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**ENFORCEABLE
RESTRICTIVE COVENANTS
IN ILLINOIS**

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UTILIZING AND DRAFTING ENFORCEABLE RESTRICTIVE COVENANTS IN ILLINOIS

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I. Introduction

In an increasingly transitional job market, employment agreements protecting both employees and employers are understandably more common. Employer's interests require protection from formerly trusted employees who often develop interests adverse to the employer when their employment relationship ends. In a service oriented technologically advanced economy, the employers most important interests may often be its customers and its technology. Often times, a contractual restriction prohibiting an employee from misappropriating those intangible assets is the best way for an employer to protect its investment and remain in business.

Restrictive covenants are a commonly used means of preventing unfair competition by a departing employee. Without a restrictive covenant, an Illinois employer is protected only from _____

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Solicitation of customers by its current employees (but not by its former employees) and misappropriation of information which statutorily qualifies as a “trade secret.”¹ Restrictive covenants are also common in contracts for the sale of a business, to protect the goodwill of the business sold. Different rules apply to restrictive covenants contained in employment agreements and those incidental to the sale of a business.² This article is limited to an examination of Illinois law on restrictive covenants in employment agreements and is intended to help the reader to understand how to utilize covenants to enhance the likelihood of meaningful enforcement.³

¹ See, e.g., ABC Trans Nat. Transport, Inc. v. Aeronautics Forwarders, Inc., 90 Ill.App.3d 817, 413 N.E.2d 1299, 46 Ill. Dec. 186, 379 N.E.2d 1228 (1st Dist., 5th Div. 1980) (customer solicitation by current employee); ILG Industries, Inc. v. Scott, 49 Ill.2d 88, 273 N.E.2d 393 (1971) (common law misappropriation of trade secrets); Composite Marine Propellers, Inc. v. Van der Woride, 962 F.2d 1263 (7th Cir. 1992) (noting Illinois Trade Secrets Act abolished common law misappropriation); Quality Lighting, Inc. v. Benjamin, 227 Ill.App.3d 880, 592 NE.2d 377, 169 Ill.Dec.890 (1st Dist., 5th Div. 1992) (Illinois Trade Secrets Act).

² See, e.g., Hamer Holding Group, Inc. v. Elmore, 202 Ill.App. 3d 994, 560 N.E.2d 907, 148 Ill.Dec. 310 (1st Dist., 2d Div. 1990), app. Den. 136 Ill.2d 544, 567 N.E. 2d 331, 153 Ill.Dec. 373 (1991); Decker, Berta and Co. v. Berta, 225 Ill.App.3d. 24, 587 N.E.2d 72, 167 Ill.Dec. 190 (4th Dist., 1992) app.den. 145 Ill.2d 632, 596 N.E.2d 627, 173 Ill.Dec. 3 (1992).

³ For earlier cases and general discussion of this topic see Jager, Illinois Returns to the Mainstream of Trade—Secret Protection, Chi. Bar. Record 18-21 (October 1988); A. Scotillo, Restrictive Covenants and Employment Agreements, Chancery and Special Remedies, ICLE 1989; R. Newbury, §2, Intellectual Property Law (ICLE 1978); Curry, Severability of Employment Restraints: The Wrong Way to Right Wrongs, 77 Ill. Bar J. 102 (October 1988); Robison, When The Party Is Over: Rights of Departing Attorneys to the Clients of their Former Firm, 75 Ill.Bar J. 552 (June 1987); G. Schuman, Protecting Customer Information under Illinois Trade Secret Law, 70 Ill. Bar J. 548 (May 1982); Sabin, Constructing a Viable Restrictive Covenant in Employment Contracts, Ill. Bar Journ. 310 (February 1984); Kanwit & Conway, Enforcement of Restrictive Covenants in Illinois Employment Contracts, Chi. Bar Records, Nov-Dec (1978). Illinois Supr. Ct. Rev. 62 NW LL L. Rev. 794-88 (1968); Witzel, Employment Contracts and Non-Competition Agreements 1969 U. Ill. L.F. 61. See generally: Statistical Analysis of Non-Competition Clauses and Employment Contracts, 15 Journ. Corporation Law 483 (1990); R. Klitzke, Trade Secrets: Important Ovasi-Property Rights, 41 Bus. Law., 555 (1986); Hutter, Drafting Enforceable Employee Non-Competition Agreements to Protect Confidential Business Information: A Lawyer’s Practical Approach to the Caselaw, 45 Alb. L. Rev., 311 (1981); Jager, Trade Secrets Law (Clark Boardman Co. 1988); Williston, 14 Treatise on the Law of Contracts, §1638 (3rd ed. 1973); Reece, Employee Non-Competition Agreements and Related Restrictive Covenants: A Review and Analysis of Massachusetts Law, 2 Mass. L. Rev. (1991).

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As a preliminary matter, restrictive covenants are considered restraints on trade and not enforced as contrary to public policy.⁴ Such a covenant will, however, be enforced when it is reasonably limited temporarily and geographically to protect a legitimate business interest of the former employer. Consequently, restrictive covenants should not be viewed as a means to restrict competition, but as a security measure to prevent unfair competition and to protect an employer's investment in its goodwill, proprietary information, and employee training.

The law governing restrictive covenants is sometimes imprecise and always unpredictable.⁵ The swampland of precedent is attributable to competing public policy considerations. On one hand, businesses are to be encouraged to invest the resources necessary to foster a viable business operation with long-term aspirations.⁶ It would hamper business growth to allow employees to take confidential information and customers developed by an employer over many years at great expense. On the other hand, the courts will protect the fundamental right of individuals to pursue a particular occupation for which they are best suited by ability and training. It would violate individual human liberty to restrict an employee from competing in his chosen field when doing so would pose no unjust threat to a former employer.

⁴ Label Printers v. Pflug, 206 Ill. App.3d. 483, 564 N.E.2d 1382, 151 Ill.Dec. 720 (2d Dist., 1991) app.den. 139 Ill.2d 597, 575 N.E.2d 916, 159 Ill.Dec. 109 (1991).

⁵ See, Curry, Severability of Employment Restraints, 77 Ill. B. J. 102 (Oct. 1988). "Appellate Court decisions come down like confetti on a parade and, ... seem to fly...in all directions," See also Arthur Murray Dance Studios of Cleveland v. Witter, 62 Ohio L. Abs. 17, 20-21, 105 N.E.2d 685, 687 (1952) ("[The case authority] is a sea, vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long.")

⁶ See, Rockwell Graphic Systems, Inc. v. DEV Industries, Inc., 925 F.2d (7th Cir. Ill. 1991) (trade secret protection important to the "efficiency of industry" and the "future of the nation").

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Competition is to be encouraged, not stifled. The outcome of the balancing of these policy considerations is controlled by reference to the facts of each case.⁷

It is consequently difficult, if not impossible, to predict whether a particular covenant will or will not be enforced. Identical covenants may suffer entirely different fates when applied to different situations, depending on the relevant industry, the nature of the businesses involved, the employee's duties, the interests to be protected, and other factors. As a result, this area of the law remains fertile ground for litigation, already thick with conflicting Appellate Court decisions which attach varying importance to the presence or absence of certain facts. What has emerged, however, is a facially consistent analysis, the existence or absence of inequitable conduct on the part of either party.

Assessing precedent is further complicated by the different types of covenants at issue. There are at least four types of restrictive covenants commonly found in employment agreements. A "Covenant not to compete" purports to prohibit competition by a former employee in the same or a similar business to that of the former employer. These are the broadest restrictions. A "non-solicitation covenant" is narrower. It purports to prohibit the former employee from soliciting customers of the former employer. A "non-contact covenant" amplifies a non-solicitation covenant by prohibiting any type of contact with the customers of the former employer, whether solicited or not. A "non-disclosure covenant" purports to prohibit use or disclosure of confidential information of the former employer, such as customer information or trade secrets. Occasionally

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other restrictions appear, such as a prohibition against the solicitation of the former employer's employees.⁸ Non-solicit and non-disclosure restrictions are sometimes referred to as "activity restraints," to distinguish them from general restraints on competition.

Determining which type or types of covenants to use in practice should be done after careful consideration of the relevant industry, the nature of the business of the employer, the responsibilities of the employee, the customer profile, the presence and nature of any proprietary information, and the potential damage that a particular employee might inflict. Without compromising the legitimate business interests of the employer, it is suggested that the more customized a covenant to a particular employment situation, the more likely it will be enforced. Blanket use of all types of covenants, simply because they appear impressive to an employer-client or because the employee will sign them regardless, increases the risk that none of the covenants will be enforced, even the one which provides needed protection for the legitimate interests of the employer.

II. The Protectable Business Interest

The starting point for any analysis of a restrictive covenant, (that is, the determination of whether and to what extent the covenant will be enforced), is the protectable interest of the employer. Illinois courts have recognized two types of interests that will support a restrictive covenant: 1) where the former employer, because of the nature of its business, has a "near-permanent relationship" with its customers and, where it not for the employee's employment, the

⁷ Southern Illinois Medical Business Associates v. Camillo, 190 Ill.App.3d. 664, 546 N.E. 2d 1059, 138 Ill.Dec. 4 (5th Dist., 1989).

⁸ Arpac Corp. v. Murray, 226 Ill.App.3d. 65, 589 N.E.2d 640, 168 Ill.Dec. 240 (1st Dist., 2d Div. 1992).

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employee would not have had contact with those customers, or 2) where the employee learned of “confidential information” or “trade secrets” by virtue of his or her employment, which information the former employee has used or is threatening to use to the detriment of the former employer.⁹ A covenant may be facially reasonable in all other respects, but will fail unless one or both of these interests is present. In effect, the “protectable business interest” requirement serves to separate those cases where enforcement will, in the balance, further the above-described public policies of healthy competition and individual liberty.

a. “Near permanent” customer relationships

Courts consider seven factors in determining whether a “near permanent” customer relationship exists. These are: 1) the length of time required to develop the clientele; 2) the amount of money invested to acquire the clientele; 3) the degree of difficulty in acquiring new clientele; 4) the extent of personal contact with customers by the employee; 5) the extent of the employer’s knowledge of its clientele; 6) the duration of the customers’ association with the employer; and, 7) the continuity of employer-customer relationships.¹⁰ These relationships need not be exclusive to be considered “near-permanent.”¹¹ Nor must the relationship be “perpetual or indissoluble” or “near

⁹ Office Mates 5, North Shore, Inc. v. Hazen, 599 N.E.2d 1072, (1st Dist., 1st Div. 1992); Tyler Enterprises of Elwood, Inc. v. Shafer, 214 Ill.App.3d. 145, 573 N.E.2d 863, 158 Ill.Dec. 50 (3rd Dist., 1991).

¹⁰ Agrimerica, Inc. v. Mathes, 170 Ill.App.3d. 1025, 524 N.E.2d 947, 120 Ill.Dec. 765 (1st Dist., 2d Div. 1988); A.B. Dick Co. v. American Pro-Tech, 159 Ill.App.3d. 786, 514 N.E.2d 45, 112 Ill.Dec. 649 (1st Dist., 4th Div. 1987); McRand, Inc. v. Van Beelan, 138 Ill.App.3d. 1045, 1051, 486 N.E.2d 1306, 1311, 93 Ill.Dec. 471, 476 (1st Dist., 3d Div. 1985).

¹¹ Instrumentalist Co. v. Band, Inc., 134 Ill.App.3d. 884, 480 N.E. 2d 1273, 89 Ill.Dec. 530 (1st Dist., 5th Div. 1985).

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permanent” as to each and every single customer.¹² A “customer” may be a distributor or an end-user to whom the same distributor sells a product, if there is a concomitant relationship between the employer and the end-user.¹³ In addition to a “near permanent” customer relationship, this interest also requires a showing that the employee has come into contact with the customers by virtue of his relationship with the employer.¹⁴ If an employee had brought all or most of the customers to the former employer from a previous employee, or cultivated them himself, it would be unfair to allow the most recent former employer to protect those customers against competition from the employee that generated the business in the first place.¹⁵

b. Confidential information and trade secrets

In a recent opinion, the Illinois Appellate Court aptly noted that the near permanency test turns in large degree on the nature of the business involved. Certain businesses are more amenable to showing near permanency, including those engaged in a professional practice, those that sell their customers a unique product and service or those who are under contract with existing customers.¹⁶ By contrast, a highly competitive industry in which customers, through cross-purchasing, satisfy their buying needs is not amenable to a showing of near permanent customer relationships.

¹² Preferred Meal Systems, Inc. v. Guse, 199 Ill.App.3d. 710, 723-24, 557 N.E.2d 506, 145 Ill.Dec. 736 (1st Dist., 2d Div. 1990), app.den. 133 Ill.2d 572, 561 N.E.2d 706, 149 Ill.Dec. 336 (1990).

¹³ Arpac Corp. v. Murray, 226 Ill.App.3d. 65, 589 N.E.2d 640, 168 Ill.Dec. 240 (1st Dist., 2d Div. 1992).

¹⁴ A.B. Dick Co. v. American Pro-Tech, 159 Ill.App.3d. 786, 514 N.E.2d 45, 112 Ill.Dec. 649 (1st Dist., 4th Div. 1987).

¹⁵ Rapp Ins. Agency, Inc. v. Baldree, 231 Ill.App.3d 1038, 597 N.E.2d936, 173 Ill.Dec. 962 (5th Dist., 1992). See, LSBZ, Inc. v. Brokis, 237 Ill.App.3d 415, 603 N.E.2d 1240, 177 Ill.Dec. 866 (2nd Dist. 1992) (no protectable interest in customers found where evidence showed that customers of hair salon patronized particular stylists rather than the salon employer); Office Mates 5, North Shore, Inc. v. Hazen, 599 N.E.2d 1072 (1st Dist., 1992).

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Oftentimes, these types of businesses rely heavily on a sales force utilizing basic sales techniques such as cold calls. The identity of prospective customers is known by all persons in the industry and customer relationships are fleeting and fickle.¹⁶

Once a protectable interest in “near-permanent” customer relationships is established, the issue becomes what type (and scope) of covenant will be found “reasonably related” to protect that interest. Although there has recently been a greater propensity to enforce activity restraints over non-competition covenants, a non-solicitation or non-contact covenant will be upheld, is not always more suitable than a non-competition covenant.¹⁷ Contrast, for example, the effect of a narrowly drawn non-competition covenant, limited to the functions of advertising, sales or marketing within a particular industry with a non-contact covenant restricting communication with all of the employers’ customers, no matter what the capacity or nature of the contact. Which covenant is truly broader?

A non-competition covenant restricting the engagement of a former employee in a capacity likely to lead to contact with the employer’s customers is advisable and should be enforced in instances where there is a protectable business interest in the employer’s customer relationships. In addition, a non-contact covenant is appropriate to protect the employer from solicitation on the part of the former employee when such solicitation is intended or likely to lead to the purchase of

¹⁶ Office Mates 5, Northshore Inc. v. Hazen, 599 N.E.2d 1072.

¹⁷ A statistical analysis of non-competition clauses in employment contracts, 15 J. Corp. L. 483 (1990). Contrast The Instrumentalist v. Band, Inc., 134 Ill.App.3d 884 (1st Dist. 1985) (customer relationships sustained two year non-competition covenant) with Arpac Corp. v. Murray, 226 Ill.App.3d 65 (1st Dist. 1992) (near permanent customer relationships did not sustain two year non-competition covenant).

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not only the same goods and services of the former employer, but substitute goods and services. Drafting techniques should be employed to define “competitive” areas, “substitute” goods or services, and “customers” of the employer. It is further advisable to set forth the reasons for utilization of both a non-compete and a non-contact covenant, so that the same will not be viewed as over-reaching.

At the same time, a non-disclosure covenant could be utilized and should be enforced when disclosure of certain information is likely to adversely affect the employer’s protectable interest in its customer relationships.

Contrast these types of customized covenants with those currently found in employment agreements and form books, in which a former employee is purportedly restricted from competing in any area competitive (undefined) with the employer, from soliciting customers (also undefined) of the former employer and disclosing the employer’s trade secrets (of course, undefined). No effort is made to limit the capacity of the former employer’s engagement in a competitive area. No effort is made to restrict solicitation or contact to communications which would adversely impact the employer’s business.¹⁸ No effort is made to identify what type of information may be considered secret concerning these customers. Use of these types of covenants, and particularly cumulative use of these covenants would likely be considered prohibitive restraints of trade. Neither employers nor

¹⁸ For example, the former employee should be allowed to contact customers when the same contact concerns a wholly non-competitive product, the utilization of which would not impact the employer’s business.

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their attorneys should be surprised when courts demand customized restrictions which are designed to protect the employer's protectable interest.

Confusion has resulted when customer identities or other information is sought to be protected, not because of the "near permanency" of the relationship with the former employer, but because such information was thought to be confidential.¹⁹ Irrespective of the existence of near permanent relationships with customers, confidential information or trade secrets will constitute a "protectable interest" and support a restrictive covenant, whether that information relates to the employer's customers, product, services, marketing or other information.

The conventional wisdom is that "confidential information" need not rise to the level of a "trade secret" to sustain a restrictive covenant.²⁰ No case has expressly distinguished "confidential information" from "trade secrets." Under the Illinois Trade Secret Act, information must be both secret (presumably the same as confidential) and "the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality."²¹

¹⁹ Lincoln Towers Insurance Agency v. Farrell, 99 Ill.App.3d 353 (1st Dist. 1981) (requiring a "near permanent" customer relationship to protect customer information as a trade secret).

²⁰ Millard Maintenance Service Co. v. Bernero, 207 Ill.App. 3d. 736, 556 N.E.2d. 379, 152 Ill.Dec. 692 (1st Dist., 4th Div. 1990); Shapiro v. Regent Printing Co., 192 Ill.App.3d. 1005, 549 N.E.2d 793, 140 Ill.Dec. 142 (1st Dist., 4th Div. 1989).

²¹ Ill.Rev.Stat., ch. 140, para. 352(d)(2)(1991).

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The courts should use a less stringent test to find “confidential information” (as opposed to a “trade secret”) sufficient to support a restrictive covenant. After all, the covenant itself is a means to preserve the confidentiality of the information. Functionally, the “reasonable means” test of the Illinois Trade Secrets Act serves to identify what information the employee is expected to keep secret as well as an objective indicator of that information which the parties have designated as qualifying for special treatment. A covenant does (or can do) the same thing. On the other hand, courts have pointed out that they should not be asked to preserve the confidentiality of information which the employer itself has failed to treat as confidential.

Less focus should be on means as opposed to secrecy, particularly where a fiduciary relationship is involved. If no means are utilized to maintain secrecy, chances are the information is not secret. If it is secret, the fact that the information was not kept under lock and key, but entrusted to employees, is immaterial. This is especially so where the information is further subject to a restrictive covenant between the parties. In such a case, the employer should consider the possibility that a former employee’s appropriation of information, not otherwise subject to protection, might constitute a breach of a fiduciary duty or some contractual duty.

The line between “confidential information” and “trade secrets” is especially difficult to draw given that the definition of “trade secret” is itself nebulous. The Illinois Supreme Court noted that an exact definition of a common law trade secret, applicable to

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all situations, was not possible.²²

- (1) the extent to which the information is known outside of (the employer's) business;
- (2) the extent to which it is known by employees and others involved in (the employer's) business;
- (3) the extent of measures taken by (the employer) to guard the secrecy of the information;
- (4) the value of the information to (the employer) and to (the employer's) competitors;
- (5) the amount of effort or money expended by (the employer) in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.²⁴

The Illinois Trade Secrets Act incorporates a flexible definition by defining a trade secret as “information” which is “sufficiently secret” to derive economic value from not being “generally known” to persons who could obtain economic value from its disclosure and use and is the subject of “reasonable” efforts to maintain its secrecy.²⁵ In most trade secret cases, whether a restrictive covenant has or has not been present, the courts have focused on the degree

²² ILG Industries, Inc. v. Scott, 49 Ill.2d 88, 93, 273 N.E.2d 393 (1971).

²⁴ Id., citing restatement of Torts, Sec. 757 comment b, p. 6. These factors are still relevant under the Illinois Trade Secrets Act (Cite).

²⁵Ill. Rev. Stat., ch. 110, par. 352 (d).

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of secrecy present or the means used to safeguard the information.²⁶ The subject of a trade secret could encompass almost anything. Despite the statute's reference to information not generally known, courts have looked to whether the information is readily accessible to a competitor.²⁷ There appear to be two exceptions. Extensive time, effort and expense in distilling or organizing publicly-available data may elevate information to protectable status.²⁸

Secondly, a combination of elements or steps, each of which is publicly known, may qualify as a trade secret if:

(a) the overall design and operation of the combination is "the essence" of the secret;²⁹

or

(b) if the elements or steps differ materially from present art.³⁰

²⁶ Rapp Ins. Agency, Inc. v. Baldree, 231 Ill. App. 3d 1038, 597 N.E. 2d 936, 173 Ill. Dec. 962 (5th Dist., 1992) (information not a trade secret when it can be derived by contacting customers directly, who would disclose, "more often than not," the information "in hopes" of obtaining a better deal); Hamer Holding Group, Inc. v. Elmore, 202 Ill. App. 3d, 994, 560 N.E. 2d 907, 148 Ill. Dec. 310 (1st Dist., 2d Div. 1990), app. den. 136 Ill.2d 544, 567 N.E. 2d 331, 153 Ill. Dec. 373 (1991) (information about directors of condominium associations; obtainable from Secretary of State and distilled and updated without considerable time; effort and expenses, was not subject to Trade Secret Act protection); Label Printers v. Pflug, 206 Ill. App. 3d, 483, 564 N.E. 2d 1382, 151 Ill. Dec. 720 (2d Dist., 1991) (customers list compiled by employee-defendant from "cold" calls to industrial parks and by reference to the Illinois Harris Guide not confidential).

²⁷ Office Mates 5, North Shore, Inc., *supra*.

²⁸ E.g., Gillis Assoc. Industries, Inc. v. Cari-All, Inc., 206 Ill. App. 3d, 184, 564 N.E. 2d 664, 571 N.E. 2d 147, 156 Ill. Dec. 560 (1991) *reference to trade journals and yellow pages did not reveal which customers previously purchased wire shelving, absent considerable time and investigatory effort; however, this information was held not protectable as a result of the employer's failure to maintain adequate safeguards).

²⁹ Ferroline Corp. v. General Ailine & Film Corp., 207 F.2d 912, (CA 7, 1953); Imperial Chemical Industries, Ltd. v. National Distillers & Chemical Corp., 342 F. 2d 737 (CA 2, 1965); Servo Corp. v. General Elec. Co., 393 F.2d 737 (CA2, 1965); Servo Corp. v. General Elec. Co., 393 F. 2d 551 (CA 1968); Struthers Scientific & International Corp. v. General Foods Corp., 334 F. Supp. 1329 (DC D Del 1970).

³⁰ Nickelson v. General Motors Corp., 361 F. 2d 196 (CA 7, 1966); Wesley-Jessen, inc. v. Reynold, 182 USPQ 135 (DC ND Ill. 1974); Opinion of Comptroller General of the United States; 180. USPQ 328 (19723); Wilkes v. Pioneer American Ins. Co. of Ft. Worth, 383 F. Supp1135 (DC D SC 1874).

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The means required to protect confidential information varies in the case law.³¹ Courts have recognized that the means necessary are those reasonable under the circumstances, and one court has equated this to cost-effective measures.³² Means which have traditionally been utilized to protect trade secrets include limited access by employees or agents with a need to know the information, keeping the information in a secured location, under lock and key, limiting copies of the information and requiring a return of all copies to the owner, marking documents as “confidential” (or some other similar legend placing the recipient on notice of the confidential nature of the document), and obtaining written acknowledgments by recipients that the secrecy of the information will be maintained and all materials will be returned to the owner. Non-disclosure agreements are particularly important when trade secret information is distributed to third parties who do not otherwise owe any duty to the employer.

III. Reasonableness as to scope

Once a protectable interest in customer relationships or confidential information is established, the court will examine whether the covenant is reasonable in scope. Generally, a covenant is reasonable in scope if it does not exceed that which is necessary to protect an

³¹ Compare, Lawter International, Inc. v. Carroll, 116 Ill. App. 3d 717, 451 N.E. 2d 1338, 72, Ill. Dec. 15 (1st Dist., 4th Div. 1983) (Boxes of documents reflecting the location, shipping addresses, telephone numbers and contact persons at each customer, quantity of products sold and accounts receivable generated, entitled to protection despite not having been marked “confidential” or kept under lock and key); Packaging House, Inc. v. Hoffman, 114 Ill. App. 3d 284 (1st Dist., 1983) (customer list marked “confidential,” kept under lock and key, pursuant to access, entitled to protection); Gillis Assoc. Industries, Inc., supra (failure to maintain adequate measures to maintain confidentiality results in forfeiture of protection); Rockwell Graphic Systems, Inc. v. DEV Industries, Inc. 995 F. 2d 174 (7th Cir. Ill. 1991) (Distribution of certain piece-part drawings to outside vendors, subject to confidentiality agreements, did not destroy trade secrecy status of drawings, distinguishing “perfect” security from cost-effective security).

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employer's legitimate business interests. The same length of time or the same geographic restriction may be considered reasonable in one situation but unreasonable in another, depending on the facts. The ever present dilemma is that the longer and wider the employer seeks protection of its interest, the more likely it is that the court will strike down the covenant as overly broad. However, if the covenant is for too short of a period of time or too small of an area, the covenant will have little or no value. Add to this the uncertainty presented by a covenant which is reasonable in scope at the time it is entered into but unreasonable at the time of enforcement due to changes in the employer's business,³³ and you have a situation which illustrates the uncertainties which typically permeate this area of the law. A historical examination of the "outer" and "inner" limits of time and geographic restrictions addressed in the case law, therefore, provides minimal guidance.

Enforcement, however, will not depend on whether a one or a three year covenant is involved, but why the one year covenant is unreasonable in one case and why the three year covenant is reasonable in another case, and what restriction, if any, is reasonable in your particular case. One commentator has concluded after statistically analyzing numerous restrictive covenant cases nationwide from the 1960's and 1980's that the average length of a restrictive covenant that was enforced by the court in the 1980's was 21 months, having been 27 months in the 1960's.³⁴

³² Rockwell Graphic Systems, Inc., *supra*.

³³ (*Gillis Associated Industries, Inc. v. Cari-All, Inc.*, 206 Ill. App. 3d 184, 564 N.E. 2d 881, 151, Ill. Dec. 426 (1st Dist., 1st Div. 1990)), app. den. 137 Ill. 2d 664, 571 N.E. 2d 147, 156 Ill. Dec. 560 (1991)

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a. Reasonable duration

Although there is no case that suggests a covenant longer than two years will automatically be stricken, two year covenants have frequently been upheld by Illinois courts and may therefore be thought of as safe.³⁵ A longer covenant could be perceived as overreaching or may add to the perception of overreaching created by a combination of other aspects of the covenant. No rule of thumb, however, can be definitely stated.³⁶ The key is why a particular period is appropriate. Reasons previously cited in upholding covenants with durational restrictions are: 1) the period typically needed to make a sale in that business;³⁷ 2) the period needed to develop the employer's clientele;³⁸ 3) the closeness and exclusivity of customer relationships sought to be protected;³⁹ 4) the costs associated with developing goodwill;⁴⁰ and, most importantly, 5) the time necessary to independently establish contacts with customers or to derive confidential information absent the employment relationship. In some businesses,

³⁴ "A Statistical Analysis of Non-Competition Clauses in Employment Contracts," 15 J. Corp. L. 483, 501 (1990).

³⁵ Arpac Corp. v. Murray, 226 Ill. App. 3d 65, 589 N.E. 2d 640, 168 Ill. Dec. 240 (1st Dist., 2d Div. 1992) (non-solicitation); PCx Corp. v. Ross, 168 Ill.App.3d 1047, 522 N.E.2d 1333, 119 Ill.Dec. 474 (1st Dist. 5th Div. 1988) (non-solicitation); The Instrumentalist Co. v. Band, Inc., 134 Ill. App.3d 884, 480 N.E.2d 1273, 89 Ill.Dec. 530 (1st Dist., 5th Div. 1985) (non-competition); Agrimerica v. Mathes, 170 Ill.App.3d 1025, 524 N.E.2d 947, 120 Ill.Dec. 765 (1st Dist., 2d Div. 1988) (non-solicitation).

³⁶ See, e.g., Donald McElroy, Inc. v. Delaney, 72 Ill.App.3d. 285, N.E.2d 1300, 27 Ill.Dec. 892 (1st Dist., 4th Div. 1979) (3 year covenant upheld).

³⁷ (Arpac Corp., *supra*).

³⁸ Millard Maintenance Service Co. v. Bernero, 207 Ill.App.3d 736, 566 N.E.2d 379, 152 Ill.Dec. 692 (1st Dist., 4th Div. 1990); Agrimerica, Inc., *supra*.

³⁹ The Instrumentalist, *supra*.

⁴⁰ Morrison Metalweld Process Corp. v. Valent, 97 Ill.App.3d., 373, 422 N.E.2d 1034, 52 Ill.Dec. 825 (1st Dist., 5th Div. ,

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customers can be developed quickly and have little loyalty; other times, a salesperson must work with a prospective customer for a long period of time to develop the prospect. Sometimes a trade secret will require eighteen months to independently develop. In those cases, a commensurate injunction is appropriate.⁴¹ Whatever type of covenant is used, it should endure as long as necessary to protect the interest sought to be protected, whether it be six months or six years.

b. Geographical restrictions

The reasonableness of a geographic restriction depends on the type of covenant used. “Activity restraints,” such as bans on solicitation or disclosure of confidential information, need no geographical restriction to be enforceable.⁴² Restraints on competition, on the other hand, must be reasonably limited by geographic area to be upheld.⁴³

The geographical area covered by a covenant not to compete should be the area from which a business does business or draws its customers.⁴⁴ If 90% of a company’s customer’s customers come from the Chicago

Metropolitan area, a nationwide covenant is likely to be stricken down as overly broad. A more conservative approach is to choose a geographical area for the covenant somewhat smaller

⁴¹ ILG Industries, Inc., *supra*.

⁴² See, Arpac Corp. v. Murray, 226 Ill.App.3d. 65, 589 N.E.2d 640, 168 Ill.Dec. 240 (1st Dist., 2nd Div. 1992).

⁴³ Preferred Meal Systems, Inc. v. Guse, 199 Ill.App.3d. 910, 557 N.E.2d 506, 145 Ill.Dec. 736 (1st Dist., 2d Div. 1990) (non-compete upheld when limited to area in which employer did business); Dryvit System, Inc. v. Rushing, 132 Ill.App.3d. 9, 477 N.E.2d 35, 87 Ill.Dec. 434 (1st Dist. 4th Div. 1985) (non-compete stricken for lack of geographic limitation); Telxon Corp. v. Hoffman, 720 F.Supp. 657 (N.D. Ill. 1989) (same).

⁴⁴ But, see, Telxon Corp., *supra* (“The inquiry concerns not where Telxon does business, but rather, where Hoffman’s employment might risk Telxon’s legitimate interests”).

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than the area from which the employer's customers are located; this can substantially ease the evidentiary burden of showing customers at the outer limits of the restricted area.

If a covenant restrains only solicitation or contact with customers, of course, it need not contain a limitation as to geographical area.⁴⁵ Courts are more likely to uphold a non-solicitation covenant or a non-contact covenant as opposed to a non-compete covenant and therefore non-competition covenants should be included in the employment agreement only when necessary to protect a vital business interest.

Non-solicitation covenants, however, sometimes present a difficult enforcement problem. In the hurried atmosphere of a preliminary injunction hearing, it is oftentimes difficult to prove that a former employee is indeed soliciting the employer's customers. The former employee will often claim he or she merely called these customers as friends to let them know of a change in position and the customers later approached the employee, not the other way around. A covenant prohibiting any type of contact with customers is strategically more advantageous to the employer, as it is unnecessary to prove who made the first contact or "solicitation." One must only show that one or more of the ex-employees' customers are now doing business with the former employee. Though there are enforcement problems here as well, such as locating the customers that have been in contact with the former employee and involving them in an inconvenient court battle documentary and other corroborating proof is likely to be available to demonstrate a mere "contact".

⁴⁵ Arpac Corp., supra.

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Non-disclosure covenants are enforceable only if they restrict that information which is truly confidential. Boiler plate language defining everything as confidential is counter-productive because it suggests to the court that the relative bargaining strength of the parties to the covenant was disproportionate and the covenant should be more closely scrutinized. Such covenants, if properly construed, can supplement the protection provided under the Illinois Trade Secrets Act. Covenants not to disclose because of their nature need not be limited in scope temporarily or spatially. The Illinois Trade Secrets Act speaks specifically to this issue and overruled certain Illinois case law to the contrary.⁴⁶

IV. Defenses and other considerations

An employee has a number of defenses available to him or her when faced with the effort of a former employer to enforce a restrictive covenant. The most obvious defenses relate to those negating the employer's case: lack of a protectable business interest in customers or confidential information or unreasonableness of the covenant in terms of time or geography. In addition, recent cases have addressed a number of other issues which potentially impact the enforceability of a facially enforceable covenant.

a. Lack of consideration

Like any other contract, restrictive covenants must be supported by consideration. Until fairly recently, some older cases held that an employment contract containing a restrictive covenant, entered into after employment commences, is void for lack of consideration unless it can be shown

⁴⁶ Ill.Rev.Stat. ch. 140, par. 353(d), overruling Disher v. Fulgoni, 124 Ill.App.2d 247 (1984) and Cincinnati Tool Steel Co. v. Breed, 482 N.E.2d 170 (1985).

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that continued employment was conditioned on the employee signing the agreement or there was a granting of new or additional benefits.⁴⁷ This is no longer the law in Illinois. Continued employment after signing an employment contract with the restrictive covenant is considered to be adequate consideration.⁴⁸ Adequacy of consideration was raised as a factor in the context of a restrictive covenant incidental to the sale of a business in Hamer Holding Group, Inc. v. Elmore, 202 Ill.App.3d 994, 560 N.E.2d 907, 148 Ill.Dec. 310 (1st Dist., 2d Div. 1990). In that case, the Appellate Court ruled that adequacy of consideration, as opposed to the existence of consideration, will ordinarily not be examined when enforcing a restrictive covenant. Naturally, as the courts perception of fairness is important, the employee will want the court to know if the consideration was minimal relative to reported cases in which restrictive covenants were upheld.

b. Adhesion contract

A claim that a restrictive covenant constitutes a contract of adhesion is still viable.⁴⁹ In the case of Texlon Corp. v. Hoffman, the court considered recitations to an employment agreement to the effect that the employee carefully considered the restrictive covenants and acknowledged their fairness. This homage to reasonableness backfired; the recitals were not considered evidence of equal power, but instead evidence of an imbalance of bargaining power. Id. Put succinctly, the superior bargaining position apparent from the text discounts the probative force of this textbook

⁴⁷ Sec. generally, Annot., Sufficiency of Consideration for Employee's Covenant Not to Compete, Entered into after Inception of Employment, 51 ALR 3d. 825 (1973).

⁴⁸ Scherer v. Rockwell International Corp., 766 F Supp. 593 (N.D. Ill. 1991); Shapiro v. Regent Printing Co., 192 Ill.App.3d. 1005, 549 N.E.2d 793, 140 Ill.Dec. 142 (1st Dist., 4th Div. 1989); McRand, Inc. v. Van Beelan, 138 Ill.App.3d. 1045, 486 N.E.2d 1306 93 Ill.Dec. 471 (1st Dist., 3d. Div. 1985).

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recitation to zero. In the Telxon case, the written agreement was presented to the employee in a package containing various other forms on the employee's first day of work. The employee received no explanation as to the limitations contained in the agreement. The district court noted that similar circumstances served to defeat the covenant at issue in American Food Management, Inc. v. Henson, 105 Ill.App.3d 141, 146, 434 N.E.2d 59, 63, 61 Ill.Dec. 122, 126 (5th Dist., 1982). The lesson to be learned is that the covenant should be discussed as part of the job offer or even in the interview process with prospective employees.

c. Unclean hands

An employee may raise the equitable defense of unclean hands against an employer seeking an injunctive order enforcing the covenant. Though, employees have sought to raise all kinds of supposed misconduct by employers as a defense to an injunction proceeding.⁵⁰ If the employer's inequitable conduct is to be recognized as a defense to an enforcement proceeding, it must actually relate to the issues in the case and not extraneous matters. Thus, efforts by an employee to raise irrelevant bad conduct by an employer is risky, as it will show the adversary in a bad light but may, and should, be perceived as a sneaky litigation tactic.

d. Bankruptcy

It appears from limited case law in the area that after filing bankruptcy, an employee may reject a restrictive covenant and employment agreement as an executory contract.⁵¹ In these cases,

⁴⁹ Telxon Corp. v. Hoffman, 720 F.Supp. 657 (N.D. Ill. 1989)

⁵⁰ See, e.g., Lawter International, Inc. v. Carroll, 116 Ill.App.3d 717, 451 N.E.2d 1338, 72 Ill.Dec. 15 (1st Dist., 4th Div. 1983) (misrepresentation of agreement with third party).

⁵¹ In re: Golconda, Inc., 56 B.R. 136 (Bankr. M.D. Fla. 1985) In re: Allain, 59 B.R. 107 (Bankr. W.D. La. 1986).

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the employer would have a right to claim damages against the estate resulting from the rejection of the covenant in the executory contract but would be unable to enjoin a violation.

In determining whether a contract is executory, the Seventh Circuit has adopted the Countrymen test which states that an agreement is executory when the obligation of both the bankrupt and claimant are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.⁵² Therefore, after an employee has terminated employment and an employer has fully performed its obligations under the employment contract, the restrictive covenant is no longer executory and the employee would be unable to reject it in bankruptcy. However, if the employer has not performed its obligations under the employment contract, such as not paying wages or commissions due to the employee, the employee could at least argue that consideration is required by both parties, the contract is executory, and the employee should therefore be allowed to reject the covenant. An employer that anticipates enforcement proceedings should consider quickly satisfying its obligations under the employment agreement if the employee is a potential candidate for bankruptcy.

e. Judicial Modification

Illinois allows limited judicial modification of restrictive covenants or “blue penciling” when the original covenant sought to be enforced is reasonable in the first instance. In House of Vision v. Hiyane,⁵³ the Illinois Supreme Court set forth the test for determining whether blue penciling would

⁵² In re: Streets and Beard Farm Partnership, 882 F.2d 233 (7th Cir. Ill.1989)

⁵³ 37 Ill.2d 32, 225 N.E.2d 21, (1967)

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be appropriate. Appellate Courts following House of Vision have occasionally blue penciled covenants⁵⁴ but House of Vision stands for the proposition that an unreasonable covenant cannot be judicially modified to make it enforceable.⁵⁵ A severability clause in an employment agreement is one factor on which a court will rely to support a decision to blue pencil.⁵⁶ Moreover, a court is more likely to strike out one covenant among several separate covenants, such as a covenant not to compete and a covenant not to solicit, than it would be to modify the geographic scope of an overly broad covenant.

f. Professional regulation

A restrictive covenant limiting the right of an attorney to practice law violates Illinois Rule of Professional Conduct 5.6 and is almost certain to be stricken as violative of public policy. Even a slight restriction prohibiting only certain types of solicitation by the departing employee would not be upheld. In sharp contrast, a covenant restricting competition by a medical professional are more likely to be enforced than a covenant against employees in almost any other occupation, because the courts do not require the employer to demonstrate the presence of a protectable business interest.⁵⁷

⁵⁴ Wyatt v. Dishong, 127 Ill.App.3d 716, 469 N.E.2d 608, 83 Ill.Dec.1 (5th Dist. 1984).

⁵⁵ See also, Dryvit System, Inc. v. Rushing, 132 Ill.App.3d 9, 477 N.E.2d 35, 37, 87 Ill.Dec. 434 (1st Dist. 1985).

⁵⁶ See, Arpac Corp., *supra*.

⁵⁷ See, Retina Services Ltd. V. Garoon, 182 Ill.App.3d. 851, 538 N.E.2d 651, 131 Ill.Dec. 276 (1st Dist., 1st Div. 1989), app. Den. 545 N.E.2d 130, 136 Ill.Dec. 606 (1989).

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Rather, it is assumed that employers of medical professionals have a protectable business interest in their clientele. This rule does not extend to dissolved medical practices.⁵⁸

VI. Conclusion

The foregoing considerations should yield an understanding of employment agreements that are more likely to be enforced by a court against an unfairly competing former employee. Such an understanding encourages the drafting of viable covenants and a more certain determination before litigation of the likelihood that a covenant will be enforced. Hopefully, this will result in fewer unfair covenants and less of the frivolous restrictive covenant litigation currently taxing the courts. Moreover, attending to the above principles will result in a restrictive covenant which is fair to both the employee and the employer.

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⁵⁸ Frazier v. Dettman, 212 Ill.App.3d 139, 569 N.E.2d 1382, 155 Ill.Dec. 771 (2d Dist., 1991), app.den. 141 Ill.2d 539, 580 N.E.2d 112, 162 Ill.Dec. 486 (1991) (dental).