

# NEGOTIATING GEORGIA'S MINEFIELD OF POST-EMPLOYMENT RESTRICTIVE COVENANTS

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## I. INTRODUCTION

With the increasing mobility of today's workforce, it is only reasonable for employers to wish to protect the investments they make in their employees and their customers. A common method of doing so is requiring employees to sign covenants that restrict their activities upon termination of their employment. Such covenants, referred to generically as restrictive covenants, may prohibit the former employee from competing with the former employer (non-compete) from soliciting the former employer's customers or employees (non-solicitation), and from disclosing the former employer's confidential information (non-disclosure). See Swartz Investments v. Vion Pharmaceuticals, 252 Ga. App. 365, 367, 556 S.E.2d 460 (2001).

This article discusses non-solicit, non-compete and non-disclosure covenants arising out of employment agreements. Georgia courts are among the most hostile in the nation towards non-solicit and non-compete covenants, but this hostility should not be mistaken for uniformity. Contradictory decisions in this area are the rule rather than the exception. Section II of this article will attempt to bring order to the chaos by identifying broad themes running through the cases that analyze non-solicit and non-compete covenants ancillary to employment agreements. Section III discusses non-disclosure covenants, including the requirements for such covenants and the reasons why they are treated different from their cousins. Finally, section IV has culled the case law for specific examples of failed covenants so that those who draft and enforce such covenants may learn from their predecessors.

## II. NON-SOLICITATION AND NON-COMPETITION COVENANTS

### A. THE GENERAL RULE

The Georgia Constitution declares void on public policy grounds any contract which "may have the effect of or which is intended to have the effect of defeating or lessening competition." See Ga. Const. of 1983, Art. III, Sec. VI, Para. V(c).<sup>1</sup> Although restrictive covenants lessen competition to some degree by their very nature, they do not violate the Georgia Constitution in all cases. W.R. Grace & Co. v. Mouyal, 262 Ga. 464, 465, 422 S.E.2d 529 (1992). Georgia courts will enforce restrictive covenants if they are: (1) reasonable in scope; (2) supported by consideration; (3) reasonably necessary to protect the restraining party's interests; and (4) not unduly prejudicial to the interests of the public. Id.

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<sup>1</sup> Georgia courts have zealously applied that constitutional prohibition. See, e.g., Jackson v. Coker, Inc. v. Hart, 261 Ga. 371, 405 S.E.2d 253 (1991) (Striking down as unconstitutional a 1990 statute which purported to require courts to "blue pencil" overbroad restrictive covenants ancillary to employment agreements to make them enforceable).

## 1. WHETHER THE RESTRAINT IS REASONABLE

The reasonableness of a restrictive covenant is a question of law for the court, considering the nature and extent of the trade or business, the situation of the parties, and all other relevant circumstances. W. R. Grace & Co. v. Mouyal, 262 Ga. 464, 465, 422 S.E.2d 529 (1992). "A three-element test of duration, territorial coverage, and scope of activity has evolved as a 'helpful tool' in examining the reasonableness of the particular factual setting to which it is applied." Id. This is a flexible and imprecise test. For example, an agreement with a reasonable territorial limitation does not require a durational limitation. Glomer v. Orthalliance, Inc., 337 F. Supp. 2d 1322, 1335 (N.D. Ga. 2004). Similarly, if a non-solicit is narrowly drawn to prevent a former employee from soliciting only those customers with whom he had contact and only for the purpose of competing with the former employer, a court will be more indulgent of a longer durational limit or larger geographic restriction. See, generally, Gale Indus. v. O'Hearn, 257 Ga. App. 220, 223, 570 S.E.2d 661 (2002).

## 2. WHETHER THE RESTRAINT IS SUPPORTED BY CONSIDERATION

A court will not invalidate a restrictive covenant for lack of consideration unless "there be such gross inadequacy of consideration as to shock the conscience and amount in itself to evidence of fraud, or be void for some other reason." Breed v. Nat'l Credit Ass'n, 211 Ga. 629, 631, 88 S.E.2d 15 (1955). When an employee executes a restrictive covenant at the time he is hired, courts uniformly agree that the employee's employment is adequate consideration for the covenant. See, e.g., Landmark Financial Services, Inc. v. Tarpley, 236 Ga. 568, 571, 224 S.E.2d 736 (1976). Because the adequacy of consideration is measured at the time the contract is executed, the fact that the contract is terminated after a short period of time does not render the consideration inadequate. Id. ("As long as there exists a valid agreement as to the restrictions at the time the employment is terminated the restrictive covenants are effective").

In many cases, however, the employee is asked to sign a restrictive covenant after he has been working for some period of time. In that case, the employee may argue that the restrictive covenant is not supported by consideration, while the employer (enjoying the benefits of doing business in an employment-at-will state) claims that the employee's continued employment is adequate consideration. The decisions on this issue are somewhat mixed. In Mike Bajalia, Inc. v. Pike, 226 Ga. 131, 133, 172 S.E.2d 676 (1970), the court held that a non-compete executed in exchange for \$1.00 and continued employment, was supported by adequate consideration. Id. ("The acknowledgment of receipt of the foregoing benefits and the employer's retention of her in its employment, in addition to the monetary consideration, was sufficient consideration for her promise in the restrictive employment agreement"). But in White v. Fletcher/Mayo/Associates, Inc., 251 Ga. 203, 208, 303 S.E.2d 746 (1983), the court seemed troubled by a perceived lack of consideration where the employee-shareholder executed a non-compete in exchange for continued employment and the sale of his shares of stock because he was paid the same share price as other employee-shareholders who were not required to sign a covenant. Nevertheless, the court never ruled squarely on the adequacy of the consideration, and invalidated the covenant based upon the employee-shareholder's lack of bargaining power. Id.

Many post-hire covenants require the employee to acknowledge that the benefits of future training and access to employer's confidential information are adequate consideration for a

restrictive covenant. If continued employment is adequate consideration, then continued employment with additional benefits is also adequate. See Mike Bajalia, supra.

### **3. WHETHER THE RESTRAINT IS REASONABLY NECESSARY TO PROTECT THE RESTRAINING PARTY'S INTERESTS**

The goal of a non-competition covenant is to balance two competing rights: (1) the employee's right to earn a living and his ability to determine with certainty the prohibited territory; and (2) the employer's interest in customer relationships created or furthered by its former employee on its behalf and its right to protect itself from the former employee's possible unfair appropriation of contacts developed while working for the employer. W.R. Grace & Co. v. Mouyal, 262 Ga. 464, 466, 422 S.E.2d 529 (1992).

In most cases, it is unreasonable for an employer to restrict a former employee from post-employment solicitation in a geographic area where the employer had no business interest. Id. On the other hand, an employer does have a legitimate interest in preventing former employees from exploiting their personal relationships with the employer's customers. Wiley v. Royal Cup, Inc., 258 Ga. 357, 359, 370 S.E.2d 744 (1988). An employer also has a legitimate interest in protecting its investment in the employee for a reasonable period of time and within the area in which the employee worked. Id. To that end, courts will generally refuse to enforce a territorial limitation that is significantly larger than the area serviced by the former employee because doing so would protect more than the employer's legitimate interests. Id.; but see Habif, Arogeti & Wynne, P.C. v. Baggett, 231 Ga. App. 289, 294, 498 S.E.2d 346 (1998) ("The fact that [the employee's] territory had not included two of the counties [restricted in the employment agreement's NSC] does not, of itself, render the agreement void for overbreadth").

There is some flexibility in the above rules in that an employer may make a showing of a legitimate business interest worthy of protection outside of the area in which the former employee worked. Id. In those circumstances, courts have taken into consideration the uniqueness of the business and whether the employer has anyone else who can adequately service the restricted territory. Nat'l Settlement Assocs. of Georgia, Inc. v. Creel, 256 Ga. 329, 331, 349 S.E.2d 177 (1986). If the departed employee was the lone person in that region, the court is more likely to uphold the restriction to protect the employer's legitimate business investment. Id.

### **4. WHETHER THE RESTRAINT UNDULY PREJUDICES THE INTERESTS OF THE PUBLIC**

The case law supplies very little analysis on the extent to which a restraint prejudices the public interest. The focus on the public interest is perhaps the flip side of the focus on the employer's interest. It would appear that the public interest would be unduly prejudiced by an overbroad restraint that protects more than the employer's legitimate business interests. Pregler v. C&Z, Inc., 259 Ga. App. 149, 150, 575 S.E.2d 915 (2003) (Restraint is overbroad because "[i]t prohibits not only solicitation of former C&Z clients but also acceptance of any work from such clients regardless of who initiated the contact. This is an unreasonable restraint, because in addition to overprotecting C&Z's interest, it unreasonably impacts on [Pregler] and on the public's ability to choose the professional services it prefers") (internal punctuation omitted).

As indicated in the quotation from Pregler, supra, courts may scrutinize covenants restricting professional more closely than other covenants in order to protect the public's ability

to engage their chosen physicians, dentists and accountants. Id.; see also Waldeck v. Curtis 1000, Inc., 261 Ga. App. 590, 593, 583 S.E.2d 266 (2003). Cf. Clein v. Kapiloff, 213 Ga. 369, 372, 98 S.E.2d 897 (1957) (“The covenant is reasonable in all respects, and there are no allegations in the petition which indicate that the public would suffer in having one less retail clothing store in this limited area for the time specified”).

## **B. DIFFERENCES BETWEEN NON-COMPETE AND NON-SOLICIT COVENANTS ANCILLARY TO EMPLOYMENT AGREEMENTS**

Non-compete and non-solicit covenants are analyzed differently because they are designed to serve different interests, but even the courts sometimes confuse the rules. A covenant not to compete prohibits the employee from performing competitive activities in a certain geographic area for a certain period of time, thereby protecting the employer’s “investment of time and money in developing the employee’s skills.” Habif, Arogeti & Wynne, P.C. v. Baggett, 231 Ga. App. 289, 294, 498 S.E.2d 346 (1998). A covenant not to solicit prohibits an employee from soliciting some or all of the employer’s clients for a limited time and sometimes in a limited geographic area. Id. A non-solicitation covenant protects the employer’s investment of time and money in developing customer relationships and goodwill. Id.

Thus, a non-compete may prevent an employee from accepting competing business (whether solicited or not) from any clients (whether previously contacted by him or not) within a given territory. Id. A non-solicit covenant, on the other hand, may prevent an employee from soliciting those clients with whom he had contact during his employment, but it may not preclude the employee from accepting *unsolicited* business from those clients. Id. Similarly, a covenant prohibiting solicitation of clients with whom the former employee had some prior dealings does not require a geographic limitation for enforcement. W.R. Grace, 262 Ga. at 465.

## **C. THE SCRUTINY APPLIED BY THE COURT**

### **1. THE THREE LEVELS OF SCRUTINY**

Restrictive covenants are not unlike statutes facing a constitutional challenge. While the three-pronged test for enforcement of a restrictive covenant (reasonable time, geographic and activities restrictions) is easy enough to recite, it is very difficult to apply in practice. To that end, the primary determinant of the fate of a restrictive covenant is the level of scrutiny that it receives from a court. Georgia courts recognize and apply three levels of scrutiny depending upon the relative bargaining power between the parties. Watson v. Waffle House, 253 Ga. 671, 672 (1985). They apply strict scrutiny to covenants ancillary to an employment or franchise agreement, see id. at 673, mid-level scrutiny to covenants ancillary to a professional partnership agreement, and “much less scrutiny” to covenants ancillary to the purchase or sale of a business. New Atlanta Ear, Nose & Throat Associates v. Pratt, 253 Ga. App. 681, 560 S.E.2d 268 (2002).

The application of slight scrutiny is justified by the increased bargaining power one has when he sells a business; the consideration paid by the purchaser in that context is typically much greater than that paid to an ordinary employee. Id. at 684. Similarly, intermediate scrutiny is appropriate to partnership agreements because partners hold relatively equal bargaining power, enjoy mutual advantage from the restrictive covenants, and share equally in the consideration. Physician Specialists in Anesthesia, P.C. v. MacNeill, 246 Ga. App. 398, 539 S.E.2d 216 (2000).

Courts apply strict scrutiny to covenants ancillary to an employment agreement because the employee generally has far less bargaining power than a partner or business owner. Id.

Situations frequently arise that blur the three types of covenants. For example, an employee may also be a minority shareholder. The first principle to keep in mind is that the focus is on the relationship of the parties at the time the covenant was executed, not at some later point in time. See Kloville, Inc. v. Kinsler, 239 Ga. 569, 570, 238 S.E.2d 344 (1977). Thus, an employee who executes a covenant but then subsequently acquires shares of stock in the company will still benefit from the court's strict scrutiny. Id.

The second principle is that the courts engage in a fact-intensive analysis to determine the relative bargaining power of the parties, and will apply strict scrutiny even if the employee was a shareholder or partner at the time he signed the restrictive covenant. In White v. Fletcher/Mayo/Assocs., Inc., 251 Ga. 203, 208, 303 S.E.2d 746 (1983), for example, the court strictly construed a non-compete signed by an executive and five-percent shareholder upon the sale of the company that employed him because: (a) he exerted no control over the decision to pursue the merger; (b) he signed the covenant in exchange for continued employment but was thereafter terminated; and (c) he received the same per share price as other stockholders who were not asked to sign a non-compete (suggesting a lack of consideration).

In Drumheller v. Drumheller Bag & Supply, Inc., 204 Ga. App. 623, 420 S.E.2d 331 (1992), by contrast, the court applied slight scrutiny to a non-compete executed in conjunction with a stock sale, reasoning that the non-compete formed a part of the consideration for the stock deal, there was no evidence of unfair pressure to sell the stock and the employee-shareholders were represented by counsel. Similarly, in Rinks v. Courier Dispatch Group, Inc., 2001 U.S. Dist. LEXIS 4728, \*9 (N.D. Ga. 2001), the district court applied Georgia law to blue pencil a non-compete executed by an employee and 20 percent shareholder because he "certainly had the business savvy and acumen to negotiate the scope of the Agreement." But see Hilb, Rogal & Hamilton of Atlanta, Inc. v. Holley, 284 Ga. App. 591, 595-96, 644 S.E.2d 862 (2007) (When parties execute separate contracts for the seller's sale of a business and the seller's subsequent employment and each contract contains different restrictive covenants, the restrictive covenants in the employment agreement are still subject to strict scrutiny).

## 2. BLUE PENCIL RULE

What do the terms strict scrutiny, mid-level scrutiny and slight scrutiny mean? The only readily identifiable distinction is that a court applying strict scrutiny will not "blue pencil" an overbroad covenant to make it enforceable, but will instead strike down the entire covenant. See Habif, Arogeti & Wynne, P.C. v. Baggett, 231 Ga. App. 289, 290, 498 S.E.2d 346 (1998). Under strict scrutiny, an entire non-compete is doomed even if it is only a discrete subsection of the non-compete that is overbroad. See, e.g., T.E. McCutcheon Enter., Inc. v. Snelling & Snelling, Inc., 232 Ga. 609, 212 S.E.2d 319 (1974).

On the other hand, courts exercising mid-level or slight scrutiny may use a blue pencil, for example, to reduce the geographic territory to the area in which the seller worked prior to the sale in order to save the covenant.<sup>2</sup> Hudgins v. Amerimax Fabricated Prods., 250 Ga. App. 283,

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<sup>2</sup> Aside from the blue pencil rule, there are few concrete differences between the scrutiny levels. One difference is that a non-compete may be unlimited in time under both mid-level and slight scrutiny, but not under

287-8, 551 S.E.2d 393 (2001). Yet, there are limits to the blue pencil rule. A court may not, for example, write in a geographic limitation where there was none in order to make the contract enforceable. New Atlanta, supra (“The blue pencil marks, but it does not write”).

Under strict scrutiny, if a covenant is overbroad, it is invalid and cannot be judicially modified even if it expressly authorizes reformation (by the court or the employer) to bring it within the limits of the law. Palmer & Cay, Inc. v. Marsh & McLennan Cos., 404 F.3d 1297, 1307 (11th Cir. 2005) (Clause purporting to allow employer to modify a restrictive covenant fails strict scrutiny because “if employers were allowed to blue-pencil their agreements, they could load up non-competition agreements with oppressively overreaching terms and intimidate all but the litigation-hardy employees, then post-hoc excise offending provisions to avoid requested judicial invalidation”).

The Eleventh Circuit offered a compelling justification for disallowing modifications to covenants ancillary to employment contracts: “[r]ecognizing that employees often choose not to challenge illegal covenants in hopes of maintaining good relations with former employers, the Georgia Supreme Court refuses to reform even reasonable employment covenants in order to discourage employers from fashioning overly broad covenants that will remain unchallenged in most instances.” Palmer & Cay, 404 F.3d at 1303-04. Indeed, Georgia’s policy on this issue is so strong that a federal court sitting in diversity refused to apply an Alabama choice of law contractual provision against a Georgia employee because Alabama law allows blue penciling of employment agreements. Dothan Aviation Corp. v. Miller, 620 F.2d 504, 507 (5<sup>th</sup> Cir. 1980).

It is important to note that non-compete and non-solicitation covenants stand or fall together, while non-recruitment and nondisclosure covenants are evaluated separately from the rest of the covenants. Sunstates Refrigerated Svcs. v. Griffin, 215 Ga. App. 61, 62-3, 449 S.E.2d 858 (1994). For example, an invalid non-solicitation covenant will invalidate an otherwise valid non-compete, but it will not invalidate an otherwise valid non-disclosure agreement. Id. A severability clause is not a panacea. It will allow the court to excise the entire restrictive covenant in order to preserve the balance of the agreement, see Circle Appliance Leasing v. Appliance Warehouse, 206 Ga. App. 405, 425 S.E.2d 339 (1992), but it will not save a reasonable non-solicit from an unreasonable non-compete and vice versa. Johnstone v. Tom’s Amusement Co., 228 Ga. App. 296, 297-8, 491 S.E.2d 394 (1997).<sup>3</sup>

### III. NON-DISCLOSURE COVENANTS

#### A. THE GENERAL RULE

Non-disclosure covenants place a restraint on the use of confidential business information. Durham v. Stand-by Labor of Ga., Inc., 230 Ga. 558, 563, 198 S.E.2d 145 (1973).

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strict scrutiny. Jenkins v. Jenkins Irrigation, 244 Ga. 95, 98, 259 S.E.2d 47 (1979). Another difference is that a covenant prohibiting a professional from providing similar services to any organization, whether or not that organization competes with the professional’s former employer, will fail strict scrutiny but survive lesser scrutiny. Habif, Arogeti & Wynne, P.C. v. Baggett, 231 Ga. App. 289, 294, 498 S.E.2d 346 (1998).

<sup>3</sup> A severability clause is still critical. In Carroll v. Harris, 243 Ga. 34, 36, 252 S.E.2d 461 (1979), the court refused to enjoin an employee’s breach of a valid non-compete because it was contained within a non-severable employment agreement that the employer had breached. If the employment agreement had contained a severability clause, the employer would have won the injunction. Id.

While there is a general presumption against covenants that restrict competition, non-disclosures are often upheld to protect and prevent the exploitation of the employer's "commercial intangibles," meaning knowledge or information relating to the employer's business. Lee v. Env'tl. Pest & Termite Control, Inc., 271 Ga. 371, 373, 516 S.E.2d 76 (1999). Thus, Georgia courts do not view non-disclosure agreements as restraining trade to the same degree as non-competes and non-solicitations.

Courts apply a two factor test to non-disclosure agreements: (1) whether the employer intends to protect confidential information regarding the business, including: trade secrets, operational methods, customer names and personnel data and (2) whether the covenant relates to protecting such information. Id. As is the case with non-competition and non-solicitation covenants, a durational limit is required in non-disclosure covenants; however, there is no territorial limitation on a non-disclosure covenant. Pregler, 259 Ga. App. at 151.

## **1. EMPLOYER'S INTENTION TO PROTECT CONFIDENTIAL INFORMATION**

Non-disclosure covenants enable employers to protect confidential information beyond that which is protected by the Georgia Trade Secrets Act. Avnet, Inc. v. Wyle Laboratories, Inc., 263 Ga. 615, 620, 437 S.E.2d 302 (1993).<sup>4</sup> However, a non-disclosure covenant does not give an employer free reign to prevent a former employee from using any information; rather the employer must be able to demonstrate a legitimate need to maintain the confidentiality of the information. Durham, 230 Ga. at 565.

Factors used to determine a legitimate need for confidentiality include: (1) the time and effort expended by the employer to compile the information or amass the clientele, (2) the economic advantage provided to the employer through customer relationships and personnel data, (3) the employer's efforts to protect such data, and (4) the aspects of the business that indicate a need to protect the information. Id. For example, in Durham the court enforced a covenant prohibiting an employee from revealing information regarding the employer's clients and methods of doing business for one year because the information was a valuable, confidential asset the employer intended to protect under the non-disclosure covenant. Id. at 560-61, 564.<sup>5</sup>

## **2. THE COVENANT'S RELATION TO PROTECTING CONFIDENTIAL INFORMATION**

The legitimacy inquiry continues with an assessment of the covenant's connection to protecting the employer's confidential business information. A typical assessment of this relationship examines the extent of the covenant's restrictions as compared to the type of confidential information the employer wishes to protect. For example, a covenant that prevents a former employee from using the employer's sales, proposals and client list information is reasonable because the former employee was entrusted with such confidential information to

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<sup>4</sup> Georgia defines a trade secret as, "information, without regard to form, including, but not limited to, technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public." O.C.G.A. § 10-1-761(4). Additionally, in order to be a trade secret the information must derive economic value and be subject to reasonable efforts to maintain its secrecy. Id.

<sup>5</sup> However, the court did note that the reasonableness of the covenant must be further explored in a trial court. Id.

complete his job and the employer would have suffered irreparable damage if such information were used against the employer. Lee, 271 Ga. at 372.

However, the court rulings are far from clear with regards to the wording necessary for a non-disclosure covenant to be enforceable. For example, in Lee the court upheld a covenant that prevented the employee from using *confidential* information including sales, processes, proposals, customer lists and information because it did not extend beyond the protection of confidential business information. Id. at 374. But see Nasco, Inc. v. Gimbert, 239 Ga. 675, 676, 238 S.E.2d 368 (1977) (Holding that a non-disclosure covenant barring employee's use of *any* information relating to the employer's business was over-inclusive because it encompassed publicly available information); see also Physician Specialists in Anesthesia, P.C. v. MacNeill, 246 Ga. App. 398, 408, 539 S.E.2d 216 (2000) (Information which is available from other sources, or that is known to the employee prior to his employment, can not be classified as a legitimate business interest to be protected by a non-disclosure covenant). The Supreme Court reached different results in Nasco and Lee because the former covenant did not contain the word "confidential."

A non-disclosure covenant cannot last into perpetuity. Generally, courts apply the same durational restrictions to non-disclosures as they apply to non-competition and non-solicitation covenants; a durational limit of two years or less is likely acceptable. Sunstates Refrigerated Svcs., Inc. v. Griffin, 215 Ga. App. 61, 63, 449 S.E.2d 858 (1994). As is the case with non-competes and non-solicits, courts will not blue pencil a durational limit in a non-disclosure covenant. Allen v. Hub Cap Haven, 225 Ga. App. 533, 539, 484 S.E.2d 259 (1997).

## **B. DIFFERENCES BETWEEN NON-DISCLOSURE AND NON-COMPETE/NON-SOLICIT COVENANTS**

The subjectivity of the two-part test to determine the validity of a non-disclosure combined with the public policy favoring protection of commercial intangibles gives courts more leeway in upholding non-disclosures covenants. Non-disclosure covenants do not require a geographic limitation and they will be upheld even if the court strikes down the non-competition or non-solicitation covenant within the same agreement. See Sunstates Refrigerated Svcs., 215 Ga. App. at 860.

A non-disclosure covenant is not a catch-all way to protect every piece of an employer's business, but it does enable the employer to protect against the disclosure of non-public information. See Durham, 230 Ga. at 564-65. Because of the public policy favoring non-disclosures, employers may be able to use them to achieve the same goals as their less favored counterparts, non-competes and non-solicitations. For example, a court might not enforce a covenant not to compete with a nationwide scope, but it would enforce a covenant preventing a departing employee from using non-public information he gained through his employment for two years. See, e.g., Lee, 271 Ga. at 374. In the case of a long term employee, the non-disclosure covenant could have the practical effect of a non-compete. Id. Thus, a smart employer will always obtain a non-disclosure covenant from its employees.

## **IV. YOUR RESTRICTIVE COVENANT MAY BE INVALID IF....**

Section II of this article attempts to identify the general rules courts have fashioned to analyze the enforceability of restrictive covenants. Yet, it is far easier to recite these rules than it

is to apply them and Georgia case law is littered with reasonable-sounding covenants that were struck down in their entirety because of a single, poorly chosen term or phrase. Your restrictive covenant might be invalid if...:

#### A. CASES INVOLVING TERRITORIAL RESTRICTIONS

1. The covenant lacks a territorial restriction. New Atlanta Ear, Nose & Throat Assoc. v. Pratt, 253 Ga. App. 681, 687 (560 S.E.2d 268) (2002) (Regardless of level of scrutiny, lack of a territorial restriction renders covenant unenforceable); but see W.R. Grace & Co. v. Mouyal, 262 Ga. 464, 467, 422 S.E.2d 529 (1992) (“[W]here the former employee is prohibited from post-employment solicitation of employer customers which the employee contacted during his tenure with the employer, there is no need for a territorial restriction expressed in geographic terms”).
2. The covenant lacks a territorial limitation *and* it prohibits the former employee from soliciting customers with whom he had no dealings during his employment. MacGinnittie v. Hobbs Group, LLC, 420 F.3d 1234, 1241 (11<sup>th</sup> 2005); accord American Software USA v. Moore, 264 Ga. 480, 448 S.E.2d 206 (1994) (Where territory covered is anywhere in the U.S., prohibition on contacting customers with whom the employee did not have a relationship is too broad to be reasonable).
3. The territorial limitation was not fixed at the time the covenant was executed. Ceramic & Metal Coatings Corp. v. Hizer, 242 Ga. App. 391, 394, 529 S.E.2d 160 (2000) (Striking down non-solicitation because it purported to restrict employee’s activities in “any territory added during the course of the agreement”); see also New Atlanta Ear, Nose & Throat Associates v. Pratt, 253 Ga. App. 681, 685, 560 S.E.2d 268 (2002) (Non-compete prohibiting physicians from working within an 8-mile radius of the employer’s offices struck down because the office locations were not written into the contract); Orkin Exterminating Co. v. Pelfrey, 237 Ga. 284, 285, 227 S.E.2d 251 (1976) (Restrictive covenant unenforceable because it provided that the territorial limitations would follow the employee to any area to which he may have been assigned or transferred during any part of the twelve months preceding his termination).
4. The territorial limitation significantly exceeds the area serviced by the former employee. Wiley v. Royal Cup, Inc., 258 Ga. 357, 359, 370 S.E.2d 744 (1988); Kloville, Inc. v. Kinsler, 239 Ga. 569, 570, 238 S.E.2d 344 (1977); But see Habif, Arogeti & Wynne, P.C. v. Baggett, 231 Ga. App. 289, 294, 498 S.E.2d 346 (1998) (Fact that the employee only worked in 9 of the 11 restricted counties at the time of his termination did not render the covenant overbroad because “the law does not require exact precision”).
5. The non-compete bars the employee from performing a number of enumerated activities within eight restricted counties and the employer fails to prove that the

employee actually performed *each* of those activities within *each* of the restricted counties during his employment. Beacon Security Technology, Inc. v. Beasley, 286 Ga. App. 11, 13, 648 S.E.2d 440 (2007).

6. The territorial limitation exceeds the area serviced by the employer. Kloville, Inc. v. Kinsler, 239 Ga. 569, 570, 238 S.E.2d 344 (1977) (Mistaken inclusion of Missouri (where Mississippi was intended) in restricted territory doomed non-compete because employer had no legitimate interests to protect in Missouri).
7. The territorial limitation is stated in terms of a radius of miles from an undefined term such as “metro-Atlanta.” Hamrick v. Kelley, 260 Ga. 307, 308, 392 S.E.2d 518 (1990) (Too vague for enforcement because “[w]e are unable to ascertain whether it means the Standard Metropolitan Statistical Area designated by the United States Census Bureau which changes over time, the counties comprising the Atlanta Regional Commission, or some other geographic designation”); but see Keeley v. Cardiovascular Surgical Assocs., P.C., 236 Ga. App. 26, 29, 510 S.E.2d 880 (1999) (Where a city, as opposed to a metropolitan area, is designated as the center of the radius the limitation is not overly vague).
8. The geographic limitation is not expressly conditioned on the employee having worked in that area within a reasonable time of his termination. Orkin Exterminating Co. v. Walker, 251 Ga. 536, 538, 307 S.E.2d 914 (1983) (Although the employee worked in Augusta up until the time of his termination, the court speculated that he *could have* been transferred out of the Augusta territory and worked for several years in another territory before terminating employment, in which case Orkin would no longer have a protectible interest in prohibiting him from engaging in pest control services in Augusta).
9. The non-compete is between the employee and the “Company,” defined in the agreement to include all successors in interest, and a change in control occurs after the agreement is signed which unreasonably broadens the scope of the non-compete. See, generally, Szomjassy v. Ohm Corp., 132 F. Supp. 2d 1041, 1049 (N.D. Ga. 2001). This situation could also arise if the “Company” as defined in the agreement includes all parent corporations, subsidiaries and affiliates as is commonly the case.

## **B. CASES INVOLVING RESTRICTIONS ON ACTIVITIES**

10. The non-solicit covenant applies to all clients with whom the former employee worked, even if they ceased to be clients before the employee’s termination. Gill v. Poe & Brown of Georgia, Inc., 241 Ga. App. 580, 582-83, 524 S.E.2d 328 (1999) (Employer has no legitimate business interest in preventing an employee from soliciting business from clients who may have severed their relationship with the employer long before the employee’s termination). However, a covenant that prohibits the solicitation of current customers of the employer that the former employee served can extend through the entire term of the former employee’s employment with the employer. Palmer & Cay of Georgia, Inc. v. Lockton Companies, Inc., 280 Ga. 479, 480, 629 S.E.2d 800, 803 (2006).

11. The non-solicit covenant applies to all customers within a specific geographic region whether or not the employee had dealings with them. W.R. Grace & Co. v. Mouyal, 262 Ga. 464, 466, 422 S.E.2d 529 (1992) (Such a covenant goes beyond the protection of the employer's legitimate interest in preventing the employee from exploiting the personal relationships he enjoyed with the employer's customers).
12. The non-solicit proscribes solicitation within 100 miles of the last office in which the employee was based of any customer "whose names became known to employee while in the employ of [Morgan Stanley]." Morgan Stanley DW, Inc. v. Frisby, 163 F. Supp. 2d 1371, 1378 (N.D. Ga. 2001) (Overbroad because it precludes solicitation of other broker's customers who become known to the former employee through casual conversation in the office).
13. The non-solicit prohibits the former employee from doing any type of work for customers of the employer. Allied Informatics, Inc. v. Yeruva, 251 Ga. App. 404, 554 S.E.2d 550 (2001); see also Riddle v. Geo-Hydro Eng'rs, Inc., 254 Ga. App. 119, 120, 561 S.E.2d 456 (2002) ("As this [covenant] prohibits Riddle from contacting these clients to sell them unrelated products such as soap or banking products, the covenant clearly goes beyond what is necessary to protect Geo-Hydro's business interests") (internal punctuation omitted).
14. The non-compete prohibits the former employee from providing similar services to organizations that do *not* compete with the employer. Habif, Arogeti & Wynne, P.C. v. Baggett, 231 Ga. App. 289, 294, 498 S.E.2d 346 (1998) (Clause prohibiting a CPA in a public accounting firm from accepting employment as an in-house chief financial officer survived midlevel scrutiny but would have failed strict scrutiny).
15. The "non-solicit" precludes the former employee from accepting *unsolicited* business from the employer's customers. Because solicitation requires an affirmative act by the employee, see Waldeck v. Curtis 1000, Inc., 261 Ga. App. 590, 593, 583 S.E.2d 266 (2003), this is really a non-compete covenant that will fail if it does not contain a reasonable geographic limitation. W.R. Grace & Co. v. Mouyal, 262 Ga. 464, 467, 422 S.E.2d 529 (1992). Even if it does contain a geographic limitation, if the employee is a professional (physician, dentist, accountant, etc.), a court may still view the restriction as an unreasonable restraint on the public's ability to choose professional service providers. Pregler v. C&Z, Inc., 259 Ga. App. 149, 150, 575 S.E.2d 915 (2003).
16. The non-compete prohibits the former employee from working for a competitor *in any scope or capacity*. Firearms Training Systems v. Sharp, 213 Ga. App. 566, 567, 445 S.E.2d 538 (1994) (Overbroad because employer has no interest in preventing its former employee from providing unrelated services to a competitor); accord Dunn v. Frank Miller Assoc., 237 Ga. 266, 268, 227 S.E.2d 243 (1976).
17. The covenant prohibits the employee from competing with the employer "directly or indirectly . . . either as an individual on his own or as a partner or joint

venturer, or as an employee or agent for any person, or as an officer, director, or shareholder *or otherwise*." Jarrett v. Hamilton, 179 Ga. App. 422, 424, 346 S.E.2d 875 (1986) (emphasis in original) ("We find the words 'or otherwise,' climaxing a catalogue of specific prohibitions, to be the functional equivalent of the [overbroad] phrase 'in any capacity'").

18. The non-compete requires the former employee to promise not to engage in or be employed by any business that is "*similar to*" the employer's business. Howard Schultz & Assoc. v. Broniec, 239 Ga. 181, 236 S.E.2d 265 (1977) (Too vague for enforcement); *but see* Allen v. Hub Cap Heaven, Inc., 225 Ga. App. 533, 539, 484 S.E.2d 259 (1997) (Covenant prohibiting, within a small geographic area and for a short time, a franchisee from owning or operating any "Hub Cap Heaven, Inc. type business" would not be too vague for enforcement if the former franchise owner was the "heart and soul" of the business).
19. The non-compete precludes the employee serving as an officer, stockholder or director with a competitor. Brunswick Floors v. Guest, 234 Ga. App. 298, 301, 506 S.E.2d 670 (1998) (Covenant is broader than necessary to protect the employer's legitimate business interests).
20. The non-recruitment covenant prohibits the covered party from hiring – as opposed to merely soliciting – sales people and administrative staff for a two year period. ALW Marketing Corp. v. Drunasky, 1991 U.S. Dist. LEXIS 20326 (N.D. Ga. 1992) (Holding in part that covenant was overbroad because it prohibits the covered party from hiring employees who leave on their own and seek employment unsolicited from the covered party).
21. The non-recruitment covenant applies to all employees, no matter how long they were employed by the restraining party. ALW Marketing Corp. v. Drunasky, 1991 U.S. Dist. LEXIS 20326 (N.D. Ga. 1992) ("Without the time to develop a lasting relationship with other agents, the short-term agent presents no threat to the employer's competitive advantage in the employee marketplace and the employer needs no protection as to that employee").

### C. CASES INVOLVING DURATIONAL LIMITATIONS:

22. Although Georgia courts have not drawn a line in the sand, a durational restriction of two years or less will usually be deemed reasonable. *See, e.g.,* Habif, Arogeti & Wynne, P.C. v. Baggett, 231 Ga. App. 289, 292, 498 S.E.2d 346 (1998) (Noting that Georgia courts have routinely found two year restrictions reasonable); *but see* Smith v. HBT, Inc., 213 Ga. App. 560, 445 S.E.2d 315 (1994) (Applying strict scrutiny to hold that a five year non-compete that applied only in certain territories and to clients identified on a list was not unreasonable considering the specialized nature of HBT's agricultural and industrial supply business). A court will usually find a time restriction reasonable if it is loosely correlated to the time it would take for the employer to replace the departed employee and reestablish business relations with its customers. *See, e.g.,* Orkin Exterminating Co. v. Walker, 251 Ga. 536, 538, 307 S.E.2d 914 (1983).

23. A non-disclosure covenant is invalid if there is no durational limit. Stahl Headers, Inc. v. MacDonald, 214 Ga. App. 323, 324, 447 S.E.2d 320 (1994). (“Unlike general non-competition provisions... specific non-disclosure clauses bear no relation to territorial limitations and their reasonableness turns on factors of time and the nature of the business interest sought to be protected.”)
24. A provision stating that the covenants are tolled and suspended for the period of time that the employee is in breach of them is unreasonable on its face. See ALW Marketing Corp. v. McKinney, 205 Ga. App. 184, 188, 421 S.E.2d 565 (1992); Cf. Paul Robinson, Inc. v. Haege, 218 Ga. App. 578, 579, 462 S.E.2d 396 (1995) (Enforcing provision that if the employee is not enjoined from breaching the covenants but a court of competent jurisdiction later finds them enforceable, the time period is tolled during the pendency of the lawsuit until appeal periods have expired). The former provision failed because it could extend the term limit of the covenant indefinitely, while the latter provision was tied to the happening of certain events.

#### IV. CONCLUSION

What could be so difficult about drafting a non-compete or non-solicitation covenant that *reasonably* restricts the territory, duration and activities of a former employee? In Georgia, the answer is plenty. Although Georgia courts have little trouble recognizing the legitimate and necessary interests that restrictive covenants serve, decisions upholding covenants are few and far between. Although the legal analysis is fact intensive and the case law is less than uniform, there are a few avoidable drafting mistakes that have doomed a significant portion of these types of covenants. Non-disclosure covenants, on the other hand, fare much better in Georgia courts and may achieve the same result as non-compete and non-solicitation covenants with far fewer headaches since they do not require geographic limitations.