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Looking back and looking forward—*Arredondo* and restrictive employment covenants in Illinois

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Because restrictive employment covenants necessarily limit—if enforced—a former employee's freedom to pursue the livelihood he or she chooses, determining the validity of such covenants is sensitive work. At the core of any restrictive covenant is an employer's business interest in prohibiting the subject post-employment activity. In Illinois, an employer must have a "legitimate" business interest in order to enforce a restrictive covenant against its former employee. Before the Illinois Supreme Court's holding in *Reliable Fire Equipment Co. v. Arredondo*, a two-factor test was widely considered to be exhaustive for purposes of the "legitimate business interest" analysis in Illinois; however, the Court held in *Arredondo* that such a rigid framework is incapable of addressing the sensitive connection between one's right to work and the protection of a purported business interest. -- N.E.2d -- (2011); 2011 WL 6000743 (Ill.) Accordingly, the Court instructed lower courts to make more flexible their analysis of restrictive employment covenants by expressly adopting a *totality of circumstances* test based on broad principles of reasonableness. This test may require extensive inquiry into the type of business interest at issue and whether the restriction is narrowly tailored to protect that interest based on the facts of each particular case.

I. The Supreme Court's decision in *Arredondo*

In *Arredondo*, Reliable Fire Equipment Company was in the business of selling and installing a variety of fire suppression equipment that it designed or engineered to meet a specific customers' needs; the majority of its business was in the Chicago metropolitan area, northern Indiana, and southern Wisconsin. During their employment with Reliable, salesmen Arnold Arredondo and Rene Garcia signed restrictive noncompetition agreements in which they agreed not to: (1) compete with Reliable during their employment and for one year thereafter in Illinois, Indiana, or Wisconsin; and (2) solicit sales or referrals from Reliable's customers or referral sources, or to solicit other employees to leave Reliable.

While still a Reliable employee, Arredondo began forming a company called High Rise Security Systems, which presented direct competition to Reliable's market in the Chicagoland area. Garcia, while still a Reliable employee, joined Arredondo as a manager at High Rise. Amidst concerns within Reliable that Arredondo and Garcia were forming another company, Arredondo resigned from Reliable and Garcia was terminated shortly thereafter.

Reliable subsequently sued Arredondo, Garcia, and High Rise, alleging a breach of their noncompetition restrictive covenant. The defendants counterclaimed, seeking a declaration that the covenants were unenforceable. At the close of a bench trial, the circuit court ruled in favor of the defendants because Reliable failed to prove the existence of a legitimate business interest that justified enforcement of the covenant. In a divided panel, the Appellate Court for the Second District affirmed. 405 Ill.App.3d 708 (Ill.App.Ct. 2010). On appeal, the Supreme Court reversed the lower courts' rulings and remanded the case for a factual determination consistent with its holding that, contrary to the test applied in the lower courts, the reasonableness of a restrictive employment covenant must be judged based on the totality of facts and circumstances.

In reaching is holding, the Court recognized that Illinois law regarding restrictive employment covenants was in need of explanation and clarity.

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Relying on its own precedent, dating back to 1873, the Court stated that "a restrictive covenant will be upheld if it contains a reasonable restraint and the agreement is supported by consideration." The Court expressly adopted a three-prong reasonableness test; specifically, the restraint must: (1) be necessary to protect the legitimate business interest to the promisee (employer); (2) not impose undue hardship on the promisor (employee) or the public; and (3) be otherwise reasonable in its scope of protection sought. Notably, the Court expressly overruled appellate court holdings from the Fourth and Second Districts that an employer's legitimate business interest is not to be considered when analyzing the reasonableness of a restrictive covenant. *See Sunbelt Rentals, Inc. v. Ehlers*, 394 Ill.App.3d 421, 915 N.E.2d 862 (Ill.App.Ct. 2009); *Steam Sales Corp. v. Summers*, 405 Ill. App.3d 442, 937 N.E.2d 715 (Ill.App.Ct. 2010).

The Court's remand of the case hinged on its determination that an invalid test was used by the lower courts to analyze the existence of a protectable legitimate business interest. Beginning with the First District Appellate Court's holding in *Nationwide Advertising Service, Inc. v. Kolar*, 28 Ill.App.3d 671, 329 N.E.2d 300 (Ill.App.Ct. 1975), some trial and appellate courts had limited identification of a protectable "legitimate" business interest only to circumstances where: (1) the employee acquired confidential information or trade secrets through his employment, and subsequently attempted to use it for his own benefit; or (2) an employer's relationships with its clientele are deemed "near-permanent," and the former employee would not have had contact with the clients but for his or her employment. The Court rejected the rigidity of that test and, instead, explicitly endorsed a "totality of circumstances" test.

Notably, the Court indicated that the totality of circumstances test in this context is nothing new, and that the *Kolar* court simply misapplied Supreme Court precedent in its formulation of the two-factor test. Specifically, the Court observed that its own pre-*Kolar* decisions were, in fact, each decided "based on the totality of [their] own facts." *See House of Vision, Inc. v. Hiyane*, 37 Ill.2d 32, 225 N.E.2d 21 (1967); *Canfield v. Spear*, 44 Ill.2d 49, 254 N.E.2d 433 (1969); *Cockerill v. Wilson*, 51 Ill.2d 179, 281 N.E.2d 648 (1972).

Given its ruling that every case should be carefully scrutinized based on its specific facts and circumstances, the Court developed an analytical framework under which to do so. The Court observed that prior appellate court precedent remains intact and can be used as a guide, but "only as non-conclusive examples of applying the employer's legitimate business interest, as a component of the three prong rule of reason, and not as establishing inflexible rules beyond the general" rule. If a legitimate business interest exists, the covenant must be no greater than necessary to protect that interest. The legitimate business interest test does not supplant the other reasonableness factors (i.e., time, geographic scope, and the scope of the restricted activity).

Despite the introduction of an explicitly flexible approach, considerations of confidential and proprietary information, and near-permanent relationships, will surely remain at the core of restrictive covenant enforcement. Accordingly, a review of the pre-*Arredondo* case law on these topics—as well as the overall reasonableness of the proposed enforcement—remains illuminating.

II. Judicial review of confidential information or trade secrets

When analyzing whether an employer has a protectable interest in confidential information or trade secrets acquired by an employee during his employment, Illinois courts consider factors such as the type of information or knowledge retained by the former employee (general versus specific), the manner in which the information is developed, and the use to which the information is put. The below cases illustrate the analysis of confidential and propriety information.

In *Smith Oil Corp. v. Viking Chemical Co.*, 127 Ill.App.3d 423, 468 N.E.2d 797 (Ill.App. Ct. 1984), a buyer and seller of an industrial lubricant business brought suit for trade secret misappropriation seeking a temporary restraining order against three former sales employees of Smith Oil, as well as their new employer and Smith competitor, Viking Chemical. The complaint alleged that the defendants possessed customer lists, pricing information, sample formulas, customer correspondence and other customer information that was taken from Smith without authorization. The plaintiffs sought to enforce a non-solicitation agreement and prohibit the former employees from disclosing any information about Smith's customers, prices, formulas, or other products or from producing any product using Smith's formulas.

The Appellate Court ruled that a former employee can take generalized skills and knowledge acquired during his employment with the former employer, but may not take confidential information concerning plans or processes developed by the former employer. Although the former employees learned the names of Smith's customers and contacts through their employment with Smith, the Court refused to protect information about customers' needs with an injunction. While knowing the identities and needs of Smith's customers was valuable information, it was not a protectable trade secret.

Finally, the Court held that the former employees could not be prevented from using their general chemistry skills or sales skills, even if they were obtained and developed while working for Smith. Nor would the Court prohibit them from using sales information in customer lists that they recalled from their time at Smith. Furthermore, the Court refused to enjoin them from developing equivalent products or formulas to those sold by their former employer based on the general skills and experience they gained while working for Smith.

More recently, in *Lifetec, Inc. v. Edwards*, 377 Ill.App.3d 260, 880 N.E.2d 188 (Ill.App. Ct. 2007), Lifetec, a medical supply company, sought an injunction to enforce a restrictive covenant and prevent its former employee, Peter Edwards, from using Lifetec's confidential price quotes for his own benefit and the benefit of his new employer, Patterson Medical Supply, Inc. Lifetec also sued Patterson for tortious interference with the employment contract. Lifetec sought to require Edwards to cease his employment with Patterson and cease any solicitation of Lifetec's customers. It was undisputed that Edwards worked for Patterson in territories that overlapped territories he worked in for Lifetec, and that Edwards violated the terms of the subject contract by obtaining work from Patterson upon leaving Lifetec. The trial court granted an injunction against Edwards, concluding that Lifetec presented sufficient evidence to raise a fair question as to whether Edwards disclosed confidential information to Patterson in order to develop a competitive advantage against Lifetec.

The Appellate Court upheld the trial court's order and found that Lifetec had a protectable interest in its confidential "open quotes" to distributors for customized products. The Court reasoned that, not only was Edwards aware of the price quotes pending at the time of his termination, but that his access to information upon which Lifetec relied in making its bids –which resulted in the open quotes—would give him the necessary information to adjust a bid made on behalf of Patterson in order to undercut a Lifetec bid. According to the Court, information as to how the open quotes were calculated before they were given to customers "is where the obvious confidentiality truly lies." Given the competitive importance of formulating the quotes, the Court rejected Edwards' argument that the quotes represent public information. The Court also rejected the argument that evidence of misappropriation or misuse of confidential information was necessary to state a claim for enforcement of a restrictive covenant.

When seeking to prove the existence of protectable confidential information in the restrictive employment covenant context, attorneys should also consider the Illinois Trade Secrets Act (ITSA), 765 ILCS 1065/1, *et seq*. Although information subject to a restrictive covenant need not rise to the level of a "trade secret" under the ITSA, the statutory framework used to analyze the existence of a trade secret clearly permeates the case law regarding post-employment restrictions on alleged proprietary information.

The ITSA defines a protected trade secret as information—including technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers—that is sufficiently secret to derive economic value from not being generally known to other persons and is the subject of reasonable efforts to maintain its secrecy. Factors used to determine whether information is a trade secret under the ITSA include: (1) the extent to which the information is known outside the employer's business; (2) the extent to which it is known by those inside the employer's business; (3) measures to guard the secrecy of the information (i.e., stamped as "confidential" or restricting access); (4) the information's value to the employer and the competition; (5) the effort or money expended to develop the information; and (6) the ease or difficulty with which others could properly acquire or duplicate the information.

III. Judicial review of near-permanent relationships

Following the *Kolar* decision in 1975, two alternative tests emerged for analyzing whether a protectable "near-permanent" relationship exists: (1) the nature of the business test, which evaluates whether a relationship is protectable by virtue of the inherent characteristics of the services or goods provided; and (2) the "seven-factors" test, which evaluates whether there is a protectable relationship based on seven objective factors. Specifically, the seven-factor test considers: (1) the length of time required to develop clientele; (2) the amount of money invested to acquire clients; (3) the degree of difficulty in acquiring clients; (4) the extent of personal customer contact by the employee; (5) the duration of a customer's association with the employer; (6) the extent of the employer's knowledge of clients; and (7) the continuity of the employer-customer relationship. A review of some instructive decisions in this realm informs the analysis of future cases.

In *Hanchett Paper Co. v. Melchiorre*, 341 Ill. App.3d 345, 792 N.E.2d 395 (Ill.App.Ct. 2003), Hanchett Paper, a packaging products distributor, sought a preliminary injunction against its former salesman, Frank Melchiorre, to enforce a restrictive covenant that prohibited Melchiorre from soliciting, selling to, or servicing customers he serviced while employed by Hanchett. The facts showed that it took Hanchett anywhere from nine months to several years to develop customers using a "team effort." The trial court enjoined Melchiorre from contacting customers serviced by Hanchett during his employment.

On appeal, Melchiorre contended that Hanchett could not establish a protectable near-permanent relationship with its customers because the customers also purchased the same products from other companies while they were Hanchett's customers. Hanchett contended that exclusivity is not necessary to establish a near-permanent relationship. The Court noted the difficulty in finding a near-permanent relationship with customers of a business engaged in sales, where, as with Hanchett, the product being sold is not unique and the customers' identities are well-known. However, a business need not show that its customer relationships are perpetual and indissoluble, exclusive, or the same for each customer. The Court applied the seven-factor near-permanency test because it provided "a more complete analysis of the facts at issue…." It

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was determined that, based on the facts, the factors weighed heavily in favor of a protectable interest on the part of Hanchett and, therefore, the Court affirmed the trial court's ruling.

In *Applebaum v. Applebaum*, 355 Ill.App.3d 926, 823 N.E.2d 1074 (Ill.App.Ct. 2005), William Applebaum, a shrimp salesman, sued Penguin Frozen Foods, Inc., a family-owned frozen shrimp distributor, related to the circumstances of his termination from Penguin. Penguin counterclaimed seeking to enforce a restrictive covenant against William Applebaum and his brother, John Applebaum, who both began working for a Penguin competitor, Worldwide Shrimp, upon leaving their employ as salesmen for Penguin. John Applebaum was a party to the non-solicitation agreement at issue, which prohibited dealings with any customers or suppliers serviced by Penguin during the twelve-month period immediately preceding his termination. The agreement was also binding on William's post-employment conduct. The trial court granted a preliminary injunction that prohibited the Applebaums from contacting certain customers and suppliers of Penguin.

On appeal, the Applebaums asserted that the trial court erred because Penguin failed to show: (1) that John "serviced" the subject customers while at Penguin; (2) that John had access to confidential information as a Penguin employee; or (3) that Penguin had near-permanent relationships with the customers and suppliers at issue. After determining that John did, in fact, "service" the customers at issue, and that the customers' preferences and credit information was not confidential, the Court turned to whether Penguin had a protectable business interest in prohibiting post-employment contact with the customers and suppliers.

With respect to Penguin's alleged near-permanent relationships, the Court held that there was no protectable interest with respect to its "secondary contact" suppliers because there was no evidence to show Penguin invested time or expense in securing those suppliers, nor was there evidence to establish the duration or continuity of those relationships. The Court also held that Penguin had no near-permanent relationship with customers serviced by John Applebaum at Penguin in a "behind-the-scenes" administrative role. The Court also noted that selling shrimp, generally, requires no specialized training, and it involves a basic, non-unique product. The Court remanded the case to the trial court to redraw the scope of the temporary injunction consistent with its opinion.

In *McRand, Inc. v. VanBeelen*, 138 Ill.App.3d 1045, 486 N.E.2d 1306 (Ill.App.Ct. 1985), McRand, a firm that designed management incentive programs, sued its former employees and their new employer seeking to enforce restrictive covenants in their employment agreements. The trial court denied McRand's motion for a preliminary injunction. On appeal, the Court found a protectable interest in McRand's customer relationships. The Court concluded that McRand had a protectable near-permanent relationship with its customers given that it took three years and $200,000 to develop major accounts, the highly competitive nature of the business, and the fact that employees would not have developed the customer relationships without their employment.

The Court further held that covenants designed to protect customer relations rather than prohibit competition do not require geographical limitations. The Court also found that McRand's employment agreements containing the restrictive covenants were not contracts of adhesion given that the former employees had high-level positions for several years, had substantial responsibilities, discussed the covenants before signing them, and signed several similar covenants over the years. Finally, the Court held that the covenants were overbroad in restricting the former employees from servicing customers that any McRand employee had contacted while the former employees were employed by McRand. However, the Court found that the trial court could properly enjoin only those activities involving customers with whom the former employees had been involved during their employment. Alternatively, if they had contact with a large percentage of customers, the court could enjoin the former employees from contacting any party that was a customer of McRand at the time of their resignations.

In *PCx Corp. v. Ross*, 209 Ill.App.3d 530, 568 N.E.2d 311 (1st Dist. 1991), PCx, a computer hardware company, brought suit against Rene Ross, its former sales consultant, and her new employer, Tech Data, for breach of her noncompetition agreement, breach of fiduciary duty, and tortious interference with contract. The Appellate Court held that the trial court properly limited the injunctive relief granted to PCx to only six customers within Ross's old sales territory. Five of these customers were not yet customers of Ross's new employer when she contacted them. The sixth customer did substantially more business with Ross's new employer following Ross's initial contact. There was no evidence that Ross had contact with customers outside of her sales territory while employed by PCx or even any access to PCx's full customer list. In addition, there was no direct evidence that Ross misappropriated PCx's customer list or misused any confidential information. Nor was there an increase in the number of customers shared by PCx and Tech Data attributable to Ross's activities. Therefore, the Court concluded that limiting the injunction to only those six customers was proper.

In *Arpac Corp. v. Murray*, 226 Ill.App.3d 65, 589 N.E.2d 640 (Ill.App.Ct. 1992), Arpac, a manufacturer of shrink-wrap machinery, brought suit to enjoin its former vice president of marketing, Charles Murray, from competing with it, based on an employment agreement containing a restrictive covenant. Immediately after leaving Arpac, Murray—who had never worked in the shrink-wrap industry prior to his employment with Arpac—set up his own corporation with the sole purpose of competing with Arpac. Although an employer has no protectable property interest in its customer base if the employer-customer relationship is short-term and the former employee acquired no specialized knowledge, the Appellate Court held that Arpac had a protectable proprietary interest in its customers and would suffer irreparable harm if Murray were not enjoined from competing. The Court found that the relationship of Arpac with its customers was nearly permanent, despite evidence that its customers occasionally conducted business with other competitors. Arpac spent considerable resources developing its clientele, maintaining customer loyalty, conducting training programs, attending trade shows, educating its distributors, and maintaining personal contact with its customers, who had an average length of association with Arpac of five years.

The Court further held that the non-solicitation portion of the restrictive covenant was reasonable. The Court found that end-users of shrink-wrap machines were also Arpac's customers, and thus properly included in the non-solicitation agreement, even though Arpac only had direct contact with the distributors who served as intermediaries. However, the noncompetition portion of the agreement which would have prevented Murray from working in any capacity in the shrink-wrap business was void as against public policy because it lacked any geographic limitations and restricted Murray from associating with any company whose activities involved competition in the shrink-wrap industry. The sole purpose of the non-competition portion of the agreement—the Court concluded—was to stifle competition, considering that the non-solicitation portion of the agreement adequately protected its customer base.

In *Midwest Television, Inc. v. Oloffson*, 298 Ill.App.3d 548, 699 N.E.2d 230 (Ill.App.Ct. 1998), Gary Oloffson left his position as a disk jockey for a radio station owned by Midwest Television. Oloffson's employment contract with Midwest Television included a restrictive covenant that barred him from working for another radio station within 100 miles for one year. When Oloffson went to work for a new radio station in the same area, Midwest Television brought suit to enforce the restrictive covenant. Oloffson challenged the restrictive covenant, arguing that it was unenforceable because Midwest Television had no protectable interest in its relationships with its listeners and advertisers, and because the restriction was unreasonable in scope.

Under the "nature of the business" test, courts look to the business' nature to determine whether a near-permanent relationship exists between an employer and its customers. Such relationships are more likely developed in professional organizations that gain customer loyalty by offering unique products and services, as opposed to sales-oriented businesses. The Appellate Court found that the unique nature of the product offered in the radio business was sufficiently professional for enforcement of the covenant. In addition, Midwest Television established the near-permanency of its relationship to its audience and advertisers under the seven-factor test to show a protectable business interest for enforcement of the covenant. The Court found that the station spent significant resources developing its audience and advertisers, encouraged personal contact between Oloffson and the audience, and had long-term relationships with its audience and advertisers. Furthermore, the Court held that the restrictive covenant's scope was reasonable as it applied only to the provision of similar services, leaving a wide range of opportunities in the broadcast industry for Oloffson to pursue.

In *Prairie Eye Center, Ltd. v. Butler*, 329 Ill. App.3d 293, 768 N.E.2d 414 (Ill.App.Ct. 2002), Prairie Eye Clinic brought an action against Patrick Butler, a former ophthalmologist, alleging that Butler violated a restrictive covenant that prohibited Butler from practicing at any location within Sangamon County, Illinois, or within ten miles of Hillsboro, Illinois, and ten miles of any branch office of the clinic. The trial court granted a preliminary injunction against Butler, and the clinic was awarded damages at trial.

The Appellate Court affirmed the trial court's ruling, specifically finding that the clinic had a protectable interest in patients Butler treated and developed prior to joining the clinic. Butler asserted that there was no evidence of a "near-permanent" relationship between the clinic and its patients in order to find a protectable interest. The Court applied a variation of the "nature of the business" test and rejected Butler's argument, noting that "medical practices have a protectable interest in the patients of their physicians and this interest is inferred from the nature of the profession." Further, the Court noted that the case law governing restrictive covenants in the medical practice context has "developed separately from that applicable to other employment contracts and no special proof of entitlement to patients is required to find a protectable interest on the part of the medical practice." The Court held that Butler's patients acquired prior to joining the clinic were precisely what the clinic negotiated for when it hired Butler. Further, had Butler wished to protect his right to his pre-existing patients were he to leave the clinic's employ, he should have negotiated that point at the time of his hiring.

The foregoing cases outline several considerations for attorneys on either side of the issue when it comes to the existence of client relationships that can be protected by restrictions on a former employee's activity.

IV. Judicial analysis of overall reasonableness

As the *Arredondo* decision re-affirms, the *totality of circumstances* test also requires the restriction to be narrowly tailored to protect the subject interest, and that it be reasonable in its duration, geographic scope, and the scope of restricted activity.

In *Liautaud v. Liautaud*, 221 F.3d 981 (7th Cir. 2000), Jim Liautaud, the operator of a successful sandwich shop chain, Jimmy John's, disclosed his secret recipes and business strategies to his cousin, Michael. Jim subsequently sued Michael for breach of a noncompetition agreement that prohibited Michael from expanding his new sandwich business, Big Mike's, beyond Madison, Wisconsin, unless those shops were operated under the name Jimmy John's. The agreement permitted Michael to open sub shops under the name Jimmy John's within Madison. Michael was also prohibited from disclosing any of Jimmy John's alleged proprietary information. At trial, Michael successfully obtained summary judgment in his favor on the grounds that, under Illinois law, the agreement was an unreasonable restraint of trade.

On appeal, Michael asserted that Jim had no legitimate business interest in preventing him from opening sub shops in locations where Jim did not even operate. Michael also asserted that the agreement unreasonably prohibited expansion of his business to anywhere in the world except Madison. Jim contended that, given the nature of the trade secrets involved, the restraint on Michael's expansion was necessary, and it did not impose unreasonable hardship on Michael.

After determining that the covenant was ancillary to a valid business relationship, the Court turned its attention to the geographic and temporal restrictions of the agreement. The Court held that, regardless of what the parties may have intended, the face of the agreement was unreasonably broad because it prevented Michael from expanding anywhere in the world outside Madison. Further, Jim's stated business interest—protection of trade secrets—did not justify a limitation on expansion to locations where Jim did not operate his business. The Court also noted that the agreement was unreasonably oppressive to Michael, irrespective of his use of the Jimmy John's "trade secrets," because it restricted him from opening any kind of sub shop whatever. The agreement was also found to be injurious to the public because it restricted competition. Finally, the Court reasoned that, even though it may take Jim some time to establish a sandwich shop business outside Madison and attract a customer base, the time to accomplish a competitive advantage cannot be in perpetuity under Illinois law.

In *Coady v. Harpo, Inc.*, 308 Ill.App.3d 153, 719 N.E.2d 244 (Ill.App.Ct. 1999), Elizabeth Coady, the former senior producer for "The Oprah Winfrey Show," brought suit against Harpo, the show's producer, seeking a declaration that her confidentiality agreement with Harpo was unenforceable. While employed as the senior producer of the show, Coady entered into a confidentiality agreement that prevented her from disseminating any confidential information she obtained during her employment with the show.

The Appellate Court held that a court, not an arbitration panel, was the proper forum to decide whether the agreement was enforceable. Although the agreement expressly provided for arbitration, the Court found that a trial court must first decide whether an enforceable contract exists before compelling arbitration. In addition, the Court held that the agreement was reasonable and thus enforceable, despite the fact that it remained in effect indefinitely and contained no geographical limitations. The agreement left Coady free to choose the nature, location, and commencement of her future employment. Therefore, the Court found the agreement reasonable and enforceable despite its lack of time or geographical limits. Confidentiality agreements that involve trade secrets or confidential information do not require such limitations. The Court noted that, although restraint of trade is a significant concern, an equally important public policy is preserving the freedom to contract.

In *Smith v. Burkitt*, 342 Ill.App.3d 365, 795 N.E.2d 385 (Ill.App.Ct. 2003), two buyers of an arts and crafts business brought an action against the sellers, alleging the sellers violated a restrictive covenant contained in the contract of sale that prohibited them from engaging "in any business competitive with" the buyers for a period of five years. In dismissing the buyers' complaint, the trial court held that the covenant was unreasonably vague, and it was impossible to determine which business activities were being restricted.

The Appellate Court overturned the trial court's ruling that the noncompetition clause was unenforceable because of its vagueness. The precise issue on appeal was whether the restriction was unreasonable in terms of the scope of prohibited activity. The sellers maintained that the restriction could be construed to mean any type of any conceivable business activity. The Court reasoned that—although the face of the agreement did not reveal the nature of the business purchased—based on the complaint, the business trade at issue pertained specifically to arts and crafts. The Court remanded the case for a factual determination as to what specific business activity the noncompetition clause sought to prohibit.

In *Prudential Insurance Co. of America v. Sempetrean*, 171 Ill.App.3d 810, 525 N.E.2d 1016 (Ill.App.Ct. 1988), Prudential sought injunctive relief against its former insurance agent, Ronald Sempetrean. Upon Sempetrean's resignation, he signed a non-solicitation agreement prohibiting him from soliciting Prudential policyholders. After becoming an insurance agent for one of Prudential's competitors, Prudential clients replaced their Prudential policies with policies sold by Sempetrean's new employer.

The Appellate Court held that the non-solicitation agreement was an unenforceable covenant not-to-compete, rather than an attempt to protect Prudential's existing property interest in policies sold by Sempetrean during his employment. The agreement unreasonably restricted Sempetrean's right to practice his profession and lacked any time or geographic limitations. Although Prudential argued that its policies were entitled to protection as "unique," the Court found that it could not protect at-will contractual relationships with its policyholders. To do so would be an unfair restraint on trade and competition beyond what was necessary to protect Prudential's interests. The Court further held that Sempetrean owed Prudential no fiduciary duty following his resignation. A former employee may compete with his former employer and solicit former customers absent a valid restrictive covenant in the employment contract, a fraudulent act, or improper taking of a customer list. These special circumstances lacking, the Court found that the trial court properly dismissed Prudential's claims.

In *Cambridge Engineering, Inc. v. Mercury Partners*, 378 Ill.App.3d 437, 879 N.E.2d 512 (Ill.App.Ct. 2007), Cambridge Engineering prevailed in a suit to enjoin its former employee, Gregory Deger, from engaging in certain sales-related activities for his new employer, Brucker Company. Cambridge subsequently sought punitive and compensatory damages against Brucker for its tortious interference with Deger's employment contract. The contract precluded Deger from engaging in any competitive activity with Cambridge anywhere in the United States or Canada for a period of 24 months. The trial court found that the agreement was "so overly broad as to make it unenforceable in Illinois"; a directed verdict was entered against Cambridge on its claim for punitive damages, and judgment notwithstanding the verdict was entered against Cambridge on the issue of liability.

On appeal, Cambridge argued that the geographic scope of the restriction was reasonable in light of testimony that it did business throughout the United States and Canada. Cambridge also argued that the restrictions on Deger's activities upon leaving the company were reasonable. The Appellate Court affirmed the trial court's ruling that the non-compete agreement was wholly unenforceable as a matter of law. The Court reasoned that, by its President's own admission, Cambridge did not have a market at all in Canada and, therefore, a Canada-wide ban on Deger was unnecessary for the protection of Cambridge's interests. As for the scope of the restriction on Deger's post-employment activities, the Court held that the noncompetition clause was unenforceable because it barred all activities on behalf of any competitor, regardless of whether those activities were actually competitive with Cambridge.

The Court also addressed Cambridge's alternative argument that, to the extent the covenant was unenforceable, it should be judicially rewritten to fall within the bounds of reasonableness, rather than voided outright. After holding that Cambridge had waived the issue for purposes of appeal, the Court noted that such reformation would, in any event, be against public policy because of the "severe effect it could have on employees subject to such covenants." The Court expressed distaste for expecting an employee unschooled in the law to determine the extent to which the covenant is enforceable, "particularly since courts apply a multifactor reasonableness standard instead of a bright-line rule." According to the Court, minimal judicial reformation is never permissibly applied; however, the inherent fairness of the restraints built into the covenant may be a key consideration for the court in its willingness to do so.

In *Rao v. Rao*, 718 F.2d 219 (7th Cir. 1983), a corporation brought suit to enforce a restrictive covenant in a former employee-physician's employment agreement. The corporation and the employee-physician entered into an employment contract that allowed the physician to purchase a 50% interest in the corporation for one dollar at the end of four years of employment. Ten days before the employee-physician would have been able to purchase his ownership interest, the corporation terminated his employment.

The Appellate Court noted that, because restrictive covenants in employment contracts impair the availability of services and interfere with competition, courts carefully scrutinize their provisions. Under Illinois law, a dismissed employee can take with him any general skills and knowledge acquired during employment. The time, expense, and effort spent to develop the physician's skills did not justify enforcement of the restrictive covenant. Thus, the Court held that a restrictive covenant is unenforceable when an employer terminates an employee in bad faith and without good cause.

In *Gorman Publishing Co. v. Stillman*, 516 F.Supp. 98 (N.D. IL 1980), Gorman Publishing sued Thomas Stillman, a former employee-publisher, claiming he violated his noncompetition agreement by accepting employment with another magazine. The agreement provided that it only applied if Stillman's termination was self-initiated or initiated by Gorman "for cause." After resigning from Gorman, Stillman went to work for another magazine serving a market similar to Gorman's. Both Stillman's new employer and former employer considered their magazines to be competitors.

The District Court held that Stillman was not released from his non-compete agreement simply because he chose to resign rather than risk being discharged. The Court rejected his claim that the publishing company initiated his termination by constructively discharging him by failing to give Stillman the responsibilities of a publisher. Gorman did not actually demote Stillman, but rather gave him fewer responsibilities than he wanted. In addition, Gorman's failure to give Stillman his desired level of authority did not amount to constructive discharge because the job of publisher was not well defined, either within the publishing industry or between the parties.

Furthermore, the Court found that the scope of the noncompetition agreement was reasonable because, after leaving Gorman, Stillman had performed work that did not violate the agreement before beginning the work that did violate the agreement. In addition, although the covenant not-to-compete applied nationwide, it was justified given the nationwide nature of Gorman's business. Finally, the Court held that the agreement's provision requiring that $500 per day be paid for breach of the covenant not-to-compete was reasonable and appropriate. Not only was there no way to determine which of Gorman's advertising accounts were lost because of Stillman's competition or their value if Stillman had stayed, but the $500-per-day provision was agreed upon after serious negotiations between the parties, who were both sophisticated and assisted by counsel.

In *Galesburg Clinic Assoc. v. West*, 302 Ill. App.3d 1016, 706 N.E.2d 1035 (Ill.App.Ct. 1999), the Galesburg Clinic Association was a medical partnership that included the defendant doctors, Dr. Tommy West and Dr. Thomas Patterson. When the doctors quit, the clinic filed a claim alleging that they breached the noncompetition covenant contained in the partnership agreement. The doctors argued that their duties under the noncompetition clause were discharged because the clinic materially breached the partnership agreement's other provisions.

A material breach of a partnership agreement can discharge the duties of a covenant not-to-compete. The test for materiality is whether the breach is of such a nature and importance that, if anticipated, the contract would not have been entered into. The Court found that the clinic materially breached the partnership agreement by conducting secret meetings of the executive committee, failing to vote on the firing of the CEO or the hiring of an accountant, compensating a member of the executive committee for unsubstantiated bills, and changing its accounting method without properly amending the articles. Each of these actions was found to constitute a material breach of express provisions in the partnership agreement, and thus discharged the doctors' duties to refrain from competition under the covenant not-to-compete.

The Court further held that the doctors' actions did not waive their right to assert a breach of the contract. Although the doctors resigned one year after the executive committee breached the agreement, they continued their normal work while protesting the committee's actions. The Court found that the doctors' delay in leaving the partnership was reasonable given the partnership's complexity, the nature of the medical practice, and the professional and personal consequences of their resignation. Therefore, their delay in resigning did not constitute a clear and unequivocal waiver of their right to declare a breach of the partnership agreement.

As the foregoing cases demonstrate, Courts have already been considering the equities involved in each case based on its unique facts, including: the severity and necessity of restricting an employee's right to work; the activities encompassed by the restriction; whether the restriction is being imposed against a high-level or low-level employee; and the public harm that could result from such a restriction on competitive behavior. As a matter of public policy, courts have also considered whether the employer sought to restrict the subject post-employment activity in an obviously unreasonable or punitive fashion. Moreover, in an effort to ferret out improper attempts to nullify a reasonable post-employment noncompetition covenant, courts clearly will consider the parties' conduct prior to the employment termination.

V. Conclusion

In *Arredondo*, the Supreme Court recognized that, given the fact-intensive analysis of an enforceable restrictive employment covenant, there is a "temptation…to view exemplary facts presented in particular cases as the outermost boundary of the inquiry," however, "if it were possible to make a complete list today, human ingenuity would render the list obsolete tomorrow." This theme perhaps best exemplifies the Supreme Court's reasoning for adopting a totality of circumstances test to determine the validity of a restrictive covenant not-to-compete in an employment contract. Unfortunately, this theme also creates unpredictability for employers, employees, attorneys, and judges when addressing this issue. Indeed, the door is now open to a broad spectrum of arguments regarding purported business interests that are entitled to protection with a restrictive employment covenant.

However, there is some solace in that the analytical framework set forth above is applicable to a wide range of factual scenarios involving protection of confidential information, trade secrets, and relationships with customers and suppliers. There can be little doubt that employers will continue to seek protection of these interests with regularity and, therefore, this analytical framework should remain relevant into the foreseeable future. ■

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