgeable and experienced in this area of the law to address your specific issues or needs.

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