**recent DEVELOPMENTS in**

**OKLAHOMA business and corporate law ‑ 2009**

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**Introduction**

In the wake of the worst recession since the Great Depression, the prospects of regulatory change at the Federal and international levels greatly overshadow the more meager developments in Oklahoma business and corporate law. We would be remiss if we did not cover the larger developments, but since “all politics is local” we shall also cover the Oklahoma developments. We have new legislation in the form of the Uniform Limited Cooperative Association Act and some notable Oklahoma cases.

This is the third year in which the economic crisis has overshadowed our business and corporate law developments. In 2007, we were examining the subprime mortgage crisis, which was precipitated by a drop in housing prices. Bear Sterns was bailed out, and other investment banks – including Citigroup, Merrill Lynch – suffered huge losses, even as their CEO’s left with attractive severance packages. We speculated about what impact the financial crisis might have on corporate governance and what changes might arise to manage future financial crises.[[1]](#footnote-1)

The events in 2007 triggered events in 2008 that we could have scarcely imagined. The financial crisis deepened as the fallout from the subprime mortgage crisis spread. The crisis would cause the venerable Lehman Brothers to fail, which shook financial markets worldwide.[[2]](#footnote-2) In its wake, the U.S. Treasury nationalized Fannie Mae and Freddie Mac, Bank of America scooped up the tottering Merrill Lynch, and the Federal Reserve bailed out AIG, the world’s largest insurer.[[3]](#footnote-3) The two remaining independent investment banks, Goldman Sachs and Morgan Stanley, made themselves into bank holding companies to ensure access to Fed funds, thus ending the era of independent investment banking on Wall Street.[[4]](#footnote-4)

That was not all. To moderate the impact on the overall economy, the Federal government intervened in unprecedented fashion with a Congressionally-approved $700 billion bailout package for the purchase of troubled financial assets.[[5]](#footnote-5) The economic crisis was not limited to the United States. The crisis impacted economies worldwide and other governments intervened with financial support.[[6]](#footnote-6) Despite unprecedented intervention by the Federal government, what began as a financial crisis spread to the overall economy resulting in the most significant economic downturn since the Great Depression.[[7]](#footnote-7)

One year later, we are seeing signs that the worst may be behind us. While unemployment continues to grow, the banking and financial systems are stable, the stock market indices are up, and other economic indicators are generally positive. While most prognosticators forecast a relatively weak recovery, which may be stymied by large governmental debt levels and weaker consumer demand, the crisis appears to have passed. People, including politicians, are considering what lessons we might learn from the crisis and what changes are needed to avoid a repeat of the crisis.[[8]](#footnote-8)

The lessons first and foremost are economic ‑ undoubtedly underscored by the need for greater market transparency and better risk management. There are several bills pending in Congress addressing these issues. While none of these bills have been enacted, a brief overview gives insight to the type of regulation that we can expect.

## Federal Legislation

The pending Federal legislation for financial regulatory reform has addressed numerous areas. The House Committee on Financial Services (the “*House Committee*”) is considering seven major bills dealing with financial reform.[[9]](#footnote-9) The **Senate Committee on Banking, Housing, and Urban Affairs** (the “*Senate Committee*”) introduced a comprehensive bill dealing with the roles of various regulators, the economic risks of non-traditional securities, such as derivatives, and the levels of executive compensation.[[10]](#footnote-10) It is unlikely that these bills will be adopted this year. Yet they provide foresight into the kind of regulatory changes that might result from this economic crisis. A brief look at the proposed changes is helpful.

### Changing the Roles of Federal Regulators

There is a general perception that inadequate financial regulation contributed to the economic crisis and that the government agencies charged with regulating the financial industry should be strengthened. Several bills would change the roles of Federal regulatory agencies.

*Agency Consolidation*. The banking and financial services industry is regulated by multiple Federal and state agencies. For example, federal and state banks and thrifts are regulated variously by the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision. The multiple-agency environment has been criticized as inefficient, and both the House Committee and Senate Committee bills would consolidate some functions. The House Committee would combine the Office of the Comptroller and the Office of Thrift Supervision. The other agencies would be largely unchanged. The Senate Committee takes a more aggressive approach. It would combine the banking responsibilities of the four agencies into a single agency. The consolidation would not change the dual Federal-state regulatory structure for state banks and thrifts, although such institutions would report to the new Federal agency.

*A New Consumer Agency*. Both the House Committee and the Senate Committee would create a new **Consumer Financial Protection Agency. The new agency would assume the** consumer protection responsibilities currently handled by the Office of the Comptroller, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Reserve, the National Credit Union Administration, and the Federal Trade Commission. It would also have responsibility for regulating mortgage brokers and payday lenders, who are lightly regulated under the present system.

*Too Big to Fail*. The House Committee and Senate Committee bills would require stricter regulation for financial institutions that are “too big to fail”. At the center of the changes would be the creation of a reserve fund paid by assessments on large financial institutions. Much like the FDIC, the fund would absorb those financial losses beyond the assets of a failed institution. In other words, the fund would reduce the risk that government funds would be needed to bail out a large, failing financial institution. Both House and Senate bills would adopt special rules for winding down large, failing financial institutions. The Senate bill would also impose stricter rules for capital, leverage, liquidity and risk management as a financial institution grows in size. It would also permit regulators to break up a financial institution if the institution poses a threat to the financial stability of the United States.

### Limiting Derivative Risk

We have discussed the effects of collateralized debt and mortgage obligations and other types of financial derivatives in aggravating the financial crisis. Because financial derivatives extrapolate the value of an underlying asset, changes in the value of the underlying asset are magnified in the linked derivatives and market risks are increased accordingly. The size of the derivative market is enormous – the notional amount of U.S. derivatives was estimated to be $203.5 trillion in the second quarter of 2009[[11]](#footnote-11) – and the market remains filled with unknowns. Questions about whether signatories, counterparties and assignees of the derivatives could perform caused the financial markets to freeze in August 2007.

To address these issues, the House Committee and Senate Committee bills propose that all standardized swap transactions between dealers and large market participants be cleared and traded through open electronic clearinghouses. The bills would authorize and regulate clearing organizations that operate the clearinghouses and would register swap dealers and major swap participants. The regulatory agency – either the CFTC or the SEC – would adopt capital requirements and rules for reporting and disclosing swap transactions. The swap rules would not cover participants engaged in hedging, that is, persons who lock in the price of an underlying asset they own.

The House Committee and Senate Committee bills would also require companies that sell asset-backed securities to retain at least 10% of the credit risk. The requirement is intended to ensure that the seller would be more prudent about the products it sells if it retains some of the investment risk.

### Limiting Executive Compensation

For many people, the systemic financial excesses were typified by excessive executive compensation. Auto executives flying on private jets to seek government bailout money and banking executives getting multi-million dollar bonuses as their banks fail suggested a culture in which the fortunes of the executives were divorced from the fortunes of the companies they ran. While not directly related, the Madoff scandal aided a popular perception of rampant greed within the financial elites.[[12]](#footnote-12) It is no surprise then that Congress would respond with proposals for greater regulation of executive compensation.[[13]](#footnote-13)

The TARP regulations[[14]](#footnote-14) imposed caps on executive compensation as a condition to accessing program benefits. In June 2009, the Treasury Secretary appointed a “Special Master for TARP Executive Compensation”, who has broad powers for regulating executive compensation at companies receiving TARP funds. Kenneth Feinberg, the special master, reduced compensation across the board at American International Group, Citigroup, Bank of America, Chrysler, General Motors, GMAC and Chrysler Financial. He capped the amount of bonuses, reset the formulas for paying bonuses to measure longer terms, and required that most bonuses be paid in stock rather than cash and that the stock be held for a long-term.[[15]](#footnote-15)

The Federal Reserve recently announced new rules that would give it the authority to restrict the compensation policies at the institutions it regulates, regardless of whether those institutions had received TARP funds.[[16]](#footnote-16) The proposed rules would cover U.S. bank holding companies, state member banks, and foreign banks with a U.S. branch, agency or lending subsidiary, and the rules are not limited to senior executives.

The House Committee and Senate Committee bills both include provisions for “say on pay”, that is, giving the shareholders of public companies the right to cast precatory votes on executive compensation. While such votes would have no legal effect, a negative vote would pressure the compensation committees develop compensation programs that are more palatable to the shareholders. The bills would also authorize the SEC to develop rules giving shareholders proxy access to nominate directors, which is intended to make boards more responsive to their shareholders.

Whether and to what extent these restrictions will have the desired effect is uncertain. Many economists believe that executive compensation grew because of market forces and an increasing emphasis on “pay for performance”. Executive compensation was weighted toward earnings-based bonuses and stock options. As corporate profits grew and the stock market rose, executive compensation grew with it.[[17]](#footnote-17) If market forces are primarily responsible for the growth, increased regulation may fail in its intended objective and create unintended consequences.[[18]](#footnote-18) Prospective executives may seek positions elsewhere, such as in private equity or hedge funds or in privately held companies, which are not subject to the compensation regulations.[[19]](#footnote-19) If talent goes elsewhere, the financial performance of the regulated companies may suffer, resulting in lower returns for shareholders and fewer jobs for the economy.[[20]](#footnote-20)

### Disclosing Beneficial Ownership

Pending before the Senate Committee on Homeland Security & Governmental Affairs is the “Incorporation Transparency and Law Enforcement Assistance Act”, which could significantly affect the formation and reporting requirements for corporations and LLCs.[[21]](#footnote-21) The bill would require the states to gather beneficial ownership information when corporations, LLCs and other entities are formed and to update the beneficial ownership information annually.[[22]](#footnote-22) The information requirements are more extensive for non-U.S. citizens or residents. The bill imposes civil and criminal penalties for persons who provide false beneficial ownership information. The push for disclosure of beneficial ownership comes from the perception that terrorist and criminal groups are using the anonymity of business entities to obscure their activities.

This issue is arising elsewhere. In response to the Incorporation Transparency Act, the National Conference of Commissioners on Uniform State Laws hurriedly drafted “The Uniform Law Enforcement Access to Entity Information Act”. The uniform act provides for an ownership reporting regimen. In the Oklahoma Legislature this year, we saw an amendment that would have created an ownership reporting requirement for LLCs. Fortunately the amendment, which was poorly drafted, was defeated.

While the Department of Justice, Treasury, Immigration & Customs and Homeland Security are pushing for disclosures, the various state secretaries of states and other filing agencies are resisting. The state agencies contend that criminal use of legal entities is a tiny fraction of the legal entities formed and maintained by the states.[[23]](#footnote-23) Imposing added formation and annual reporting requirements will unreasonably burden the legal entities used for lawful practices. Some states do not have annual reporting requirements and those that do note high rates of non-compliance under their present systems. They fear the added burdens of beneficial ownership reporting will result in massive non-compliance with little effect on the problem since terrorists and criminals will lie about ownership/control.[[24]](#footnote-24) With substantial penalties for false reporting, the reporting requirements may end the practice of attorneys forming entities for their clients or result in higher client costs for attorneys that continue.

The beneficial ownership disclosures would not affect non-profit organizations, which have no ownership and are arguably the entities of choice for fraudulent or illegal activity. Recent examples include the New York-based United Homeless Organization, which donated no money to the homeless, a Minneapolis-based charity that served as a front for Somalia militia recruitment, and the wealthy Alavi Foundation, which is accused of being a front for the Iranian government.[[25]](#footnote-25)

### Overview of Federal Developments

Traditionally, the states were the custodians of corporate governance. Governance was shaped largely by state statutes and the state courts’ application of fiduciary duties to the directors and officers. That responsibility is clearly shifting. While states will continue to play important roles – especially in the application of fiduciary duties and other common law principles – the Federal government is taking a more active role. New and more extensive Federal regulation will impact large financial institutions (“too big to fail”) and mortgage brokers and payday loan companies that had previously avoided regulation. New executive compensation rules will impact a wider swath of companies ‑ banks, thrifts, their holding companies and public companies. While not affecting private companies and non-financial companies directly, the regulations could influence these companies indirectly if the Federal requirements, such as “say on pay”, become standards for proper behavior. Other regulations, such as the Homeland Security amendments to require beneficial ownership disclosure, would materially affect all domestic entities. Federal regulation has undoubtedly had a greater affect on business entities in recent years than has state regulation, and there is little indication that this trend will change.[[26]](#footnote-26)

**Oklahoma Developments**

### Legislation ‑ the Uniform Limited Cooperative Association Act

*Overview*. The Oklahoma Legislature passed and the Governor signed the Uniform Limited Cooperative Association Act (“*ULCAA*”).[[27]](#footnote-27) The ULCAA builds on the traditional law governing cooperatives, but recognizes a growing trend toward the “new generation cooperatives”, which acknowledge the need for outside equity investment. This ULCAA creates a new form of business entity and is an alternative to other cooperative and unincorporated structures. It is more flexible than most current law, and provides a default template that encourages planners to utilize tested cooperative principles for a broad range of purposes.

Under the ULCAA, a coop, or “limited cooperative association” in the ULCAA terminology, is an unincorporated association. It can be used for various purposes, including marketing, advertising, bargaining, processing, purchasing, real estate, and worker owned cooperatives. For example, the ULCAA would allow a group of wheat farmers to build a value-added pasta facility – as the Alva area farmers have done ‑ keeping their business in a cooperative form while attracting and utilizing investment capital. It might also be used by an urban food coop to attract investment capital to build facilities for the operation of the coop’s business.

Key highlights of the ULCAA include:

* A coop is formed by filing with the Oklahoma Secretary of State.
* A coop may have both patron and investor members.
* Unless otherwise provided in the formation documents, the ULCAA does not allow transfer of or security interests in non-financial rights (like LLCs). A judgment creditor’s remedy is limited to charging orders against debtor-members or their transferees.
* The coop may have marketing contracts with third parties who are not patron members.
* A coop is managed by directors, who appoint its officers (like a corporation).
* A coop can issue “member interests” for tangible or intangible personal property, or any other benefit to the association, including money, labor, services, promissory notes, agreements to contribute, and contracts to be performed. Profits and losses must be allocated between patron members, unless the coop formation documents provide otherwise, and the patron membership cannot be allocated any less than 50% of profits, even if investor members are allowed. Distributions may be made in any form, including cash, capital credits, allocated patronage equities, etc. The interests of patron members enjoy the same exemption from state securities laws that they would in similar cooperative associations under existing law.[[28]](#footnote-28)
* A member may maintain a derivative action to enforce a coop’s right where the coop fails to or will not enforce that right.[[29]](#footnote-29)
* Foreign coops may apply for and receive a certificate of authority to transact business in the state.
* Coops may convert to another entity (and vice versa).

*Background*. The ULCAA is an addition to Oklahoma’s existing body of cooperative law. The existing body includes the Cooperative Corporations Act, an early set of statutes first adopted in 1919 and used little today,[[30]](#footnote-30) and the Cooperative Marketing Association Act (the “*Coop Marketing Act*”), first adopted in 1937 and which is the primary organic act for Oklahoma cooperatives.[[31]](#footnote-31)

As in other states, the laws for Oklahoma cooperatives are linked to state corporation laws and Federal and state income tax laws. Oklahoma cooperatives are generally formed under the Coop Marketing Act. The Coop Marketing Act is not as comprehensive as the typical state corporation law, and it defaults to the Oklahoma General Corporation Act in matters not covered by the Coop Marketing Act.[[32]](#footnote-32) The Coop Marketing Act is also shaped by Subchapter T of the Internal Revenue Code, which states what cooperatives must do to qualify for cooperative tax treatment under the Code. The Code affords qualifying cooperatives with a form of “pass through” treatment, which avoids income taxation at the entity level.

Oklahoma’s early experience with cooperatives produced some interesting case law – notably a string of cases dealing with cotton gins formed as cooperative corporations and those formed as for-profit corporations. At the time, the Oklahoma Corporation Commission required gin operators to obtain a certificate of need before doing business. The Commission also fixed the rates at which cotton was ginned. Cooperative corporations were exempted from the certificate of need requirements.

A for-profit operator sued, contending that requiring a certificate of need from one person and not another violated the equal protection clause of the Fourteenth Amendment. In *Frost v. Corporation Commission of Oklahoma*,[[33]](#footnote-33) the U.S. Supreme Court agreed. It held that the certificate of need granted a franchise, which is a property right protected by the Fourteenth Amendment. The property right is impaired when a similarly situated person can operate within the franchise without satisfying similar requirements. The Court rejected the argument that the democratic nature of the cooperative was sufficiently distinctive from a for-profit corporation to uphold the different regulatory treatment.

In *Corporation Commission of Oklahoma v. Lowe,*[[34]](#footnote-34) the U.S. Supreme Court also dealt with a for-profit gin operator’s claim that the advantages of its cooperative competitor violated the Fourteenth Amendment. The for-profit gin operator claimed that the cooperative’s practice of rebating profits to customers based on their patronage circumvented the Commission’s fixed gin fees and violated the equal protection clause of the Fourteenth Amendment. The Court held, however, that no equal protection violation occurred since the for-profit operator could rebate his profits if he wanted.

Beyond these cases, few decisions dealing with cooperatives would hold much interest or affect significantly the broader body of corporate law until the 1990 decision in *Hargrave v. Canadian Valley Elec. Co-op., Inc.*,[[35]](#footnote-35) in which the Oklahoma Supreme Court held that the fiduciary duties that directors owe shareholders in business corporations are also owed by directors to patrons in cooperatives. Few decisions have occurred since *Hargrave* and the paucity of Oklahoma case law regarding cooperatives suggests that the relevant law is largely statutory and regulatory.

The impetus for the ULCAA is not so much to alter Oklahoma’s existing cooperative laws as to offer new financial alternatives in the structuring of Oklahoma coops. The ULCAA should be viewed as an alternative to the Coop Marketing Act. In a traditional cooperative, net earnings or profits are rebated to the cooperative’s patrons ‑ those doing business with the cooperative – in the form of patronage dividends or distributions. The patronage distributions are apportioned on the basis of the business done with the cooperative. In the typical business corporation, profits inure to the benefit of the shareholders and are apportioned on the basis of share ownership.[[36]](#footnote-36) In a general sense, cooperatives pay their “profits” to their customers. Business corporations pay their profits to their owners. This distinction is crucial to understanding the differing natures of cooperatives and business corporations.

While cooperatives and corporations differ in how they pay out their profits, the corporation arguably has greater financial flexibility than the cooperative. A corporation can benefit its shareholders by distributing profits or its customers by charging lower prices. Only the market limits the prices it charges and the investment returns it might generate for its shareholders. The cooperative has similar flexibility as to pricing and customers, but is limited by statute in what it can pay those who have invested capital in the cooperative. Under the Coop Marketing Act, a cooperative can pay no more than 8% per annum on its stock.[[37]](#footnote-37) If higher returns are needed to attract investment capital, the coop cannot compete. The ULCAA addresses this limitation by combining coop and corporate concepts. A coop formed under the ULCAA can pay higher returns to its “investment members” as it continues to make traditional distributions to its patrons.

*Oklahoma Modifications to the ULCAA*. The Oklahoma legislature adopted the ULCAA with few changes from the uniform version. The notable departures include the following.

* *Section 441-110 [Relation to Restraint of Trade and Antitrust Laws]*. This section was intended to extend the tradition exemption of coops from application of the antitrust laws.[[38]](#footnote-38) It states that an association shall be exempt to the extent provided under Title 79 of the Oklahoma Statutes, which contains the Oklahoma Antitrust Reform Act.[[39]](#footnote-39) The Antitrust Reform Act does not exempt coops, however, presumably because the Coop Marketing Act provided a statutory exemption for coops formed under its provisions.[[40]](#footnote-40) Since the Coop Marketing Act exemption covers only coops formed under its provisions and the Antitrust Reform Act does not have an exemption, coops formed under the ULCAA would have no Oklahoma antitrust exemption. This omission appears to be a drafting error and the Oklahoma legislature would presumably create an antitrust exemption in future legislation.
* *Section 441-818 [Standards of Conduct and Liability]*. This section tracks the uniform version of the ULCAA, but deserves some attention since its implications are not immediately apparent. Section 441-818 imposes the same duties and affords directors and committee members the same protections imposed and afforded “directors of entities organized under the Oklahoma General Corporation Act.”[[41]](#footnote-41) In other words, Section 441-818 applies the corporate governance structure to coops. The fiduciary duties of due care and loyalty and protections, such as the business judgment rule, that apply to corporate directors will apply to coop directors. The analogous application is consistent with existing Oklahoma case law,[[42]](#footnote-42) but the express statement is helpful since the ULCAA’s use of an “unincorporated association” is arguably distinguishable from the Coop Marketing Act’s coop corporation. With the incorporate reference under Section 441-818(b) to the Oklahoma General Corporation Act, a coop can presumably include in its articles of organization the liability limitation afforded under Section 1006.B.7 of the Oklahoma General Corporation Act.[[43]](#footnote-43)

### New Case Decisions

Several Oklahoma cases deal with business and corporate law and deserve mention.

*Crutchfield v. Marine Power Engine Company[[44]](#footnote-44)* deals with the issue of successor liability. The plaintiff, Steve Crutchfield, was the Vice President of Sales for Marine Power Engine, Inc. (“*MP Engine*”), which sold its assets to Hirel Holdings, Inc. (“*Hirel*”) in February 1997. A few months later, Crutchfield was terminated and received a severance package, which was not fully honored. In November 1997, Crutchfield filed suit for the breach of promised severance against MP Engine, Hirel and the former MP Engine president and owner. On December 31, 1997, Hirel sold most of the MP Engine assets to the newly formed Marine Power Holding, L.L.C. (“*MP Holding*”), which was owned by a non-affiliate. In 2001, MP Engine settled with Crutchfield and judgment was entered. In 2005, in an apparent attempt to collect his judgment, Crutchfield filed a garnishment affidavit against “Marine Power Engine Company” and a customer of MP Holding. The customer and MP Holding, responding for Marine Power Engine Company, denied liability to Crutchfield.

Crutchfield contended that MP Holding was a “mere continuation” of MP Engine and liable to him under his judgment against MP Engine. The trial court agreed. On appeal, the Court of Appeals reversed, and the matter was appealed to the Oklahoma Supreme Court.

The Court noted that a company that acquires all of the assets of another company is not liable for the seller’s liabilities, except to the extent that: (a) the successor agrees to assume a liability; (b) the succession occurs by consolidation or merger; (c) the acquisition is fraudulent; or (d) the acquiring company is a “mere continuation” of the selling company.[[45]](#footnote-45)

Crutchfield claimed that Hirel was a mere continuation of MP Engine and MP Holding was a mere continuation of MP Engine through Hirel. He based his claim on evidence showing Hirel’s continued use of the “Marine Power” name on a fax and a severance check. He elicited the former president’s testimony that MP Engine ceased operations after the sale to Hirel. As to MP Holding, Crutchfield showed that it used the “Marine Power” trade name, it filled orders place by Hirel, it used a website developed by MP Engine, and it used a telephone number that had belonged to MP Engine. In the trial court’s words, “[T]o the general public, you’re still using the same information and you’re basically even representing that you are the same in what [MP Engine and MP Holding] own . . ..”

The Court held, however, that evidence of continued operations is misguided. It wrote:

“When determining whether a successor corporation is liable for the debts of a seller corporation under the mere continuation exception, a court must look to whether there is a continuation of the corporate entity rather than a continuation of business operations.” At ¶33.

The Court’s focus is essentially whether the persons controlling the seller are those that control the successor after the sale. Successor liability would apply when those controlling the seller have changed the entity to avoid its liabilities and continue to control the assets of the successor. A claimant could prove liability by showing that the seller and buyer have common ownership or management before and after the sale or that other facts indicate a sham transfer, such as the seller’s receipt of inadequate consideration for the sale.

The Court’s focus on whether the entity has truly changed is appropriate. The focus on operations is too broad. Many unaffiliated buyers acquire full operations for fair consideration. A focus on continued operations would cause these legitimate buyers to face the risks of successor liability, which would in turn discourage sales and raise prices. The penalty of successor liability should fall only on those whose purpose is to escape liabilities, and a focus on the change of entity accomplishes this goal.

The Oklahoma Supreme Court revisited the issue of reinstatement in *Williams v. Smith & Nephew, Inc*.[[46]](#footnote-46) In *Corman v. H-30 Drilling, Inc*.,[[47]](#footnote-47) the Court had ruled that a corporation whose charter was suspended for non-payment of franchise taxes must be afforded the opportunity to pay its back taxes and reinstate its charter in order to defend itself in a legal proceeding. The *Smith & Nephew* case deals with whether a corporation can assert a cause of action that accrued when the corporation was suspended.

The case involved an orthopedic surgeon who had implanted an allegedly defective medical device into several patients. Anticipating claims against him, the surgeon sued the maker of the device, Smith & Nephew, Inc., and the distributor, Dunlap Medical, Inc. Dunlap counter-claimed against Smith & Nephew, which moved to dismiss Dunlap’s claim based on the latter’s suspension. Dunlap defended by saying it had paid its delinquent taxes and was reinstated, which mooted the Smith & Nephew’s argument.

The root of Dunlap’s argument is that a reinstatement after suspension “relates back” to the point of suspension as if the charter had never been suspended. Once it was reinstated, it could maintain an action that it could not have maintained when it was suspended. Smith & Nephew argued that, since Dunlap was barred from suing during its suspension, a claim could not accrue during the suspension.

The Court sided with Dunlap. After an extensive statutory analysis, it noted that the policy considerations supported its conclusion. Denying a suspended corporation the right to sue or defend encourages payment of the delinquent taxes. What would be gained, the Court asks, if a corporation were denied rights after it had paid its taxes? The Court’s position continues the line it took in *Corman* by viewing the reinstatement and relation back language broadly and favoring a complete restoration of the corporation’s rights.[[48]](#footnote-48)

The *Inergy Propane, LLC v. Lundy*[[49]](#footnote-49) case looks for the first time at the Oklahoma statute dealing with non-solicitation covenants in employment agreements. In 2001, the Legislature added Section 219A to the statutes dealing with restrictive covenants, which prohibited non-compete covenants in employment agreements, but excepted certain non-solicitation covenants.[[50]](#footnote-50) In the following years, a few cases dealt with non-competes, but those cases were judged under the prior statutes.[[51]](#footnote-51) The *Lundy* case examines Section 219A.

Lundy sold his propane business to a predecessor of Inergy Propane.[[52]](#footnote-52) He later went to work for Inergy and signed a non-solicitation agreement that prohibited him for one year after the end of his employment from soliciting Inergy employees for other propane-related employment and for two years from soliciting any Inergy customer within 50 miles of the Inergy locations that Lundy serviced. An Inergy customer was defined as anyone who was a customer within 12 months of the end of his employment or who received a proposal within six months of the end of his employment.

When Lundy left his employment with Inergy and started his own propane business, which included former Inergy customers, Inergy sued alleging breach of the non-solicitation agreement. Lundy defended claiming that the non-solicitation was overly broad and burdensome.

In reaching its conclusions, the Court began by noting that the “rule of reason”, which had traditionally applied to restrictive covenants in Oklahoma, continued to apply to the newly enacted Section 219A.[[53]](#footnote-53) The application is important, for the briefly worded section leaves a number of questions unanswered. For example, the section does not address the non-solicitation of employees, which is commonly restricted. The section does not address the permissible term or scope of a non-solicitation covenant. Resolution of these issues would be left to the rule of reason.

In arguing that the covenant was overly broad, Lundy claimed that the non-solicitation was monopolistic and compared it to the cardiovascular surgeon’s situation in *Cardiovascular Surgical Specialists Corp. v. Mammana*.[[54]](#footnote-54) Mammana’s covenant had prohibited him from taking referrals within his market. Determining that referrals were essential to Mammana’s practice, the Court found that the covenant was monopolistic and unlawful. The prohibition against referrals differed, however, from a prohibition against soliciting former patients. Court did not void Mammana’s covenant not to solicit former patients and refused to void Lundy’s covenant on this ground.

Lundy also argued that the non-solicitation is unreasonable and urged adoption of the standards set forth in the Restatement of Contracts.[[55]](#footnote-55) The Court balked, however, about adopting the Restatement standards. In determining reasonableness, the Court said the focus should be whether the covenant has a pro- or anti-competitive effect. In other words, the focus should be on whether the covenant advances the public good and not on the effects on the employer or employee. Considering the effects on the employer or employee introduces elements, such as financial hardship, that are extrinsic to an objective determination of reasonableness. The Court concluded that the non-solicitation is a common arrangement that advances the public good and is thus reasonable.

The *Lundy* case is interesting in that it links two related understandings of the rule of reason – that applied to restraints of trade in the antitrust context and that applied to restrictive covenants such as non-competes and non-solicitations. The Court holds that the analysis – focusing on the public good – should be the same in both contexts. If properly applied, the holding is a welcome development that would bring greater consistency to the area of non-competes and non-solicitations.

[Missed **Vanguard Environmental Inc. v. Curler, 2008 OKC CIV APP 57, 190 P.3d 1158, applying rule of reason to broad non-solicitation covenant. Fischer opinion]**

**Conclusion**

We should perhaps expect that trying times would produce greater changes. In the wake of this recession, many developments are forthcoming especially on the Federal level. As the debate unfolds and amendments are passed, it will be interesting to gauge the impact of the changes. Will the markets be less volatile? Will financial institutions be safer? Will executive compensation come down? Will better corporate governance increase? We can look forward to next year and, perhaps, some answers to these questions.

Gary W. Derrick
November 25, 2009

1. Gary W. Derrick, “Recent Developments in Oklahoma Business and Corporate Law – 2007”, OBA 2007 Recent Developments (Day Two). [↑](#footnote-ref-1)
2. Lehman Brothers filed the largest bankruptcy filing in U.S. history on September 15, 2008. Lehman had over $630 billion in assets and 25,000 employees. The largest previous filing was WorldCom, whose assets before bankruptcy were just over $100 billion. “Lehman's Demise Triggered Cash Crunch around the Globe”, *Wall St. Jour.* (Sept. 29, 2008). [↑](#footnote-ref-2)
3. “On [September 16, 2008], the Federal Reserve made a bridge loan to A.I.G., the largest insurance company in the world; . . . A.I.G. has assets of over $1 trillion and over 100,000 employees worldwide. The Fed has the option to purchase up to 80% of the shares of A.I.G., is replacing A.I.G.’s management, and is nearly wiping out A.I.G.’s existing shareholders. A.I.G. is to be wound down by selling its assets over the next two years. The Fed has never asserted its authority to intervene on this scale, in this form, or in a firm so far removed from its own supervisory authority.” Stephen J. Dubner, “Freakonomics: Diamond and Kashyap on the Recent Financial Upheavals”, *NYTimes* (Sept. 18, 2008). [↑](#footnote-ref-3)
4. “Goldman Sachs and Morgan Stanley, the last big independent investment banks on Wall Street, will transform themselves into bank holding companies subject to far greater regulation, the Federal Reserve said Sunday night, a move that fundamentally reshapes an era of high finance that defined the modern Gilded Age.” Andrew Ross Sorkin and Vikas Bajaj, “Goldman and Morgan Shift Marks End of Era in Finance”, *NYTimes* (Sept.21, 2008). [↑](#footnote-ref-4)
5. Emergency Economic Stabilization Act of 2008 (the “EESA”), Division A of Public Law 110-343, 12 U.S.C. 5201 et seq. (enacted Oct. 3, 2008), which designated the bailout as the Troubled Assets Relief Program or “TARP”. The $700 billion purchase package paralleled other Federal guaranty and borrowing programs that totaled nearly $7.8 trillion. *See* Pittman, Mark and Bob Ivry, “U.S. Pledges Top $7.7 Trillion to Ease Frozen Credit”, *Bloomberg.com* (Nov. 24, 2008). [↑](#footnote-ref-5)
6. Castle, Stephen and David Jolly, “Giant Stimulus Plan Proposed for Europe”, *NYTimes* (Nov. 26, 2008); “China Seeks Stimulus”, *The Economist* (Nov. 10, 2008). [↑](#footnote-ref-6)
7. This is not to say that the current economic problems are like those of the Great Depression. The Great Depression was much worse. In 1933, unemployment was over 25% and was far higher if part-time workers are included. Between 1929 and 1933, the gross domestic product (“*GDP*”) shrank to nearly half of what it was. Exports were one-fifth of what they were in 1929. Farm mortgages were being foreclosed at the rate of 20,000 a month. Banks were entirely closed in 38 states and restricted in the other ten states. Over 5,000 banks had failed by 1933, wiping out the savings of millions of people.

In comparison, unemployment today is slightly over 10%. After solid increases in 2006 and 2007, GDP decreased 1.1% in 2008 and the 2009 decrease will be smaller. Americans have substantial savings, retirement funds, and equity in real estate. American exports are growing. *See* Gross Domestic Product releases from the Bureau of Economic Analysis; and “Freakonomics: John Steele Gordon on the Financial Mess: Greed, Stupidity, Delusion — and Some More Greed”, *NYTimes* (Sept. 22, 2008). [↑](#footnote-ref-7)
8. Much finger-pointing has occurred in the crisis with accusations of insufficient regulation. A fuller discussion of the regulatory roles reveals a more complex picture than offered by the finger-pointing. The financial crisis (as distinguished from the economic crisis) was rooted in the unprecedented growth in new financial instruments. The instruments were a response to more money, more demand for new opportunities and – as one would expect in a relatively flexible market – a growth in supply of opportunities. These developments produced a prodigious increase in worldwide wealth. The undeniable benefits of an increasingly globalized marketplace and the expansion of capitalism has given the United States and the world generally a living standard unequalled in economic history and has raised the living standards for more than a billion people in the undeveloped or developing countries of the world.

 The desire to grow created pressure to relax restraints that were in some areas regrettable. Certainly notable were the pressures on Fanny Mae and Freddie Mac to loan to broader pools of potential homeowners, which they did to their detriment. Also notable were the desires of the large investment banks (banks that do not accept customer deposits) to ease the capital requirements that would allow higher leveraging in their capital structures. Assuming they could better invest the borrowed proceeds, higher leveraging would mean higher profits for their shareholders and higher bonuses for their personnel. These large investment banks could also compete better with the proliferating hedge funds that had no capital requirements and were siphoning away investment dollars.

 But to place the role of regulation in context, it is not fair to suggest that the financial markets had become some sort of Wild West. The U.S. and world markets were better regulated than in prior decades. The accounting rules and securities laws – especially after the Sarbanes Oxley enactments – had strengthened financial reporting and increased market transparency. The U.S. regulators for commercial banks had been monitoring capital levels and asset quality for some time, and brought to bear greater sophistication and more resources, especially after the savings and loan collapse two decades before. Treasury had greater powers and there was more coordination in the international markets. *See* Berenson, Alex, “How Free Should a Free Market Be?”, *NYTimes* (Oct. 4, 2008) (noting that two critical components of economic activity ‑ unemployment and productivity – are better today than in several periods following the Great Depression). [↑](#footnote-ref-8)
9. The **Financial Stability Improvement Act of 2009 [dealing with systemic financial risks and “too big to fail” institutions];** the **Over-the-Counter Derivatives Markets Act of 2009 [new regulations for trading derivatives];** t**he Private Fund Investment Advisers Registration Act of 2009 [extending registration requirements for investment advisors];** the **Federal Insurance Office Act of 2009 [creating Federal oversight of the insurance industry];** t**he Investor Protection Act of 2009 [extending the SEC’s authority and funding];** **H.R. 3126, Consumer Financial Protection Agency Act of 2009 [creating the Consumer Financial Protection Agency];** and the **Enhanced Accountability and Transparency in Credit Rating Agencies Act [strengthening regulation of credit rating agencies]. The House Committee has many other bills dealing with home mortgages, executive compensation, and the Federal stimulus measures.**  [↑](#footnote-ref-9)
10. The Restoring American Financial Stability Act of 2009 (Committee draft). The Senate Committee has combined into a single bill topics generally addressed in the House Committee’s seven bills. [↑](#footnote-ref-10)
11. Office of the Comptroller of the Currency, Quarterly Report on Bank Trading and Derivatives Activities (Second Quarter 2009). [↑](#footnote-ref-11)
12. In popular culture, Michael Moore’s 2009 movie, *Capitalism: A Love Story*, garnered headlines as it attacked capitalism as undemocratic. A more discerning cultural critique could be found in Tom Wolfe’s 1987 *Bonfires of the Vanities*, which excoriates a young Wall Street investment banker – a “master of the Universe” ‑ for his extravagant and dissolute lifestyle. [↑](#footnote-ref-12)
13. Complaints about executive compensation, and attempts to control it, are nothing new. In 1993, the Internal Revenue Service capped the deductibility in public companies of executive compensation exceeding $1 million. Internal Revenue Code of 1986, §162(m). The section was intended to reign in executive compensation by eliminating the tax-deductibility of executive compensation above $1 million unless the excess compensation was performance-based. The Securities and Exchange Commission has long sought improved executive compensation disclosures. The SEC adopted new disclosure requirements for executive compensation in 1992 and in 1993. Executive Compensation Disclosure (Rel No. 6962, eff. Oct. 21, 1992) and Executive Compensation Disclosure, Securityholder Lists and Mailing Lists (Rel No. 7032, eff. Nov. 22, 1993). Later major revisions occurred in 2006. Executive Compensation and Related Person Disclosure (Rel. Nos. 33-8732A; 34-54302A, eff. Nov. 6, 2006) (substantial revisions of disclosure regulations under Reg. S-K, including the adoption of a “compensation discussion and analysis” section for proxy statements). The SEC’s mandate for better transparency arguably focused a brighter light on executive pay. [↑](#footnote-ref-13)
14. The Federal government’s $700 billion bailout program, otherwise known as the Troubled Assets Relief Program or “TARP”, enacted as Emergency Economic Stabilization Act of 2008 (the EESA), 12 U.S.C. 5201 et seq. The regulations are found at Interim Final Rule, 31 CFR Part 30, 73 Fed. Reg. 62205 (Oct. 20, 2008). [↑](#footnote-ref-14)
15. *See* “Special Master for TARP Executive Compensation Kenneth R. Feinberg, Testimony before the House Committee on Oversight and Government Reform” (Oct. 28, 2009). [↑](#footnote-ref-15)
16. *See* press release, Board of Governors of the Federal Reserve System (Oct. 22, 2009); “Proposed Guidance on Sound Incentive Compensation Policies”, Fed. Reg. 74:206, pgs. 55227-55238 (Oct. 27, 2009). [↑](#footnote-ref-16)
17. *See gen*., Steven N. Kaplan, testimony on “Empowering Shareholders on Executive Compensation and H.R. 1257: the Shareholder Vote on Executive Compensation Act”, before the House Committee on Financial Services, March 8, 2007 (providing overview of CEO compensation). Kaplan notes in his testimony that the top 25 hedge fund managers earned more in 2004 than all 500 CEO’s in the S&P 500; the number of professional baseball, basketball, and football players earning more than $5.0 million annually grew almost 10-fold from 1994 to 2004; top lawyers saw their pay increase by more than 2.5 times; while the pay of S&P 500 CEO’s increased three-fold over the same period (and declined since 2000). For a divergent view, *see* Lucian A. Bebchuk, *Pay without Performance*, Harv.Univ.Press(2004) (with Jesse Fried). [↑](#footnote-ref-17)
18. For example, IRC §162(m), which eliminated the deduction of executive compensation over $1.0 million, was intended to slow the growth of executive compensation. It exempted performance-based compensation. The exemption led to greater use of performance-based compensation, which contributed to the dramatic increase in executive compensation. Rather than slowing compensation growth, the law unwittingly increased it. *See* Wallace, James S. and Kenneth R. Ferris, “IRC Section 162(m) and the Law of Unintended Consequences” (Nov. 2006) (available at SSRN: http://ssrn.com/abstract=942667). [↑](#footnote-ref-18)
19. The taxation of hedge fund managers has become a political issue. Some changes occurred in 2008 and others may follow. The Emergency Economic Stabilization Act of 2008 eliminated the deferral of management fees. The Alternative Minimum Tax Relief Act of 2008 contained a provision that would have taxed income and gain allocated to “carried interests” at ordinary income rates. That Act passed the House of Representatives in June 2008, but died in the Senate. The current administration’s 2010 budget would tax carried interests at ordinary income rates. “General Explanations of the Administration’s Fiscal Year 2010 Revenue Proposals” (avail. at <http://www.treas.gov/offices/tax-policy/library/grnbk09.pdf>). H.R. 1936 is pending before the House Ways and Means Committee, which would tax income from “investment services partnership interest” at ordinary income rates and would subject the income to self-employment taxes. [↑](#footnote-ref-19)
20. “Chief executives are being lured by private equity-owned businesses, which offer higher pay and freedom from scrutiny of shareholders and regulators; executives at privately held firms secure ownership positions that can turn into bountiful riches when businesses are sold or go public again. [The private firms’] willingness to pay big money may bolster the argument of defenders of corporate pay practices who contend that companies have been paying going rate in market to attract top talent.” Sorkin, Andrew Ross, “Private Firms Lure Chief Executives with Top Pay”, *NYTimes* (Jan. 8, 2007).

 Earlier this month, the Supreme Court heard arguments in *Jones v. Harris Associates*, No. 08-586, which considers whether the fees charged a mutual fund by its investment advisor were excessive. An aspect of the case involves the board’s role in determining appropriate compensation. The arguments are outlined and briefs available at <http://www.scotuswiki.com/index.php?title=Jones%2C_et_al.%2C_v._Harris_Associates>.

 For more on executive compensation, see the Harvard Law School Corporate Governance Blog at <http://blogs.law.harvard.edu/corpgov/>. [↑](#footnote-ref-20)
21. S. 569, also known as the Levin-Grassley-McCaskill bill. [↑](#footnote-ref-21)
22. The bill defines “beneficial owner” as an individual who can control, manage, or direct the entity. It excepts publicly held companies, which currently disclose beneficial ownership above certain levels. [↑](#footnote-ref-22)
23. In supporting passage, Senator Levin stated that “the Department of Treasury's Financial Crimes Enforcement Network identified 768 incidents of suspicious international wire transfer activity involving U.S. shell companies.” The number is notable in that it counts wires that are merely “suspicious”, as opposed to “illegal”, and the number is slight in comparison to the total number of international wires. [↑](#footnote-ref-23)
24. Public companies must disclose beneficial ownership above certain levels. The determinations are often complicated and may require subjective legal determinations that non-lawyer owners are ill-equipped to make. [↑](#footnote-ref-24)
25. *See* Confessore, Nicholas, “Homeless Organization Is Called a Fraud”, *NYTimes* (Nov. 24, 2009) (regarding the UHO); Andrea Elliott, “Charges Detail Road to Terror for 20 in U.S.”, *NYTimes* (Nov. 23, 2009) (fake Somalia charity); and **Michael B. Farrell, “**What's known about Iran-linked Alavi Foundation?”, *Christian Science Monitor* (Nov. 14, 2009). [↑](#footnote-ref-25)
26. For those interested in the “Federalization” of corporate law, see Leo E. Strine Jr., “Breaking the Corporate Governance Logjam in Washington”, 63:4 Bus.Law 1073 (Aug. 2008). [↑](#footnote-ref-26)
27. House Bill 2148, authored by Representative Don Armes and Senators Patrick Anderson, Earl Garrison, Sean Burrage and Tom Ivester. [↑](#footnote-ref-27)
28. While the offer and sale of cooperative interests is exempt from securities registration under both Federal and state law, the offer and sale of interests remain subject to the antifraud provisions of the Securities Act of 1933 and the Oklahoma Securities Act. *See* 15 U.S.C. §77a(a)(5)(B); 71 O.S. §1-201.8. [↑](#footnote-ref-28)
29. The directors and officers of a cooperative are subject to the same fiduciary obligations that regulate managers of other legal entities, such as business corporations, limited liability companies and partnerships. *See, e.g.,* *Hargrave v. Canadian Valley Elec. Co-op., Inc.*, 792 P.2d 50 (Okla. 1990). [↑](#footnote-ref-29)
30. Okla.Stat., tit. 18, §§421 – 436. The U.S. Supreme Court criticized the Cooperative Corporations Act for retaining for-profit corporate concepts and failing to implement fully the cooperative principles of a proper cooperative act:

“A corporation organized under the [Act] has capital stock, which, up to a certain amount, may be subscribed for by any person, firm or corporation; is allowed to do business for others; to make profits and declare dividends, not exceeding eight percent per annum, and to apportion the reminder of its earnings among its members ratably [based on their patronage]. Such a corporation is in no sense a mutual association.”

*Frost v. Corporate Commission of Oklahoma*, 278 U.S. 515 at 524, 49 S. Ct. 235, 73 L. Ed. 483 (1929). Ironically, by blending cooperative principles and for-profit corporate concepts, the ULCAA takes an approach that the Court in its majority opinion had criticized. In a dissenting opinion, however, Justice Brandies wrote in prescient fashion, “That no one plan of organization is to be labeled as truly co-operative to the exclusion of others was recognized by Congress in connection with co-operative banks and building and loan associations [citation omitted]. With the expansion of agricultural co-operatives, it has been recognized repeatedly.” [↑](#footnote-ref-30)
31. Okla.Stat., tit. 2, §§17-1 – 17-24. Other special purpose cooperative provisions are found in Title 18, §§437 through 437.29 [Rural Electrification]; §§438.1 through 438.35 [Telephone Cooperative Corporations]; and §§439.1 and 439.2 [Grain Cooperatives]. [↑](#footnote-ref-31)
32. *Id*. §17-24. [↑](#footnote-ref-32)
33. 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 483 (1929). [↑](#footnote-ref-33)
34. 281 U.S. 431, 50 S. Ct. 397, 74 L. Ed. 945 (1930). *See also; Southwestern Cotton Oil Co. et al. v. Farmers Union Co-Op. Gin Co. et al*., 1933 OK 371, 165 Okla. 31, 24 P.2d 658 (Okla. 1933); and *Choctaw Cotton Oil Co. v. Corporation Commission*, 1926 OK 516, 121 Okla. 51, 247 P. 390 (Okla. 1926) (cases denying claims like those in *Lowe* that the payments of patronage dividends by a cooperative cotton gins were illegal when the rates for cotton ginning were fixed by the Corporation Commission; no constitutional violation occurs when competitors were free to distribute their own profits in a like fashion). [↑](#footnote-ref-34)
35. 792 P.2d 50 (Okla. 1990). [↑](#footnote-ref-35)
36. The same is true for limited liability companies, partnerships or other forms of associations used for profit. [↑](#footnote-ref-36)
37. 2 O.S. §§17-3.A.3 and 17-13.C. [↑](#footnote-ref-37)
38. Enacted in 1922, the Capper-Volstead Act exempts most agricultural cooperatives from Federal antitrust laws. 7 U.S.C. §291. The Coop Marketing Act exempts cooperatives formed under its provisions from the Oklahoma antitrust laws. 2 O.S. §17-21. [↑](#footnote-ref-38)
39. 79 O.S. §§201 – 212. [↑](#footnote-ref-39)
40. 2 O.S. §17-21. [↑](#footnote-ref-40)
41. Section 441-818(a) imposes duties and (b) affords protections. The corporate governance structure rests largely on the common law and less so on statutory authority. Thus, it is important to note that Section 441-818 applies the “the law applicable to directors of entities organized under the Oklahoma General Corporation Act” and not the duties and protections provided under the Oklahoma General Corporation Act.

 The Oklahoma ULCAA also incorporates the Oklahoma General Corporation Act by reference to regulate conflicts of interest (§441-818) and indemnification (§441-901). [↑](#footnote-ref-41)
42. *See Hargrave v. Canadian Valley Elec. Co-op., Inc*., 792 P.2d 50 (Okla. 1990). [↑](#footnote-ref-42)
43. *See* Section 441-113(b)(10), which permits the limitations in a cooperative’s organic rules. [↑](#footnote-ref-43)
44. 2009 OK 27, 209 P.3d 295 (Okla.). [↑](#footnote-ref-44)
45. Citing *Pulis v. United States Elec. Tool Co*., 1977 OK 36, 561 P.2d 68. [↑](#footnote-ref-45)
46. 2009 OK 36, **212 P.3d 484. Courts have addressed reinstatement several times in recent years. See** *Specific Systems of Tulsa, Inc. v. American Bank & Trust Company*, 51 P.3d 1228 (Okl.C.A 2002) (dealing with a corporation’s power to refile a dismissed case during its suspension); *Corman v. H-30 Drilliing, Inc*., 2001 OK 92, 40 P.3d 1051 (dealing primarily with charter reinstatement and ability of corporation to defend), and *K.J. McNitt Construction, Inc. v. Economopoulos*, 2001 OK CIV APP 45, 23 P.3d 983 (dealing primarily with director and officer liability during charter suspension). [↑](#footnote-ref-46)
47. *Id.* [↑](#footnote-ref-47)
48. Judicial attitudes have not always been so accommodating. As recently as Century Investment Group, Inc. v. Bake Rite Foods, Inc., **2000 OK CIV APP 48, 7 P.3d 510, the Court of Appeals wrote, “**Bake Rite argues that Century employed an ambush tactic . . .. Century did ambush Bake Rite. However, under these facts, it is an ambush countenanced by the law.” The *Specific Systems* court distinguished *Bake Rite* on the facts, and the hard-nosed attitude in *Bake Rite* would appear to be a thing of the past. [↑](#footnote-ref-48)
49. 2009 **OK CIV APP 8** , \_\_ P.3d \_\_ [↑](#footnote-ref-49)
50. 15 O.S. §219A, which provides:

A. A person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer.

B. Any provision in a contract between an employer and an employee in conflict with the provisions of this section shall be void and unenforceable. [↑](#footnote-ref-50)
51. *See* *Cardiovascular Surgical Specialists, Corp. v. Mammana*, 2002 OK 27, 61 P.3d 210; ***Vanguard Environmental Inc. v. Curler*, 2008 OK CIV APP 57, 190 P.3d 1158.** The prior statutes theoretically permitted employment non-competes if “reasonable”, although application of the reasonableness standard had voided non-competes in the litigated cases, which gave rise to a perception that Oklahoma law prohibited non-competes. A more complete treatment of thenon-compete cases and statutes can be found in Gary W. Derrick and Irving L. Faught, “New Developments in Oklahoma Business Entity Law”, 56 Okla.L.Rev. 259, 272-281 (2003). [↑](#footnote-ref-51)
52. Lundy has also entered into a 15-year non-compete when he sold his business. The case discusses this non-compete at some length. Since the non-compete was given in the sale of a business, which has long been permitted under Section 218, the non-compete did not invoke the new Section 219A, which covers only non-competes in employment. [↑](#footnote-ref-52)
53. *Id*. at ¶¶24-28. The Court described the rule of reason as asking three questions: “(1) what is the relevant market; (2) what is the effect of the restraint on competition in that market; and (3) if the effect is anticompetitive, are there any pro-competitive benefits that outweigh the anticompetitive effects.” ¶25. [↑](#footnote-ref-53)
54. 2002 OK 27, 61 P.3d 210. [↑](#footnote-ref-54)
55. Restatement (Second) of Contracts, §188 (1981), which states that a restrictive covenant is reasonable if: (1) it is no greater than necessary to protect the employer from unfair competition, (2) does not impose an undue hardship on the employee, and (3) is not injurious to the public. [↑](#footnote-ref-55)