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Florida's Noncompetition Statute: An Analysis of the 1990 Amendment

Leslie A. Wickes

FLORIDA'S NONCOMPETITION STATUTE: AN ANALYSIS OF THE 1990 AMENDMENT*

I. INTRODUCTION

In 1953, the Florida Legislature enacted section 542.33, a statute governing contracts in restraint of trade.[1] This statute granted courts authority to enforce an employee's covenant not to compete against a former employer.[2] Since the enactment of this statute, Florida courts have generously enforced noncompetition agreements allowing employers to restrict competition by former employees in virtually all instances.[3]

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*I would like to dedicate this note to my husband, Frank D. Wickes.

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1. Act of 1953, 1953 FLA. LAWS ch. 28048 (codified originally at FLA. STAT. § 542.12 (1953), codified as amended and renumbered at FLA. STAT. § 542.33 (1991)).

2. *Id.* The statute also covers covenants not to compete between sellers and buyers of certain business interests, between independent contractors and their employers, between licensors and licensees, and between partners. *See id.* The scope of this note is limited to covenants between employers and employees.

3. *See* Kendall B. Coffey, *Noncompete Agreements by the Former Employee: A Florida Law Survey and Analysis*, 8 FLA. ST. U. L. REV. 727, 730 (1980) (noting that cases construing the statute "have allowed few defenses, and have virtually mandated injunctive relief to remedy violations"); Leonard K. Samuels, *Florida's Amended Noncompetition Statute: A Reasonable*

Historically, section 542.33 has specifically granted Florida courts the discretion to enforce such agreements by injunction.[4] The Florida Legislature amended the provision, effective June 28, 1990, to clarify the courts' discretion in this area.[5] The amendment prohibits a court from granting injunctions if a noncompetition agreement is (1) contrary to the public health, safety, or welfare; (2) unreasonable; or (3) not supported by a showing of irreparable injury.[6] This amendment will likely curtail the liberal enforcement of noncompetition agreements in Florida,[7] and will bring Florida in line with the majority of jurisdictions.[8]

This note will discuss the amendment's effect on noncompetition agreements between employers and employees. In addition, this note will examine Georgia's statutory solution to the problem of determining

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Approach, FLA. B.J., July/Aug. 1991, at 60 (noting that "Florida has evolved into perhaps the easiest forum in the nation in which to enforce noncompetition agreements").

4. FLA. STAT. § 542.33(2)(a) (1989). Prior to the 1990 amendment, § 542.33(2)(a) provided:

> One who sells the goodwill of a business . . . and one who is employed as an agent, independent contractor, or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area . . . so long as such employer continues to carry on a like business therein. *Said agreements may, in the discretion of a court of competent jurisdiction, be enforced by injunction.*

Id. (emphasis added).

5. Act effective June 28, 1990, 1990 FLA. LAWS ch. 90-216.

6. FLA. STAT. § 542.33(2)(a) (1991). Specifically, the amendment added the following three sentences to paragraph (2)(a) of the statute:

> However, the court shall not enter an injunction contrary to the public health, safety, or welfare or in any case where the injunction enforces an unreasonable covenant not to compete or where there is no showing of irreparable injury. However, use of specific trade secrets, customers lists, or direct solicitation of existing customers shall be presumed to be an irreparable injury and may be specifically enjoined. In the event the seller of the goodwill of a business, or a shareholder selling or otherwise disposing of all his shares in a corporation breaches an agreement to refrain from carrying on or engaging in a similar business, irreparable injury shall be presumed.

Id.

7. *See* Hapney v. Central Garage, Inc., 579 So. 2d 127 (2d DCA) (outlining the amendment's effect while reversing and remanding a trial court's decision to grant a temporary injunction in favor of a former employer), *rev. denied*, 591 So. 2d 180 (Fla. 1991); *see also* Samuels, *supra* note 3, at 60 ("1990 amendment will preclude employers from enforcing noncompetition agreements with impunity"). For a discussion of the *Hapney* decision, see *infra* text accompanying notes 70-96.

8. Under the amendment, Florida courts must consider the reasonableness of a covenant not to compete as a whole before granting injunctive relief. A majority of states also apply broad reasonableness tests to noncompetition agreements. *See* DONALD J. ASPELUND & CLARENCE E. ERIKSEN, EMPLOYEE NONCOMPETITION LAW § 6.01 (1990).

what is a "reasonable" noncompetition agreement. Lastly, this note will discuss several recommendations for drafting documents under the amendment.

II. HISTORICAL BACKGROUND

A. *The Common Law*

Covenants not to compete originated in the fifteenth century.[9] However, early English courts refused to enforce them, recognizing a strong public policy against restraints on competition.[10] This policy developed in response to the labor shortage after the Black Death[11] and the rise of craft guilds.[12] Craft guilds prohibited a man from working outside his apprenticed trade.[13] Therefore, any restraint deprived the apprentice of the right to earn a livelihood and deprived the public of the fruits of the apprentice's labor.[14] These circumstances compelled courts to hold all covenants not to compete void.[15]

However, in light of the extraordinary rise in commerce during the seventeenth century, courts changed this policy. Courts recognized that parties entering agreements for the sales of businesses usually possessed equal bargaining power, unlike parties in the master-apprentice relationship.[16] Courts presumed that the seller of a business could subsist on the sale proceeds, even if the agreement restricted the

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9. *See* ANTHONY C. VALIULIS, COVENANTS NOT TO COMPETE: FORM, TACTICS, AND THE LAW 156 (1985). The oldest known case dealing with a covenant not to compete is *Dyer's Case* which was decided in 1414. *Id.* The plaintiff sued, claiming that the defendant, an employee, violated a bond not to follow his trade anywhere in the plaintiff's town for a period of six months. *Id.* The following statement by one of the judges in the case clearly reflects the policy toward such agreements at that time: "By God, if the plaintiff were here he should go to prison until he paid a fine to the King." *Id.*

10. *Id.* at 158; *see, e.g.*, Colgate v. Bacheler, 78 Eng. Rep. 1097 (Q.B. 1602) (holding all restraints on trade are void); Blacksmith of South-Mims, 74 Eng. Rep. 485 (C.P. 1587) (holding covenants not to compete against the law and void).

11. VALIULIS, *supra* note 9, at 156. After the Black Death in 1348, the English government enacted legislation which made unemployment a crime. *Id.* at 156-57. Thus, any restriction on an individual's right to work was, in effect, aiding crime. *Id.* at 157.

12. *Id.* at 157. Although the guild system began to die out in the sixteenth century, legislation was passed in an attempt to revitalize it. *Id.* Thus, the public policy against restraints on trade only increased. *Id.*

13. Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685, 691 (Ohio C.P. 1952) (presenting a detailed history of covenants not to compete beginning with early English common law).

14. *Id.*

15. VALIULIS, *supra* note 9, at 158.

16. *Id.* at 159.

seller's ability to work.[17] Thus, the courts analyzed the reasonableness of the restraint and upheld covenants in connection with the sale or lease of a business provided the restraint was limited in scope.[18]

By the eighteenth century, developments in technology improved transportation and communication and increased the population's physical and economic mobility.[19] Further, the industrial revolution simplified work, resulting in decreased training time and the abolition of apprenticeships.[20] These societal changes significantly lessened the impact of restraints on competition and prompted English courts to extend the reasonableness analysis to the employer-employee context.[21]

As early as 1711, courts recognized the conflicting policy ramifications of contractual restrictions on competition. In *Mitchell v. Reynolds*,[22] Justice Parker (later Lord Macclesfield) stated that an individual's right to work, the public's right to unrestrained competition, and the individual's right to contract all must be examined in determining whether to enforce a noncompetition agreement.[23] In an attempt to reconcile the conflicting policies, Justice Parker distinguished between general and particular restraints of trade.[24] Justice Parker declared general restraints, those extending throughout England, automatically void.[25] However, particular restraints, those limited to a particular place, were valid if supported by adequate consideration.[26] Justice Parker's reconciliation of competing policies eventually developed into a reasonableness test, which balanced the conflicting interests of the employer, the employee and the public.[27]

In the early nineteenth century, American courts developed a slightly modified version of the *Mitchell* rule, by upholding restraints

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17. *Id.*

18. *Id.*; *see, e.g.*, Broad v. Jollyfe, 79 Eng. Rep. 509 (K.B. 1620) (upholding agreement in connection with defendant's sale of inventory to plaintiff that defendant would not compete in a limited area); Rogers v. Parrey, 80 Eng. Rep. 1012 (K.B. 1613) (upholding agreement in which defendant promised the plaintiff that defendant would not pursue his trade in a particular shop during the twenty-one year period that the shop was leased to plaintiff).

19. VALIULIS, *supra* note 9, at 161.

20. *Id.* at 160.

21. *Id.* at 159-61.

22. 24 Eng. Rep. 347 (Q.B. 1711).

23. *Id.* at 350-51.

24. *Id.* at 349.

25. *Id.* at 348.

26. *Id.* at 349.

27. VALIULIS, *supra* note 9, at 164.

that were limited in both time and area.[28] Initially, these courts characterized a restraint which covered an entire state as general.[29] However, the United States Supreme Court rejected that formulation as "too narrow a view of the subject," recognizing that other factors may affect the reasonableness of a geographic limitation.[30] Within a short time, state courts also began to reject the general/particular distinction and to adopt a rule of reason analysis.[31]

By the end of the nineteenth century, American courts were using a fact-based reasonableness test.[32] Although courts varied in their exact statement of the test, they adopted the same basic analysis in balancing the interests of the employer, the employee, and the public.[33] Additionally, all courts required that a covenant not to compete be ancillary to an otherwise valid contract.[34] If the restraint's sole purpose was to prevent competition, the restraint was not enforced.[35] Today, this fact-based reasonableness test remains the common law rule in the United States.[36] Additionally, the states that have adopted statutes governing covenants not to compete have incorporated some form of this reasonableness test.[37]

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28. Harlan Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 643-44 (1960); *see, e.g.*, Pike v. Thomas, 7 Ky. (4 Bibb) 486 (1817); Pierce v. Woodward, 23 Mass. (6 Pick.) 206 (1828); Palmer v. Stebbins, 20 Mass. (3 Pick.) 188 (1825).

29. *See* Taylor v. Blanchard, 95 Mass. (13 Allen) 370, 375 (1866); Lawrence v. Kidder, 10 Barb. 641, 655 (N.Y. App. Div. 1851); Keeler v. Taylor, 53 Pa. 467, 470 (1866).

30. Oregon Steam Navigation Co. v. Winsor, 87 U.S. (20 Wall.) 64, 67 (1873).

31. *See* Blake, *supra* note 28, at 644 (citing cases in New York, Massachusetts, and Rhode Island). Professor Blake noted that the rule of reason analysis was firmly established within 50 years of the first American decision in a restraint of trade case. *Id.*

32. VALIULIS, *supra* note 9, at 164-66.

33. *Compare* Thomas W. Briggs Co. v. Mason, 289 S.W. 295, 297-98 (Ky. 1926) (test considers whether the restriction: (1) reasonably protects the employer; (2) unreasonably restrains the employee; (3) is reasonably related to business of the employer; (4) is reasonably related to the territory covered by employer; and (5) is against public policy) *with* Milwaukee Linen Supply Co. v. Ring, 246 N.W. 567, 569 (Wis. 1933) (test considers: (1) the business interest of the employer; (2) the interest of the employee; and (3) the public interest).

34. United States v. Addyston Pipe & Steel Co., 85 F. 271, 288-91 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899).

35. *Id.*

36. VALIULIS, *supra* note 9, at 165.

37. *See, e.g.*, ALA CODE § 8-1-1 (1984); CAL. BUS. & PROF. CODE §§ 16601-16602 (West 1987); DEL. CODE ANN. tit. 6, § 2707 (Supp. 1990); HAW. REV. STAT. § 480-4 (1985); LA. REV. STAT. ANN. § 23.921 (West Supp. 1992); MONT. CODE ANN. §§ 28-2-703 to -705 (1991); N.D. CENT. CODE § 9-08-06 (1987); OKLA. STAT. ANN. tit. 15, § 217-19 (West Supp. 1992); OR. REV. STAT. § 653.295 (1991); S.D. CODIFIED LAWS ANN. §§ 53-9-8 to -11 (1990); WIS. STAT. ANN. § 103.465 (West 1988).

B. *The Enactment of the Statute*

Prior to 1953, Florida courts applied the basic common law rule, considering equitable issues of fairness and reasonableness in determining the validity of covenants not to compete.[38] Florida courts shared the common law concern that noncompetition covenants left people unable to work, perhaps forcing them to become public charges.[39] Furthermore, these courts recognized that employment contract terms were often dictated by the employer.[40] Thus, Florida courts favored employees exclusively, as evidenced by the fact that before 1953 no Florida court had enforced a noncompetition agreement against an employee.[41]

This situation left employers unable to protect their business goodwill and other interests.[42] Noncompetition agreements were often the only feasible device available to limit unfair competition by former employees.[43] Responding to employers' needs, the Florida Legislature enacted section 542.12 in 1953.[44] The renumbered statute, prior to the 1990 amendment, provided in pertinent part:

> Contracts in restraint of trade valid
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> (1) Notwithstanding other provisions of this chapter to the contrary, each contract by which any person is restrained from exercising a lawful profession, trade, or business of any kind, as provided by subsections (2) and (3) hereof, is to that extent valid, and all other contracts in restraint of trade are void.
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> (2)(a) One who sells the goodwill of a business, or any shareholder of a corporation selling or otherwise disposing of all of his shares in said corporation, may agree with the buyer, and one who is employed as an agent, independent contractor, or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area, so long as the buyer or

38. *See* Love v. Miami Laundry Co., 160 So. 32, 36 (Fla. 1935) ("whether equity will lend its arm to enforce the covenants of this contract by high writ of injunction must depend upon whether or not the contract is so fair and reasonable as to commend itself to a court of equity").

39. *Id.* at 34.

40. *Id.* at 36.

41. Arond v. Grossman, 75 So. 2d 593, 595 (Fla. 1954).

42. *See* Flammer v. Patton, 245 So. 2d 854, 857 (Fla. 1971).

43. *Id.*; *see* Coffey, *supra* note 3, at 728.

44. *Flammer*, 245 So. 2d at 857.

> any person deriving title to the goodwill from him, and so long as such employer, continues to carry on a like business therein. Said agreements may, in the discretion of a court of competent jurisdiction, be enforced by injunction.[45]

C. *The Pre-Amendment Case Law*

Since the statute was enacted, most Florida courts have vigorously enforced noncompetition agreements.[46] In *Atlas Travel Service, Inc. v. Morelly*,[47] the Florida Supreme Court upheld a two-year covenant not to compete recognizing that the statute "clearly supersedes the common law rule."[48] Further, in *Capelouto v. Orkin Exterminating Co.*,[49] the Florida Supreme Court affirmed the constitutionality of the statute, rejecting a claim that the statute violated equal protection by preventing the practice of a trade.[50] In *Capelouto*, the court scrutinized a two-year noncompetition agreement between an exterminating company and its branch manager. The contract prohibited the branch manager from competing in the area he managed.[51] The court explained that such contracts would be enforced when they protected the legitimate business interests of the employer without harming the public and without inflicting an unduly harsh or oppressive result on the employee.[52] The court held that, absent an overriding public interest in the availability of the employee's services, the test for enforcing covenants not to compete was reasonableness as to time

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45. FLA. STAT. § 542.33 (1989). Section (2)(b) of the statute permits a licensee to agree with a licensor to refrain from carrying on or engaging in a similar business or from soliciting old customers within a reasonably limited time and area. Licensor/licensee agreements may also be enforced by injunction. FLA. STAT. § 542.33(2)(b) (1989). Section (3) of the statute permits partners, upon dissolution or in anticipation of dissolution, to agree that some or all will not carry on a similar business within a reasonably limited time and area. FLA. STAT. § 542.33(3) (1989).

46. *See* Coffey, *supra* note 3, at 729-30; Samuels, *supra* note 3, at 60.

47. 98 So. 2d 816 (Fla. 1st DCA 1957).

48. *Id.* at 818. In addition, the *Atlas* court noted that the statute's permissive language stating that noncompetition agreements "may" in the "discretion" of the court "be enforced by injunction" does not give the court absolute discretion. *Id.* Instead, the statute is construed as requiring reasonable discretion so that the object of the statute is not nullified. *Id.*

49. 183 So. 2d 532 (Fla. 1966).

50. *Id.* at 534. The court stated that the appellant offered no convincing authority supporting his constitutional argument. *Id.*

51. *Id.* at 533.

52. *Id.* at 534.

and area.[53] Finding that the time and area provisions were reasonable,[54] the court affirmed the injunction.[55]

Later, in *Miller Mechanical, Inc. v. Ruth*,[56] the Florida Supreme Court held that a noncompetition agreement containing unreasonable time or area provisions could be modified by the court.[57] The *Miller* court determined the reasonableness of the time and area provisions by balancing "the employer's interest in preventing the competition against the oppressive effect on the employee."[58] After *Miller*, appellate courts repeatedly modified and upheld otherwise unenforceable agreements.[59]

More recently, courts have specifically limited their analysis to determining the reasonableness of the time and area provisions.[60] These courts expressly did not consider the effect on the employee, the type of interest protected by the employer, or any other equitable considerations when deciding whether to grant or deny an injunction.[61] Instead, these courts addressed equitable considerations only when deciding the scope of the injunction.[62]

Thus, after section 542.33 was enacted, courts consistently favored the employer who sought to prevent a former employee from compet-

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53. *Id.*

54. *Id.* The covenant prohibited the employee, for a period of two years after leaving employment, from competing in the area in which the employee had managed employer's business and serviced its customers. *Id.*

55. *Id.*

56. 300 So. 2d 11 (Fla. 1974).

57. *Id.* at 12.

58. *Id.*

59. *See, e.g.*, Marshall v. Gore, 506 So. 2d 91 (Fla. 2d DCA 1987) (modifying scope of injunction to prohibit marketing of specific type of computer software instead of all computer software); Orkin Exterminating Co. v. Girardeau, 301 So. 2d 38 (Fla. 1st DCA 1974) (modifying area to portion of city in which former employee had worked); Kenco Chem. & Mfg. Co. v. Railey, 286 So. 2d 272 (Fla. 1st DCA 1973) (modifying area and reducing time limit from 5 years to 3 years); McQuown v. Lakeland Window Cleaning Co., 136 So. 2d 370 (Fla. 2d DCA 1962) (affirming trial court's modification of time provision from 5 years to 1 year).

60. *See* Florida Pest Control & Chem. Co. v. Thomas, 520 So. 2d 669 (Fla. 1st DCA 1988) (holding that if the time and area restrictions are reasonable, the court has no power but to enforce the covenant); Twenty Four Collection, Inc. v. Keller, 389 So. 2d 1062, 1063 (3d DCA 1980) (stating that "[t]he only authority the court possesses over the terms of a non-competitive agreement is to determine, as the statute provides, the reasonableness of its time and area limitations"), *rev. denied*, 419 So. 2d 1048 (Fla. 1983).

61. *See Twenty Four Collection*, 389 So. 2d at 1063; *see also* Sarasota Beverage Co. v. Johnson, 551 So. 2d 503, 506 (Fla. 2d DCA 1989) (stating that an unduly harsh and oppressive result to the employee is an insufficient reason not to enforce a covenant not to compete).

62. *See, e.g., Sarasota Beverage Co.*, 551 So. 2d at 506 ("such a[n] [equitable] consideration is relevant only when determining whether the covenant is reasonable as to time and area").

ing. Cases interpreting the statute allowed few defenses and practically guaranteed injunctive relief. In fact, in *Capraro v. Lanier Business Products, Inc.*,[63] the Florida Supreme Court held that irreparable injury was presumed on breach of a valid covenant not to compete.[64] The court emphasized that "immediate injunctive relief is the essence of such suits and oftentimes the only effectual relief."[65] Thus, Florida employers could enforce noncompetition agreements without showing any actual or potential harm to their business interests.

Justice Overton filed a vigorous dissent in *Capraro*. He stressed that the majority's holding was "contrary to basic equitable principles and places the employee at a distinct disadvantage with his employer."[66] He argued that former employees should not be restrained from earning a living, especially nonmanagement employees, except when absolutely necessary to stop irreparable harm.[67] Furthermore, Justice Overton urged the legislature to modify the statute to allow courts to apply equitable principles when injunctive relief is sought.[68] Apparently, the 1990 amendment to section 542.33 was a direct response to Justice Overton's call.

III. 1990 AMENDMENT TO THE STATUTE

Effective June 28, 1990, the Florida Legislature added the following three sentences to section 542.33(2)(a):

> However, the court shall not enter an injunction contrary to the public health, safety, or welfare or in any case where the injunction enforces an unreasonable covenant not to compete or where there is no showing of irreparable injury. However, the use of specific trade secrets, customer lists, or direct solicitation of existing customers shall be presumed to be an irreparable injury and may be specifically enjoined. In the event the seller of the goodwill of a business, or a shareholder selling or otherwise disposing of all of his shares in a corporation breaches an agreement to refrain from carrying on or engaging in a similar business, irreparable injury shall be presumed.[69]

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63. 466 So. 2d 212 (Fla. 1985).
64. *Id.* at 213.
65. *Id.*
66. *Id.* at 214 (Overton, J., dissenting).
67. *Id.* (Overton, J., dissenting).
68. *Id.* (Overton, J., dissenting).
69. Act effective June 28, 1990, 1990 FLA. LAWS ch. 90-216 (codified at FLA. STAT. § 542.33(2)(a) (1991)).

A. *Second District Interpretation*

In *Hapney v. Central Garage, Inc.*,[70] the Second District Court of Appeal outlined its view of the effect of the amendment to section 542.33. However, before addressing the amendment, the *Hapney* court discussed the pre-amendment state of the law.[71] Specifically, the court addressed whether judicial review under the original statute was limited to analyzing reasonableness in time and area without regard to whether the covenant reasonably related to the protection of a legitimate business interest of the employer.[72] Noting that no Florida court had yet considered this issue, the court found that judicial review was not so limited.[73] The court held that an employer must plead and prove a legitimate business interest in order to enforce a noncompetition agreement.[74]

Hapney worked for various auto repair shops from 1981 until 1988 when he went to work for Gulfcoast.[75] Hapney signed an employment

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70. 579 So. 2d 127 (2d DCA), *rev. denied*, 591 So. 2d 180 (Fla. 1991).

71. *Id.* at 129.

72. *Id.*

73. *Id.* at 131-34. However, the *Hapney* court stated that many prior decisions implied the necessity of a legitimate interest. *Id.* at 131. Arguably, courts have always considered an employer's legitimate business interests when determining the reasonableness of time and area provisions in covenants not to compete. In *Miller Mechanical, Inc. v. Ruth*, for example, the Florida Supreme Court specifically stated that in determining the reasonableness of time and area provisions, the courts should weigh the employer's interest in preventing the competition against the oppressive effect on the employee. 300 So. 2d 11, 12 (Fla. 1974). In fact, the requirement that noncompetition agreements be reasonable as to time and area implies the necessity of a legitimate business interest. For example, in *Orkin Exterminating Co. v. Girardeau*, the court restricted the geographic scope of a covenant not to compete to the area in which the former employee had worked. 301 So. 2d 38, 40 (Fla. 1st DCA 1974). In doing so, the court found the agreement's geographic scope reasonably related to the employer's legitimate business interest, i.e., the employer's customer relationships. Without examining the business interest that the employer seeks to protect, a court could not determine what time and area provisions are reasonable.

74. *Hapney*, 579 So. 2d at 134. No previous appellate cases had mentioned an explicit requirement that the employer plead and prove a legitimate business interest. In a strong dissent, Justice Lehan criticized the majority for engaging in judicial activism when it imposed this condition on the validity of noncompete agreements. *Id.* at 139 (Lehan, J., dissenting). Justice Lehan argued that by requiring the employer to show a legitimate business interest, the majority revoked the presumption of irreparable injury that previously had been available to employers. *Id.* at 136 (Lehan, J., dissenting). He explained that by requiring an employer to prove that the contract protected a particular kind of interest, the majority in effect required the employer to prove injury from the breach of the contract. *Id.* at 137 (Lehan, J., dissenting). "This will, I think, have the effect of turning the law in this area on its head." *Id.* (Lehan, J., dissenting).

75. *Id.* at 128.

agreement with Gulfcoast which provided he would not offer, as an agent, employee, owner, or distributor, similar products or services on behalf of a competitor of Gulfcoast.[76] This agreement restricted Hapney from competing on the west coast of Florida from Crystal River to Naples and inland 100 miles.[77] In 1989, Hapney started working for a competitor in the prohibited area.[78] In response, Gulfcoast sued, and the trial court granted a temporary injunction.[79]

On appeal, the Second District Court of Appeal vacated the temporary injunction.[80] In doing so, the court emphasized that because section 542.33 was in derogation of the common law, it must be strictly construed.[81] At common law, a covenant which prohibited competition per se was void as against public policy.[82] However, if the covenant prohibited unfair competition through the use of trade secrets, confidential information, special relationships developed with customers, or to protect another legitimate business interest, then the covenant would be upheld.[83] The *Hapney* court read section 542.33 to indicate that the legislature did not intend to abolish the common law requirement of a legitimate business interest.[84]

The court then noted that Gulfcoast probably could not prove the agreement protected a legitimate business interest.[85] Hapney did not have significant contact with customers, nor did he acquire any trade secrets or other confidential information.[86] However, Gulfcoast did provide Mr. Hapney with significant training in the installation of cruise controls and cellular telephones.[87] In light of these facts, the court remanded the case, permitting Gulfcoast to argue that this train-

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76. *Id.*

77. *Id.* Gulfcoast has facilities in Tampa, St. Petersburg, Sarasota, and Ft. Myers, and draws customers from surrounding areas. *Id.*

78. *Id.* at 128-29.

79. *Id.* at 129.

80. *Id.* at 134.

81. *Id.* at 131.

82. *Id.* at 129.

83. *Id.*

84. *Id.* The court noted that no Florida decision had addressed whether an employer had to show a legitimate business interest to be protected under the agreement. *Id.* at 130. The court reviewed the law of other jurisdictions and concluded that the overwhelming majority did not permit agreements that prohibited competition per se, but required that the contract relate to the protection of a legitimate business interest. *Id.* Additionally, the court noted several Florida decisions imply such a requirement. *Id.* at 131.

85. *Id.* at 134.

86. *Id.* at 129.

87. *Id.*

ing rose to the level of a legitimate business interest.[88] The court noted that for training to qualify as a protectible interest, the training must be special or extraordinary, not merely the simple training needed to perform a particular job.[89]

Additionally, the court concluded that the 1990 amendment applied retroactively and set forth the changes resulting from the amendment.[90] The court outlined the "sweeping impact" of the amendment as follows:

1. It strictly curtails the presumption of irreparable injury resulting from a violation of a noncompete covenant, as permitted in *Capraro*.[91]

2. A reasonableness test applies and the court may not enforce an unreasonable covenant.[92] Traditional equitable principles apply to avoid unfair and unjust results.[93]

3. Covenants protecting trade secrets and customer lists and prohibiting solicitation of customers receive special treatment under the amendment.[94] In these cases, an employer who proves such a protectible interest is entitled to a presumption of irreparable injury.[95] Thus, while all employers must first prove the existence of a protectible interest, the degree of proof required depends on the type of interest protected.[96]

B. *Plain Language Interpretation*

The *Hapney* court's interpretation of section 542.33 is consistent with the amendment's plain language. The amendment clearly states that the court will enter no injunctions under three circumstances: (1) if contrary to the public health, safety, or welfare; (2) in any case where the injunction enforces an unreasonable covenant not to compete; or (3) where there is no showing of irreparable injury.[97] Although the amendment specifies when injunctions will not be granted, it effectively establishes the following three requirements for obtaining an injunction:

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88. *Id.* at 134.
89. *Id.* at 132.
90. *Id.* at 134.
91. *Id.* at 133.
92. *Id.*
93. *Id.*
94. *Id.* at 134.
95. *Id.*
96. *Id.*
97. FLA. STAT. § 542.33(2)(a) (1991).

1. *Public Health, Safety, or Welfare.* The injunction must not be contrary to the public health, safety, or welfare. This requirement is not new. Many cases prior to the amendment imposed this requirement, and many employees, especially doctors and other health care workers, defended against injunctions on this ground.[98]

2. *Reasonableness.* The covenant not to compete must be reasonable. Before the amendment, courts held that if the time and area provisions were reasonable, a court must enforce a covenant not to compete even if enforcement was unduly harsh and oppressive to the employee.[99] The amendment's language, however, suggests a broader reasonableness test now applies. This test allows consideration of all aspects of the covenant, not just the time and area provisions. *Hapney* instructs courts to apply traditional equitable principles to avoid unfair and unjust results.[100] This will likely resurrect the common law reasonableness test, permitting courts to balance all interests and policies in determining whether a covenant is reasonable.

By expanding the reasonableness inquiry, the amendment allows courts much greater discretion to determine which covenants to enforce. Parties must prove the specific effects of enforcement or nonenforcement of the agreement and must show that equity is on their side. Before the amendment, litigation focused on time and area provisions. After the amendment, the focus may be broader. Because the reasonableness test is fact specific, there can be no exhaustive list of factors that courts may consider.[101] However, some factors are common.

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98. *See, e.g.*, Lloyd Damsey, M.D., P.A. v. Mandowitz, 339 So. 2d 282 (Fla. 3d DCA 1976) (refusing to enforce restrictive covenant against employee surgeon in view of compelling need for surgeon's services and fact that enforcement would jeopardize public health of community); Hefelfinger v. David, 305 So. 2d 823 (Fla. 1st DCA 1975) (enforcing restrictive covenant against employee pediatrician even though there was a need for pediatricians in the area because the restraint would not harm the public health).

99. *See, e.g.*, Florida Pest Control & Chem. Co. v. Thomas, 520 So. 2d 669 (Fla. 1st DCA 1988); *supra* notes 59-62 and accompanying text.

100. Hapney v. Central Garage, Inc., 579 So. 2d 127, 133 (2d DCA), *rev. denied*, 591 So. 2d 180 (Fla. 1991).

101. However, one author gathered a long list of factors that courts in other jurisdictions have considered in the past when deciding the reasonableness of noncompetition agreements. ASPELUND & ERIKSON, *supra* note 8, § 6.04. The factors listed include:

a. Ability to obtain other employment;
b. What ordinary person would anticipate;
c. Length of employment or association;
d. Expenses incurred by employer;
e. Nature of goods or services;
f. Attorney advice;

For example, courts have long considered an employee's ability to obtain other employment.[102] Employees may now benefit by arguing that finding non-competitive employment is difficult. Employees can buttress this argument if they possessed significant experience in the employer's field before working for employer.[103] However, courts will probably not discard a covenant based on undue hardship alone.[104] Instead, undue hardship may tip the balance in favor of the employee when the employer's need for protection is not great.[105]

Courts also consider an employer's offer to limit the noncompetition agreement's effect.[106] Such an offer could minimize employee claims that the restraint imposes undue hardship.[107] Additionally, a court may find a restraint more reasonable if the employee voluntarily left employment to enter competition rather than competing after being fired.[108]

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g. Position as executive or professional;
h. Give and take negotiations;
i. Bargaining power;
j. Voluntary limitation of enforcement;
k. Pre-termination activities of employees;
l. Prior experience of employee;
m. Employee's choice to go into competition;
n. Misrepresentation or concealment by either party;
o. Employee's abilities;
p. Refusal or failure to sign all or portion of contract;
q. Intent of employer in bringing suit;
r. Intent of employee in entering competition;
s. Professional standards and customs;
t. Mitigation of damages including finding of substitutes;
u. Prior and mass departures;
v. Existence of trade secrets or confidential information;
w. Need to protect customers and/or goodwill; and
x. Time and area restrictions.

Id.

102. *Id.* § 6.04(3).

103. *See* Besso Chem., Inc. v. Schmidt, 522 F. Supp. 1087, 1091-92 (E.D. Ark. 1981) (denying enforcement of noncompetition agreement and noting former employee had 11 years of experience in the field prior to working for employer).

104. *See* ASPELUND & ERIKSON, *supra* note 8, § 6.04(36).

105. *See id.*

106. *Id.* § 6.04(13).

107. *Id.*

108. *E.g.*, Vermont Elec. Supply Co. v. Andrus, 315 A.2d 456, 458 (Vt. 1974) (noting a further consideration that "this case deals with an employee who voluntarily left his employer for the very purpose of going into business competitively in the same special field. He was not placed in the double bind of being both fired and subject to five years of employment restraint.").

3. *Irreparable Harm.* The employer must show irreparable harm. Since 1986, the Florida Supreme Court has held that a mere violation of a noncompetition agreement creates a presumption of irreparable injury.[109] Under the amendment, however, the presumption only arises where the employee uses trade secrets, uses customer lists, or directly solicits existing customers.[110] Without the presumption, an employer must prove irreparable harm in addition to the existence of a valid contract, the employee's intentional and material breach of the contract, and the absence of any other form of relief.[111]

Finally, *Hapney* also requires a legitimate business interest as a condition precedent for upholding a noncompetition agreement.[112] However, this requirement appears superfluous. Without a legitimate reason for the agreement, such as protecting a business interest, the

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109. Capraro v. Lanier Bus. Prods., Inc., 466 So. 2d 212, 213 (Fla. 1985).

110. *See* FLA. STAT. § 542.33(2)(a) (1991). Whether the presumption arising under the statute is rebuttable or irrebuttable is unresolved. Recently, the Third District Court of Appeal suggested that the presumption is irrebuttable. *See* Sun Elastic Corp. v. O.B. Industries, No. 91-2199, 1992 WL 123429 (Fla. 3d DCA 1992). In *Sun Elastic*, the court reversed the denial of a temporary injunction, noting that it was admitted that the former employee directly solicited existing customers of the former employer. *Id.* at *2-3. While acknowledging that the 1990 amendment to § 542.33 was intended to restrict the availability of injunctive relief, the court stressed that the amendment provided that the presumption of irreparable injury was available in this circumstance. *Id.* at *2. Therefore, the court found that "cases holding that a trial court is required to enjoin the violation of a noncompetitive agreement which is reasonable as to its duration and geographical limitation remain directly applicable and controlling." *Id.* (citations omitted). The court remanded with directions to grant the temporary injunction. *Id.* at *3.

The majority in *Sun Elastic* did not address whether the evidence presented by the employee rebutted the presumption of irreparable injury. In a special concurrence, Judge Cope viewed this as a suggestion by the majority that the presumption arising under the statute is irrebuttable. *Id.* at *4 (Cope, J., specially concurring). Stating that there is no evidence that the legislature intended for the presumption to be irrebuttable, Judge Cope pointed out that in certain circumstances, the solicitation of existing customers may not result in irreparable injury. *See id.* (Cope, J., specially concurring). For instance, if there is a liquidated damages clause or if the damages can be calculated, there would be no irreparable injury. *See id.* (Cope, J., specially concurring).

In addition, Judge Cope emphasized that it was inappropriate for the majority to "exhume" the *Capraro* line of cases which hold that a court must enjoin competition if irreparable injury is presumed and the time and area restrictions of an agreement are reasonable. *Id.* at *5 (Cope, J., specially concurring). Judge Cope stated that legislature specifically intended to overrule *Capraro* and to adopt the rule of the *Capraro* dissent. *Id.* (Cope, J., specially concurring). Therefore, Judge Cope suggests that a presumption of irreparable injury and reasonable time and area restrictions do not mandate injunctive relief.

111. *See* Hunter v. North Am. Biologicals, Inc., 287 So. 2d 726, 727 (Fla. 4th DCA 1974).

112. Hapney v. Central Garage, Inc., 579 So. 2d 127, 134 (2d DCA), *rev. denied*, 591 So. 2d 180 (Fla. 1991).

employer cannot suffer irreparable harm. Additionally, an agreement without a legitimate end is unlikely to be reasonable. Thus, even without independently requiring a legitimate business interest, evidence of legitimate business interests will be necessary to prove irreparable harm and reasonableness under the amendment.

C. *Retroactive or Prospective Application*

Whether the broader reasonableness test and the burden of proving irreparable harm apply to employers with covenants predating the amendment depends on whether the amendment operates retroactively. If the amendment is retroactive, it will apply to any contract, regardless of when it was entered. Conversely, if the amendment is prospective, it will apply only to contracts entered after June 28, 1990, the effective date of the statute.

Generally, statutes are applied prospectively unless their language clearly shows legislative intent for retroactive application.[113] Further, even clear legislative intent that a statute operate retroactively will be ignored if the statute "impairs vested rights, creates new obligations, or imposes new penalties."[114] However, if a statute is found to be remedial in nature, the Florida Supreme Court directs that the statute be retroactively applied to serve its intended purpose.[115] A remedial statute changes a mode of procedure or a remedy, a remedy being the means used to enforce a right or redress an injury.[116] A substantive change in a statute will not be applied retroactively, regardless of legislative intent.

The *Hapney* court held that the 1990 amendment to section 542.33 is remedial.[117] The *Hapney* court observed that the amendment "merely refines the relief available by categorizing the burden of proof in relation to the protectible interest at issue, and clarifies that the general principles of equity shall apply in this class of cases."[118] Therefore, the court held that underlying substantive rights were not affected by the amendment.[119]

This holding is consistent with the amendment's plain language. The amendment itself suggests its purpose is to limit the circumstances

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113. Young v. Altenhaus, 472 So. 2d 1152, 1154 (Fla. 1985).

114. Anderson v. Anderson, 468 So. 2d 528, 530 (Fla. 3d DCA 1985).

115. City of Orlando v. Desjardins, 493 So. 2d 1027, 1028 (Fla. 1986).

116. St. Johns Village v. Department of State, 497 So. 2d 990, 993 (Fla. 5th DCA 1986).

117. Hapney v. Central Garage, Inc., 579 So. 2d, 127, 134 (2d DCA), *rev. denied*, 591 So. 2d 180 (Fla. 1991).

118. *Id.*

119. *Id.*

in which courts can grant injunctions.[120] An injunction is a remedy, and the amendment alters the means of obtaining that remedy. In this sense, the amendment is remedial. However, the amendment could also be considered substantive. Before the amendment, the First District Court of Appeal directed courts to enforce covenants not to compete if the time and area provisions were reasonable, even if the covenant was harsh and oppressive.[121] Arguably, the amendment's expanded reasonableness requirement alters that decision. Under the amendment, a harsh and oppressive covenant may not be enforceable regardless of the reasonableness of the time and area provisions.[122] Thus, employers may not be able to enforce certain covenants under the amendment that were enforceable before. For this reason, the amendment arguably impairs an employer's substantive right to enforce certain covenants and should therefore only be applied prospectively.

Other Florida cases imply that a covenant's overall reasonableness has been a consideration under the statute since its inception. As early as 1966, the Florida Supreme Court held that noncompetition agreements would be enforced to protect the legitimate interests of the employer without harming the public interest and without inflicting an unduly harsh or oppressive result on the employee.[123] Therefore, it appears that, long before the amendment, the Florida Supreme Court could refuse to enforce harsh and oppressive covenants. This supports the argument that the amendment does not alter substantive rights, and leads to the Second District's conclusion that the amendment is merely remedial.

Finally, employers can argue that the amendment cannot be applied retroactively because abolishing the presumption of irreparable injury alters substantive rights. However, the Florida Supreme Court has held that the burden of proof is a procedural issue, and that shifting the burden of proof does not abrogate substantive rights.[124] Nonetheless, Justice Lehan argues in his *Hapney* dissent that the amendment

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120. *See* FLA. STAT. § 542.33(2)(a) (1991) ("However, the court shall not grant an injunction. . . .").

121. Florida Pest Control & Chem. Co. v. Thomas, 520 So. 2d 669, 671 (Fla. 1st DCA 1988).

122. *See* STAFF OF FLA. S. COMM. ON JUDICIARY-CIV., CS FOR SB 2642 (1990) STAFF ANALYSIS at 3 (May 17, 1990) (stating that "although courts currently examine covenants for the purpose of assessing their reasonableness, the addition of language stating that the court shall not enter an injunction which enforces an unreasonable covenant could result in the court's reexamination of whether the covenant is 'burdensome'").

123. Capelouto v. Orkin Exterminating Co., 183 So. 2d 532, 534 (Fla. 1966).

124. Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239, 243 (Fla. 1977).

does not alter the burden of proof because no burden previously existed.[125] Therefore, the amendment imposes a new element of proof and cannot be retroactively applied to pre-1990 contracts.[126] The validity of Justice Lehan's argument may depend on whether the presumption of irreparable injury available prior to the amendment is characterized as conclusive or rebuttable.[127] At this time, the Florida Supreme Court has not addressed that question.[128]

IV. THE GEORGIA ACT

The amendment to section 542.33 requires a reversion to a common law reasonableness inquiry. Prior to 1990, Georgia also applied the common law to noncompetition agreements.[129] However, in 1990, the Georgia Legislature passed a restrictive covenant act directed at the problems caused by its courts' numerous and conflicting applications of the common law.[130] Georgia's experience shows the problems that may result from a broad reasonableness inquiry and provides an example of one state's statutory solution.

Effective July 1, 1990, Georgia enacted a new restrictive covenant act.[131] While the Act did not substantially alter preexisting common law in Georgia, the Act did shift public policy to favor the use and enforcement of noncompetition agreements.[132] Before the Act, Georgia courts decided hundreds of cases using various unclear rules.[133] The

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125. *See* Hapney v. Central Garage, Inc., 579 So. 2d 127, 141 (2d DCA), *rev. denied*, 591 So. 2d 180 (Fla. 1991) (Lehan, J., dissenting).

126. *Id.*

127. *See id.*

128. *Id.*; *see supra* note 110.

129. *See, e.g.*, Barrett-Walls, Inc. v. T.V. Venture, Inc., 251 S.E.2d 558, 561 (Ga. 1979) (stating that the rule of reason applies when reviewing covenants in restraint of trade).

130. Act effective July 1, 1990, 1990 GA. LAWS 1676 (codified at GA. CODE ANN. §§ 13-8-2 to -2.1 (Supp. 1992)).

131. *Id.* For a discussion of this Act, see Peter C. Quittmeyer, *Georgia's New Restrictive Covenant Act*, 42 MERCER L. REV. 1 (1990).

132. *See* Quittmeyer, *supra* note 131, at 2. *Compare* GA. CODE ANN. § 13-8-2.1(a) (stating that "[c]ontracts that restrain in a reasonable manner any party from exercising any trade . . . shall not be considered against the policy of the law, and . . . shall be enforceable for all purposes.") *with* Preferred Risk Mut. Ins. Co. v. Jones, 211 S.E.2d 720, 722 (Ga. 1975) (stating "[c]ovenants not to compete ancillary to employment contracts must be scrutinized in terms of the public policy generally disfavoring such contracts as restraints on trade and competition").

133. Quittmeyer, *supra* note 131, at 2. The accumulation of cases was so confusing and voluminous that Justice Jordan of the Georgia Supreme Court stated, "[t]en Philadelphia lawyers could not draft an employer-employee restrictive covenant agreement that would pass muster under the recent ruling of this court." Fuller v. Kolb, 234 S.E.2d 517, 518 (Ga. 1977) (Jordan, J., dissenting).

primary purpose of the Act was to provide standards for determining the validity of noncompetition agreements.[134] To accomplish that purpose, the Act identified the circumstances under which a covenant is considered reasonable.[135] If a covenant is not considered reasonable under the Act, then common law applies to determine if the covenant is reasonable.[136]

To narrow its application, the Act defines "employee" to include only executives, officers, managers, research and development personnel, and other persons possessing significant confidential information or specialized skills.[137] This definition is based on the presumption that these types of employees have more bargaining power than other classes of employees.[138] Furthermore, the definition presupposes that an employer of this type of employee is more likely to have a legitimate business purpose for the noncompetition agreement.[139] The definition of "employee" specifically excludes any employee "who lacks selective or specialized skills, learning, customer contacts, or abilities."[140]

With regard to covenants that restrict competition, the Act requires a prohibited area be limited to the area where the employee is working at the time of termination.[141] The Act also requires that prohibited activities bear a reasonable relation to the employee's previous activities performed for the employer.[142] Additionally, there is a rebuttable presumption that a two-year time limitation is valid.[143]

With regard to covenants that restrict solicitation of employer's customers, the Act allows prohibition of both solicitation and acceptance of prior customers.[144] Also, the agreement need not specify a prohibited area since the prohibition follows the prior customer.[145] The Act restricts enforcement of these covenants by allowing the employer to prohibit solicitation only of prior customers with whom the employee had material contact.[146] Material contact includes direct business deal-

134. Quittmeyer, *supra* note 131, at 1.

135. *See* GA. CODE ANN. § 13-8-2.1(a) (stating that contracts described in § 13-8-2.1(b)-(d) are considered reasonable).

136. *See id.* § 13-8-2.1(a).

137. *Id.* § 13-8-2.1(c)(1)(B).

138. *See* Quittmeyer, *supra* note 131, at 10.

139. *Id.*

140. GA. CODE ANN. § 13-8-2.1(c)(1)(B).

141. *Id.* § 13-8-2.1(c)(2).

142. *Id.*

143. *Id.* § 13-8-2.1(c)(6).

144. *Id.* § 13-8-2.1(c)(3).

145. *Id.*

146. *Id.*

ings, acquaintance through confidential information, and any connection resulting in sales commissions for the employee.[147]

Georgia's experience can be instructive in Florida in two ways. First, the Georgia Legislature adopted the Act to remedy confusion resulting from the hundreds of cases interpreting the reasonableness requirement. Confusing and sometimes conflicting case law is not limited to Georgia. Florida courts are susceptible to the same problem because a reasonableness inquiry necessarily involves a fact-specific inquiry. Because an endless variety of factual situations will arise, an endless variety of decisions will result.

Second, Georgia's Act restates basic common law principles of reasonableness applied in Georgia before the Act's adoption. Florida's amendment requires a reasonableness inquiry before injunctive relief may be granted. Although Florida courts' interpretation of reasonableness will not necessarily match Georgia courts', Georgia's Act can still be helpful. The Georgia Legislature sorted through its case law and identified certain clearly reasonable restraints. These clearly reasonable restraints will likely be found reasonable in Florida. Thus, Georgia's Act provides a useful starting point for defining reasonable covenants in Florida.

V. SUGGESTIONS FOR DRAFTING UNDER THE AMENDED STATUTE

In addition to developing factual arguments to prove reasonableness at trial, employers should modify the language of their noncompetition agreements to respond to the Florida amendment. The amendment has two effects. It opens up the reasonableness inquiry, and it limits the use of the presumption of irreparable harm. Thus, the drafter's goal is twofold: (1) to show that the restraint is reasonable, and (2) to facilitate proof of irreparable harm.

A. *Reasonableness*

In his authoritative article on employee covenants not to compete, Professor Blake recommends several ways to increase the probability a court will find a noncompetition agreement reasonable.[148] He recommends that the employer emphasize the fairness and flexibility of the company's procedures.[149] These procedures may include a waiver provision allowing an employee to receive a waiver of the restraint under

147. *Id.* § 13-8-2.1(c)(1)(D).
148. Blake, *supra* note 28, at 687.
149. *Id.* at 687-89.

certain circumstances.[150] Also, since courts often consider whether the restraint imposes hardship on the employee, the employer should document the employee's ability to do other work. Thus, the contract should incorporate the employee's resume by reference or list the education and skills possessed by the employee.[151] In addition, the employer should include a statement that the employee is able and willing to move if compliance with the restraint so requires.[152] One commentator suggests making the employee's ability to earn a livelihood without violating the restraint a material condition to the employment.[153]

Other commentators suggest that employers include an exit interview clause in their noncompetition agreements.[154] This provision would require the employee to notify the employer of the employee's new employer and new job description.[155] In addition, the clause would require the employee to schedule an exit interview before leaving employment.[156] At the exit interview, the employer can accomplish several goals. First, the employer can remind the employee about the covenant not to compete and discuss its terms and conditions in detail.[157] Second, the employer can inquire about the employee's plans for future employment, specifically asking if the employee intends to compete.[158] Third, the employer can ensure that the employee has returned all confidential information by having the employee sign a written acknowledgment to that effect.[159] Fourth, the employer can obtain a written acknowledgment that the employee has not breached the terms of the noncompetition agreement.[160] Lastly, if litigation en-

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150. *Id.* at 688. An employer also might consider giving financial assistance to the employee during the term of the restraint in the event the employee was unable to find non-competitive employment. *Id.*

151. *See id.* at 689.

152. *Id.*

153. VALIULIS, *supra* note 9, at 52. Valiulis suggests the following clause be included in an acknowledgment section of the agreement: "Employee further acknowledges that (1) in the event his/her employment with employer [sic] terminates for any reason, he/she will be able to earn a livelihood without violating the foregoing restriction and (2) his/her ability to earn a livelihood without violating such restrictions is a material condition to his/her employment with Employer." *Id.*

154. *See id.* at 61; Michael L. Agee, *Covenants Not to Compete in Tennessee Employment Contracts: Almost Everything You Wanted to Know But Were Afraid to Ask*, 55 TENN. L. REV. 341, 386 (1988).

155. *See* VALIULIS, *supra* note 9, at 61; Agee, *supra* note 154, at 386.

156. Agee, *supra* note 154, at 386.

157. *Id.*

158. VALIULIS, *supra* note 9, at 61.

159. *See id.*

160. *Id.*

sues, the exit interview provides important evidence that the employer was willing to cooperate and communicate with the employee about the restraint.

In addition to these tactics, employers must tightly draft agreements to limit the restraint to the minimum needed to protect the employer's interests.[161] A contract prohibiting competition per se without explaining the need to do so may be unreasonable.[162] Therefore, the employer should relate the scope of the agreement to specific business interests. Professor Blake emphasizes that employers should alert the court to the confidential nature of the parties' relationship.[163] To do so, he recommends specifically including in the contract a description of the kinds of confidential information that the employer makes available to a particular employee or a particular class of employees.[164] Further, he suggests that employers should describe the nature of the employee's relationship with customers.[165] With this information, an employer can show the employee's awareness that the job placed the employee in a position of confidence.[166]

B. *Irreparable Injury*

To obtain an injunction, an employer must prove that the breach of the covenant caused irreparable injury.[167] A court may favor a provision stating that certain violations constitute irreparable injury.

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161. *Id.* at 47.

162. *See id.* According to *Hapney*, an agreement prohibiting competition per se is void as against public policy. Hapney v. Central Garage, Inc., 579 So. 2d 127, 134 (2d DCA), *rev. denied*, 591 So. 2d 180 (Fla. 1991).

163. Blake, *supra* note 28, at 689.

164. *Id.*

165. *Id.*

166. *Id.* Additionally, the agreement can include an acknowledgment by the employee that the covenant is necessary to protect the employer's legitimate business interests. VALIULIS, *supra* note 9, at 48. An example of a clause in which the employee acknowledges the confidential relationship is:

> Acknowledgments. Employer is in the business of steel manufacturing, warehousing, and processing, currently specializing in specialty steel products. Employee acknowledges that: (1) Employer's products are highly specialized items; (2) the identity and particular needs of Employer's customers are not generally known in the steel industry; (3) Employer has a proprietary interest in the identity of its customers and customer lists; and (4) documents and information regarding Employer's methods of production, sales, pricing, costs, and the specialized requirements of Employer's customers are highly confidential and constitute trade secrets.

Id.

167. *See* FLA. STAT. § 542.33(2)(a) (1991).

The amended statute presumes irreparable injury when the employee uses trade secrets, customer lists or solicits the employer's customers.[168] Thus, the employer will probably not have to prove irreparable harm in those cases.[169]

However, if the employer wants to protect other interests under the agreement, the agreement should provide that a violation impairing those interests constitutes irreparable injury. For example, if an employer provides an employee with training or confidential information, the contract should state that the subsequent use of that training or confidential information by the former employee irreparably injures the employer. Thus, later proof of irreparable harm may not be necessary.

VI. CONCLUSION

Florida case law after the enactment of the 1953 noncompetition statute developed significant advantages for employers seeking to prohibit competition. Often, employers obtained relief without proving irreparable harm, and courts granted injunctions without considering the effect on the employee. Equitable considerations were addressed only to determine whether any modification of the time and area provisions was necessary.

The 1990 amendment limits these advantages. The amendment restricts the presumption of irreparable injury, and courts will now evaluate noncompetition cases in light of all relevant facts and circumstances. Furthermore, the amendment is, arguably, remedial in nature since it merely alters the requirements for obtaining an injunction. Thus, the amendment may apply retroactively to contracts that predate its effective date.

By limiting the advantages previously available to employers, the amendment returns Florida law to its common law origin. At common law, Florida courts stringently protected the right to work and the right to economic freedom. The common law courts were extremely reluctant to uphold contracts that limited a person's right to follow a chosen calling and enforced such contracts only when "mutuality and fairness were demonstrated beyond peradventure of doubt."[170]

Under the original statute, the courts moved away from such policies, liberally enforcing noncompetition agreements regardless of

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168. *Id.*

169. The issue of proof depends on whether the presumption is rebuttable or irrebuttable. *See supra* note 110.

170. Flammer v. Patton, 245 So. 2d 854, 857 (Fla. 1971).

the effect on the employee. The amendment restores the fairness analysis. Georgia's experience, however, instructs that a "fair" approach may be at the cost of consistency in the case law. Hopefully, Florida courts will apply the amendment to achieve the appropriate balance among the conflicting policies involved, including the right to contract freely, the right to work, the right to economic freedom, and the right to unfettered competition.

Leslie A. Wickes