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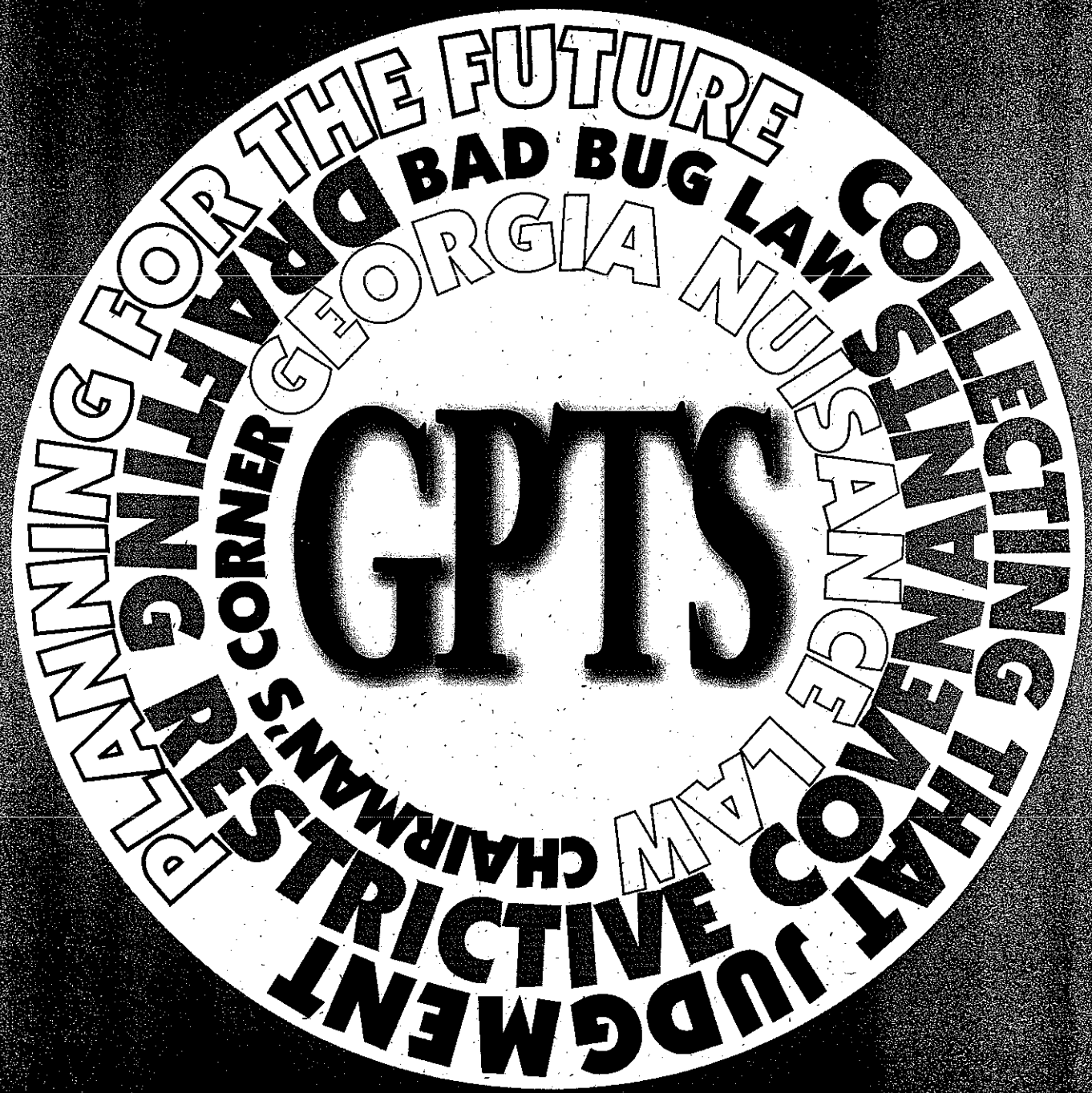

Drafting Restrictive Covenants In Employment Agreements From A Litigator's Perspective

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In many industries, personnel working at all levels within an organization are asked to sign generic employment agreements containing restrictions on post-employment conduct, without much thought being given to whether the restrictions are enforceable, sensible or even necessary as to any particular employee. This article will address some of the considerations that may bear on both the need for and the enforceability of restrictive covenants with respect to various types of personnel.[2]

I.
The Basics Applicable to all Restrictive Covenants in the Employment Context.

Georgia has a thick body of appellate case law interpreting the enforceability of restrictive covenants in employment agreements. Although cases sometimes turn on fine points, there are certain rules that Georgia's courts universally apply.

A. Consideration

Under black letter contract law, an employment agreement containing restrictive covenants, like any other contract, must be supported by consideration. Since Georgia is an "at-will" employment state, employment, or continued employment, constitutes sufficient consideration for the employee's agreement to be bound by post-employment restrictive covenants. An employer can decline to hire a candidate, or terminate an employee, for refusing to execute an employment agreement containing restrictive covenants.[3]

B. The Covenant Must be Narrowly Drawn and Reasonable.

The covenant must be narrowly drawn to protect the employer's business interests, while not preventing the employee from earning a living after termination of the employment.[4] Covenants which are overbroad will not be enforceable.

C. The Covenant Must Be Written

Georgia's courts must have a written covenant to review for enforceability. A verbal agreement will not be enforced.[5]

D. Strict Scrutiny

Because restrictive covenants partially restrain trade, Georgia's courts will apply strict scrutiny when evaluating the enforceability of such covenants.[6]

E. No Blue Pencil

Georgia's courts will not attempt to rewrite a vague, ambiguous or overbroad covenant to render it enforceable. The covenant must be enforceable as written, or it will be stricken by the court.[7]

F. Georgia's Courts Will Always Apply Georgia Law, Regardless of the Choice of Law Specified in the Agreement

If the employee governed by the agreement lives in Georgia, Georgia's public policy dictates that a Georgia court must apply Georgia

law to interpret the restrictive covenants.[8] Even if the employee moves to Georgia after resigning the employment in connection with which he signed the restrictive covenant agreement, Georgia law will still be applied to the interpretation of the restrictive covenants. In Convergys v. Keener[9], a case in which the employee moved to Georgia to accept a position with responsibilities that would violate the restrictive covenants he had executed in favor of his prior employer, the Georgia Supreme Court answered the certified question whether a Georgia court must first ascertain whether Georgia has a materially greater interest in applying Georgia law, before the court applies Georgia law to invalidate a covenant not to compete. The Georgia Supreme Court answered this question in the negative, confirming that Georgia's courts must always apply Georgia law to the interpretation of a covenant not to compete where the employee is a Georgia resident – even if the employee has moved into the state for the purpose of violating the covenant, and even if the employment agreement specifies that another state's law will govern.

G. Georgia's Courts Will Honor Forum Selection Clauses.

Although, as is noted above, Georgia's courts will ignore a choice of law provision and apply Georgia law for public policy reasons, Georgia's courts generally will honor forum selection clauses in employment agreements.[10] Thus, a restrictive covenant that might not be enforceable under Georgia law could survive if the agreement contained a forum selection clause specifying exclusive venue in a more employer-friendly state.

Georgia's courts will in some instances enforce a forum selection clause set forth in an agreement that is a companion to the agreement containing the restrictive covenants at issue. The Court of Appeals recently enforced a forum selection clause set forth in a merger agreement where litigation ensued over an employment agreement that was an exhibit to the merger agreement.[11] In support of this decision, the Court noted that agreements that are executed contemporaneously are to be construed as a whole.

H. Unenforceable Restrictive Covenants Will Fatally Taint Other Restrictive Covenants in the Same Agreement.

If an agreement contains an unenforceable covenant not to compete or an unenforceable covenant not to solicit customers, that covenant will fatally taint other enforceable covenants, and the court will not enforce any covenants.[12] The Georgia Court of Appeals has recently suggested that even covenants not to solicit other employees can fatally taint covenants not to compete and not to solicit customers - and vice versa.[13]

II.
Covenants Not to Solicit Customers

A covenant not to solicit customers is an agreement in which the employee promises, or covenants, not to solicit business from the employer's customers after termination of the employee's relationship with the employer. The covenant must be reasonable in scope and duration in order to be enforceable.

A. Covenant Not to Solicit Customers Must Be Reasonable in Scope

A covenant not to solicit customers must be restricted in scope to customers or prospective customers with which the employee has had "material contact", which is defined as contact either on behalf of the employer or in an effort to further the employer's business.[14] Courts will refuse to enforce a covenant not to solicit those customers with whom the employee simply became acquainted during the employment relationship, on the ground that such a broadly-worded covenant would, for example, prohibit the employee from soliciting business from a neighbor who just happened to also be a customer of the company with whom the employee had never interacted for business purposes, but with whom the employee had become acquainted while employed with the company.[15]

Similarly, a covenant not to solicit customers that bars solicitation of business from clients whose names become known to the employee during employment, without the covenant specifying how those names must become known to the employee in order for the covenant to apply, is overbroad.[16] But, as will be discussed below in the analysis of nondisclosure agreements, there may be other ways to protect such information.

The covenant must describe the nature of the prohibited solicitation. Thus, for example, a covenant not to solicit customers will not be enforced when the covenant prohibits all solicitation of clients of the company with which the employee had had material contact during the twelve months preceding termination, without also specifying the nature of the prohibited solicitation.[17] Since even solicitation of company customers for business unrelated to the company's business would be prohibited under such a covenant, the covenant would be overbroad.

The scope of the covenant should also be restricted to those customers with which the employee had business contact within a short period of time prior to termination, such as one or two years. Reaching further back in time is unreasonable and may render the covenant unenforceable.[18]

B. Covenant Not to Solicit Customers Must Be Reasonable in Duration

Although it is not clear that the Georgia appellate courts have ever specified an outer duration for the enforceability of a covenant not to

solicit customers, the rule of thumb is that three years or longer is too long, and that one year or less is generally reasonable. The large grey area in between is a source of litigation. In some instances, depending on the nature of the prohibited conduct, the level of skill required for the position, and characteristics of the industry, only a covenant of a very short duration will be deemed reasonable. This may be particularly true in an industry in which information and contacts are considered "stale" after merely a few months, or where the employee is low ranking and is therefore unlikely to have a significant impact on the company's customer relationships.

Employers who require personnel to sign a covenant not to solicit customers should consider the reasons behind the duration they select, as the attorney attempting to enforce the covenant in an injunction hearing will need to demonstrate to the judge that the duration of the covenant is reasonable under the circumstances. Employers should take into consideration the typical period of retention of clients within their industry, as well as the nature of the employee's contacts with clients, in determining the duration necessary to protect the employer from a former employee's potential efforts to divert clients. The employer should be able to articulate these factors if called upon to do so in an injunction hearing.

C. Former Employee Cannot Be Prohibited From Accepting Unsolicited Business

Although the employer may bar the employee from soliciting business from the employer's customers with whom the employee had material contact, the employer may not bar the employee from accepting unsolicited business from those same customers.[19] There will, however, likely be a jury question as to who solicited whom, in the event that the matter proceeds to litigation.

III.
Covenants Not to Solicit Employees

Covenants not to solicit employees are often used to prevent a key employee from departing the company and taking his entire team with him. A duration of two years or less will often be enforced if deemed reasonable under the specific circumstances of the case.

Historically, the case law has not required that the restriction be limited to solicitation of those company employees either with whom the employee has had some interaction, or within a specified territory with some relationship to the employee. The Georgia Court of Appeals, however, recently struck down a covenant not to solicit employees because (1) it contained no territorial restriction, and (2) there was no evidence that the employee at issue had relationships with other employees located outside his geographic area.[20] Therefore, it would be wise to restrict the scope of any such covenant to those employees who are either within the employee's geographic area or with whom the employee had business contact.

Similarly, it would be wise to follow (with covenants not to solicit employees) the trend identified in case law governing covenants not to solicit customers, and limit the scope of the covenant to personnel with whom the employee had business relationships during the one year just prior to termination of the employment relationship.

As is noted previously, the penalty for disregarding these rules may be a refusal by the court to enforce the covenant not to solicit employees, and a refusal by the court to enforce any other restrictive covenants in the agreement.[21]

IV.
Covenants Not to Compete

For reasons which will be explained below, covenants not to compete have limited usefulness in a world in which many services can be performed at remote locations. They nevertheless warrant discussion, because much of the case law governing restrictive covenants has addressed covenants not to compete.

In a covenant not to compete, the employee covenants, or promises, that he or she will refrain from competing with the employer in a particular line of business, within a specified geographic area, for a specified period of time. The scope, territory and duration of the covenant must each be reasonable. Drafting an unenforceably overbroad covenant not to compete purely for its *in terrorem* effect will backfire on the employer, as the unenforceable covenant will fatally taint the other restrictive covenants in the employment agreement, and none will be enforceable.[22]

The covenant must be tailored to the specific responsibilities and skills of the employee. It must balance the employee's right to earn a living against the employer's interest in protecting the customer relationships which the employee has been expected to cultivate on the employer's behalf.[23]

A. Territorial Restriction Must Be Reasonable

Of particular concern to many companies may be the fact that Georgia's courts require a specification of a geographic territory in a covenant not to compete, and the territory cannot exceed reasonable boundaries. This is often difficult to accomplish in an era of telecommuting, when some employees can work productively at a computer many miles from the territory in which their customers are located.

1. Territorial Restriction Must Be Tied to Employee's Actual Territory

The covenant not to compete must be restricted to the territory in which the employee actually operates on the employer's behalf.

Inclusion of geographic areas outside the employee's area of responsibility will fatally taint the covenant. Failure to modify the covenant when an employee's territory changes, such that the covenant identifies as restricted territory locations in which the employee no longer works, will fatally taint the covenant. Thus, if the employee is transferred after execution of an employment agreement, the employee should be required to execute a new employment agreement, with an updated territorial restriction in the covenant not to compete, soon after the transfer is complete.[24]

A covenant not to compete restricting the former employee's activities to the company's territory, without tying the restriction to the territory in which the employee operated on behalf of the company, will be overbroad and unenforceable.[25]

2. Territorial Restriction Must Be Narrow

A territorial restriction encompassing the entire United States, or the entire world, will be overbroad and unenforceable.[26] As a result, it may be impossible in some instances to draft a covenant not to compete that is both enforceable and useful. For example, a software developer bound by a covenant not to compete could simply either move his offices to a point just beyond the restricted territory, or telecommute, and continue to compete without a pause. The software developer would be in full compliance with the covenant, but could continue to harm the employer's business.

3. Territorial Restriction Must Be Determinable When the Covenant is Signed

It is a basic tenet of contract construction that a contract cannot be formed in the absence of a meeting of the minds. Thus, it is logical that a territorial restriction in a covenant not to compete must be "knowable" at the time the agreement is executed. For this reason, a covenant which specifies as its geographic territory a particular radius of the employer's principal place of business as of the date the agreement is terminated will be unenforceable, because the employee cannot know, at the time the agreement is executed, where the employer's principal place of business will be as of the date of termination, and therefore cannot consent to a restriction on unknowable future conduct.[27]

Where the territorial restriction specifies a radius of the employer's offices in a particular city, but does not specify a street address, the restriction is likewise "unknowable" at the time the agreement is executed, because the employer's offices within that city could change during the term of the agreement. Thus, the restriction is overbroad and the covenant is not enforceable.[28] If, however, the employment agreement is modified to specify office locations, including physical addresses, the territorial restrictions will become "knowable", and the covenant not to compete will be enforceable.[29]

Similarly, where a covenant not to compete specifies a territory which will grow during employment, or which will include territory added as a result of a merger or change in control of the employer, the territory will be "unknowable" when the agreement is signed, and the covenant will be unenforceable.[30]

B. Scope Must be Reasonable

The covenant not to compete should only restrict activities which mirror those engaged in by the former employee on the employer's behalf. Thus, a restriction barring a former painter from also working as a sales person in the decorative painting business was deemed to be overbroad and unenforceable.[31] Restricting a former mid-level manager from owning a competing business would be overbroad.[32] Broader restrictions on higher level managers are easier to justify.

A common mistake is to restrict competition in "any capacity." Such language is overbroad and will virtually always render the covenant not to compete unenforceable.[33] A possible exception to this rule may apply when the covenant also includes a very detailed description of the prohibited services. For example, a covenant not to compete barring solicitation by a former broker of securities transactions or brokerage services was recently found not to be overbroad despite barring such solicitation by the former broker acting in the capacity of an employee, officer, director, or stockholder of a corporation, when the broker had held none of these positions with his former employer.[34] The court's rationale was that the scope was adequately limited to "solicitation of securities transactions or brokerage services" – the broker's former job description - such that the title to be held by the broker at the time he engaged in the restricted competitive behavior should not have a bearing on whether the covenant was enforceable.

When evaluating the enforceability of a covenant not to compete, courts will occasionally look beyond the four corners of the agreement to examine the factual context in which the parties have operated.[35]

C. Duration Must be Reasonable

As with other restrictive covenants, the duration of the covenant not to compete must be reasonable. Counsel for the employer will need to be able to articulate to a court the reasons the specified duration is necessary to protect the employer in the event that the employer ever needs to enforce the covenant. Practitioners who choose to draft covenants not to compete should select the

shortest duration that will adequately protect the employer, bearing in mind the rule of thumb that one year is generally acceptable, three years is generally too long, and the enforceability of any covenant lasting between one year and three years will depend on the employee's specific circumstances.

D. Covenant Not to Compete in Employment Agreement Executed In Anticipation of Acquisition of Ownership Interest Receives Strict Scrutiny

Restrictive covenants in the context of a partnership[36] or a sale of a business[37] receive lesser scrutiny than those in the employment context. Where an employment agreement has been executed in anticipation that the employee will become a shareholder of the employing business, however, the restrictive covenants in the employment agreement likely will still be subjected to strict scrutiny.[38]

V.
Nondisclosure Agreements

A properly drafted nondisclosure agreement ("NDA") can fulfill the purpose of a covenant not to solicit customers, by prohibiting the employee from using or disclosing the contents of confidential company records (including customer lists) for purposes unrelated to the company's business needs. The effect can be to deprive a departing employee of the ability to use confidential company information to solicit business from the company's customers for the benefit of his own competing business.

A well-crafted NDA typically encompasses any information, regardless of whether it is in written form, which is (1) important to the operation of the business, and (2) the subject of efforts to maintain its secrecy. The NDA should protect any such information that does not satisfy the statutory definition of a trade secret.[39] Examples of information that may need to be included in an NDA are customer and vendor contact information, marketing information, financial records (including pricing and profit margins for various products or services), plans for business and product expansions, business models, and the like, as well as industry-specific information. As with the other restrictive covenants addressed in this article, the NDA must clearly specify what it covers, and should be tailored to the specific needs of the business. Any ambiguity can make it difficult to enforce the NDA in court.

A. The NDA Must Specify a Reasonable Duration

An NDA must have a specified duration in order to be enforceable with respect to any information that is not a trade secret.[40] The duration must be reasonable, with reasonableness dependent on the nature of the information to be protected and the length of time needed to protect the employer from the disclosure of that information. Courts have often endorsed a two-year duration. However, in an industry in which technological advances or a fast sales pace render certain types of information obsolete in a matter of months, a two-year duration may be unreasonably long. In contrast, in an industry in which little changes over several years, an argument could be made that a much longer duration may be necessary for the protection of certain information. The decision as to the length of the NDA should be made carefully on the basis of the type of information to be protected and the characteristics of the industry. The employer's counsel should be conservative in determining the necessary duration in order to ensure the enforceability of the NDA.

B. Use of an NDA in Lieu of, or in Addition to, a Covenant Not to Compete or Not to Solicit Customers.

The Georgia Supreme Court has, on at least one occasion, treated an NDA as an enforceable covenant not to compete without a geographic limitation.[41] In that case, a former employee had taken and was using confidential information belonging to his former employer in order to compete with the former employer. Although there was no enforceable covenant not to compete in place, the former employee had executed an enforceable NDA which encompassed information about the employer's customers. The Georgia Supreme Court enforced the NDA so as to bar the former employee from using confidential information belonging to the former employer to compete with the former employer. In other words, the NDA effectively became an enforceable covenant not to compete with no territorial restriction. Although the author is unaware of any more recent cases in which an NDA has been effectively converted into an enforceable covenant not to compete, such a theory should be considered in instances in which the employee signed only an NDA and no other covenant.

VI.
Enforcement Of Covenants

Although Georgia's courts recognize each of the four types of restrictive covenants addressed in this article, in most cases the practitioner will be selecting from among covenants not to solicit customers, not to solicit personnel, and not to disclose confidential information. A covenant not to compete will rarely be of benefit to the employer, and the existence of an unenforceable covenant not to compete in the agreement will render the other covenants unenforceable.

Assuming that (1) enforceable covenants have been drafted, (2) the covenants are not tainted by any unenforceable covenants in the same agreement, and (3) the employee leaves and attempts to violate the covenants, the employer's logical next step will be to seek injunctive relief from a court that has jurisdiction and venue over the former employee. Likewise, assuming the em-

ployee wants to engage in conduct that would violate the covenants and believes that the covenants are not enforceable, the employee may be in a position to seek declaratory relief in which a Georgia court will declare that the covenants are not enforceable. In either situation, a court will be asked to provide equitable relief. The Georgia Court of Appeals recently held that a permanent injunction may bar a former employer from enforcing restrictive covenants in an employment agreement, even in states other than Georgia that are referenced in the covenants.[42] The Court of Appeals first applied Georgia law to declare that restrictive covenants in an employment agreement specifying a Florida choice of law, but binding a Georgia resident, were not enforceable as a matter of Georgia public policy. Because the unenforceable covenant included Florida within its territory, the Court of Appeals held that the injunction against enforcement of the covenant must also encompass the Florida portion of the territory. The injunction thus prevented the employer from continuing pending Florida litigation over the covenant, and thereby protected against the possibility of an inconsistent result in another jurisdiction.

Although this interpretation is now the law in Georgia's state court system, the U.S. Court of Appeals for the Eleventh Circuit has rejected this approach.[43] Instead of seeking injunctive relief, a party in federal court that is challenging the enforceability of a restrictive covenant encompassing territory located in another state may only seek a declaratory judgment that the restrictive covenant is not enforceable, as the Eleventh Circuit limits the applicability of an injunction to the state in which the litigation is pending. The Eleventh Circuit leaves it to the courts of the other state(s) referenced in the covenant to reach their own interpretation of the declaratory judgment, and to enter injunctive relief only to the extent that the other courts deem appropriate.

Conclusion

The decision regarding which restrictive covenants to use, what future conduct to restrict, and how long to restrict the conduct, must be made with the specific facts of both the employer's and the employee's situation in mind. If the covenants are properly drafted, they will address the employer's specific needs and survive judicial scrutiny, thereby providing strong protections against efforts by a former employee to divert customers, personnel or confidential information to the employee's new endeavor. If the covenants are poorly drafted, they may be unenforceable, or – if enforceable – may simply fail to provide the protections the employer needs.

Endnotes

1 *The contents of this article are not intended to provide legal advice, but merely to provide a general analysis of the subject at hand. The author gratefully acknowledges the assistance of Steven W. Hardy in the preparation of this article.*

2 *Restrictive covenants in the contexts of partnership agreements or the sale of a business are beyond the scope of this article. Restrictive covenants in independent contractor agreements are afforded the same treatment as restrictive covenants in employment agreements. See, e.g., Watson v. Waffle House, 253 Ga. 671 (1985). This article will refer to both employment and independent contractor agreements as "employment agreements."*

3 *See Griffin v. Vandegriff, 205 Ga. 288 (1949)*

4 *Howard Schultz & Assoc. v. Broniec, 239 Ga. 181, 186 (1977); see Sysco Food Svcs. v. Chupp, 225 Ga. App. 584, 586 (1997).*

5 *Pope v. Kem Mfg. Corp., 249 Ga. 868, 869-70 (1982).*

6 *Howard Schultz, 239 Ga. at 186 ; see also Ga. Const. 1983, Art. III, VI, V(c).*

7 *WAKE Broadcasters v. Crawford, 215 Ga. 862, 864 (1960); Howard Schultz, 239 Ga. at 186.*

8 *See Nasco v. Gimbert, 239 Ga. 675, 676 (1977).*

9 *276 Ga. 808 (2003).*

10 *See Iero v. Mohawk Finishing Prod., 243 Ga. App. 670 (2000).*

11 *SR Business Svcs. v. Bryant, 267 Ga. App. 591 (2004).*

12 *Adv. Tech. Consultants v. Roadtrac, LLC, 250 Ga. App. 317, 320 (2001) (en banc).*

13 *See Dent Wizard Int'l. Corp. v. Brown, 272 Ga. App. 553 (2005).*

14 *See W.R. Grace v. Mouyal, 262 Ga. 464, 467, n.3 (1992); see also Capricorn Systems v. Pednekar, 248 Ga. App. 424, 427 (2001); see also American Software USA v. Moore, 264 Ga. 480, 484 (1994).*

15 *Wolff v. Protégé, 234 Ga. App. 251 (1998).*

16 *Morgan Stanley DW v. Frisby, 163 F. Supp.2d 1371, 1378 (NDGA 2001).*

17 *Riddle v. Geo-Hydro Engineers, 254 Ga. App. 119 (2002).*

18 *See Gill v. Poe & Brown of Ga., 241 Ga. App. 580 (1999).*

19 *Am. Gen. Life & Accident Ins. Co. v. Fisher, 208 Ga. App. 282, 283-284 (1993), cert. vacated; Habif, Arogeti & Wynne v. Baggett, 231 Ga. App. 289 (1998), cert. denied.*

20 *Hulcher Svcs. v. R.J. Corman RR Co., LLC, 247 Ga. App. 486, 492 (2000).*

21 *See Dent Wizard, 272 Ga. App. at 553.*

22 *See Adv. Tech. Consultants, 250 Ga. App. at 320; see also Dent Wizard, 272 Ga.App. at 553.*

23 *See Hulcher, 247 Ga. App. at 491.*

24 *See Lighting Galleries v. Drummond, 247 Ga. App. 124 (2000).*

25 *Szomjassy v. OHM Corp., 132 F.Supp.2d 1041, 1049 (NDGA 2001); see Hulcher, 247 Ga. App. at 491.*

26 *Am. Software, 264 Ga. at 484.*

[27] *See Koger Properties v. Adams-Cates, 247 Ga. 68, 69 (1981).*

[28] *See, e.g., New Atlanta Ear, Nose & Throat Assoc. v. Pratt, 253 Ga. App. 681 (2002).*

[29] *New Atlanta Ear, 253 Ga. App. at 686.*

[30] *Szomjassy, 132 F.Supp.2d at 1050.*

[31] *Whimsical Expressions v. Brown, Court of Appeals No. A05A1232 (September 8, 2005), and cases cited therein.*

[32] *See, e.g., Ken's Stereo-Video Junction v. Plotner, 253 Ga. App. 811 (2002). In most instances, restrictive covenants are before the court because the former employer has sued to enforce restrictive covenants against the former employee. In this instance, however, the former employee petitioned for a declaratory judgment that the restrictive covenants were unenforceable.*

[33] *See Wright v. Power Ind. Consultants, 234 Ga. App. 833 (1998), overruled on other grounds by Adv. Tech. Consultants, 250 Ga. App. at 320; see also Szomjassy, 132 F.Supp.2d at 1050; see also Hulcher, 247 Ga. App. at 492, 493. The author served as lead counsel for the former employees in Wright.*

[34] *Covington v. D.L. Pimper Group, 248 Ga. App. 265, 267 (2001).*

[35] *See, e.g., Lighting Galleries, 247 Ga. App. at 127, in which the court looked at the circumstances in order to determine the meaning of the covenant's restriction against employment as a "residential lighting sales consultant", and after doing so held that that phrase was sufficiently specific to render the covenant not to compete enforceable.*

[36] *Habif, 231 Ga. App. at 290.*

[37] *Watson, 253 Ga. at 671.*

[38] *See, e.g., New Atlanta Ear, 253 Ga. App. at 684. (Georgia Court of Appeals declined to apply a lesser level of scrutiny to restrictive covenants in employment agreements which some physicians had executed in anticipation of their acquisition of shares in a medical practice. The physicians had initially executed employment agreements, only becoming shareholders at a later date. Because there was a gap in time between the employment and the acquisition of ownership interests, and the employment and shareholder agreements each stated that they contained obligations separate from those set forth in the other agreement, the court applied strict scrutiny (the standard for employment agreements) to the analysis of the restrictive covenants in the employment agreements.)*

[39] *"'Trade secret' means information, without regard to form, including, but not limited to, technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public and which information: (A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." O.C.G.A. § 10-1-761(4).*

[40] *Wright, 234 Ga. App. at 837; Howard Schultz, 239 Ga. at 188; U3S Corp. of Am. v. Parker, 202 Ga. App. 374, 378 (1991), cert. denied.*

[41] *Lee v. Environmental Pest & Termite Control, 271 Ga. 371 (1999).*

[42] *Hostetler v. Answerthink, 267 Ga. App. 325 (2004).*

[43] *See Palmer & Cay v. Marsh & McLennan Cos., 2005 Slip (11th Cir. No. 03-16248, 4/1/2005), n. 16.*