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Post Employment Restraints: An Analysis of Theories of Enforcement, and a Suggested Supplement to the Covenant Not to Compete

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POST EMPLOYMENT RESTRAINTS: AN ANALYSIS OF THEORIES OF ENFORCEMENT, AND A SUGGESTED SUPPLEMENT TO THE COVENANT NOT TO COMPETE

I. INTRODUCTION

The free market has long been recognized as the foundation of our economic system. It is axiomatic that a free market system functions most efficiently in an environment of freedom of choice and of contract, of freely flowing commerce, and of unbridled competition. At early common law, covenants not to compete in employment agreements[1] were viewed by the courts as a restraint of trade and invalid.[2] Undeniably, however, the knowledge, business contacts, and expertise gained by key employees during their employment placed the employees in a unique position upon leaving an employer's service. If they used this acquired knowledge, the individuals or a new employer

1. This article is concerned exclusively with covenants which are ancillary to employment contracts. No treatment is accorded to promises not to compete that are ancillary to pension or profit-sharing plans; nor does this article address the competition restraints imposed in the sale of a business. The differences in purpose and the considerations involved in the latter are considered in Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 647 (1960). As explained by Professor Blake, the objective of the post-employment restraint is "not to prevent the competitive use of the unique personal qualities of the employees—either during or after the employment—but to prevent competitive use, for a time, of information or relationships which pertain peculiarly to the employer and which the employee acquired in the course of the employment." *Id.*

2. The Dyer's Case, 2 Hen. V.P. 26 (1414); Carpenter, *Validity of Contracts Not To Compete*, 76 U. PA. L. REV. 244, 244-45 (1928).

> Not only did the early cases attach no importance to the narrowness or the generality of the restriction, but they made no distinctions as to whether the contract was a bare one not to compete, or was made as part of a contract for a term of employment, or as ancillary to the sale of a business. The reasons for holding contracts not to engage in a trade or employment void were not stated in the early cases, but the objections to such covenants are not difficult to surmise when it is remembered that at that time there were few trades a man could follow without having been duly apprenticed . . . . Under these conditions it is apparent that an agreement not to carry on a trade or to refrain from competing with the covenantee might have greatly injured the covenantor by divesting him of his only means of earning a livelihood . . . .

Id. *See* Kreider, *Trends In The Enforcement Of Restrictive Covenants*, 35 U. CIN. L. REV. 16, 16 (1966). *See generally* RESTATEMENT OF CONTRACTS §§ 515-16, 518 (1932); 6 A. CORBIN, CONTRACTS §§ 1379-96 (1962); S. WILLISTON & G. THOMPSON, CONTRACTS §§ 1628-1664A (rev. ed. 1936).

would gain an unfair competitive edge over the former employer.[3] Consequently, the courts came to tolerate the use of covenants not to compete as instruments to protect former employers.[4] But even today, this tolerance is not unlimited.

The courts' recognition that employers had legitimate concerns and interests worthy of protection instigated enforcement of *reasonable* covenants by injunction following a breach.[5] The extent of enforcement is confined to that which is reasonable under the circumstances.[6] Courts have determined that a covenant which offends the rule of reason does not result in total denial of enforcement.[7] Accordingly, this comment will discuss approaches taken by the courts when faced with an *unreasonable* covenant in the employment agreement.

This article analyzes approaches taken by courts in all fifty states toward an unreasonable covenant not to compete. There are four basic approaches to overly broad restrictive covenants:

1. Deny enforcement of the entire covenant;
2. The blue pencil approach in which a court will grant enforcement of the covenant if it can blue pencil or strike out objectionable language without changing the impact of the clause;
3. Reform an overly broad restraint without regard to the severability of contract language; and

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3. Kreider, *supra* note 2, at 16-17.

4. *See, e.g.*, Dowden v. Pook, [1904] 1 K.B. 54; Nordenfelt v. Maxim Nordenfelt, etc. Co., [1894] A.C. 535; Chesman v. Nainby, 93 Eng. Rep. 819 (K.B. 1726).

5. *See, e.g.*, Smithereen Co. v. Renfroe, 325 Ill. App. 229, —, 59 N.E.2d 545, 548-49 (1945) (injunctive relief will be granted where the employer proves that nonenforcement of the covenant will result in irreparable harm to or substantial interference with his business).

6. Some courts determine the validity of such covenants by applying what is known as the "rule of reason" test, which requires a covenant to be reasonable in order to be valid. *See, e.g.*, Josten's, Inc. v. Cuquet, 383 F. Supp. 295, 297 (E.D. Mo. 1974); Technicolor, Inc. v. Traeger, 57 Hawaii 113, —, 551 P.2d 163, 170 (1976). *See also* Note, *Partial Enforcement Of Post-Employment Restrictive Covenants*, 15 COLUM. J.L. SOC. PROBS. 181, 182-88 (1979).

7. Under the rule of reason, an employee's restrictive covenant is unenforceable as against public policy if it constitutes an unreasonable restraint of trade. To be held reasonable, the covenant must satisfy the following requirements: (1) The agreement must be necessary for the protection of the employer; (2) it must provide a reasonable time period; (3) it must cover a reasonable territory; (4) it must not be unreasonable as to the employee; and (5) it must not be unreasonable as to the general public. Richards, *Drafting and Enforcing Restrictive Covenants Not To Compete*, 55 MARQ. L. REV. 241, 242 (1972) (citing Lakeside Oil Co. v. Slutsky, 8 Wis. 2d 157, 98 N.W.2d 415 (1959)).

For an interesting analysis of this issue, see Judge Hoover's metaphorical treatment of the issue in Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 62 Ohio L. Abs. 17, 105 N.E.2d 685 (C.P. 1952). "In determining what is reasonable the Goddess of Justice that hovers over the American court house with scale in hand has a delicate job of weighing; and it is a three—not a two—pan scale for she must balance the conflicting interests of employer, employee and public." *Id.* at —, 105 N.E.2d at 692.

4. Regulation by statute.[8]

This annotation will classify each state under one of the above categories. This comment is intended to be used as a tool by the practitioner, providing him or her with a convenient reference to state statutes, case law, or in-depth articles dealing with covenants not to compete in all fifty states. Also discussed is the possibility of protecting an employer's business interest by supplementing the covenant with a confidentiality or secrecy agreement.

II. THE FOUR APPROACHES TO OVERLY BROAD RESTRICTIVE COVENANTS

A. Unreasonable Restriction May Not Be Modified and Enforced

Where the restrictive covenant is unreasonable in time, area, or both, some states have adopted the rule that the restrictive covenant "must be judged as a whole and must stand or fall when so judged."[9] Under this rule, the restrictions are not divisible by the courts.

> Whether part of the contract might be deemed reasonable and enforceable is not the question. It comes to us as a single document. We must construe it as the parties made it. "The Court cannot by splitting up the territory make a new contract for the parties. It must stand or fall integrally."[10]

The Arkansas case of *Rector-Phillips-Morse, Inc. v. Vroman*[11] provides a forthright example of this approach. Vroman, the employee-salesman, agreed not to compete with Rector-Phillips-Morse within a single county for three years after termination of his employment. The Arkansas Supreme Court held that the three-year period was too long and refused even partial enforcement, despite the following provision in Vroman's employment agreement:

> It is the intent of the parties to restrict the activities of Vroman only to the extent necessary for the protection of legitimate business interests of RPM and they specifically covenant and agree that the above provisions, under any set of circumstances not now foreseen by the parties, be deemed too broad for that purpose that such provisions will, nevertheless, be valid and enforceable to the extent necessary for such

8. Blake, *supra* note 1, at 629-83.

9. Welcome Wagon, Inc. v. Morris, 224 F.2d 693, 701 (4th Cir. 1955).

10. Henley Paper Co. v. McAllister, 253 N.C. 529, 535, 117 S.E.2d 431, 434-35 (1960). *See also* Welcome Wagon, Inc. v. Morris, 224 F.2d 693, 701 (4th Cir. 1955).

11. 253 Ark. 750, 489 S.W.2d 1 (1973).

protection.[12]

The court explained that partial enforcement amounted to a judicial rewrite of the contract and tended to provoke unnecessary litigation. Therefore, the court held that the covenant would not be enforced.[13]

Georgia is another state which refuses to grant partial enforcement of unreasonable restrictive covenants.[14] In *Richard P. Rita Personnel Services International, Inc. v. Kot*,[15] the franchisee agreed to a covenant restricting him from competing against the franchisor in Fulton, Cobb, and DeKalb counties, or any territorial areas where the franchisor had granted franchises.[16] Upon the franchisee's breach, the franchisor sought to enforce only that part of the covenant applicable to the three Georgia counties, and requested that the court adopt the "blue pencil" theory, deleting the unenforceable portion of the covenant.[17] After examining cases rejecting partial enforcement,[18] the court refused to sever the unreasonable language and held that the covenant in its entirety was unenforceable.[19]

Even though it appears that rejection of the entire covenant is followed in only a few states, principally Arizona,[20] Arkansas,[21] Georgia,[22] Maine,[23] Nebraska,[24] South Carolina,[25] Tennessee,[26]

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12. *Id.* at 753, 489 S.W.2d at 3-4.

13. *Id.* at 755, 489 S.W.2d at 5. For a detailed examination of the position taken by the Arkansas courts when faced with an unreasonable covenant, see Orkin Exterminating v. Weaver, 257 Ark. 926, —, 521 S.W.2d 69, 71-72 (1975), and Note, *Employee Covenants Not To Compete*, 29 ARK. L. REV. 406, 413 (1975).

14. *See* Morris, *A Survey Of Covenants Not To Compete Ancillary To Employment Contracts In Georgia*, 10 GA. STA. B.J. 125, 125 (1973).

15. 229 Ga. 314, 191 S.E.2d 79 (1972).

16. *Id.* at —, 191 S.E.2d at 80.

17. *Id. See* Morris, *supra* note 14, at 136.

18. *E.g.*, WAKE Broadcasters v. Crawford, 215 Ga. 862, —, 114 S.E.2d 26, 28 (1960).

19. 229 Ga. at —, 191 S.E.2d at 81. One commentator believes that the *Rita* decision is illustrative of a clear trend among Georgia courts to refuse to apply any theory of partial enforcement. Morris, *supra* note 14, at 137. *See* Labor Pool of Atlanta, Inc. v. Alps, Inc., 227 Ga. 463, —, 181 S.E.2d 385, 385 (1971).

20. *See* Lassen v. Benton, 87 Ariz. 72, 347 P.2d 1012 (1959). Reluctant to rewrite the contract for the parties, the court upheld the entire covenant on the grounds that it was indivisible. *Id.* at —, 347 P.2d at 1013. It is not clear whether the court, had it found the agreement to be divisible, would have applied its blue pencil and enforced only part of the agreement.

21. Orkin Exterminating v. Weaver, 257 Ark. 926, —, 521 S.W.2d 69, 71-72 (1975); Rector-Phillips-Morse, Inc. v. Vroman, 253 Ark. 750, —, 489 S.W.2d 1, 4 (1973). *See* notes 11-13 *supra* and accompanying text.

22. Richard P. Rita Personnel Servs. Int'l, Inc. v. Kot, 229 Ga. 314, —, 191 S.E.2d 79, 81 (1972); Labor Pool of Atlanta, Inc. v. Alps, Inc., 227 Ga. 463, 463, 181 S.E.2d 385, 385 (1971). *See* notes 14-19 *supra* and accompanying text.

23. *See* Roy v. Bolduc, 140 Me. 103, —, 34 A.2d 479, 480-81 (1953).

24. *See* Midlands Transp. Co. v. Apple Lines, Inc., 188 Neb. 435, —, 197 N.W.2d 646, 651 (1972); Adams v. Adams, 156 Neb. 778, 58 N.W.2d 172 (1953). Although not faced with an unrea-

Virginia[27] and Wisconsin,[28] this minority view marshalls some persuasive policy arguments. For example, some courts argue that to allow modification of unreasonable covenants would encourage employers to draft broad non-competition agreements, knowing that most employees respect them as written. The proportionately few breached covenants would find their way into court, to "be pared down and enforced when the facts of a particular case are not unreasonable."[29] Typically, these courts will not modify and enforce unreasonable restraints on the ground that a court may not rewrite the parties' contract because to do so is "not within the judicial province as it has been traditionally understood in our law."[30] Still other courts refuse to enforce unreasona-

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sonable covenant in *Adams*, the language of the opinion indicates the court's tendency to uphold or deny enforcement of a covenant as written. "[A]n agreement which limits the right of a person to engage in a business or occupation will be strictly construed and *will not be extended by implication or construction beyond the fair or natural import of the language used.*" *Id.* at —, 58 N.W.2d at 179 (emphasis added).

25. Eastern Business Forms, Inc. v. Kistler, 258 S.C. 429, 189 S.E.2d 22 (1972). The following excerpt from *Kistler* is indicative of the South Carolina Supreme Court's response to partial enforcement of covenants not to compete:

> The contract shows upon its face that it was the intent of the parties thereto that this covenant be treated as indivisible. It follows, that there is no basis for drawing a sharply defined line separating the excess territory. We cannot make a new agreement for the parties into which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally. The invalidity of the covenant is not aided by the respondent's willingness to accept a restriction that is proper in scope.

Id. at 434, 189 S.E.2d at 24. (*But see* Annot., 61 A.L.R. 3d 397, 412 (1975), for the proposition that *Kistler* approves of the use of the "blue pencil" theory.) For a thorough examination of South Carolina's reaction to unreasonable restraints, see Comment, *The Status Of The Blue Pencil Rule As Applied In South Carolina To Covenants Not To Compete*, 28 S.C.L. REV. 726, 729-38 (1977).

26. Tennessee's refusal to follow the blue pencil theory or to allow the recent approach of partial enforcement is illustrated in Allright Auto Parks, Inc. v. Berry, 219 Tenn. 280, 409 S.W.2d 361 (1966). The *Berry* decision is discussed in Note, *Trade Regulation—Covenants Not To Compete*, 34 TENN. L. REV. 717, 721 (1967).

27. Richardson v. Paxton Co., 203 Va. 790, —, 127 S.E.2d 113, 117 (1962). For a detailed explanation of Virginia's approach to unreasonable restraints, see Note, *Employee Covenants Not To Compete: Where Does Virginia Stand?*, 15 U. RICH. L. REV. 105, 142-44 (1980).

28. The Wisconsin approach is dictated by statute:

> A covenant by an assistant, servant or agent not to compete with his employer or principal during the term of the employment or agency, or thereafter, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any such restrictive covenant imposing an unreasonable restraint is illegal, void and unenforceable even as to so much of the covenant or performance of the covenant or performance as would be a reasonable restraint.

WIS. STAT. ANN. § 103.465 (West 1977). For a helpful explanation of the Wisconsin approach, see Richards, *supra* note 7. *See also* notes 103-06 *infra* and accompanying text.

29. Richard P. Rita Personnel Servs. Int'l, Inc. v. Kot, 229 Ga. 314, —, 191 S.E.2d 79, 81 (1972).

30. Rector-Phillips-Morse, Inc. v. Vroman, 253 Ark. 750, 753, 489 S.W.2d 1, 4 (1973). Blake argues that a court's willingness to modify the proportionately few covenants which come to trial "smacks of having one's employee's cake, and eating it too." Blake, *supra* note 1, at 683.

ble restraints under the aegis of a state restraint of trade statute prohibiting such covenants.[31]

B. *The Blue Pencil Approach*[32]

The frequently cited case of *Mitchell v. Reynolds*[33] was among the first decisions to recognize the validity of limited noncompetition strictures. A prerequisite for enforceability was that the covenant could restrain the employee no more than necessary to protect the employer. Following *Mitchell*, the English courts were forced to confront the problem of an unreasonable geographical restriction where the circumstances clearly merited a lesser restraint.[34] Since courts traditionally had refrained from rewriting or revising contracts, they were anxious to find another solution.[35] An acceptable alternative was created in *Chesman v. Nainby*.[36] By contract, the former employee was not to compete in an area one-half mile around the employer's shop or any other shop in which the employer might relocate. Using what has since come to be known as the "blue pencil" approach,[37] the court upheld the specific restraint and invalidated the general restraint.[38]

As explained by Professor Corbin, the blue pencil rule determines the divisibility of a covenant that excessively restrains trade by purely mechanical means:

> [I]f the promise is so worded that the excessive restraint can be eliminated by crossing out a few of the words with a "blue pencil" while at the same time the remaining words constitute a complete and valid contract, the contract as thus "blue pencilled" will be enforced. By some occult process, the courts adopting this rule convinced themselves that partial enforcement without the aid of a "blue pencil" would be "making a new contract for the parties" while partial enforcement in the

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31. *See* notes 93-107 *infra* and accompanying text.

32. This theory has also been referred to as "the doctrine of partial validity," in Extine v. Williamson Midwest, Inc., 176 Ohio St. 403, —, 200 N.E.2d 297, 299 (1964), "the rule of . . . selective construction," in Solari Indus., Inc. v. Malady, 55 N.J. 571, —, 264 A.2d 53, 60 (1970), and the "blue pencil theory of severability," in Richard P. Rita Personnel Servs. Int'l, Inc. v. Kot, 229 Ga. 314, —, 191 S.E.2d 79, 81 (1972).

33. 24 Eng. Rep. 347 (Ch. 1711).

34. *See, e.g.*, Dowden v. Pook, [1904] 1 K.B. 54; Nordenfelt v. Maxim Nordenfelt, etc. Co., [1894] A.C. 535.

35. Note, *Ohio Puts Away Its Blue Pencil*, 5 CAP. U.L. REV. 99, 100 (1976).

36. 93 Eng. Rep. 819 (K.B. 1726).

37. This term originated from the traditional use of a blue lead pencil by the courts when evaluating such a covenant in a contract. 6 A. CORBIN, CONTRACTS § 1390, at 67 (1962).

38. 93 Eng. Rep. at 821.

wake of a "blue pencil" is not.[39]

Thus, where a covenant imposes a limit upon an unreasonable extent of territory, the court may, in its discretion, enforce the covenant only to a reasonable extent.[40]

The blue pencil approach to unreasonable covenants not to compete is perhaps best illustrated by a thorough examination of the court's treatment of the covenant in *Extine v. Williamson Midwest, Inc.*[41] In *Extine*, the employment agreement contained the following restraint:

> In consideration of his employment by Employer, Employee agrees that on the termination for any cause whatsoever of his said employment, he will not, within two years after such termination, directly or indirectly, engage in the same or similar or competitive line of business to that now carried on by Employer, either on his own account or through or for or in behalf of any former employee of Employer and that he will not, within said period of employment and two years thereafter, in any way, directly or indirectly, divert or attempt to divert from Employer any business whatsoever and particularly not by influencing or attempting to influence any of the customers with whom he may have had dealings.[42]

In light of the facts of the case, the Supreme Court of Ohio recognized that some restraint on the former employee was warranted, but

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39. 6 A. CORBIN, CONTRACTS § 1390, at 67 (1962). The American Law Institute emphasizes the form of the covenant:

> Where a promise in reasonable restraint of trade in a bargain has added to it a promise in unreasonable restraint, the former promise is enforceable unless the entire agreement is part of a plan to obtain a monopoly; but if full performance of a promise indivisible in terms would involve unreasonable restraint the promise is illegal and is not enforceable even for so much of the performance as would be a reasonable restraint.

RESTATEMENT OF CONTRACTS § 518 (1932).

40. This concept of blue pencilling, or crossing out the unreasonable portions of the covenant without impairing the meaning of the contract, is illustrated in the following example.

> A contract stating that X, now working for a Cincinnati clothier, could not thereafter for three years sell clothing in Cincinnati, in Ohio, or in the United States, could be enforced in Cincinnati by blue penciling or crossing out, "in Ohio, or in the United States," which would appear to be unreasonable under the circumstances, thus leaving the literal wording of the contract including only "Cincinnati."

Kreider, *supra* note 2, at 24-25. One court has deemed the ability to sever and enforce contract terms as part of "[t]he unique virtue of equity [which] sometimes straightens out morally damaged frames as well as rehabilitates legally wrecked principles." Barb-Lee Mobile Frame Co. v. Hoot, 416 Pa. 222, 224, 206 A.2d 59, 60 (1965).

41. 176 Ohio St. 403, 200 N.E.2d 297 (1964), *overruled*, Raimonde v. Van Vlerah, 42 Ohio St. 2d 21, 325 N.E.2d 544 (1975). For an in-depth discussion of the *Extine* decision, see Kreider, *supra* note 2, at 27-30. Since *Raimonde*, Ohio courts will now determine a reasonable restriction and, if necessary, rewrite the parties' contract. *See* Keller v. Graphic Systems of Akron, Inc., 422 F. Supp. 1005, 1013 (N.D. Ohio 1976); Note, *supra* note 35, at 403-04.

42. 176 Ohio St. at 403-04, 200 N.E.2d at 298.

held that the above clause, in its entirety, surpassed reasonable limits.[43]

The court determined the covenant met the blue pencil, or partial validity, test, and that it was divisible into restraints which kept the former employee from participating in four different activities for two years after termination of employment. The covenant as written provided that the former employee: (1) would not engage in the same or similar competitive line of business on his own account; (2) would not engage in a competitive line of business on behalf of any former employee of the employer; (3) would not divert or attempt to divert business from the employer; and (4) would not attempt to divert business from the employer by influencing or attempting to influence customers with whom the former employee may have been dealing.[44]

The court concluded that restraints (1) and (2) were not limited geographically. Those restraints, if enforced, would apply to areas where the employer neither conducted present business nor planned future activity. Consequently, the court found restraints (1) and (2) were unreasonable, and, using its blue pencil, severed them from the agreement. However, the court held that restraints (3) and (4) were designed to protect "the employer in its own legitimate occupation and enterprise, and, therefore, are valid and enforceable."[45]

States such as Connecticut,[46] Illinois,[47] Indiana,[48] New York,[49] North Carolina,[50] Pennsylvania,[51] Rhode Island,[52] and West

43. *Id.* at 407, 200 N.E.2d at 300.

44. *Id.* at 406-07, 200 N.E.2d at 299.

45. *Id.* at 406-07, 200 N.E.2d at 300.

46. *See* Timenterial, Inc. v. Dagata, 29 Conn. Supp. 180, —, 277 A.2d 512, 515 (1971) (covenant unenforceable because it was indivisible).

47. Central Keystone Plating, Inc. v. Hutchison, 62 Ill. App. 2d 188, —, 210 N.E.2d 239, 242-43 (1965) (covenant found divisible; case remanded with instructions to determine reasonable area). *See* Note, *Validity of Covenants Not To Compete: Common Law Rules And Illinois Law*, 1978 U. ILL. L.F. 249, 255-61.

48. *See* Donahue v. Permacel Tape Corp., 234 Ind. 398, —, 127 N.E.2d 235, 241 (1955) (covenant unenforceable because restricted area, the United States and Canada, described in covenant as one indivisible whole).

49. Karpinski v. Ingrasci, 28 N.Y.2d 45, 52, 268 N.E.2d 751, 755, 320 N.Y.S.2d 1, 7 (1971); Note, *Remedies—Covenant Not to Compete Between Professionals—Severance and Enforcement of Only that Portion of Covenant Which is Reasonable in Scope*, 40 FORDHAM L. REV. 430, 432 (1971).

50. Welcome Wagon Int'l, Inc. v. Pender, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961); Constangy, *Employment Contract Covenants Not to Compete: Enforceability Under North Carolina Law*, 10 WAKE FOREST L. REV. 217, 234-235 (1974). *See* Note, *Restraints on Trade—Covenants in Employment Contracts not to Compete within the Entire United States*, 49 N.C.L. REV. 393, 401 (1971).

51. Reading Aviation Serv. v. Bertolet, 454 Pa. 488, —, 311 A.2d 628, 630 (1973); *accord*, Barb-Lee Mobile Frame Co. v. Hoot, 416 Pa. 222, —, 206 A.2d 59, 61 (1965). Pennsylvania's

Virginia,[53] continue to apply the blue pencil test to unreasonable covenants. But as seen in the following sections, the law is still developing on the issue of making a covenant not to compete reasonable by rewriting it.

C. *Partial Enforcement Without Regard to Severability of Terms*[54]

It is argued that a theory of reasonable enforcement is more consistent with the inherent concerns of equity—fairness and reasonableness—than the mechanical blue pencil test, which is said to emphasize form over substance and result in arbitrariness and inconsistency.[55] This modern approach contends that equity should not permit the injustice which might result from rejecting the covenant merely because the court disagrees with an employer over the restrictions necessary to protect the employer's business.[56]

Many of the more recent cases indicate a trend toward enforcing indivisible covenants to a reasonable and lawful extent.[57] *Wood v.*

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application of the blue pencil rule is discussed at length in Comment, *Enforcement Of Restrictive Covenants In Pennsylvania Employment Contracts*, 80 DICK. L. REV. 693, 708-10 (1976).

52. Max Garelick, Inc. v. Leonardo, 105 R.I. 142, —, 250 A.2d 354, 357 (1969).

53. *See* O. Hommel Co. v. Fink, 115 W. Va. 686, —, 177 S.E. 619, 621 (1934) (partial enforcement of covenant's terms; court did not couch its decision in terms of blue pencil approach). Later West Virginia courts speak of "shaving" the contract's terms. *See, e.g.*, Pancake Realty Co. v. Harber, 137 W. Va. 605, —, 73 S.E.2d 438, 442 (1952) (partial enforcement of covenant denied as court refused to reduce or "shave" terms of agreement without express territorial limitation).

54. This approach or theory of enforcement of unreasonable covenants is hereinafter referred to as "reasonable enforcement."

55. *See, e.g.*, Insurance Center, Inc. v. Taylor, 94 Idaho 896, —, 499 P.2d 1252, 1255 (1972); Bess v. Bothman, — Minn. —, 257 N.W.2d 791, 794-95 (1977). The reasonable enforcement approach rejects a dependence on form where differences in wording of substantively identical agreements would result in the partial enforcement of one restraint but in complete invalidity of the other. Comment, *The Status of the Blue Pencil Rule as Applied in South Carolina to Covenants not to Compete*, 28 S.C.L. REV. 726, 728 (1977). This dichotomy is illustrated in the following sample covenant based on an example found in Kreider, *supra* note 2, at 24-25: Employee agrees not to engage in competition with Employer in the clothing business with the State of X. Even though State X is composed of several cities and counties, the blue pencil theory would find the terms grammatically unseverable. The covenant would be totally void. In contrast, the reasonable enforcement theory would not even consider divisibility and would simply enforce the covenant to a reasonable extent. The latter approach might limit the restraint to City Y or County Z.

56. Raimonde v. Van Vlerah, 45 Ohio St. 2d 21, 325 N.E.2d 544 (1975). The *Raimonde* court pointed out that blue penciling can eviscerate a contract: "Because employers seek to ensure that provisions are not unreasonable, and therefore severed, employees may gain the benefit of overly-lenient employment restrictions." *Id.* at —, 325 N.E.2d at 546.

57. *E.g.*, American Eutectic Welding Alloys Sales Co. v. Rodriguez, 480 F.2d 223, 227-29 (1st Cir. 1973); Mason Corp. v. Kennedy, 286 Ala. 639, —, 244 So. 2d 585, 590 (1971); Technicolor, Inc. v. Traeger, 57 Hawaii 113, —, 551 P.2d 163, 170 (1976); Insurance Center, Inc. v. Taylor, 94 Idaho 896, —, 499 P.2d 1252, 1254-55 (1972); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 370 (Iowa 1971), *modified on other grounds*, 190 N.W.2d 413 (Iowa 1971); Foltz v. Struxness, 168 Kan. 714, —, 215 P.2d 133, 137-38 (1950); Redd Pest Control Co. v. Heatherly, 248 Miss. 34, —, 157 So.

May[58] illustrates this tack. In *Wood*, the employer, in accordance with the employment agreement, sought to prevent his former employee from competing with him within specified temporal and geographical limits.[59] The trial court found that the area encompassed by the restriction was excessive and therefore unreasonable. In refusing to modify the covenant, it held that the unreasonable restraint was not severable, and that the entire covenant was thus unenforceable. On appeal, the Washington Supreme Court agreed with the finding of unreasonableness, but rejected the mechanistic blue pencil test. The case was remanded with instructions to enforce time and area restrictions that were reasonable under the circumstances.[60]

The *Redd Pest Control Co. v. Heatherly*[61] decision is another example of a court's application of the reasonableness test. In *Heatherly*, the restrictive covenant prohibited the former employee from working in the exterminating business anywhere in the state. The court modified the covenant, enjoining the former employee from competing with his former employer within a fifty-mile radius of Tupelo. The territory was determined to be that in which he could use contacts established in his former job to take away his former employer's customers. The court explained that "the legality of contracts in restraint of trade should not turn upon the mere form of wording but rather upon the reasonableness of giving effect to the indivisible promise to the extent that it would be lawful."[62]

As discussed above, a number of recent cases evidence a new direction in enforcing unreasonable covenants.[63] It appears the following

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2d 133, 135-36 (1963); Solari Indus., Inc. v. Malady, 55 N.J. 571, —, 264 A.2d 53, 61 (1970); Raimonde v. Van Vlerah, 45 Ohio St. 2d 21, —, 325 N.E.2d 544, 547 (1975) (specifically overruling Extine v. Williamson Midwest, Inc., 176 Ohio St. 403, 200 N.E.2d 297 (1964), and abandoning the blue pencil test); Justin Belt Co. v. Yost, 502 S.W.2d 681, 685-86 (Tex. 1973); Wood v. May, 73 Wash. 2d 307, —, 438 P.2d 587, 590-91 (1968).

58. 73 Wash. 2d 307, 438 P.2d 587 (1968).

59. The employer relied on the following clause in the employment agreement:

> [F]or a period of five years from and after the time he shall leave the . . . employer [Wood], either if by resignation or by discharge, that he shall not engage directly or indirectly in any business or enterprise the nature of which is competitive to the very employers [sic] business, that is to say he shall not engage in the practice of Horseshoeing or Blacksmithing, within a radius of one hundred miles [from the employer's principal place of business].

Id. at 308, 438 P.2d at 588.

60. *Wood* is discussed at length in 45 WASH. L. REV. 210 (1970).

61. 248 Miss. 34, 157 So. 2d 133 (1963).

62. *Id.* at —, 157 So. 2d at 136. This case receives thorough treatment in Note, *Employee Covenants Not To Compete: Where Does Virginia Stand?*, 15 U. RICH. L. REV. 105, 140 (1980).

63. Note 57 *supra* and accompanying text.

jurisdictions will enforce indivisible covenants to a lawful and reasonable extent: Alabama,[64] Alaska,[65] Colorado,[66] Delaware,[67] Florida,[68] Hawaii,[69] Idaho,[70] Iowa,[71] Kansas,[72] Kentucky,[73] Maryland,[74] Massachusetts,[75] Minnesota,[76] Mississippi,[77] Missouri,[78] New Hampshire,[79] New Mexico,[80] New Jersey,[81] Nevada,[82] Ohio,[83] Oregon,[84] Puerto Rico,[85] Texas,[86] Utah,[87] Vermont,[88] Washington,[89]

64. Mason Corp. v. Kennedy, 286 Ala. 639, —, 244 So. 2d 585, 590 (1971).

65. *See generally* National Bank of Alaska v. J.B.L. & K. of Alaska, Inc., 546 P.2d 579 (Alaska 1976) (*semble*).

66. Gulick v. A. Robert Strawn & Assocs., Inc., 477 P.2d 489, 493 (Colo. App. 1970). *See generally* Krendl & Krendl, *Noncompetition Covenants In Colorado: A Statutory Solution?*, 52 DEN. L.J. 488 (1975).

67. Turek v. Tull, 37 Del. Ch. 190, —, 139 A.2d 368, 373-74, *aff'd*, 38 Del. Ch. 182, 147 A.2d 658 (1958).

68. Kofoed Pub. Relations Assocs. v. Mullins, 257 So. 2d 603 (Fla. Dist. Ct. App. 1972). The court explained that it would impose "too high a duty of foresight on contracting parties" if a covenant was entirely unenforceable because the parties failed to define a reasonable area. *Id.* at 605. *See* American Bldg. Maintenance Co. v. Fogelman, 167 So. 2d 791, 792 (Fla. Dist. Ct. App. 1964); 19 U. MIAMI L. REV. 318 (1964).

69. Technicolor, Inc. v. Traeger, 57 Hawaii 113, —, 551 P.2d 163, 170 (1976).

70. Insurance Center, Inc. v. Taylor, 94 Idaho 896, —, 499 P.2d 1252, 1255 (1972).

71. Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 370 (Iowa 1971), *modified on other grounds*, 190 N.W.2d 413 (Iowa 1971).

72. Foltz v. Struxness, 168 Kan. 714, —, 215 P.2d 133, 137 (1950).

73. *See* Ceresia v. Mitchell, 242 S.W.2d 359, 362 (Ky. 1951) (dictum indicates the court will enforce unreasonable restraints to a reasonable extent where to do so would not deleteriously affect the parties and the public).

74. Massachusetts Indem. & Life Ins. Co. v. Dresser, 269 Md. App. 364, —, 306 A.2d 213, 217 (1973). *See* Millward v. Gerstung Int'l Sport Educ., Inc., 268 Md. 483, —, 302 A.2d 14, 17 (1973); 34 MD. L. REV. 169 (1974).

75. *See* All Stainless, Inc. v. Colby, 364 Mass. 773, —, 308 N.E.2d 481, 485 (1974); Metropolitan Ice Co. v. Ducas, 291 Mass. 403, —, 196 N.E. 856, 858 (1935); Whiting Milk Cos. v. O'Connell, 277 Mass. 570, —, 179 N.E. 169, 170 (1931). These decisions reject the blue pencil approach the court used in Edgecomb v. Edmonston, 257 Mass. 12, —, 153 N.E. 99, 102 (1926). *See* Comment, *Recent Developments Concerning Employee Covenants Not To Compete: A Quiet "Corbinization" of Massachusetts Law*, 12 NEW ENG. L. REV. 647, 674-78 (1977).

76. Bess v. Bothman, — Minn. —, 257 N.W.2d 791, 794-95 (1977).

77. Redd Pest Control Co. v. Heatherly, 248 Miss. 34, —, 157 So. 2d 133, 135-36 (1963).

78. R.E. Harrington, Inc. v. Frick, 428 S.W.2d 945, 951 (Mo. App. 1968). *See* Comment, *Covenants Not To Compete—Enforceability Under Missouri Law*, 41 MO. L. REV. 37, 42-43 (1976).

79. Smith, Batchelder & Rugg v. Foster, 119 N.H. 679, —, 406 A.2d 1310, 1313-14 (1979). New Hampshire courts may reform an overly broad restrictive covenant if the employer first shows that it acted in good faith in the execution of the employment contract. *Id.* at —, 406 A.2d at 1313.

80. *See generally* Lovelace Clinic v. Murphy, 76 N.M. 645, 417 P.2d 450 (1966) (*semble*).

81. Solari Indus., Inc. v. Malady, 55 N.J. 571, —, 264 A.2d 53, 61 (1970).

82. Hansen v. Edwards, 83 Nev. 189, —, 426 P.2d 792, 794 (1967).

83. Raimonde v. Van Vlerah, 45 Ohio St. 2d 21, —, 325 N.E.2d 544, 547 (1975); Note, *supra* note 35.

84. *See* Eldridge v. Johnston, 195 Or. 379, 245 P.2d 239 (1952); Comment, *Enforcement Of Employee Noncompetition Agreements In Oregon*, 58 OR. L. REV. 336, 338-40, 361 (1979).

85. American Eutectic Welding Alloys Sales Co., Inc. v. Rodriguez, 480 F.2d 223, 227-29 (1st Cir. 1973).

and Wyoming.[90] Courts following the theory are not dissuaded by the proposition that the approach permits *in terrorem* tactics by an employer.[91] They assert the proposition that courts willing to modify without reference to divisibility are bound by certain restraints. Partial enforcement of even reasonable restrictions is not allowed "[w]henever evidence of conscious overreaching, bad faith, monopolization or deliberate oppression is shown."[92]

Thus it appears that reasonable enforcement of unreasonable and indivisible covenants is the rule in a growing majority of state jurisdictions.

D. *Regulation by Statute*

In addition to the common law doctrines described above, there are a number of statutory definitions of the extent of enforceability of covenants not to compete. In California,[93] Montana,[94] North Dakota,[95] Oklahoma,[96] and South Dakota,[97] statutory law declares void every restrictive covenant which prevents a person from practicing a lawful profession, trade, or business.

The Oklahoma statute is representative. It provides that "[e]very contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by the next two sections, is to that extent void."[98] It follows that employee

86. Justin Belt Co. v. Yost, 502 S.W.2d 681, 685 (Tex. 1973); Newman, *Restrictive Covenants In Employment Contracts*, 35 TEX. B.J. 225, 225 (1972); Note, *Contracts—Covenants Not To Compete—Unlimited Covenant Contained In Settlement Agreement Is Subject To Reformation*, 52 TEX. L. REV. 1024 (1974).

87. *See generally* Allen v. Rose Park Pharmacy, 120 Utah 608, —, 237 P.2d 823, 828 (1951) (*semble*).

88. *See* Vermont Electric Supply Co. v. Andrus, 132 Vt. 195, —, 315 A.2d 456, 458 (1974).

89. Wood v. May, 73 Wash. 2d 307, —, 438 P.2d 587, 590-91 (1968); Note, *supra* note 60.

90. *See* Keller v. California Liquid Gas Corp., 363 F. Supp. 123, 126-27 (D. Wyo. 1973) (*semble*).

91. Insurance Center, Inc. v. Taylor, 94 Idaho 896, —, 499 P.2d 1252, 1255 (1972). *See* Kniffin, *Employee Noncompetition Covenants: The Perils Of Performing Unique Services*, 10 RUT.-CAM. L.J. 25, 56 (1978); Krendl & Krendl, *supra* note 66, at 517-18.

92. Insurance Center, Inc. v. Taylor, 94 Idaho 896, —, 499 P.2d 1252, 1255 (1972).

93. CAL. BUS. & PROF. CODE §§ 16600-16602 (West 1964).

94. MONT. REV. CODES ANN. §§ 13-807 to -809 (1967).

95. N.D. CENT. CODE § 9-08-06 (1975).

96. OKLA. STAT. tit. 15, §§ 217-219 (1971).

97. S.D. COMP. LAWS ANN. §§ 53-9-8 to -11 (1967). The South Dakota statutes, however, provide an exception for employees engaged in a licensed profession. An agreement not to compete for ten years, with a geographical limitation of twenty-five miles from the employer's principal place of business, is enforceable. *Id.* at § 53-9-11.

98. OKLA. STAT. tit. 15, § 217 (1971). The exceptions provided by §§ 218 and 219 of the

noncompetition restraints are, for the most part, void and unenforceable.[99] The Oklahoma Supreme Court, however, carved out an exception in *Tatum v. Colonial Life and Accident Insurance Co. of America*[100] when it validated a covenant preventing a former Colonial insurance agent from soliciting known clients of his former employer for two years. The court reasoned that such a "hands off" provision was not overly restrictive and thus did not violate the statute or public policy.[101]

A similar statute exists in Louisiana, where restrictive covenants between employer and employees are void unless the restraint is for no more than two years and is justified due to the expense incurred by the employer in training the employee.[102] Wisconsin[103] and Michigan[104] statutes also forbid noncompetition restraints that limit the practice of a profession, trade, or business. Both states, however, have exceptions for covenants in employment agreements.[105] Wisconsin declares all employee noncompetition covenants void except those reasonably nec-

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Oklahoma statutes pertain to restrictive covenants given in connection with the sale of business goodwill and in connection with the dissolution of a partnership.

99. *See, e.g.*, Farren v. Autoviable Servs. Inc., 508 P.2d 646, 648 (Okla. 1973); Neal v. Pennsylvania Life Ins. Co., 480 P.2d 923, 924-25 (Okla. 1970); E.S. Miller Lab., Inc. v. Griffin, 200 Okla. 398, —, 194 P.2d 877, 878-79 (1948). The result appears to be identical in states having similar statutes. *See* Muggill v. Reuben H. Donnelly Corp., 62 Cal. 2d 239, —, 398 P.2d 147, 149, 42 Cal. Rptr. 107, 109 (1965); Marine Forwarding & Shipping Co. v. Barone, 154 So. 2d 528, 530 (La. App. 1963); Couch v. Administrative Comm. of Difco Lab., Inc. Salaried Employees Profit Sharing Trust, 44 Mich. App. 44, —, 205 N.W.2d 24, 26 (1972) (court discussed statute's applicability to employer's attempted forfeiture of former employee's interest in profit sharing plan).

100. 465 P.2d 448 (Okla. 1970).

101. *Id.* at 452. *Compare* the restrictive covenant in *Tatum with* the covenant in Neal v. Pennsylvania life Ins. Co., 480 P.2d 923 (Okla. 1970). In *Neal*, the employment agreement contained the following restraint:

> After the termination of the Agreement, Supervisor [Neal] agrees for the period of one year from the date of such termination he will not, in the territory where Supervisor represented Company, directly or indirectly, represent or be connected with any other health and accident or life insurance company engaged in business competitive to that of the Company.

Id. at 924. The court, in declaring the restriction invalid, explained that such a contract restrained Neal from pursuing a lawful profession and therefore violated statutory law. *Id.*

In *Tatum*, however, the noncompetition covenant restricted Tatum for two years from contacting persons insured under health or accident policies issued by his former employer and inducing them to cancel, lapse, or fail to renew their insurance policies. In the majority opinion, Justice Lavender reasoned that the contractual provision was neither expressly prohibited nor was it contrary to the policy of the law. Therefore the covenant was enforced. 465 P.2d at 452. *But see* Cooper v. Tanaka, 591 P.2d 1181, 1183 (Okla. Ct. App. 1978) (construing OKLA. STAT. tit. 15, § 217 as declaring illegal only those contracts that unreasonably restrain trade).

102. LA. REV. STAT. ANN. § 23:921 (West 1964). *See* Nalco Chemical Co. v. Hall, 237 F. Supp. 678, 681 (E.D. La. 1965), *aff'd*, 347 F.2d 90 (5th Cir. 1965); Comment, *Agreements Not To Compete*, 33 LA. L. REV. 94 (1972).

103. WIS. STAT. ANN. § 103.465 (West 1974).

104. MICH. COMP. LAWS ANN. §§ 445.761, .766 (1967).

105. *See* WIS. STAT. ANN. § 103.465 (West 1974); MICH. COMP. LAWS ANN. § 445.766 (1967).

essary to protect the employer, and further abolishes partial enforcement if the contract contains unreasonable limitations.[106] The Michigan statutory exception enforces covenants only when the employee is given a customer list and the restriction is limited to a maximum of ninety days.[107]

III. COVENANTS OF CONFIDENTIALITY

In certain situations, the employer is much more concerned about the possibility of a former employee using or disclosing information about the employer's credit practices, financial arrangements, customer lists, etc., than he is concerned about an employee going to work for a competitor. Under these circumstances, the employer's welfare is better served by a proviso requiring the employee to refrain from using or disclosing any such information that he or she learned as a consequence of or through his or her employment. Such non-disclosure agreements may be difficult to enforce, however. The possibility of a court declaring a covenant void, as seen above,[108] freeing an individual to compete with his or her former employer, and leaving the former employer entirely unprotected, is a very real one indeed.

Admittedly, the mere fact that an employer has deemed certain information "confidential" is not sufficient to justify enforcement of a confidentiality covenant. The employer must prove that the use or disclosure of such information by a former employee or competitor would subject his business to unfair injury.[109] This requires proving that the information gives the employer an advantage over competitors. Simply claiming that certain information constitutes trade secrets will not necessarily dictate the court's determination.[110]

In order to merit protection, business information must be unique and not readily obtainable from external sources, such as public

106. Krendl & Krendl, *supra* note 66, at 522 (discussing the Wisconsin statute); *see* note 28 *supra*.

107. MICH. COMP. LAWS ANN. § 445.766 (1967). For a detailed look at Michigan's statutory approach to unreasonable covenants, see Alterman, *Trade Regulation In Michigan: Covenants Not To Compete*, 23 WAYNE L. REV. 275 (1977).

108. *See* notes 20-31 *supra* and accompanying text.

109. For a discussion of confidential information as a basis for enforcing a covenant not to compete, see Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 667-74 (1960); Krendl & Krendl, *supra* note 66 at 502; Note, *Partial Enforcement Of Post-Employment Restrictive Covenants*, 15 COLUM. J.L. SOC. PROB. 181, 184 (1979); Note, *Employee Covenants Not To Compete: Where Does Virginia Stand?*, 15 U. RICH. L. REV. 105, 123-25 (1980).

110. *See* Kaumagraph Co. v. Stampagraph Co., 235 N.Y. 1, —, 138 N.E. 485, 487-88 (1923); Victor Chemical Works v. Iliff, 299 Ill. 532, —, 132 N.E. 806, 812-13 (1921).

records or trade directories.[111] Professor Blake points out that in many cases the most salient consideration is whether the method, technique, or knowledge imparted to the employee is the product of considerable investment of time, effort, or money by the former employer.[112] The steps taken by the employer to ensure the secrecy of the information is another factor. As Blake has noted, a well-structured program of company security procedures advising employees of the confidentiality surrounding certain classes of information can be an extremely persuasive argument for enforcement on that basis.[113]

The covenant of confidentiality has another attractive quality in that it generally allows a broad restraint to protect the employer's interests. For example, in *Novelty Bias Binding Co. v. Shevrin*,[114] a former employee became familiar with his employer's production and marketing scheme. The court held that the material was confidential and would prove beneficial to the employer's competitors. The court reasoned that since the rivals who would benefit from such special information extended throughout a twenty-six state area, enforcement in that area was justified.[115]

IV. CONCLUSION

As seen from the above, the law is a mass of factually distinct holdings and a jumble of seemingly irreconcilable decisions. Given the confusing doctrine underpinning the approaches taken toward unreasonable covenants not to compete, and additional problems in determining the reasonableness of the covenant on facts, circumstances, and policy considerations, drafting a noncompetition covenant becomes a venture laden with uncertainty.[116] Although the covenant of confidentiality is no panacea,[117] if properly drafted it can prevent a former employee from disclosing information such as the business's credit terms,

111. *See* Blake, *supra* note 109, at 671. *See generally* Harry Livingston, Inc. v. Macher, 30 Del. Ch. 94, —, 54 A.2d 169, 173 (1947); Roy v. Bolduc, 140 Me. 103, —, 34 A.2d 479, 480-81 (1943).

112. Blake, *supra* note 109, at 671.

113. *Id.* at 673-74.

114. 342 Mass. 714, 175 N.E.2d 374 (1961).

115. *Id.* at —, 175 N.E.2d at 376-77.

116. For an excellent discussion of how to draft an effective covenant not to compete, see Richards, *Drafting And Enforcing Restrictive Covenants Not To Compete*, 55 MARQ. L. REV. 241, 248-49 (1972).

117. One commentator believes that confidential information necessitates a broader restraint, in terms of both time and space, for adequate protection. *See* Comment, *Recent Developments Concerning Employee Covenants Not To Compete: A Quiet "Corbinization" Of Massachusetts Law*, 12 NEW ENG. L. REV. 647, 689 (1977).

marketing procedures, and accounting practices—information that all businessmen desire to keep from their competitors.[118] The practitioner would do well to include in employment agreements covenants of non-competition and of confidentiality carefully tailored to the specific needs of the situation.

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118. A representative covenant of confidentiality provides as follows:

> Except as required by his duties to the Company, the Employee will never, directly or indirectly, use, disseminate, disclose, lecture upon, or publish articles concerning any information, disclosed to the Employee or known by the Employee as a consequence of or through his employment by the Company, not generally known in the industry in which the Company is engaged or may become engaged, about the Company's products, processes and services, including information relating to research, development, inventions, manufacture, purchasing, accounting, engineering, merchandising, and selling. Upon termination of his employment with the Company, all documents, records, notebooks and similar repositories of or containing such confidential information, including copies thereof, then in the Employee's possession, whether prepared by him or others, will be left with the Company. This secrecy agreement shall survive the termination of the employee's employment by the Company.

The author wishes to express appreciation to Richard L. Barnes for his gracious consent in allowing this covenant to be reproduced herein.