Preliminary Injunctions Enforcing Contractual Nondisparagement Clauses

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This article examines injunctive enforcement of contractual nondisparagement clauses.

Appellate courts in tort cases regularly reject requests for preliminary injunctions against defamatory speech, deeming such relief an unconstitutional prior restraint.[1] Requests for permanent injunctions in tort cases fare better. Many appellate courts have adopted the "modern rule" that narrow permanent injunctions against specific defamatory statements are permissible, but only after adjudication that the challenged statements are false.[2]

In contrast to tort cases, appellate courts in cases involving contractual nondisparagement clauses have been more willing to approve of preliminary injunctions imposing broad relief. The constitutional soul-searching that occurs in tort cases is less pronounced in contract cases seeking to enforce nondisparagement clauses, with courts holding that constitutional free speech rights have been waived by contractual promises not to disparage.

The Connecticut Supreme Court's 2009 decision *Perricone v. Perricone* is the most comprehensive appellate ruling addressing injunctive enforcement of a nondisparagement clause.[3] There, Connecticut's highest court affirmed a preliminary injunction against the ex-wife of a prominent dermatologist, barring her from making "derogatory or defamatory" remarks about her former husband, thus blocking her from appearing on a television show.[4]

The central constitutional holding in *Perricone* is that "a party's contractual waiver of the first amendment's prohibition on prior restraints on speech constitutionally may be enforced by the courts even if the contract is not narrowly tailored to advance a compelling state interest."[5] *Perricone* relies on the holding of *Cohen v. Cowles Media Co.*, the U.S. Supreme Court decision establishing that the First Amendment does not bar a plaintiff from pursuing a damages action against a newspaper for breach of a promise of confidentiality.[6]

Section I of this article discusses U.S. and state supreme court decisions on the availability of permanent injunctive relief to bar defamatory speech in noncontract cases.[7]

Section II discusses *Perricone* and *Brammer v. KB Home Lone Star, L.P.*,[8] a 2003 Texas intermediate appellate case rejecting a temporary injunction enforcing a nondisparagement clause as an unconstitutional prior restraint. Three unpublished cases that approve of preliminary injunctions enforcing contractual nondisparagement clauses are also discussed.

Section III, largely based on the structure of *Perricone*, examines five questions, in addition to traditional equitable principles, that courts consider when reviewing requests for preliminary injunctions to enforce contractual nondisparagement clauses:

1. Is there state action?
2. Is a contractual prior restraint constitutionally valid?
3. Did the defendant waive free speech rights?
4. Does enforcement violate public policy?
5. Is the injunction sufficiently precise and not overbroad?

Of these five questions, the first two—state action and constitutionality—are relatively settled. The third and fourth questions—waiver and public policy—matter the most in determining the enforceability of nondisparagement clauses by preliminary injunctions. *Perricone* and *Brammer* adopt different legal standards on how to determine waiver. As the only two published decisions on the topic of this article, they are the most important cases for courts and practitioners to consider.

I. Prior Restraint Cases

A prior restraint of speech—prohibiting speech before it is uttered—raises First Amendment concerns.

In 1931, the Supreme Court in *Near v. Minnesota* struck down as unconstitutional a state statute permitting injunctions barring newspapers from publishing defamatory articles.[9] The *Restatement (Second) of Torts* explains that "ever since *Near v. Minnesota*, it has been recognized that prior restraint of a publication runs afoul of the First Amendment."[10]

In 1976, in *Nebraska Press Ass'n v. Stuart*, the Supreme Court explained that the common thread running through the cases following *Near* "is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[11]

In 2005, the Supreme Court in *Tory v. Cochran* agreed to answer the question of whether a post-trial permanent injunction in a defamation case violated the First Amendment.[12] But the Court ultimately sidestepped the question because the plaintiff died after oral argument. Given the changed circumstances, the Court vacated the injunction and remanded, giving the substituted plaintiffs an opportunity to seek narrower relief. The Court, however, "express[ed] no view on the

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constitutional validity of any such new relief."[13]

While the U.S. Supreme Court in *Tory* did not decide the constitutionality of permanent injunctions prohibiting adjudicated false defamatory statements, state supreme courts have answered the question.

By a 5–2 vote, in 2007 the California Supreme Court in *Balboa Island Village Inn v. Lemen* adopted the "modern rule" (and not the "traditional rule" that equity will not enjoin libel) and held that "a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory" is constitutional.[14]

The case involved a dispute between a homeowner Anne Lemen and her neighbor, the Balboa Island Village Inn. Lemen, unhappy about noise from the bar at the inn, repeatedly approached customers and employees and made negative statements about the business, statements that were ultimately adjudged false.

The final injunction prohibited Lemen from making these false statements again. The California Supreme Court approved "a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory."[15]

There were two dissents in *Balboa Island*. One considered the injunction censorship of speech and observed that past false and defamatory statements might, in the future, be true or nondefamatory depending on the context they were made.[16] The other dissent proposed a balancing test and concluded that First Amendment free speech guarantees outweigh "garden-variety defamation."[17]

In 2010, the Kentucky Supreme Court in *Hill v. Petrotech Resources Corporation*, vacated a temporary injunction barring defamatory comments as an impermissible prior restraint but followed California and adopted the "modern rule" that defamatory speech may be enjoined after a full trial on merits "upon the condition that the injunction be narrowly tailored to limit the prohibited speech to that which has been judicially determined to be false."[18]

Hill involved an investment in an oil and gas company and aggressive statements by the representative of a disappointed investor that the company was engaged in illegal activity. The temporary injunction, vacated by the Kentucky Supreme Court, imposed a blanket bar on defamatory statements about the company.[19] But if and when the statements were adjudged false, the court ruled that they could be enjoined if a four-part test were met: (1) the injunction is clearly and narrowed drawn so as not to prohibit protected expression; (2) the falsity of the speech is finally adjudicated by a preponderance of the evidence; (3) the enjoined speech is not political in nature or imbued with public interest that outweighs the protection of private interests; and (4) the usual equitable requirements for an injunction are met.[20] In 2014, the Texas Supreme Court in *Kinney v. Barnes*, citing the first dissent in *Balboa Island*, rejected the "modern rule" and held "the Texas Constitution does not permit injunctions against future speech following an adjudication of defamation" and that the "well-settled remedy for defamation in Texas is an award of damages."[21]

Kinney involved a legal recruiter, Robert Kinney, who left his employment at BCG Attorney Search to start a competing firm. On public websites, BCG accused Kinney of paying a bribe to place associates at a law firm and engaging in a "unethical kickback scheme." Kinney sued BCG and its president for defamation, seeking an injunction that the statements on the websites be removed and also that that the company president be enjoined from making similar statements in the future.[22]

The trial court denied the requested relief as an unconstitutional prior restraint and the intermediate appellate court affirmed.[23]

The Texas Supreme Court in *Kinney* distinguished between deleting past speech from a website and a bar on future speech. An order to remove the statements made in the past from the websites was constitutionally permissible; an order enjoining similar statements in future was not. The court reversed and remanded so that the lower court could apply the narrow holding that "a permanent injunction requiring the removal of posted speech that has been adjudicated defamatory is not a prior restraint."[24]

Kinney explained its holding that an injunction prohibiting future speech is an unconstitutional prior restraint under the Texas constitution: "even the most narrowly crafted of injunctions risks enjoining protected speech because the same statement made at a different time and in a different context may no longer be actionable. Untrue statements may later become true; unprivileged statements may later become privileged."[25]

Rejecting the "modern rule," *Kinney* concluded trial courts are "simply not equipped to comport with the constitutional requirement not to chill protected speech in an attempt to effectively enjoin defamation."[26]

Whether a state has adopted or rejected the "modern rule" for permanent injunctions against defamation will likely be considered by the courts in that state when requests for injunctions against disparagement based contractual promises are decided.

In one sense, a contractual promise not to disparage takes the place of the final adjudication that a statement is false and defamatory. But there is a difference—a contractual promise not to disparage can prohibit truthful speech and thus anti-disparagement preliminary injunctions are generally broader than the permanent injunctions approved in tort cases under the "modern rule."[27]

II. The Nondisparagement Clause Injunction Cases

While nondisparagement clauses in contracts are commonplace,[28] there are only a handful of cases analyzing their enforcement by preliminary injunctions.

As a general matter, negotiated nondisparagement clauses (such as in severance agreements and litigation settlements) are more likely to be enforceable than those contained in form agreements and employee handbooks.[29] Indeed, under the

federal Consumer Review Fairness Act, effective in 2017, form nondisparagement clauses prohibiting consumer comments about goods and services are void.[30]

Five appellate decisions addressing preliminary injunctions enforcing nondisparagement clauses are discussed below. Two decisions are published; three are not. Four affirm the injunction; one reverses. One is from Connecticut, one is from Ohio, and three are from Texas.

These five cases address diverse circumstances: a divorce; the end of a romantic relationship; the purchase of house with construction defects; a dispute between a small business and a larger company; and a controversy about 145 million-year-old dinosaurs.

Perricone, the only state supreme court case in the group, affirms a preliminary injunction against defamation and disparagement.

During their 2003 divorce, Dr. and Ms. Perricone entered into a confidentiality agreement with language forbidding the dissemination of information obtained in discovery and further acknowledging that Dr. Perricone and his business interests "may be severely harmed by the public dissemination of defamatory or disparaging information" about him. Ms. Perricone was prohibited from disseminating such information "to the public and the press."[31]

Years later Dr. Perricone learned that his ex-wife planned to appear on a television show to talk about him. He obtained a court order to enforce the nondisparagement clause, thus blocking her planned appearance on ABC's 20/20. That order was affirmed by the Connecticut Supreme Court in 2009 in a comprehensive decision analyzed in more detail in Section III below.

Brammer is a 2003 published Texas intermediate appellate decision.[32] It is the only case of the five vacating a preliminary injunction.

The nondisparagement clause in *Brammer* was in a settlement agreement resolving, temporarily, a dispute between a couple and homebuilder about construction defects in a house. The clause provided: "you agree not to use any public medium such as the 'internet' or any broadcast or print medium or source to complain or disparage the building quality or practices of KB Home, it being acknowledged that any complaints or actions against KB Home are to be resolved solely in a private manner."[33]

When the homeowners resumed their public complaints, including an interview on a television news program, the builder successfully sought a temporary injunction barring them from "directly or indirectly slandering or defaming Plaintiff in any way."[34] On appeal, the court rejected the injunction as "an unconstitutional prior restraint" and ruled that the homeowners had not waived their First Amendment rights by agreeing to the nondisparagement provision.[35] The reasoning of *Brammer* is discussed more fully in Section III below.

AultCare v. Roach is a short unpublished 2007 Ohio intermediate appellate decision affirming an order barring Roach from making disparaging comments about AultCare.[36] Roach had sued AultCare and other companies for interfering with his business. The litigation settled and Roach agreed not to disparage AultCare. About six years later, a preliminary injunction issued enforcing the nondisparagement promise and the appellate court affirmed, noting that the restriction had been agreed to voluntarily.

Taylor v. DeRosa is an unpublished 2010 Texas intermediate appellate decision about the discovery and ownership of the fossilized remains of an allosaurus, a dinosaur that lived 145 million years ago.[37]

There was a mediated settlement of the dispute and the settlement agreement contained an arbitration clause and "a non-disparagement clause forbidding any party from criticizing or disparaging the other parties publicly."[38]

The DeRosas filed an arbitration demand alleging that Taylor repeatedly violated the nondisparagement clause. The DeRosas prevailed, with the arbitrator awarding damages and imposing an injunction barring Taylor from criticizing the DeRosas and their film about the allosaurus dinosaur.

Taylor filed suit objecting to the arbitration award; the DeRosas moved to confirm the award and the trial court did so. Taylor appealed, arguing that the injunction barring him from disparaging DeRosa was an unconstitutional prior restraint.

The court of appeals affirmed. While noting that prior restraints are usually unconstitutional, the court explained that the strong presumption in favor arbitrator decisions included deference to an arbitrator's decision to restrain speech.[39] On substantive grounds, the court said, "the injunction in the present case merely serves to enforce a bargained-for provision" not to disparage, a promise that was made in exchange for "substantial monetary compensation."[40]

Walls v. Klein is an unpublished 2013 Texas intermediate appellate decision about a soured romantic relationship, a settlement where Klein paid Walls $30,000, and the enforcement of the settlement agreement's nondisparagement clause.[41]

The agreement provided "[t]he Parties agree and acknowledge they will not disparage one another."[42] After the settlement, Walls said that she intended to publicly disparage Klein on Facebook and Klein filed suit to stop her. The court granted his request for temporary relief and she appealed.

The court of appeals in *Walls* affirmed a temporary injunction barring Walls from "disparaging and/or defaming Klein in any mode, form, or fashion whatsoever."[43]

Walls unsuccessfully argued that the injunction was unconstitutional, specific performance was not a remedy for breach, and irreparable harm was not shown.

The court held that the trial court had correctly concluded that Walls waived constitutional rights in the agreement based on her testimony that she signed the agreement and received $30,000. The court also relied on clauses at the end of the agreement that it was entered into "voluntarily, with the benefit and advice of counsel."[44]

Walls's argument that damages would suffice was rejected because the Walls/Klein agreement provided that the contractual obligations "shall be enforceable in a court of equity by specific performance."[45]

The court also found sufficient evidence in the record of irreparable harm based on Klein's testimony.

Walls distinguished *Brammer* because in that case, unlike *Walls*, there was no testimony in the record from the defendants to support waiver. Also, there were issues of public concern in *Brammer* that were absent from *Walls*.

Finally, the court approved the text of the injunction— including the order that Walls not disparage or defame Klein—but modified the injunction to allow her to report "truthful incidents" to law enforcement.[46]

The structure of *Perricone* is a helpful framework for approaching motions seeking injunctive enforcement of nondisparagement clauses. Relevant case authority is analyzed under that structure in the following section.

III. Issues Courts Address

After finding that there was an agreement not to disparage, *Perricone* considered: (1) whether there was state action; (2) the constitutional validity of a contractual prior restraint; (3) whether there was a waiver of free speech rights; (4) whether public policy barred enforcement of the waiver; and (5) indefiniteness of the agreement. These five topics are addressed below.

A. State Action Requirement

There is an argument that constitutional questions are irrelevant to enforcement of private contracts because there is no state action. The counter-argument is that judicial enforcement of a contract is itself state action triggering constitutional scrutiny.[47] None of the cases discussed in this article turn on this issue.

The Supreme Court in *Cohen* began its analysis by asking whether there was "'state action' within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered." If there was no state action, "then the First Amendment has no bearing on this case."[48]

The Court found state action because the Minnesota Supreme Court's ruling under review in *Cohen* was based on promissory estoppel theory, not a written agreement. Promissory estoppel is a "state-law doctrine which . . . creates obligations never explicitly assumed by the parties." Thus, the state action requirement was met.[49]

In *Perricone*, there was written agreement. *Perricone* thus considered whether the Supreme Court in *Cohen* meant to "distinguish promissory estoppel actions from contract actions" on the issue of state action. The court ultimately assumed without deciding that "the judicial enforcement of a confidentiality agreement between private parties constitutes state action."[50]

Perricone notes that a "number of courts have concluded that *Cohen* merely stands for the narrow proposition that, when the state creates a legal duty and then enforces that duty, the enforcement constitutes state action."[51]

But *Perricone* also cites a law review article that argues "the distinction between the enforcement of a promise and the enforcement of a contract in this context 'is dubious at best and probably false, because the defendant in a promissory estoppel action initially create[d] his

obligation by making a promise to do something.'" That law review article argues that because state power is being applied in a manner that suppresses speech, there is state action.[52]

B. Validity of Contractual Prior Restraint

Whether contractual nondisparagement clauses are *per se* invalid has been litigated and the issue is settled. Even though such clauses limit free speech rights, they can be valid and enforceable.

Cohen is central. After finding state action, Justice Byron White, writing for the *Cohen* majority, rejected the argument that awarding damages for breach of the promise of confidentiality violated the First Amendment. While the newspaper otherwise would have had a First Amendment right to publish the name of its source, it could be held liable for damages for divulging the name because it had made a promise to keep the name confidential.[53]

In *Perricone*, Ms. Perricone unsuccessfully argued that judicial enforcement of agreements to limit speech are "presumptively unconstitutional" and "subject to strict scrutiny."[54]

In rejecting this argument, the Connecticut Supreme Court relied on *Cohen*. The court recognized that "*Cohen* involved an action for damages, and not, as in the present case, a request for a restraining order," but concluded that the "reasoning in *Cohen* is equally applicable here."[55]

Perricone explained: "when private parties – and not the government – voluntarily have defined the scope of disclosures that would trigger sanctions, the parties cannot complain if the court merely holds them to their promises." Where constitutional free speech rights have been waived by contract, the contractual promises "may be enforced by the courts even if the contract is not narrowly tailored to advance a compelling state interest."[56]

Outside the preliminary injunction context, many courts have rejected arguments that nondisparagement clauses are constitutionally invalid. For example, in 1999 the Colorado Supreme Court in *Pierce v. St. Vrain Valley School District*, upheld a nondisparagement clause, overruling lower courts that considered the clause constitutionally impermissible.[57]

In *Pierce*, a school superintendent accused of sexual harassment resigned in exchange for a payment and a promise that there would be no disparaging public comments. Representatives of the school district violated the agreement and made comments about the circumstances leading to the resignation.

The former superintendent sued for breach of the nondisparagement clause. The trial court and the intermediate appellate court dismissed his lawsuit, accepting defendants' argument that the nondisparagement clause was void as a restraint on free speech.

The dismissal of the lawsuit was reversed by Colorado's Supreme Court. Citing *Cohen*, the Court held "the parties imposed their own restrictions on their ability to speak publicly" about the resignation. Enforcement of that agreement "does not violate the First Amendment." Nor were there public policy reasons to void the clause. The school board "clearly concluded at the time they entered into the agreement that the public interests in the efficient administration of the school system outweighed considerations regarding the accessibility of this information to the public."[58]

C. Waiver

Both *Perricone* and *Brammer* hold that free speech rights can be waived by contract if the waiver is knowing, voluntary, and intelligent. But *Perricone* puts the burden on the party trying to avoid the waiver and *Brammer* puts the burden on the party trying to enforce it.

Because the Connecticut Supreme Court had not previously considered who has the burden of proving the contractual waiver of First Amendment rights, *Perricone* addressed the question as a matter of first impression. It held that the policy of "freedom of contract and efficient resolution of disputes" applies to waivers of the First Amendment and, therefore, such waivers are "presumptively enforceable" and "the burden of proving . . . invalidity is on the party seeking to avoid the waiver."[59]

Brammer rejected a similar argument. In Texas, the protection of free speech rights is more important than the enforcement of contracts and waivers can only be enforced if there is clear and convincing evidence of a knowing, voluntary, and intelligent waiver.[60]

In addition to the different legal standard, the evidentiary record in the two cases differed. There was testimony in the record that Ms. Perricone had signed the agreement and discussed it with counsel.[61] The was no similar testimony from the defendants in *Brammer.*

In deciding whether the waiver was "intelligent and voluntary," the *Perricone* court identified five factors to be considered: (1) the relative bargaining equality of the parties; (2) whether or not the terms of the agreement were negotiated; (3) whether the party seeking to avoid the waiver was advised by counsel; (4) the extent to which that party benefited from the agreement; and (5) whether the provision restricting speech was conspicuous. Considering these factors, the court found the waiver effective.[62]

In contrast, *Brammer* ruled there was no evidence in the record to show that that the defendants "knowingly, voluntarily, and intelligently agreed to waive the constitutional safeguards implicated by defamatory or disparaging speech."[63]

Both *Brammer* and *Perricone* cite the Ninth Circuit decision *Leonard v. Clark.*[64] *Leonard* accepted the argument that a union had waived free speech and petitioning rights in a labor agreement between fire fighters and city that imposed economic consequences on certain lobbying efforts that would increase the city's labor costs.

Brammer cites *Leonard* for the level of proof required to show waiver: "[The] United States Supreme Court requires clear and convincing evidence that waiver [of constitutional rights] is knowing, voluntary, and intelligent."[65]

Perricone cites *Leonard* for its finding that a waiver is knowing,

voluntary, and intelligent when the waiving party was advised by competent counsel, actually proposed the language that it objected to, voluntarily signed the agreement, and was of relatively equal bargaining strength to the other party.[66]

In any proceeding seeking a preliminary injunction to enforce a nondisparagement clause, whether there was a knowing, voluntary, and intelligent waiver of free speech rights is likely to be a central battleground.

D. Public Policy

Dr. Perricone argued that once a court finds a waiver of constitutional rights, there is no need to consider public policy. The Connecticut Supreme Court disagreed, explaining that there is a "two step approach to claims involving contractual waivers of constitutional rights." The first step is "whether the wavier violates the constitution." The second step is "whether there are, nevertheless, compelling public policy reasons not to enforce the waiver."[67]

The public policy analysis looks at interests beyond those of the parties and whether the restricted speech is about matters of public concern. If the speech is not about such matters, enforcement is more appropriate.[68]

Perricone explains that "[c]ourts also have considered whether the contractual restriction on speech was tailored to advance the primary purpose of the contract." If not, there is a stronger argument against enforcement.[69]

Applying this test to the nondisparagement provision that the Perricones had agreed to, the court found it enforceable. The agreement did not involve criminal behavior, public health and safety, or other matters of "great public importance."[70] And because the divorce settlement gave Ms. Perricone a lump sum based on the value of Dr. Perricone's business, the restrictions on speech were "tailored to advance [the] primary purpose of protecting the value of [his] business."[71]

Brammer presented different circumstances. *Brammer* voided the injunction because the enjoined speech involved matters of public concern—alleged defects in homes that were being offered for sale.[72]

Walls, the unpublished Texas case that affirmed a nondisparagement injunction, involved a factual situation closer to *Perricone*, a failed personal relationship. *Walls* noted that *Brammer* involved matters of public concern, one reason the outcome in *Walls* differed from the outcome in *Brammer*.[73]

E. Scope and Specificity of Injunction

In both tort and contract cases, the enjoined party often argues that the injunction is overbroad or vague. Those arguments frequently meet with at least some success leading to a narrowing of the injunction.

In both *Balboa Island* and *Walls*, the appellate courts found the injunctions overbroad and imposed modifications so that the enjoined party could communicate with law enforcement.[74] In *AultCare*, the court rejected defendant's interpretation that the injunction prohibited him from talking to his lawyer. Even though this was a "plausible" interpretation, applicable doctrines required a reading of the injunction so that it did not bar communications with counsel.[75]

In *Perricone*, Ms. Perricone argued that the nondisparagement clause (and, necessarily, the injunction) was indefinite and that anything she might say about her divorce, including that she was divorced, could be considered disparaging. The court deemed these concerns hypothetical, noting that the defendant could seek modification of the injunction in the trial court "as it may apply in the future to other contemplated conduct."[76]

Balboa Island follows similar reasoning in addressing hypothetical circumstances. It observes that if circumstances change—such as the prohibited statements become true—then the "defendant may move the court to modify or dissolve the injunction."[77]

Conclusion

Given the prevalence of nondisparagement clauses in contracts, it is surprising how few appellate cases address preliminary injunctions enforcing such clauses. Perhaps practitioners are reluctant to seek such relief out of a concern that courts would view the requested relief an improper prior restraint. *Perricone* stands out for its thorough and thoughtful exploration of the important questions raised by motions to enforce nondisparagement clauses by preliminary injunction.

The key question for courts to consider in deciding motions seeking preliminary injunctions enforcing nondisparagement clauses is whether the defendant has waived constitutionally-protected free speech rights and whether there are public policy reasons not to issue the requested relief.

Perricone found waiver; *Brammer* did not. *Perricone* offers a five-factor test to determine whether the waiver was "intelligent and voluntary." The decision relies, in part, on the defendant's testimony that she signed the agreement and discussed it with counsel. There was no comparable testimony in *Brammer*.

The two decisions also differ because the speech in *Brammer* was about a public issue, while in *Perricone* the speech was about a private matter.

Walls, where the injunction was approved by the appellate court, has similarities to *Perricone*—testimony from the defendant in the record and no public policy considerations. In addition, *Walls* cites the language of the agreement that its terms were voluntary, entered into with the advice of counsel, and could be enforced in a court of equity by specific performance. Also, in both *Walls* and *Perricone*, the record demonstrated that consideration was paid for the promise not to disparage.

These factors—the contractual language and the evidentiary record—contributed to conclusion in both cases that enforcement of the nondisparagement clauses by preliminary injunction was appropriate.

Endnotes

1. Dan B. Dobbs, Dobbs Law of Remedies: Damages-Equity-Restitution § 7.2(2): "[I]njunction against libel raises the fear of censorship, so [such]

injunction[s are] seldom sought and usually denied."

2. An article in the Communications Lawyer addressed this trend. Jim Stewart & Len Niehoff, *Zombies among Us: Injunctions in Defamation Cases Come Back from the Dead*, Comm. Law. Fall 2014, at 28. A proposal for how courts should analyze post-publication injunctions is offered in David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 Wm. & Mary L. Rev. 1 (2013).

3. 972 A.2d 666 (Conn. 2009)

4. *Id.* at 672.

5. *Id.* at 679.

6. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

7. Permanent injunctions are constitutionally distinct from preliminary injunctions because permanent injunctions occur only after a judicial determination that the speech is unprotected. Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 2 at 147, 170 (1998) ("After speech is conclusively judicially determined to be unprotected—because it is obscene, for example—a permanent injunction . . . would be no more troubling on constitutional grounds than a civil or criminal penalty.")

8. 114 S.W.3d 101 (Tex. App. 2003).

9. 283 U.S. 697 (1931).

10. *Restatement (Second) of Torts* § 623: Special Note on Remedies for Defamation Other Than Damages (1977): "Equity courts have never been inclined to grant freely injunctive remedies against personal defamation, and ever since *Near v. Minnesota* (1931) 283 U.S. 697, it has been recognized that prior restraint of a publication runs afoul of the First Amendment. Nevertheless, it remains possible that injunctive relief might on some occasions become a suitable supplement to declaratory relief. When it has been formally determined by a court that a statement is both defamatory and untrue and the defendant persists in continuing to publish it, a carefully worded injunction might meet the need and be available against further publication of the statement that has already been determined by the court to be false and defamatory."

11. 427 U.S. 539, 559 (1976). *Nebraska Press* struck down as unconstitutional an injunction barring press reports of confessions by defendants in a murder trial.

12. 544 U.S. 734 (2005). The Court granted certiorari to decide: "Whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment." *Id.* at 736. The plaintiff was prominent Los Angeles lawyer Johnnie Cochran.

13. *Id.* at 738-39.

14. 40 Cal.4th 1141 (2007)

15. *Id.* at 1144. The injunction prohibited statements such as the Village Inn serves tainted food, participates in prostitution, sells alcohol to minors, distributes illegal drugs, is involved in child pornography, and encourages lesbian activities. *Id.* at 1146.

16. *Id.* at 1167. This dissent also argued that the injunction was unnecessary because the plaintiff had not demonstrated that monetary damages would be an inadequate remedy. *Id.* at 1168.

17. *Id.* at 1172.

18. 325 S.W.3d 302, 309 (Ky. 2010).

19. *Id.* at 304.

20. *Id.* at 309.

21. 443 S.W.3d 87, 99 (Tex. 2014).

22. *Id.* at 89-90.

23. *Id.* at 90.

24. *Id.* at 101.

25. *Id.* at 98. *Balboa, Hill,* and *Kinney* were all cited in a 2015 Seventh Circuit decision *McCarthy v. Fuller*, 810 F.3d 456 (7th Cir. 2015), in which Judge Richard Posner and Judge Diane Sykes debate (without deciding) the constitutionality of post-trial injunctions against defamation. Judge Posner writing for the majority, vacates a broad injunction and remands so that the trial court can consider a narrower injunction. *Id.* at 463. Judge Sykes would have directed the trial court to deny the injunction. She argues against the constitutionality of permanent injunctions enjoining defamation: "Defamation by its nature is highly contextual . . . . A permanent injunction as a remedy for defamation does not account for constantly changing contextual factors that affect whether the speech is punishable or protected." *Id.* at 465.

26. 443 S.W.3d at 99.

27. The injunction in *Perricone* barred defamatory and derogatory remarks. In other cases, disparaging statements are prohibited. Dictionaries define disparagement as "bringing discredit upon" and "to lower in rank or reputation." *Vivian v. Labrucherie*, 214 Cal. App. 4th 267, 277 n.4 (2013).

28. Tonia Hap Murphy, *Nondisparagement Clauses in Severance Agreements: A Capstone Contracts Exercise*, 34 J. of Legal Stud. Educ. 5, 6 (2017).

29. *Id.* at 18.

30. 15 U.S.C. § 45b

31. 972 A.2d at 671.

32. 114 S.W.3d at 103-04

33. *Id.* at 105.

34. *Id.*

35. *Id.* at 106.

36. 2007 WL 3088036 (Ohio App. Oct. 22, 2007)

37. 2010 WL 1170228 (Tex. App. Mar. 24, 2010)

38. *Id.* at *1.

39. *Id.* at *2.

40. *Id.* at *3.

41. 2013 WL 988179 (Texas App. Mar. 13, 2013)

42. *Id.* at *1.

43. *Id.* at *2.

44. *Id.* at *3.

45. *Id.* at *1.

46. *Id.* at *5.

47. *See Shelley v. Kraemer*, 334 U.S. 1 (1948)(constitution bars judicial enforcement of racially restrictive covenants).

48. 501 U.S. at 668.

49. *Id.*

50. 972 A.2d at 676-77.

51. *Id.* at 677 n.10.

52. *Id.* (quotations omitted)(citing Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 Cornell L. Rev. 261, 350-51 (1998)). Another author reaches the same conclusion as Professor Garfield. Brian Stryker Weinstein, *In Defense of Jeffrey Wigand: A First Amendment Challenge to the Enforcement of Employee Confidentiality Agreements Against Whistleblowers*, 49 S.C. L. Rev. 129, 133 (1997)("private agreements still can raise a First Amendment question because court enforcement of private contracts is subject to constitutional scrutiny . . . . the mere application of common law by state courts constitutes state action").

53. *Cohen* was a 5-4 decision. Justices Harry Blackmun and David Souter wrote dissents. They believed that the publication of truthful information about a political campaign was protected by the First Amendment and would have affirmed the Minnesota Supreme Court's decision voiding the damage award.

54. 972 A.2d at 677.

55. *Id.* at 679.

56. *Id.*

57. 981 P.2d 600, 604 (Colo. 1999)

58. *Id.* at 607. In *Trump v. Trump*, 582 N.Y.S.2d 1008 (1992), Donald Trump obtained a written promise from Ivana Trump that she would not speak about their marriage or his personal, business or financial affairs. When this agreement later became part of a proposed judgment, the trial court deleted the promise to remain silent and signed the judgment. Mr. Trump appealed asking the appellate court to reinstate the promise, which it did, rejecting the argument that it was an unconstitutional prior restraint.

59. 972 A.2d at 680-81. *Perricone* rejected the argument that for there to be a waiver of First Amendment rights, the agreement needs to mention the First Amendment specifically. *Id.* at 682.

60. 114 S.W.3d at 109-10.

61. 972 A.2d. at 680.

62. *Id.* at 682-83.

63. 114 S.W.3d at 110.

64. 12 F.3d 885 (9th Cir. 1993)

65. 114 S.W.3d at 110.

66. 972 A.2d at 682.

67. *Id.* at 686 n.29.

68. *Id.* at 688.

69. *Id.*

70. *Id.* at 689.

71. *Id.* at 674 n.6 ("The separation agreement provided that the plaintiff would pay a lump sum to the defendant, which apparently was based on the defendant's valuation of the plaintiff's business.") and 689 ("the restrictions on speech imposed by the confidentiality agreement are tailored to advance its primary purpose of protecting the value of the plaintiff's business.")

72. 114 S.W.3d at 109.

73. While nondisparagement clauses in negotiated agreements are mostly enforceable, in other areas they are not. *See* Murphy, *supra* note 28 at 18 ("nondisparagement clauses in certain contexts have attracted particularly scrutiny" pointing to restrictions on such clauses by the NLRB, in FLSA settlements, and in consumer contracts under the law of certain states).

74. *Balboa*, 40 Cal.4th at 1160-61 (the prohibition on making statements modified to permit statements to "governmental officials with relevant enforcement responsibilities"); *Walls*, 2013 WL 988179 at *5 (permitting defendant "to report any truthful incidents of illegal conduct directed at her to law enforcement").

75. 2007 WL 3088036 at *4.

76. 972 A.2d at 691 n.35.

77. 40 Cal.4th at 1161.