Restrictions on Post-Employment Competition by an Executive Under Georgia Law

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Today many corporations are attempting to restrict post-employment competition by executive employees. The corporation may be motivated by a sincere attempt to protect its investment in customer relationships or its intellectual property. The corporation also may be seeking to protect itself from competition or simply trying to make it more difficult for the assets to "walk out the door." Whatever the motivation, with increasing frequency, corporations are requiring their executives to execute one or more agreements containing restrictions on post-employment opportunities.[1] Executives, in turn, are seeking legal advice on the enforceability of such restrictions.

This Article analyzes the current state of Georgia law concerning the enforceability of contractual restrictions on post-employment competition in the case of an executive.[2] Such restrictions generally contain language prohibiting the executive from competing or being employed by a competitor in a defined geographic area. The agreement may also contain a separate provision restricting the executive from soliciting the

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1. A study of reported cases concerning noncompete provisions that compared cases decided in the 1960s with the cases decided in the 1980s found that the percentage of cases involving executives had more than doubled in that period. Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 520 (1990).

2. The term "executive" means an individual with significant management responsibilities, who normally has an officer title such as vice president. The term also applies to individuals who provide expertise to an employer, but who may have a limited number of personnel reporting to them, such as senior research personnel or professional employees.

customers of the executive's former employer. Usually, these restrictions are anywhere from six months to three years in duration.[3]

This Article is divided into two parts. The first part discusses the current state of Georgia law concerning noncompete provisions. The Georgia courts have identified certain interests of the employer and employee as worthy of protection. To balance those interests, the courts have developed a set of rules. A violation of any of those rules, normally, though not always, will render the noncompete provision unenforceable. The second part of the Article discusses some of the added complexity that an executive faces when attempting to predict how a Georgia court will apply those rules.

I. THE LAW IN GEORGIA OF NONCOMPETE PROVISIONS IN EMPLOYMENT AGREEMENTS

In Georgia, covenants restricting post-employment competition in employment agreements are subject to a reasonableness test.[4] As the Georgia Supreme Court stated in *W.R. Grace & Co. v. Mouyal*,[5]

> [A] restrictive covenant contained in an employment contract is considered to be in partial restraint of trade and will be upheld "if the restraint imposed is not unreasonable, is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public."[6]

Whether a restriction is "not unreasonable" and whether it is "reasonably necessary" depends on the interest the court is seeking to protect. The Georgia courts have identified certain interests of the employer, the

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3. The agreement may also contain provisions restricting the employee's ability to recruit his former colleagues and, normally, will contain confidentiality and intellectual property provisions that can be quite extensive. The enforceability and effect of these agreements are beyond the scope of this Article. One should note, however, that there is authority for a rather broad injunction, at least at the preliminary injunction stage, based on a confidentiality agreement, even when there is no noncompete agreement. *See* Lee v. Envtl. Pest & Termite Control, Inc., 271 Ga. 371, 516 S.E.2d 76 (1999).

4. The Georgia courts will apply Georgia law on the issue of the enforceability of a covenant not to compete when the employee is a resident of Georgia, regardless of whether there is a choice of law provision in the employment contract. Nasco, Inc. v. Gimbert, 239 Ga. 675, 238 S.E.2d 368 (1977); Hulcher Servs., Inc. v. R.J. Corman R.R., 247 Ga. App. 486, 543 S.E.2d 461 (2000); Enron Capital & Trade Res. Corp. v. Pokalsky, 227 Ga. App. 727, 490 S.E.2d 136 (1997). On the other hand, a Georgia court will honor a choice of forum provision. Iero v. Mohawk Finishing Prods., Inc., 243 Ga. App. 670, 534 S.E.2d 136 (2000).

5. 262 Ga. 464, 422 S.E.2d 529 (1992).

6. *Id.* at 465, 422 S.E.2d at 531 (quoting Rakestraw v. Lanier, 104 Ga. 188, 194, 30 S.E. 735, 738 (1898)).

party in whose favor the restraint is imposed, that are entitled to protection. The courts then attempt to balance those interests against the interest of the employee, who is subject to the restraint.[7]

A. Balancing the Interest of the Employer and the Employee

The interest most often cited by Georgia courts as warranting protection is the employer's customer relationships. The courts have repeatedly stated that restraints are necessary to protect an employer from having its customers pirated away by unfaithful employees.[8] The courts assume that the customer relationship was originally with the employer or that the employer has provided the resources and training that allowed the employee to develop the customer relationships. One of the early cases focusing on customer relationships dealt with restraints imposed by a pest control company that hired World War II veterans, trained them for the business, and provided them with a sales territory.[9] As will be seen, this acceptance of the employer's interest in protecting customers from being expropriated drives most of the law of noncompete provisions in Georgia.

Courts have also stated that noncompete provisions protect the employer from an unfaithful employee's use of confidential information.[10] The Georgia Supreme Court, however, has indicated that confidential knowledge obtained by the employee while working for his employer is a legitimate interest, but it should be protected by a confidentiality agreement—not a noncompete restriction.[11] Nonetheless, the Georgia courts, on occasion, still rely on protecting the employer's information as a justification for enforcing a noncompete provision.[12] The interest that the court seeks to protect may determine its attitude toward restrictive covenants in employment agreements. If

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7. *See* Brunswick Floors, Inc. v. Guest, 234 Ga. App. 298, 299-300, 506 S.E.2d 670, 672 (1998); Sysco Food Serv. of Atlanta, Inc. v. Chupp, 225 Ga. App. 584, 586, 484 S.E.2d 323, 325 (1997).

8. *E.g.,* Orkin Exterminating Co. v. Dewberry, 204 Ga. 794, 51 S.E.2d 669 (1949).

9. *Id.*

10. *See, e.g.*, Weber v. Tillman, 913 P.2d 84, 91-92 (Kan. 1996); Mgmt. Recruiters of Boulder, Inc. v. Miller, 762 P.2d 763, 765 (Colo. Ct. App. 1988); Label Printers v. Pflug, 564 N.E.2d 1382 (Ill. App. 1991); Brockley v. Lozier Corp., 488 N.W.2d 556 (Neb. 1992); United Lab., Inc. v. Kuykendall, 370 S.E.2d 375 (N.C. 1988); Voorhees v. Guyan Mach. Co., 446 S.E.2d 672, 677 (W.Va. 1994); Marcam Corp. v. Orchard, 885 F. Supp. 294, 297 (D. Mass. 1995). *See also* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 667-74 (1960).

11. Am. Software USA, Inc. v. Moore, 264 Ga. 480, 482, 448 S.E.2d 206, 208 (1994).

12. *See* Watson v. Waffle House, Inc., 253 Ga. 671, 324 S.E.2d 175 (1985); Orkin Exterminating Co. v. Mills, 218 Ga. 340, 127 S.E.2d 796 (1962); Smith v. HBT, Inc., 213 Ga. App. 560, 445 S.E.2d 315 (1994).

a court focuses solely on protecting the employer from former employees expropriating customers, that court is less likely to enforce noncompete provisions outside of the traditional sales context. Moreover, the court will be skeptical of protections that are not limited to customers with whom the employee dealt. If a court believes that a noncompete provision protects the employer from the use of confidential information by former employees, then that court should be more likely to enforce such provisions against all employees, whatever their function, and over broader areas.

The Georgia courts also seek to protect the interests of the employee. In the eyes of the court, employees have little bargaining power, and when an employee agrees to an employment contract that contains a restrictive covenant, he receives little in return but a job.[13] As a result, the Georgia courts have expressed a need to protect employees from overreaching by their employers.[14] This somewhat paternalistic attitude is based on a belief about the employer–employee relationship that may not be accurate in all cases. As will be discussed in Part II, some employees, and particularly executives, may have had considerable bargaining power when negotiating an employment agreement.

An additional driver that determines a court's attitude towards noncompete provisions in employment agreements is whether the court believes that such agreements are necessary to further economic development. The economic effect of post-employment restrictive covenants has been subject to a growing debate. Originally, commentators argued that enforcing noncompete agreements allowed corporations to protect their intellectual capital and other proprietary information and, thereby, encouraged economic growth. Such encouragement was deemed particularly important in a modern business economy.[15]

The rationale that enforcing restrictive covenants favors economic development has come under attack recently. Commentators have argued that California's domination of the high-tech industry was due

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13. Rash v. Toccoa Clinic Med. Assocs., 253 Ga. 322, 325-26, 320 S.E.2d 170, 173 (1984).

14. *Dewberry*, 204 Ga. at 804, 51 S.E.2d at 676.

15. *See generally* Alexander P. Woollcott, *A Turning Point for the Enforceability of Restrictive Covenants in Georgia:* W.R. Grace & Co., Dearborn Division v. Mouyal, 29 GA. B.J. 136, 141 (1993); Chiara F. Orsini, Comment, *Protecting an Employer's Human Capital: Covenants Not to Compete and the Changing Business Environment*, 62 U. PITT. L. REV. 175 (2000); Gary P. Kohn, Comment, *A Fresh Look: Lowering the Mortality Rate of Covenants Not to Compete Ancillary to Employment Contracts and to Sale of Business Contracts in Georgia*, 31 EMORY L.J. 635, 636-37 (1982). *See also* A.E.P. Indus. v. McClure, 302 S.E.2d 754 (N.C. 1983).

in part to California's hostility to post-employment restrictions.[16] A provision of the California Civil Code has been interpreted to prohibit nearly all agreements that restrict post-employment.[17] Commentators have contended that prohibiting the enforcement of noncompete provisions allows employees to freely move among substantial corporations, medium-sized entrepreneurial firms, and high-tech start ups.[18] This movement helped generate the cross-fertilization of ideas that was necessary to fuel the technology boom. Georgia is a net importer of executive technology talent.[19] One can assume that two major objectives of the law that regulates economic activity are to foster economic development and to attract highly-skilled individuals to the state. Therefore, seeking to determine whether a court will enforce a post-employment restriction is predicting, to some degree, whether the Georgia courts believe that the goal of economic development is more likely to be furthered by enforcing restrictive covenants or by being hostile to them.

The Georgia Supreme Court and the Georgia Court of Appeals have balanced the interest of the employer against the desire to protect the employee in a constantly evolving body of case law.[20] As the United States Court of Appeals for the Fifth Circuit stated in 1981, "A 'trend' in the area of restrictive covenants is somewhat difficult to divine in

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16. *See* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999); Hanna Bui-Eve, Note, *To Hire or Not to Hire: What Silicon Valley Companies Should Know About Hiring Competitor's Employees*, 48 HASTINGS L.J. 981, 982-83 (1997). *But see* Jason S. Wood, *A Comparison of the Enforceability of Covenants Not to Compete and Recent Economic Histories of Four High Technology Regions*, 5 VA. J.L. & TECH. 14 (2000).

17. CAL. BUS. & PROF. CODE § 16600 (West 1997).

18. *See* Gilson, *supra* note 16.

19. *See* Press Release, Georgia Center for Advanced Telecommunications Technologies, Egon Zehnder and GCATT Find Technology Executives Warm to Georgia (Dec. 18, 1998) (*available at* http://www.gcatt.gatech.edu/news/execsurvey.html).

20. In 1990 the Georgia Legislature passed a statute, O.C.G.A. section 13-8-2.1 (1990), in an attempt to modify and codify the law in Georgia concerning noncompete provisions in employment contracts. In *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371, 372, 405 S.E.2d 253, 254 (1991), the Georgia Supreme Court held that O.C.G.A. section 13-8-2.1 was unconstitutional as being in conflict with the Georgia Constitution of 1983, Article III, Section 6, Paragraph 5 (c). The statute provided that contracts that restrain competition "in a reasonable manner," are not unconscionable and are not against public policy should be enforced. O.C.G.A. § 13-8-2.1(g)(1). The Georgia Supreme Court held that the statute was "an effort by the General Assembly [to] breathe life into contracts otherwise plainly void as being impermissible" under the state constitution. 261 Ga. at 372, 405 S.E.2d at 255.

Georgia in light of a high precedential mortality rate."[21] Since that comment, the Georgia courts have continued to overrule or question fairly recent decisions. For example, recently the Georgia Court of Appeals disavowed two cases that were less than three years old when it held that if one restraint is not reasonable, then all noncompete restraints in the same agreement are not enforceable.[22] This lack of consistency makes predicting a decision in a particular case hazardous when it involves the enforcement of a noncompete provision.

While this Article focuses on restrictions in employment agreements, it is important to understand that noncompete provisions also commonly appear in agreements relating to the sale of a business. In such cases, the seller promises not to compete with the buyer of the business after the sale. Traditionally, the Georgia courts have willingly enforced broad restraints if they were ancillary to the sale of a business.[23] With restrictions ancillary to the sale of a business, the courts will allow the restriction to be effective for a significantly longer duration than if the restriction is in an employment agreement.[24] More importantly, the court, in effect, will modify or "blue pencil" a noncompete agreement ancillary to the sale of a business so that it is reasonable and enforceable.[25] As will be seen below, Georgia courts will not "blue pencil" restraints in employment agreements.

In addition to business sales and employment contexts, noncompete provisions are often incorporated in partnership agreements. In Georgia, the courts have held relatively recently that restrictive covenants in partnership agreements will be reviewed more favorably than the "strict scrutiny" given to employment agreements but not as generously as in business sale situations.[26] Thus, in Georgia, noncompete restraints are subject to three different levels of scrutiny: restrictive covenants in employment agreements are strictly strutinized; restrictive covenants in partnership agreements are subject to "intermediate scrutiny;" and restrictive covenants in a sale of a business are subject to the lowest

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21. Barnes Group Inc. v. Harper, 653 F.2d 175, 178 (5th Cir. 1981).

22. *See* Advance Tech. Consultants, Inc. v. RoadTrac, LLC, 250 Ga. App. 317, 320-21, 551 S.E.2d 735, 737-38 (2001) (disavowing Wright v. Power Indus. Consultants, Inc., 234 Ga. App. 833, 508 S.E.2d 191 (1998) and Wolff v. Protégé Sys., Inc., 234 Ga. App. 251, 506 S.E.2d 429 (1998)). In those cases, the court had evaluated all the covenants independently.

23. Lyle v. Memar, 259 Ga. 209, 210, 378 S.E.2d 465, 466-67 (1989); Kloville, Inc. v. Kinsler, 239 Ga. 569, 570, 238 S.E.2d 344, 345 (1977).

24. Jenkins v. Jenkins Irrigation, Inc., 244 Ga. 95, 98, 259 S.E.2d 47, 50 (1979).

25. *Id.* at 100-01, 259 S.E.2d at 51.

26. *Rash*, 253 Ga. at 326, 320 S.E.2d at 173; Habif, Arogeti & Wynne v. Baggett, 231 Ga. App. 289, 289-90, 498 S.E.2d 346, 349 (1998).

level of scrutiny. Obviously, under this three-tier analysis, it is important whether a restraint is deemed to be ancillary to the sale of a business, a partnership agreement, or an employment agreement. The employee, however, may enter into an employment agreement in connection with the sale of his or her employer. As discussed in more detail in Part II, the characterization of the type of restraint may not be a simple matter.[27]

B. The "No Blue Pencil" Rule in Employment Agreements

The impact of the various rules that govern the enforceability of noncompete provisions is compounded because of Georgia's "no blue pencil" rule for restrictive covenants in employment agreements. Under Georgia law, a court will *not* modify an unreasonably restrictive covenant in an employment agreement. The court will not enforce the restrictive covenant to the degree it is reasonable or strike words or phrases so that the restrictive covenant can be interpreted as reasonable.[28] Moreover, if an agreement includes more than one restrictive covenant, Georgia's interpretation of the "no blue pencil" rule holds that if any restraint is invalid, then all noncompete provisions in the agreement are also unenforceable.[29] For example, a provision that prohibits the solicitation of customers is not enforceable, even if it is reasonable, if there is another provision that prohibits the employee from competing in a geographic area that is unreasonably large. While one can find cases that evaluate each restrictive covenant independently, the rule that if one covenant is invalid, all covenants in the agreement are invalid recently was reiterated unanimously by the Georgia Court of Appeals in *Advance Technology Consultants, Inc. v. Roadtrac, LLC*.[30]

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27. *See infra* text accompanying notes 274-345.

28. *Chupp*, 225 Ga. App. at 587, 484 S.E.2d at 326. The no blue pencil rule applies regardless of whether there is a severabiltiy clause in the agreement. Browing v. Orr, 242 Ga. 380, 381, 249 S.E.2d 65, 66 (1978); Harville v. Gunter, 230 Ga. App. 198, 200, 495 S.E.2d 862, 864 (1998). The fact that noncompete provisions are not enforceable, however, does not automatically render nondisclosure covenants unenforceable. Wright v. Power Indus. Consultants, Inc., 234 Ga. App. 833, 835-36, 508 S.E.2d 191, 194 (1998).

29. *Advance Tech. Consultants, Inc.*, 250 Ga. App. at 320, 551 S.E.2d at 737. The Author's firm served as counsel to Advance Technology Consultants, Inc. in that litigation.

30. 250 Ga. App. 317, 321-22, 551 S.E.2d 735, 738 (2001). The rule that if one restraint falls, all restraints are invalid may still be subject to challenge in the partnership situation. In a recent partnership case, *Physician Specialists in Anesthesia, P.C. v. MacNeill*, 246 Ga. App. 398, 539 S.E.2d 216 (2000), the court evaluated each restraint independently. But less than a year later in *Advance Technology Consultants, Inc.*, the court stated that it was not addressing whether the approach taken in *MacNeill*, that is individually evaluating each restrictive covenant in a partnership situation, was correct. 250 Ga. App. at 321 n.16, 551 S.E.2d at 738 n.16.

C. The Reasonableness Inquiry and the Three Elements Test

How then does a Georgia court determine whether a restrictive covenant on post-employment competition is reasonable? In attempting to provide some substance to the general reasonableness inquiry, the Georgia Supreme Court counsels that a three-element test of duration, territorial coverage, and scope of activity is a "helpful tool" in examining restraints.[31] The starting place, therefore, is the cases decided by the Georgia courts under one or more of these three elements: duration, territorial coverage, and scope of activity.

1. The Duration of the Restraint. The first element of the three-element test is duration. In order for a restrictive covenant in an employment agreement to be enforceable, the restriction must be strictly limited in time and must be otherwise reasonable.[32] The Georgia Court of Appeals has stated that a two-year duration for a restrictive covenant is often considered reasonable in employment agreements.[33] In *Hart v. Marion A. Allen, Inc.*,[34] the court upheld a three-year restrictive covenant in a broadly worded nonsolicitation provision.[35] The plaintiff in *Hart* held the title of executive vice president, but nothing indicated that the plaintiff performed executive functions or that his title or function played a part in the court's acceptance of the length of the restraint.[36] All the court said in *Hart* was that "the three-year time limitation in the agreement was not unreasonable."[37] In *Smith v. HBT, Inc.*,[38] the court upheld a restraint that prohibited Mr. Smith from soliciting customers for a period of five years after his employment was terminated, if the customers were both on a list of customers supplied by his employer and were located in a certain defined territory.[39] The court stated that five years was not unreasonable "[c]onsidering the specialized nature of HBT's business."[40] HBT sold agricultural supplies

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31. W.R. Grace & Co. v. Mouyal, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992); *Chupp*, 225 Ga. App. at 584, 484 S.E.2d at 324.
32. Orkin Exterminating Co. v. Walker, 251 Ga. 536, 537, 307 S.E.2d 914, 916 (1983); Koger Props., Inc. v. Adams-Cates Co., 247 Ga. 68, 69-70, 274 S.E.2d 329, 330-31 (1981).
33. *Baggett*, 231 Ga. App. at 292, 498 S.E.2d at 351.
34. 211 Ga. App. 431, 440 S.E.2d 26 (1993).
35. *Id.* at 432, 440 S.E.2d at 27.
36. *Id.*
37. *Id.*
38. 213 Ga. App. 560, 445 S.E.2d 315 (1994).
39. *Id.* at 563, 445 S.E.2d at 318.
40. *Id.*

to farmers, and the court did not explain in what sense HBT's business was specialized.[41]

However, there is a recent case, *Allen v. Hub Cap Heaven, Inc.*,[42] in which the court stated that a four-year restriction was excessive, although in an unusual fact situation.[43] In that case, the Georgia Court of Appeals reviewed a restraint that had been entered into by a franchisee.[44] The Georgia courts generally analyze noncompete provisions in franchise cases the same as if the restriction was in an employment agreement.[45] In *Allen* the restrictive covenant prohibited the franchisee from competing anywhere during the term of the agreement and from competing within fifty miles of the "franchised location" for one year after the agreement was terminated. The term of the agreement was for five years. Approximately two years into the agreement, the franchisee sold the franchise with the franchisor's permission. The franchisee contended that the noncompete agreement ran for only one year from the sale, which would mean that the restriction had lapsed. The franchisor contended that there was a total of four years remaining on the noncompete restriction, three years during the original term and the one-year post-term restriction.[46] The court of appeals stated that if the franchisor were correct on the interpretation issue, the franchisor still could not enforce the restrictive covenant.[47] A restriction lasting four years after the sale would be "unenforceable because it is overbroad."[48]

In another jurisdiction, employees have argued that two years or even one year is too long a restriction given the rapid change of technology.[49] Employees who are technologically orientated may make a similar argument in Georgia. The Georgia courts tend to state that the court should evaluate all relevant circumstances in determining whether to enforce a noncompete provision.[50] Therefore, such an argument might have a chance of success. There is language, however, from the Georgia

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41. *Id.* at 560, 445 S.E.2d at 316.
42. 225 Ga. App. 533, 484 S.E.2d 259 (1997).
43. *Id.* at 539, 484 S.E.2d at 265.
44. *Id.* at 534, 484 S.E.2d at 262.
45. *Id.* at 538, 484 S.E.2d at 264. *See also* Johnstone v. Tom's Amusement Co., 228 Ga. App. 296, 299, 491 S.E.2d 394, 398 (1997).
46. 225 Ga. App. at 534-35, 484 S.E.2d at 262.
47. *Id.* at 539, 484 S.E.2d at 265.
48. *Id.*
49. *See* Earthweb, Inc. v. Schlack, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999).
50. Herndon v. Waller, 241 Ga. App. 494, 496, 525 S.E.2d 159, 161 (1999); *Chupp*, 225 Ga. App. at 585, 484 S.E.2d at 325; Elec. Data Sys. Corp. v. Heineman, 217 Ga. App. 816, 820, 459 S.E.2d 457, 461 (1995).

Court of Appeals that seemingly automatically approves a two-year period for a restriction, and there is no recent case that has held a two-year duration for a restrictive covenant to be unreasonable on the basis that the two-year restriction was too long.[51]

Noncompete provisions often are limited to two years or less; therefore, the duration is not usually the major focus of a challenge to a post-employment restriction by an employee.[52] In light of the decision in *Smith* referred to above,[53] short of litigation, there is no way to determine whether a restriction for three, four, or even five years would be enforceable. Moreover, litigation is the only means of testing an argument that, given the fast pace of technology and the employee's specific situation, a post-employment restriction of even two years is unreasonable.

2. The Territory Covered By the Noncompete Provision. The second element is the territorial coverage of the restraint. To analyze the territorial element in determining the enforceability of restrictive covenants under Georgia law, one has to divide restrictive covenants into two broad types. The first type is a general noncompete restriction that prohibits the former employee from competing with a former employer. The second type of restrictive covenant is a nonsolicitation restriction that prohibits the former employee from soliciting the customers of a former employer but does not broadly prohibit competition.[54]

The rule for general noncompete restrictions under Georgia law is that such restraints must have a defined territory.[55] The former employee must be restricted from competing only in a specific area, and that area must be reasonable.[56] Nonsolicitation restrictions, on the other hand,

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51. *Baggett*, 231 Ga. App. at 292, 498 S.E.2d at 351. One drafting mistake that the employers can make concerning the duration of the restraint is to draft restrictions that do not encompass a definite time period. In *Kuehn v. Selton & Associates*, 242 Ga. App. 662, 663-65, 530 S.E.2d 787, 789-90 (2000), the Georgia Court of Appeals struck down a noncompete provision that restricted a real estate agent who had assisted his employer in leasing space in an office building. The restriction limited competition from the agent for "as long as a [t]enant remains in the building." *Id.* at 663, 530 S.E.2d at 789. The court reasoned that because there was the potential that the restriction would exceed a reasonable time, the restriction was void. *Id.* at 664, 530 S.E.2d at 789.

52. A survey of reported cases found that the average duration of a restraint that the courts agreed to enforce was 21.3 months. Whitmore, *supra* note 1, at 515.

53. 213 Ga. App. 560, 445 S.E.2d 315.

54. *Mouyal*, 262 Ga. at 465, 422 S.E.2d at 531; Chaichimansour v. Pets Are People Too, 226 Ga. App. 69, 70-71, 485 S.E.2d 248, 249-50 (1997).

55. *Mouyal*, 262 Ga. at 465, 422 S.E.2d at 531; *Chaichimansour*, 226 Ga. App. at 70, 485 S.E.2d at 249.

56. Kuehn v. Selton & Assocs., 242 Ga. App. 662, 664, 530 S.E.2d 787, 790 (2000).

do not have to be limited to a specific geographic area. But to be enforceable under Georgia law, if the restriction is not limited to a reasonable territory, the agreement may only prohibit the former employee from soliciting customers with whom the employee had some prior dealings.[57] Restrictions that limit the employee from soliciting all of his former employer's customers must have a geographic limitation or they are automatically deemed unreasonable.[58] In addition to these general rules, the Georgia courts have developed several supplemental rules that must not be violated for a noncompete provision to be enforceable.

a. General Noncompete Provisions. To reiterate, the first type of post-employment restrictive covenant, the general noncompete restriction, must limit the area in which the former employee may not compete to a reasonable geographic area. The most common type of territorial restriction in the reported cases in Georgia is the one in which the employee has a territory that he served—for example, a sales territory or a territory where the employee provided services such as floor installation or pest control.[59] In those cases, the territory may be defined as a list of counties or as a radius of so many miles from a particular location or from a designated city.[60]

Assuming that the noncompete provision sets forth a specified territory, the question is whether restricting a former employee from competing in that territory is reasonable. In order to resolve that question in Georgia, the courts have devised a rule that the territory is reasonable if, and only if, the employee has in fact worked in the territory. If the territory that is the subject of the restraint is consistent with the sales person's territory and the employee had in fact worked his territory, the geographic size of the restraint will be held to be reasonable.[61] Often the area is quite small—for example, within a ten-mile

57. *Moore*, 264 Ga. at 482-83, 448 S.E.2d at 208-09; *Mouyal*, 262 Ga. at 465, 422 S.E.2d at 531; Sanford v. RDA Consultants, Ltd., 244 Ga. App. 308, 310-11, 535 S.E.2d 321, 323-24 (2000).

58. *Moore*, 264 Ga. at 481-83, 448 S.E.2d at 208-09.

59. Adcock v. Speir Ins. Agency, 158 Ga. App. 317, 318, 279 S.E.2d 759, 760 (1981) (upholding thirteen-mile radius of Forest Park, Georgia); *Baggett*, 231 Ga. App. at 292-93, 498 S.E.2d at 351-52 (upholding a seven-county area).

60. *Adcock*, 158 Ga. App. at 318, 279 S.E.2d at 760-61 (upholding thirteen-mile radius of Forest Park, Georgia); *Baggett*, 231 Ga. App. at 292-93, 498 S.E.2d at 351-52 (upholding a seven-county area).

61. Barry v. Stanco Communications Prods., Inc., 243 Ga. 68, 70, 252 S.E.2d 491, 493 (1979); *Kuehn*, 242 Ga. App. at 664, 530 S.E.2d at 790.

radius of a particular city.[62] But the territory can encompass the entire state of Georgia,[63] and in one case, the court upheld a restraint encompassing a two-hundred mile radius of Atlanta.[64] In the latter case, the court stated that the employee had worked in a substantial portion of the area that was the subject of the restriction and the nature of the employer's business "justifie[d] an unusually large geographical restriction."[65]

If the territory is larger than the area where the employee worked, such as the whole area where his employer provided services, the territory is unreasonable and the covenant is unenforceable. For example, in *Brunswick Floors, Inc. v. Guest*,[66] the court declared invalid a restriction that prohibited the former employee from competing within an eighty-mile radius of Brunswick, Georgia because the evidence at trial was that the employee had not worked throughout the whole eighty-mile area.[67] And in *Thomas v. Coastal Industrial Services, Inc.*,[68] the court declared invalid a restriction that listed thirty-four counties in Georgia and fourteen counties in South Carolina because the former employee's sales route had not included three of the Georgia counties and, apparently, none of the South Carolina counties.[69] As will be discussed below, it is not always clear how to interpret the requirement that the employee must have "worked in the territory," particularly outside of the traditional sales or service territory situation.

An additional requirement also must be met to uphold a covenant restricting an employee's post-employment activity in a specific territory. In *Orkin Exterminating Co. v. Walker*,[70] the Georgia Supreme Court held that the limitation must require that the employee worked in the territory fairly recently before his termination.[71] In *Walker* the court invalidated a restriction on a former pest control service employee, in part, because it prohibited competition within fifteen miles of Augusta,

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62. *See* Nunn v. Orkin Exterminating Co., 256 Ga. 558, 559, 350 S.E.2d 425, 426 (1986).

63. *Barry*, 243 Ga. at 71, 252 S.E.2d at 494.

64. Nat'l Settlement Assocs. of Ga. v. Creel, 256 Ga. 329, 330-32, 349 S.E.2d 177, 179-80 (1986).

65. *Id.* at 332, 349 S.E.2d at 180. National Settlement was in the business of marketing "lump sum and structured settlement[s]." *Id.* at 330, 349 S.E.2d at 178. While the business was unusual, the court was unclear why it was entitled to greater protection than other businesses, such as pest control services. The court did point out that Mr. Creel was the only employee assigned to his territory. *Id.* at 330-31, 349 S.E.2d at 178, 180.

66. 234 Ga. App. 298, 506 S.E.2d 670 (1998).

67. *Id.* at 300-01, 506 S.E.2d at 672-73.

68. 214 Ga. 832, 108 S.E.2d 328 (1959).

69. *Id.* at 833-34, 108 S.E.2d at 330.

70. 251 Ga. 536, 307 S.E.2d 914 (1983).

71. *Id.* at 538, 307 S.E.2d at 916-17.

Georgia.[72] The court speculated that the employee could have transferred from Augusta, and then he would not have worked there for several years.[73] If his employment were then terminated, he would not have had any contacts with the Augusta area for some time before the termination, yet he still would be restricted from competing in the Augusta area. The court found "such a restriction . . . clearly unreasonable."[74] For that reason and because of some additional defects that the court found in the agreement, the restriction was not enforceable.[75] The court engaged in this hypothetical transfer analysis even though the employee had in fact worked in Augusta for the twenty years immediately preceding the termination of his employment and no such transfer had occurred.[76]

The reasoning in *Walker* was applied recently in *Lighting Galleries, Inc. v. Drummond*.[77] There, an employee had been transferred from the restricted territory approximately one year before his termination.[78] The court of appeals, relying on *Walker*, stated that in light of the transfer, it was unreasonable to impose the "full two-year restriction" on the employee.[79] As a result of *Walker* and *Drummond*, unless the agreement specifically requires that the employee work in the area that is the subject of the restraint prior to his termination and he does in fact work in that area immediately prior to the termination, there is a substantial risk that the agreement will be unenforceable.

The employer cannot ensure that it will not conflict with the decision in *Walker* by stating that the employee is prohibited from working in whatever territory he worked immediately before termination. The Georgia courts will not allow the definition of the area to be deferred until the employee's employment is terminated.[80] The Georgia Court of Appeals has repeatedly held that a territorial limitation not determinable until the time of the employee's termination is invalid.[81] For example, a restriction that stated that the employee could not compete

72. *Id.* at 538-39, 307 S.E.2d at 916-17.
73. *Id.* at 538, 307 S.E.2d at 916.
74. *Id.*
75. *Id.* at 538-39, 307 S.E.2d at 916-17.
76. *Id.* at 536-38, 307 S.E.2d at 915-16.
77. 247 Ga. App. 124, 543 S.E.2d 419 (2000).
78. *Id.* at 124-25, 543 S.E.2d at 420.
79. *Id.* at 126-27, 543 S.E.2d at 421.
80. *Harville*, 230 Ga. App. at 200, 495 S.E.2d at 864.
81. *Id.*

in an area within ten miles of any office where the employee worked during the course of his employment would be invalid.[82]

Outside of the traditional salesperson context, a major difficulty with the general territorial noncompete provision is determining whether an employee worked in the territory prior to his termination. For example, in *Habif, Arogeti & Wynne v. Baggett*,[83] the Georgia Court of Appeals upheld a restriction that prohibited competition "'within the counties of Fulton, DeKalb, Clayton, Gwinnett, Cobb, Fayette and Douglas.'"[84] The agreement limited the employment of Mr. Baggett, who had been a partner in an accounting firm and had served an eighteen-month term as managing partner of the firm. Mr. Baggett claimed that for over two years he had not worked in two of the counties and had performed only a nominal amount of work in DeKalb County.[85] The court said that during his career, Mr. Baggett had "indisputably worked in all seven counties and in many other areas throughout the country and Georgia."[86] In addition, the court concluded that the places where Mr. Baggett had worked constituted a "substantial portion of the seven-county area during the two years before" he left the firm.[87] As a result, the court held that the restriction was reasonable.[88]

In *Baggett* there is no real discussion of what was meant by the requirement that Mr. Baggett work in any of the counties. Mr. Baggett likely visited clients and performed accounting services at client locations. The court did not discuss how often he visited his clients or how regular his visits were, but the court seems to have required Mr. Baggett to have been physically present in the county while he performed his services. In other words, the legal enforceability of the restraint depended on whether Mr. Baggett went to Decatur to visit clients or whether the clients came to his office in Atlanta.

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82. *See* Harville v. Gunter, 230 Ga. App. 198, 200, 495 S.E.2d 862 (1998); *see also* Wake Broadcasters, Inc. v. Crawford, 215 Ga. 862, 114 S.E.2d 26 (1960); Davis v. Albany Area Primary Health Care, Inc., 233 Ga. App. 311, 503 S.E.2d 909 (1998).

83. 231 Ga. App. 289, 498 S.E.2d 346 (1998). Mr. Baggett was a partner in an accounting firm, and the court stated that his restrictive covenant would be subject to intermediate scrutiny. *Id.* at 291, 498 S.E.2d at 350. The court pointed out, however, that much of its discussion on the appropriate territory restraint would apply to a restrictive covenant that was ancillary to an employment agreement and subject to strict scrutiny. *Id.* at 290-91, 498 S.E.2d at 349-50.

84. *Id.* at 291, 498 S.E.2d at 350.

85. *Id.* at 292, 498 S.E.2d at 351.

86. *Id.*

87. *Id.* at 293, 498 S.E.2d at 352.

88. *Id.* at 297, 498 S.E.2d at 354.

As the definition of a territory expands to a larger area, the Georgia courts in the past have been quite hostile to the concept of limiting the employee's ability to compete. Originally, there was a rule that the restriction on post-employment competition could not cover a whole state, at least if the state was Georgia, regardless of whether the employee worked in the whole state. In *Orkin Exterminating Co. v. Dewberry*,[89] the court said that it was the policy of Georgia that its residents should have "the privilege of pursuing their lawful occupations at some place within its borders" and concluded that "an agreement which applies to the whole state is void, and cannot be enforced."[90] That decision was overruled in *Barry v. Stanco Communications Products, Inc.*[91] In *Barry* the court held that a noncompete provision was enforceable, even though the restriction included the whole State of Georgia.[92] The court in *Barry* reviewed a restriction on two sales employees whose sales territory was the State of Georgia, and the court stated that the salesmen "were employed to and did solicit business throughout the entire State of Georgia."[93]

The Georgia courts, however, have apparently remained hostile to large territory restrictions. First, the Georgia Supreme Court stated in *American Software USA, Inc. v. Moore*,[94] that restraining an employee who provided software support services from competing anywhere in the United States after his employment terminated was unreasonable.[95] While it appears that the employer conducted its software business throughout the United States, the court pointed out that the employee was restricted from competing without regard to whether he may have done "any licensed software business . . . at any specific location in the country."[96] A restriction encompassing the entire United States was unenforceable.[97]

The difficulty of meeting the "worked in the territory" test is also illustrated by *Hulcher Services, Inc. v. R.J. Corman Railroad*.[98] There,

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89. 204 Ga. 794, 51 S.E.2d 669 (1949).
90. *Id.* at 808, 51 S.E.2d at 678.
91. 243 Ga. 68, 71, 252 S.E.2d 491, 494 (1979).
92. *Id.*
93. *Id.* at 70-71, 252 S.E.2d at 493.
94. 264 Ga. 480, 448 S.E.2d 206 (1994).
95. *Id.* at 483, 448 S.E.2d at 209.
96. *Id.* at 482, 448 S.E.2d at 208.
97. *Id.* at 483, 448 S.E.2d at 209. A New York court has held that restrictions that encompass the entire United States could be reasonable in light of the national scope of the employer's business. *See* Innovative Networks, Inc. v. Satellite Airlines Ticketing Ctrs., Inc., 871 F. Supp. 709, 728 (S.D.N.Y. 1995).
98. 247 Ga. App. 486, 543 S.E.2d 461 (2000).

the court invalidated a restriction that prohibited competition in five designated states—Florida, Georgia, Illinois, Ohio, and Tennessee.[99] The employee in *Hulcher*, Daniel Keating, was a former senior division manager who had supervised emergency disaster remediation services to railroads.[100] While the restrictive covenant prohibited Mr. Keating from competing in the five listed states, the court believed that the restriction was effectively broader because, by strategically selecting those five states, Mr. Keating's former employer had effectively prohibited Mr. Keating from working in the eastern United States.[101] This was so because, according to the court, no mainline railroad east of the Mississippi could operate without passing through the five states and the railroads would not want someone who could not work on their whole line.[102]

The opinion in *Hulcher* is not clear about where and how often Mr. Keating had provided services in the past. At one point, the decision said that Mr. Keating had never worked in Ohio, one of the five states.[103] At another point, however, the court stated that a vice president of Hulcher testified that the restricted territory (including Ohio) covered the area where Mr. Keating had worked in the past and had developed relationships.[104] In any event, the court declared the restraint unreasonable, stating:

> In this case, the area restricted as to competition exceeds the area within which Keating worked for Hulcher. . . . The record fails to show facts that justify such extensive territorial restriction. Further, entire states are included, although Keating worked for Hulcher only in a limited area of such states where the railroads were located. . . . Therefore, the covenant is unreasonably broad because it covers a state and areas of states where the plaintiff never worked.[105]

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99. *Id.* at 490-91, 543 S.E.2d at 466.
100. *Id.* at 486, 543 S.E.2d at 463.
101. *Id.* at 490-91, 543 S.E.2d at 466.
102. *Id.* at 490, 543 S.E.2d at 466.
103. *Id.* at 487, 543 S.E.2d at 463.
104. *Id.* at 490, 543 S.E.2d at 466.
105. *Id.* at 491, 543 S.E.2d at 466 (citations omitted). In both *Moore* and *Hulcher*, the court points out that the employee did not have an exclusive territory. *Moore*, 264 Ga. at 482, 448 S.E.2d at 208; *Hulcher*, 247 Ga. App. at 490, 543 S.E.2d at 466. One can assume that the presence of an exclusive territory in the eyes of the court might justify a more expansive territorial reach in a noncompete provision. Presumably, the employer has a greater interest to protect when there is only one employee in an area. See *Creel*, in which the court points out that Mr. Creel was the sole employee in the area. 256 Ga. at 331, 349 S.E.2d at 178. The court, however, is unclear on how much greater of an area would be approved and how an exclusive territory would expand the "worked in the territory" test.

Of course, Mr. Keating worked only in areas where the railroads were located because he was providing emergency remediation services to railroads.[106] In *Baggett* the court rejected the argument that Mr. Baggett had to have worked in all areas of the counties designated, calling such an argument "untenable."[107] The court stated that as long as the former employee had recently worked in a substantial portion of the territory, the restriction would be upheld.[108] But in *Baggett*, the court was reviewing a territory limitation of seven counties,[109] whereas in *Hulcher* the restriction was for five states.[110] The decision in *Hulcher* makes it extremely difficult to defend a territory restriction of any substantial size for an employee who did not physically cover the territory in a manner similar to a traditional traveling sales person. Many employees and most senior business people will work at fixed locations and, like Mr. Keating, will visit customers only at irregular intervals to perform specific tasks or to discuss business. Under *Hulcher*, for such employees, territory restrictions of any size will not meet the "worked in the territory" test.

The courts, however, use a different analysis when the restriction limits the ability of a former employee who worked at a medical or similar type facility to compete. Perhaps in recognition that doctors no longer make house calls, in the medical facilities cases, the issue is not whether the employee doctor worked in the territory, but whether the facility served patients throughout the territory. For example, in *Saxton v. Coastal Dialysis & Medical Clinic, Inc.*,[111] the court held that the medical doctor, Dr. Saxton, who had served as the interim chief executive officer of a dialysis clinic in Savannah, could be restricted from competing in an area that was defined as "within a sixty-mile radius of City Hall" in Savannah.[112] The only discussion of the reasonableness of the territory consisted of statements that "the evidence presented at the hearing indicated that Coastal Dialysis attracted patients from throughout the restricted area" and "[s]ome patients at Coastal Dialysis come from outside the [sixty] mile radius."[113] Also, in *Keeley v. Cardiovascular Surgical Associates, P.C.*,[114] the court upheld a restric-

106. *Hulcher*, 247 Ga. App. at 486, 543 S.E.2d at 463.
107. *Baggett*, 231 Ga. App. at 293, 498 S.E.2d at 352.
108. *Id.*
109. *Id.*
110. *Hulcher*, 247 Ga. App. at 487, 543 S.E.2d at 463.
111. 220 Ga. App. 805, 470 S.E.2d 252 (1996).
112. *Id.* at 808-09, 470 S.E.2d at 255.
113. *Id.*
114. 236 Ga. App. 26, 510 S.E.2d 880 (1999).

tion that limited competition within a seventy-five mile radius of Albany, Georgia.[115] The court pointed out that the trial court had found that Dr. Keeley's employer had a substantial patient base throughout the area of the restriction.[116] On the other hand, in *Northside Hospital v. McCord*,[117] the court struck down a restraint that limited competitive activity within a twenty-five mile radius of a clinic that was owned by the hospital.[118] There the court held that the hospital had not shown that the clinic "draws patients from the [twenty-five]-mile radius" and, therefore, "the geographic limitation in the covenant appears unreasonable."[119]

If, in cases other than those involving medical facilities, one could justify general noncompete provisions on the ground that the employer had obtained customers from the area of the restriction, then much larger restraints would be justifiable. There is little indication, however, that the courts will expand the approach of looking at where the employer did business other than in the medical context. The court of appeals did state in *Baggett* that "[i]t is undisputed [the employer] did business throughout the seven counties,"[120] but the court clearly did not rely on that comment in upholding the restriction in *Baggett*. It appears that Georgia courts generally will rely on the territory from

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115. *Id.* at 30, 510 S.E.2d at 885.

116. The court pointed out that the employment agreement had contemplated that Dr. Keely would become a partner in the firm. *Id.* at 30-31, 510 S.E.2d at 885-86. Therefore, the agreement was subject to "intermediate scrutiny." *Id.*, 510 S.E.2d at 885. It is not clear, however, if there would have been a different result under the traditional employment test for medical personnel.

117. 245 Ga. App. 245, 537 S.E.2d 697 (2000).

118. *Id.* at 248, 537 S.E.2d at 699.

119. *Id.* But, even in the medical personnel cases, the court does not rigorously apply the "served the territory" test. In *Pittman v. Harbin Clinic Professional Ass'n*, 210 Ga. App. 767, 771, 437 S.E.2d 619, 623 (1993), the court refused to enforce a restriction that prohibited competition within a fifty-mile radius of a clinic's location in Rome. In that case, the court was influenced by the fact that the clinic had two different restrictions—one of thirty miles for partners and one of fifty miles for employee physicians. *Id.* The court stated that "the contract itself sets forth the counties . . . from which the clinic draws its patients" and that the restriction for the partners was within the area set forth by the contract. *Id.* at 769, 437 S.E.2d at 622. As for the employees, the court stated that because of this separate treatment and because the "area exceeds . . . the clinic's practice as described in the contract," the noncompete clause was *not* enforceable for the employee physicians. *Id.* at 771, 437 S.E.2d at 623. In *Pittman* there was no real discussion of whether the clinic served the whole territory. The court, also, was unclear on why the fact that the partners could negotiate a more limited territorial restriction rendered the restriction on the employees unreasonable.

120. 231 Ga. App. at 294, 498 S.E.2d at 352.

which the employer draws its customers as justification for a restraint only in the limited situation involving medical facilities.[121]

In summary, three different tests control the enforceability of the territory-type noncompete provisions under Georgia law. The test depends on the type of employee. If one is dealing with a medical person, the rule is that the person can be limited to the area served by the medical facility at which the person was employed.[122] If the employee is a typical sales person or service person with a territory, then that employee can be prohibited from competing in that territory.[123] If the employee is neither, then only a limited territory will be enforceable, and then only if the employee physically visited the locations outside of his or her office.[124]

Before discussing nonsolicitation provisions, one other type of "territory restriction" should be mentioned. One can craft a territory restriction in an attempt to limit the ability of a former employee to go to work for one or more specific competitors. Such a restriction provides that an employee cannot compete within a certain number of miles of certain cities that happen to be the locations of the headquarters of the employer's competitors. Just such a "geographic restriction" was described in *Electronic Data Systems Corp. v. Heineman*.[125] There, the trial court, in a procedure that was criticized by the court of appeals as being unnecessarily truncated, had declared unenforceable territory restrictions that prohibited the former employees from competing within a twenty-five mile radius of twelve cities where Electronic Data Systems had competitors.[126] The court of appeals reversed and remanded,

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121. One might contend that the same analysis used in the medical cases should apply to any employee who served the public from a fixed location. So viewed, the issue would be whether the facility drew its customers from the area of the restraint. *See Adcock*, 158 Ga. App. 317, 279 S.E.2d 759.

122. *See* Saxton v. Coastal Dialysis & Med. Clinic, Inc. 220 Ga. App. 805, 470 S.E.2d 252 (1996), *aff'd*, 267 Ga. 177, 476 S.E.2d 587 (1996). There is an indication in *Saxton* that if an area is greater than the area approved in *Saxton* and the territory is too large, the noncompete provision might be held unenforceable even if one could demonstrate that patients came from the area.

123. *Barry*, 243 Ga. at 70, 252 S.E.2d at 493. Again, there is an indication that if the sales territory is larger than one state, a noncompete provision might be deemed simply too large.

124. *Baggett*, 231 Ga. App. at 292-94, 498 S.E.2d at 351-52. The court in *Baggett* is unclear on whether a very limited restriction, for example, one county or ten miles from the employee's office, would be upheld if the employee dealt with customers at this office, but unlike Mr. Baggett, did not visit the offices of his or her customers.

125. 217 Ga. App. 816, 459 S.E.2d 457 (1995).

126. *Id.*

stating that the restriction was not unreasonable as a matter of law,[127] although the dissent pointed out that there was no evidence that the employees had worked in these restricted areas.[128]

It is difficult to square the reasoning of the majority of the court of appeals in *Heineman* with the rule that the employee must have worked throughout the territory. In light of the procedural history of the case, the majority may have intended the issue of whether the employee had in fact worked in the territory to be open on remand.[129] The procedural posture of *Heineman* makes it a weak reed to support restrictions that happen to encompass the headquarters of several competitors. Such a restriction would normally not be enforced. The rule that the employee had to have worked in the territory would require the employee to have worked recently in the designated cities, which would be unlikely. On the other hand, a Georgia court might hold such a restriction to be reasonable if it were limited to a few cities that the employee had recently visited while performing his duties as an employee.[130]

b. Nonsolicitation Provisions. The second type of restriction is a nonsolicitation provision that limits the employee from soliciting former customers. The seminal decision is *W.R. Grace & Co. v. Mouyal*.[131] Pierre Mouyal signed an employment contract with the Dearborn Division of W.R. Grace that stated in part:

> Employee agrees that during the period of eighteen months immediately following cessation of Employee's employment with Dearborn,

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127. *Id.* at 820, 459 S.E.2d at 461.

128. *Id.* at 822-23, 459 S.E.2d at 462 (Smith, J., dissenting).

129. It is not clear what happened to the restraint upon remand. The case was appealed to the Georgia Supreme Court, which took jurisdiction because the issue in the second appeal was primarily one of equity. *Heineman*, 268 Ga. at 756, 493 S.E.2d at 134. One of the employees had signed a nonsolicitation agreement, and the trial court submitted the issue of whether the employee had breached that agreement to the jury. The jury found that the employee had violated that provision. By the time the verdict was rendered, however, there were only three days left on the two-year restriction. The trial court had enjoined the defendant from competing for those three days. *Id.* at 757, 493 S.E.2d at 135. The supreme court did not comment on the enforceability of the covenant but limited its discussion to the issue of whether the injunction should be for only three days or extended to take account of the litigation. The supreme court held that the trial court's injunction was proper and that noncompete provisions would not be extended to account for the period of litigation. *Id.* It is not clear what happened to the territory type restriction that had been discussed by the trial court prior to remand.

130. The territory could be limited to one location and, therefore, aimed at only one competitor. Such a restraint might be more easily defended. *See infra* text accompanying notes 163-64.

131. 262 Ga. 464, 422 S.E.2d 529 (1992).

> Employee shall not, on Employee's own behalf or on behalf of any person, firm, partnership, association, corporation or business organization, entity or enterprise, solicit, contact, call upon, communicate with or attempt to communicate with any customer or prospect of Dearborn, or any representative of any customer or prospect of Dearborn, with a view to sale or providing of any product, equipment or service competitive or potentially competitive with any product, equipment or service sold or provided or under development by Dearborn during the period of two years immediately preceding cessation of Employee's employment with Dearborn, provided that the restrictions set forth in this section shall apply only to customers or prospects of Dearborn, or representative of customers or prospects of Dearborn, with which Employee had contact during such two-year period.[132]

Upon termination of his employment with Dearborn, Mouyal became an officer and director of a competitor of Dearborn and, within the eighteen-month period, allegedly solicited a customer that came within the prohibition of the noncompete provision quoted above. W.R. Grace filed suit in federal court and, after the district court denied an injunction, appealed to the Eleventh Circuit.[133]

The Eleventh Circuit Court of Appeals certified the following question to the Georgia Supreme Court:

> Whether, as a matter of law, a no-solicitation clause in an employment contract that prohibits the solicitation of the employer's clients that the employee actually contacted while serving the employer, such as the no-solicitation clause involved in this case, is enforceable in Georgia notwithstanding the absence of an explicit geographical limitation.[134]

The Georgia Supreme Court responded in the affirmative, stating that a nonsolicitation restriction is valid if it is limited to the customers with whom the employee dealt, and if the restriction is so limited, there is no need for a territory limitation at all.[135] In adopting this new rule, the court articulated the following rationale:

> At the same time, the employer has a protectible interest in the customer relationships its former employee established and/or nurtured while employed by the employer and is entitled to protect itself from the risk that a former employee might appropriate customers by taking unfair advantage of the contacts developed while working for the employer.[136]

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132. *Id.* at 464, 422 S.E.2d at 530.
133. W.R. Grace & Co. v. Mouyal, 959 F.2d 219, 220 (11th Cir. 1992).
134. *Mouyal*, 262 Ga. at 464-65, 422 S.E.2d at 531.
135. *Id.* at 467-68, 422 S.E.2d at 532-33.
136. *Id.* at 466, 422 S.E.2d at 532 (citations omitted).

The court also pointed out that requiring a specific territory is not "in keeping with the reality of the modern business world . . . as the technology of today permits an employee to service clients located throughout the country and the world."[137] Some have pointed to *Mouyal* as a decision changing the Georgia courts' hostility to noncompete agreements, driven by a desire to make the state more friendly to modern business.[138] Whatever the court's motivation, the decision in *Mouyal* leaves some difficult questions.

Does the limitation have to be to customers of the former employer, or can the employee be prohibited from soliciting prospective customers? The certified question posed by the Eleventh Circuit referred only to a prohibition on "the solicitation of the employer's clients that the employee actually contacted while serving the employer."[139] The Georgia Supreme Court pointed out in a footnote that the question differed somewhat from the noncompete provision in the agreement that, in fact, had been executed by Mouyal.[140] In the agreement at issue, the restriction covered customers *and prospects* and was applicable only to those clients and prospects contacted during the last two years of Mouyal's employment.[141] The Georgia Supreme Court answered the certified question in the affirmative and did not refer back to the issue raised in the footnote.[142] The Eleventh Circuit acknowledged that the supreme court had responded to the wording of the question and not to the wording of the restrictive covenant.[143] Nonetheless, the Eleventh Circuit went on to hold that the covenant was reasonable.[144]

In *Covington v. D.L. Pimper Group, Inc.*,[145] a Georgia state court faced the question of whether to enforce a nonsolicitation restriction if the restriction includes prospective customers. There the restrictive covenant stated that the former employee could not "solicit, contact, call upon, communicate with or attempt to communicate with any client or prospective client" provided that the employee had contact with such client during the two years before his termination.[146] The court of

137. *Id.* at 467, 422 S.E.2d at 533.
138. *See* Woollcott, *supra* note 15.
139. 262 Ga. at 464-65, 422 S.E.2d at 531.
140. *Id.* at 465 n.1, 422 S.E.2d at 531 n.1.
141. *Id.* at 464, 422 S.E.2d at 530.
142. *Id.* at 468, 422 S.E.2d at 533.
143. *Mouyal*, 959 F.2d at 223.
144. *Mouyal*, 982 F.2d at 480-81.
145. 248 Ga. App. 265, 546 S.E.2d 37 (2001).
146. *Id.* at 268, 546 S.E.2d at 40.

appeals pointed out that the language of the restriction was almost identical to that in *Mouyal* and upheld the restriction.[147]

Another issue arises under *Mouyal* as a result of the wording of the Eleventh Circuit's question. The covenant in *Mouyal* stated that the employee must have dealt with the customers within the last two years. The Eleventh Circuit's question had no such limitation.[148] One could argue that because the supreme court did not impose any time limit when it answered the Eleventh Circuit's question, the absence of a time limit in the covenant is not fatal. Recently, however, the Georgia Court of Appeals held that a nonsolicitation provision was unenforceable when the restriction in effect prohibited an employee from soliciting his former customers although he had not dealt with those customers for over four years and some of those customers were no longer customers of his employer.[149] The court of appeals relied on the covenant in *Mouyal* and did not feel limited by the supreme court's response to the particular phrasing of the Eleventh Circuit's question.[150]

Mouyal also raises the question of whether a nonsolicitation agreement has to be limited to prohibiting only *solicitation* of former customers. Can the restriction in a nonsolicitation agreement prohibit the employee more broadly from working with or providing services to such customers? In *Singer v. Habif, Arogeti & Wynne, P.C.*,[151] a case that preceded *Mouyal* by ten years, one reason for invalidating the noncompete provision was that the restraint prohibited the employee not only from soliciting former clients but also from accepting former clients who came without any solicitation.[152] The decision stated that it was unreasonable to prohibit the former employee from providing services if

147. *Id.* at 269, 546 S.E.2d at 41.

148. 262 Ga. at 464-65, 422 S.E.2d at 531.

149. Gill v. Poe & Brown of Ga., Inc., 241 Ga. App. 580, 524 S.E.2d 328 (1999). *See also* Smith Adcock & Co. v. Rosenbohm, 238 Ga. App. 281, 284, 518 S.E.2d 708, 711 (1999) (stating as one of its reasons for invalidating a nonsolicitation provision the fact that the restriction applied to clients "who had severed their relationship with the firm years before the employee's termination").

150. *Gill*, 241 Ga. App. at 582-83, 524 S.E.2d at 330-31. But in *Merrill Lynch, Pierce, Fenner & Smith v. Schwartz*, 991 F. Supp. 1480 (M.D. Ga. 1998), the federal district court granted a preliminary injunction in favor of the employer, Merrill Lynch, although the restriction prohibited the stock broker from soliciting any clients. Apparently, the broker could not solicit clients even if the broker had ceased dealing with the client several years in the past. In that case, Merrill Lynch had employed the broker for thirty years.

151. 250 Ga. 376, 297 S.E.2d 473 (1982).

152. *Id.* at 377, 297 S.E.2d at 475.

the customer initiated the relationship.[153] *Singer* has been followed by the court of appeals, although not without criticism.[154]

Three cases, however, indicate that if the draftsperson is clever, the rule articulated in *Singer* may be avoided. In *Smith v. HBT, Inc.*,[155] the court upheld a restriction that prohibited the employee from "calling on or conversing with or selling any of the clients or customers."[156] In *Augusta Eye Center, P.C. v. Duplessie*,[157] the restriction stated: "Employee agrees that during the period of twelve (12) months following termination of his employment with AEC, Employee shall not, on his own behalf or on behalf of any person [or entity] solicit, contact, call upon, communicate with or attempt to communicate with any patient of AEC . . . ."[158] The court upheld an injunction prohibiting the employee, who was a doctor, from violating the covenant quoted above.[159] Finally, in *Covington v. D.L. Pimper Group, Inc.*,[160] the court also faced language that prohibited the employee from "communicating" with his former clients. The court in *Covington* observed that the restrictive covenant at issue in *Mouyal* provided that the employee could not "solicit, contact, call upon, *communicate* with or *attempt to communicate* with any client or prospective client" after he left the employ of the division of W.R. Grace.[161] The court then pointed out that the decision in *Singer* did not deal with a prohibition on communicating and upheld the restraint.[162]

There does not appear to be any practical distinction between prohibiting an employee from communicating with or conversing with former clients, which is acceptable under *Smith* and *Covington*, and prohibiting an employee from accepting work of former clients, which is

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153. *Id.* The conclusion that a provision that prohibits accepting a customer who was not solicited was unreasonable was joined in by only a plurality of the Georgia Supreme Court. That holding was, however, adopted by a majority of the court in *Walker*, 251 Ga. at 538-39, 307 S.E.2d at 917.

154. *See* Am. Gen. Life & Accident Ins. Co. v. Fisher, 208 Ga. App. 282, 284, 430 S.E.2d 166, 168 (1993) (holding a noncompete provision unenforceable because it prohibited the employee from accepting customers even though he had not solicited them). Judge Beasley concurred specially, stating that she was bound by the supreme court's decision in *Walker*, but she also stated that the better rule was not to make a distinction between accepting customers and soliciting them. *Id.* at 285, 430 S.E.2d at 169 (Beasley, J., concurring).

155. 213 Ga. App. 560, 445 S.E.2d 315 (1994).

156. *Id.* at 561, 445 S.E.2d at 316.

157. 234 Ga. App. 226, 506 S.E.2d 242 (1998).

158. *Id.* at 226, 506 S.E.2d at 243.

159. *Id.* at 227, 506 S.E.2d at 244.

160. 248 Ga. App. 265, 546 S.E.2d 37 (2001).

161. *Id.* at 268, 546 S.E.2d at 40 (emphasis added).

162. *Id.* at 269-70, 546 S.E.2d at 41.

not acceptable under *Singer*. How can one provide services without communicating or conversing with a former client or customer? One way of reconciling the language of the cases is to believe that in *Mouyal* the Georgia Supreme Court was, in effect, overruling *Singer*, at least when the restriction used the magic words "prohibiting any communication." Another way of reconciling the law is to believe that the prohibition on communicating or conversing is not to be taken literally. One could argue that in *Smith*, *Covington*, and *Duplessie*, the terms communicating or conversing were meant to include only communications that amounted to soliciting.[163] Once the customer contacts the employee, the employee can communicate in serving the account. Hopefully, at some point, the Georgia courts will make clear whether *Singer* is good law.

An additional question raised by *Mouyal* is whether the limitation also applies to customers with whom the executive had supervisory responsibilities but no direct contact. Modern selling is often a team effort, and sales and pricing strategies will be discussed with senior management, sales force superiors, and technical personnel as the sales team attempts to make a sale.[164] In *American General Life & Accident Insurance Co. v. Fisher*,[165] however, the court stated that one reason for invalidating a restriction was that it could have been interpreted to prohibit a salesman from acting as a supervisor if he had worked only as a salesman for his former employer.[166] In addition, the rationale set forth in *Mouyal* is that an employer is entitled to protection from a former employee who is taking unfair advantage of the employee's contacts with customers.[167] The employer should rely on confidentiality provisions for protection from the employee using only his knowledge.[168] Given a rationale that emphasizes the personal contact between the employee and the customer, and the decision in *Fisher*, it does not appear that an attempt to limit the employee from soliciting customers when there was no direct relationship would be enforceable under Georgia law.

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163. This is the approach taken in *Baggett*, in which the court upheld a restriction that prohibited Baggett from "taking any action to" contact any former client. 231 Ga. App. at 298, 498 S.E.2d at 355. The court interpreted that language to require some affirmative act and held that such language would not preclude Baggett "from accepting unsolicited business from the forbidden clients." *Id.*

164. *See* NOEL CAPON, KEY ACCOUNT MANAGEMENT AND PLANNING: THE COMPREHENSIVE HANDBOOK FOR MANAGING YOUR COMPANY'S MOST IMPORTANT STRATEGIC ASSET 88-90, 100-02 (2001).

165. 208 Ga. App. 282, 430 S.E.2d 166 (1993).

166. *Id.* at 284, 430 S.E.2d at 168.

167. 262 Ga. 464, 466, 422 S.E.2d 529, 532.

168. *See Moore*, 264 Ga. 480, 483-84, 448 S.E.2d 206, 209.

Related to the question above is a slightly different issue: can the prohibition, in addition to providing that the former employee cannot solicit former customers, also preclude the former employee from working for an organization that solicits such customers, whether the former employee personally provides services to such customers or not? Here, the customers subject to the prohibition are limited to customers with whom the former employee had personal contact, whereas in the previous paragraph, customers were included in the prohibition with whom the employee had no contacts. While the issue is slightly different, the result would probably be the same. The rationale articulated by the Georgia Supreme Court as justifying the decision in *Mouyal* controls both cases. That rationale was that nonsolicitation restrictions are designed to prohibit the former employee's use of his personal relationship with his former customers.[169] Under that rationale, prohibiting an employee from working for an organization that served the customers of his former employer would appear to be too broad and not enforceable. The new employer must be allowed to, in effect, erect a "Chinese Wall" and still retain the services of an employee who is subject to a restrictive covenant prohibiting soliciting his former customers.[170]

It is important to remember that under Georgia's interpretation of the "no blue pencil" rule, if the restriction in the covenant is too broad, then the whole covenant is unenforceable. For example, if the noncompete provision prohibits soliciting prospective customers and the court holds that such a restriction is too broad, the employee is free of the covenant and can solicit any customers. Moreover, all other noncompete provisions in the agreement are also unenforceable. Therefore, rather small errors in drafting will have large consequences.

c. A Prohibition Against Working for One Particular Competitor. The possibility exists that an employer may simply state that the employee cannot work for one or more competitors for a limited period after his employment ends. Such a restriction does not easily fall within the framework established by the Georgia courts because it is neither a general noncompete provision nor a nonsolicitation provision. There is out-of-state authority that a provision that prohibits one from providing services to a specific customer is not a restriction on competition and,

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169. *See supra* text accompanying notes 8-12.

170. In *Adcock*, the court pointed out that among other deficiencies in the drafting of the noncompete provision, the restriction prohibited the employee not only from soliciting customers generally, but also from supervising others, whether or not the employee provided any information concerning the customer. 158 Ga. App. at 319, 279 S.E.2d at 761.

therefore, does not violate a general prohibition against noncompete provisions.[171] The rationale is that such a restriction on dealing with one entity does not really constitute a limitation on competition. In Georgia the courts have based their review of restrictive covenants on the state constitutional provision that prohibits contracts that may have the effect of defeating or lessening competition.[172] One can contend that prohibiting an employee from working with one or two specific companies does not lessen competition in any general sense. Under that rationale, a restriction that a Coca-Cola employee could not go to work for Pepsi, for example, for a period after he left Coca-Cola might well be enforced by a Georgia court.

3. Restrictions on Scope of Activity in Noncompete Provisions. The third element under the "helpful tool" analysis is that the former employee can only be restricted in a noncompete provision from a limited scope of activities. The Georgia courts have articulated a rule that for a post-employment restriction to be enforceable, the former employee must be restricted *only* from providing the types of services in the future that he provided on behalf of his former employer.[173] Broad language that prohibits an employee from being employed by, owning stock in, or serving as an officer, director or agent for a new company has been struck down.[174] In addition, the use of the phrase "or otherwise" or similar phrases, such as "in any capacity," render a restrictive covenant too broad.[175] A Georgia court will not enforce such a prohibition even if the former employee is in fact working in the very same capacity that he worked for his former employer.[176]

Additional requirements have been mentioned by the Georgia courts under the scope of the activity requirement. In *Wolff v. Protege Systems, Inc.*,[177] the court stated that a restrictive covenant was overbroad because it prohibited the employee from "doing business" with certain customers.[178] The court said the restriction should be limited so that

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171. *See* Gen. Commercial Packaging, Inc. v. TPS Package Eng'g, Inc., 126 F.3d 1131, 1132-33 (9th Cir. 1997).

172. Jackson & Coker, Inc. v. Hart, 261 Ga. 371, 405 S.E.2d 253 (1991).

173. *Mouyal*, 262 Ga. at 467-68, 422 S.E.2d at 533.

174. *See* Harville v. Gunter, 230 Ga. App. 198, 200, 495 S.E.2d 862, 864 (1998).

175. Puritan/Churchill Chem. Co. v. Eubank, 245 Ga. 334, 335, 265 S.E.2d 16, 17 (1980); Dunn v. Frank Miller Assocs., Inc., 237 Ga. 266, 268, 227 S.E.2d 243, 245 (1976); Nationwide Adver. Serv., Inc. v. Thompson Recruitment Advers., Inc., 183 Ga. App. 678, 685, 359 S.E.2d 737, 743 (1987).

176. *Harville*, 230 Ga. App. at 200, 495 S.E.2d at 864.

177. 234 Ga. App. 251, 506 S.E.2d 429 (1998).

178. *Id.* at 253, 506 S.E.2d at 433.

the former employee would be prohibited only from "providing software applications *used* by Protege," his former employer, which the court defined as software that his former employer owned or for which his former employer had been granted an exclusive license.[179] And in *Baggett*, the court observed that in the normal employee case, the employee was restricted from working for competitors only, even if the services were similar to the services that he had provided his employer.[180] In *Baggett* the accountant was prohibited from providing accounting, tax, or business services to any organization, not just accounting firms that competed with his former firm.[181] The language used in these two cases, however, was not relied upon for either decision. In *Wolff* there were other reasons why the noncompete clause was not valid,[182] and in *Baggett* the court upheld the restraint because it held that Baggett was a partner and such a scope of activity requirement did not apply to restraints ancillary to a partnership agreement.[183]

The rule that an employee cannot be prohibited from working for noncompetitors could have wide-ranging consequences. An employer may want to prohibit the employee from immediately going to work directly for the customer to keep the customer from reducing costs by bringing the service in-house. Whether a Georgia court will rely on such alleged defects in the scope of activity element as the sole basis for invalidating a noncompete provision remains to be seen.

Most of the litigation over whether the language prohibiting the employee's scope of activity is too broad occurs in cases in which the employee was subject to a general restriction on his ability to compete with his former employer in a specified territory. But a nonsolicitation restriction can be held invalid under the scope of activity element if, in the court's opinion, the restriction is too broadly drafted. In *Allied Informatics, Inc. v. Yeruva*,[184] the court dealt with a covenant that stated: "EMPLOYEE agrees that he/she will not directly or indirectly solicit employment or enter into a contractual agreement with any Client/Firm, where he/she was assigned to work, for a period of one year after the last working day of the assignment."[185] The court struck down the covenant and said:

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179. *Id.* at 253 n.3, 506 S.E.2d 432 n.3.
180. 231 Ga. App. at 294-95, 498 S.E.2d at 352.
181. *Id.* at 294, 498 S.E.2d at 352.
182. 234 Ga. App. 251, 506 S.E.2d 346.
183. 231 Ga. App. 289, 498 S.E.2d 346.
184. 251 Ga. App. 404, 554 S.E.2d 550 (2001).
185. *Id.* at 404, 554 S.E.2d at 552.

> We hold that the nonsolicit covenant here is overbroad because it does not limit the type of business that Yeruva is prohibited from doing with an Allied client. The terms "employment" and "contractual agreement" are not limited in the agreement and could encompass work that has nothing to do with the type of work that Yeruva did while he was employed with Allied. Based on the contract as written, any employment or contractual agreement, even though completely unrelated to Allied's business, would be in violation of the nonsolicit agreement. Such a provision is not reasonably necessary to protect the interests of Allied and is therefore overbroad and unenforceable.[186]

As a result, a nonsolicitation provision could still be held invalid—even though the restriction is limited to customers with whom the former employee dealt, and the restriction requires the employee to have dealt with those customers in the last few years. As will be discussed below, however, Georgia courts are inconsistent when it comes to dealing with the scope of activity element in evaluating restrictive covenants.

It bears repeating that rather small errors in drafting the scope of activity restrictions will have dramatic consequences. If the agreement is too broadly written, the covenant not to compete is invalid and all other noncompete provisions in the agreement are invalid. The wording has to be carefully analyzed. In *Sysco Food Service of Atlanta, Inc. v. Chupp*,[187] the court upheld a restriction that prohibited a former sales manager from being "a consultant, manager, supervisor, employee or owner of a competing business," because the list of functions was modified by the phrase: "in which the employee provides services which are the same or substantially similar to employee's duties for Sysco."[188]

However, there appears to be a few cases in which the court has tried to carve out exceptions to the scope of activity rule. The Georgia

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186. *Id.* at 406-07, 554 S.E.2d at 553. The court could have relied on the language in *Baggett* referred to above and held that the restraint was invalid because it limited the employee from working for companies that were not necessarily competitors of the employer. One cannot tell whether the court does not agree with the language in *Baggett* or whether the argument was not made to the court.

187. 225 Ga. App. 584, 484 S.E.2d 323 (1997).

188. *Id.* at 584, 484 S.E.2d at 324. *See also* Wright v. Power Indus. Consultants, 234 Ga. App. 833, 835, 508 S.E.2d 191, 193-94 (1998). A similar issue arises in medical cases. In *Augusta Eye Center, P.C. v. Duplessie*, 234 Ga. App. 226, 226, 506 S.E.2d 242, 243 (1998), the court upheld a restriction that stated that after termination the employee/doctor could not "render medical treatment or perform surgery in the field of ophthalmology or ophthalmologic surgery as an employee, partner, officer, . . . director, or shareholder . . . ." Because the list of positions was limited by the introductory phrase, the court felt the scope of the restriction was not too broad. *Id.* at 228-29, 506 S.E.2d at 244-45.

Supreme Court articulated an exception in *Watson v. Waffle House, Inc.*[189] In that case, the Watsons had entered into a lease agreement with Waffle House, Inc. that prohibited them from competing with Waffle House for a two-year period after the lease expired by opening another restaurant within a five-mile radius of the Waffle House that they had leased. Shortly after the lease expired, the Watsons opened a new restaurant within four-tenths of a mile of their former Waffle House location.[190]

The court stated that the lease had the characteristics of a franchise agreement and created a relationship in which the lessor (Waffle House, Inc.) had substantially superior bargaining power.[191] Thus, according to the court, the agreement should be treated as an employment agreement.[192] The provisions prohibiting competition by the lessee for two years and within five miles of the Watsons' Waffle House restaurant were held to be reasonable.[193] The difficulty was that the lease broadly prohibited the Watsons from engaging in the restaurant or fast food business within that five-mile radius. While, apparently, the noncompete provision did not use the exact words "in any capacity," the Watsons argued that they were, in effect, prohibited from competing in any capacity.[194] The Georgia Supreme Court rejected that argument, explaining:

> In the present case, the time and territorial effect are without question reasonable. . . . There remains a question of the breadth and burdensomeness of the activity sought to be restricted. We have held that a restriction of employment in a business "in any capacity" is overbroad and unreasonable. However, we do not view this as an "in any capacity case." To determine the reasonableness of the restricted activity, we look to its nature and to whether it affects the business interests of the employer. The evidence here indicates that the business of a Waffle House is such that the Watsons were its heart and soul. Their participation involved every facet of the business and they gained knowledge which the Waffle House has a reasonable stake in protecting. Under these circumstances, a prohibition against engaging in the restaurant or fast food business in such a narrow area for so short a time simply means that the Watsons shall not compete within

189. 253 Ga. 671, 324 S.E.2d 175 (1985).
190. *Id.* at 671, 324 S.E.2d at 176.
191. *Id.* at 672, 324 S.E.2d at 177.
192. *Id.*
193. *Id.* at 673, 324 S.E.2d at 178.
194. *Id.* at 671, 324 S.E.2d at 177.

> that time and within that area. This restraint cannot be said to be unreasonable.[195]

This exception has been referred to as the "heart and soul" exception. When it applies, however, is not readily apparent. The only other case in which it has been applied is *Hub Cap Heaven*, another franchise case, discussed above, and there the restriction was declared void on other grounds.[196] Moreover, the court of appeals has held that the "heart and soul" exception is very limited. In *Arnall Insurance Agency v. Arnall*,[197] the court stated: "Defendant's departure may have hurt plaintiff; but it did not bring the business to a halt. It cannot be said, therefore, that defendant was the 'heart and soul' of the business."[198] The source of the court's "bring the business to a halt" test is not clear. There is no indication in the court's decision in *Waffle House* that the departure of the Watsons would have brought the business of the franchised Waffle House to a halt. The court's focus in *Waffle House* was on the Watsons' knowledge of how the business was conducted.[199] After the court's decision in *Arnall*, in *Russell Daniel Irrigation Co. v. Coram*,[200] the court further limited *Waffle House* to a situation in which there was a "very restricted territory . . . for a short period of time."[201] The court of appeals refinements reduced the impact of *Waffle House* to a very limited set of facts.

Another decision in which a Georgia court did not follow the scope of activity rule is *Saxton*, which concerned a doctor who was interim chief executive officer of a dialysis clinic. The restriction in *Saxton* stated that the employee shall not "own, manage, operate, or control, . . . or participate in the ownership, management, operation, or control of or . . . be employed in a medical or managerial capacity" by any competing clinic.[202] Dr. Saxton was not a shareholder of the clinic where he was interim CEO, and therefore, the noncompete clause covered a broader spectrum of relationships than his relationship with his former employer.[203] The court in *Saxton* quoted approvingly the trial court's language that "'the unusually broad and iron-clad restrictions are reasonable,' because the 'shareholders entrusted all aspects of their

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195. *Id.* at 673, 324 S.E.2d at 178 (citation omitted).
196. 225 Ga. App. at 538, 484 S.E.2d at 264-65.
197. 196 Ga. App. 414, 396 S.E.2d 257 (1990).
198. *Id.* at 418, 396 S.E.2d at 260.
199. 253 Ga. at 673, 324 S.E.2d at 178.
200. 237 Ga. App. 758, 516 S.E.2d 804 (1999).
201. *Id.* at 761, 516 S.E.2d at 806.
202. 220 Ga. App. at 808, 470 S.E.2d at 255.
203. *Id.* at 808-09, 470 S.E.2d at 255.

business to Dr. Saxton.'"[204] The normal rule on scope of activity was not applied.

Saxton dealt with a fairly senior employee,[205] and *Waffle House* dealt with a franchisee.[206] But, the willingness to jettison the scope of activity requirement is not confined to only those limited situations. In *Smith* the court upheld the following restriction:

> "[Employer agrees not to] compete *in any way* against HBT either by himself as an individual, or in association with others, incorporated or otherwise, for five (5) years from the date his employment is terminated with HBT by using any facet or part of the heretobefore marketing program *or calling on or conversing with or selling any of the clients or customers in the list of customers furnished by HBT* in the following described geographical area. . . ."[207]

Smith was a salesman of agricultural supplies.[208] The court disregarded the "in any way" language and upheld the restriction, stating:[209]

> Although this court has held that a restriction of employment in a business "in any capacity" is overbroad and unreasonable, this is not an "in any capacity" case. The covenant at issue is narrowly tailored and limits Smith's activities in using HBT's marketing program or contacting customers furnished to him by HBT in a specific geographical area. Smith is not prohibited from competing in the area with potential customers whose names were not furnished to him while he was employed with HBT and is not prohibited in using a marketing program not provided to him by HBT. However, Smith is temporarily enjoined from using the information supplied to him by HBT in soliciting customers in a competing business in the geographical area. . . . Under these circumstances, we cannot say as a matter of law that the covenant was impermissibly broad.[210]

The court's decisions in *Waffle House*, *Saxton*, and *Smith* are all illustrative of situations in which the employee had obtained knowledge that the court felt was worthy of protection. In these cases, the court was unwilling to rely on any confidentiality agreement to protect the employer and basically ignored the scope of activity requirement so as

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204. *Id.* at 809, 470 S.E.2d at 255.
205. *Id.* at 808, 470 S.E.2d at 255.
206. 253 Ga. at 672, 324 S.E.2d at 177.
207. 213 Ga. App. at 561, 445 S.E.2d at 316 (emphasis added).
208. *Id.* at 560, 445 S.E.2d at 316.
209. *Id.* at 562-63, 445 S.E.2d at 317-18.
210. *Id.* (citation omitted).

to avoid invalidating the restrictions.[211] Indeed, in *Smith*, the employee had signed a confidentiality agreement, but the court still wanted to enforce the noncompete provision.[212] The problem, of course, is that in other cases in which the employee had access to important information, the court nonetheless imposed a strict scope of activity rule. As a result, these three cases render the scope of activity element of the "helpful tool" unreliable.

Georgia has traditionally been characterized as hostile to noncompete provisions. As one justice of the Georgia Supreme Court stated: "Ten Philadelphia lawyers could not draft an employer-employee restrictive covenant agreement that would pass muster under the recent rulings of this court."[213] The implementation of the "worked in the territory" test and its permutations has made it difficult to enforce territory restraints. Since *Mouyal*, nonsolicitation restraints should be easier to enforce, but *Mouyal* is a relatively recent decision, and there are several unanswered questions. And, the drafting of a scope of activity restriction is full of traps for the unwary. While sometimes the court invalidates the restraint after a fairly detailed factual inquiry, often the court simply quotes the noncompete provision and finds that it violates some rule.[214] Yet, Georgia has enforced noncompete provisions in a variety of circumstances. How the circumstances surrounding an executive's noncompete restriction may alter the analysis and require a detailed factual analysis will be discussed in Part II.

II. ADDITIONAL COMPLEXITIES FACING AN EXECUTIVE

As demonstrated above, determining whether a noncompete or nonsolicitation provision will be enforced in Georgia against any employee can be challenging. When one is faced with an agreement that has been entered into by an executive, the analysis can be even more complex. Often the executive's situation will not be comparable to that of the typical sales person or other employee who has signed a noncompete agreement.[215] The executive will almost certainly not have performed services within a "specified territory" so that one can easily

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211. *See generally Waffle House*, 253 Ga. 671, 324 S.E.2d 175; *Saxton*, 200 Ga. App. 805, 470 S.E.2d 252; *Smith*, 213 Ga. App. 560, 445 S.E.2d 315.

212. 213 Ga. App. at 560-61, 445 S.E.2d at 316-17.

213. Fuller v. Kolb, 238 Ga. 602, 605, 234 S.E.2d 517, 518 (1977) (Jordan, J., dissenting).

214. *Compare* Saxton, 220 Ga. App. 805, 470 S.E.2d 252, *with* Sunstates Refrigerated Servs., Inc. v. Griffin, 215 Ga. App. 61, 449 S.E.2d 858 (1994).

215. In a survey of noncompete agreements, sixty-four percent applied to individuals who were in sales. Whitmore, *supra* note 1, at 521 n.221.

determine if the executive "worked within a territory." The executive, normally, will have had broad supervisory or management responsibilities. The employer may be able to contend that the agreement, if not the noncompete provision, was subject to considerable negotiation. The history of the negotiations will be used to argue that the executive had considerable bargaining power. Moreover, the executive may have entered into the noncompete agreement either as the result of the sale of his former employer or in contemplation of the sale of his current employer.

In addition to these complexities, the executive may have signed more than one agreement that contains a noncompete provision. For example, a noncompete provision may be included in a stock option agreement or other deferred compensation agreement. These agreements may provide for substantial forfeiture if the executive is deemed to have been in violation.[216] The fundamental question is: Do these differences from the typical employee situation alter the analysis of a noncompete provision for an executive?

A. The Impact of the Executive's Responsibilities on the Enforceability of a Noncompete Provision

The most obvious difference between an executive and the typical employee is that the executive has wider responsibilities. Does the fact that the executive has such responsibilities change the traditional three-element analysis used by the Georgia courts? In other words, can the employer successfully argue that the executive has broad and important responsibilities that are, perhaps, crucial to the success of the enterprise and, therefore, the court should relax the stringent rules as they apply to one or all three elements?[217]

There is some support in the Georgia cases for such an argument. In *AGA, LLC v. Rubin,*[218] the court of appeals rejected the argument that it should be more willing to enforce a restraint because the employee

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216. *See* IBM v. Bajorek, 191 F.3d 1033 (9th Cir. 1999) (dealing with forfeiture of profit on stock options, which was approximately $1 million); Boyer v. Piper, Jaffray & Hopwood, Inc., 391 F. Supp. 471 (D. S.D. 1975) (involving forfeiture of profit sharing); Muggill v. Reuben H. Donnelley Corp., 398 P.2d 147 (Cal. 1965) (dealing with forfeiture of pension rights).

217. In Colorado the statute that generally prohibits noncompete provisions, C.R.S. § 8-2-113(2)(d) (2001), makes an exception for executives. *See* Mgmt. Recruiters of Boulder, Inc. v. Miller, 762 P.2d 763 (Col. Ct. App. 1988). *See also* Kupscznk v. Blasters, Inc., 647 So. 2d 888 (Fla. Ct. App. 1994) (indicating that noncompete provisions that restrict senior management should be looked upon more favorably).

218. 243 Ga. App. 772, 533 S.E.2d 804 (2000).

was a physician.[219] While holding that the agreement restricting a physician was subject to strict scrutiny, the court did state: "We cannot agree with AGA that the covenant should receive less scrutiny simply because Rubin was a physician. The facts do not suggest that Rubin was a partner, shareholder, or *other form of owner or manager of AGA*."[220]

In *Saxton v. Coastal Dialysis & Medical Clinic, Inc.*,[221] the case dealing with a doctor who was interim chief executive officer of a dialysis clinic, discussed above, the court upheld a broadly written noncompete agreement because an executive has responsibility for "'all aspects of [the] business.'"[222] One could also contend that the "heart and soul" exception supports the argument that when an executive is crucial to the business, the court should be more tolerant of broadly written restraints. If, however, the test for the "heart and soul" exception is whether the departure of the executive will bring the business to a halt, as stated by the Georgia Court of Appeals, then few executives will meet that test.

On the other hand, there are several cases in which Georgia courts dealt with noncompete provisions entered into by individuals with senior responsibilities without indicating that those responsibilities had an impact on the court's analysis of the noncompete restraint. In *Hulcher Services, Inc. v. R.J. Corman Railroad*,[223] the employee was a senior division manager and had significant responsibilities, but the court did not place any importance on his management duties in holding that the noncompete restriction was void.[224] In *Uni-Worth Enterprises v. Wilson*,[225] the court assessed restrictions on the executive vice president for sales and the executive vice president for research but did not indicate that their managerial functions would support a more favorable treatment for post-employment restraints.[226] Likewise, in *Sunstates Refrigerated Services, Inc. v. Griffin*,[227] plaintiff was the former chief executive officer. The court pointed out the executive's title in passing, but there was no discussion of his position or whether he was the heart and soul of the business.[228] In a fairly cryptic opinion, the court held the restrictions were invalid because they did not provide for any

219. *Id.* at 775, 553 S.E.2d at 806.
220. *Id.* (emphasis added).
221. 220 Ga. App. 805, 470 S.E.2d 252 (1996).
222. *Id.* at 809, 470 S.E.2d at 255.
223. 247 Ga. App. 486, 543 S.E.2d 461 (2000).
224. *Id.* at 492, 543 S.E.2d at 467-68.
225. 244 Ga. 636, 261 S.E.2d 572 (1979).
226. *Id.* at 640, 261 S.E.2d at 574-75.
227. 215 Ga. App. 61, 449 S.E.2d 858 (1994).
228. *Id.* at 61, 449 S.E.2d at 859.

territorial limitation.[229] Also, in *Habif, Arogeti & Wynne v. Baggett*,[230] discussed above, the Georgia Court of Appeals alluded to Mr. Baggett's broad responsibilities because he had served as managing partner of the accounting firm. The court in this opinion, however, strains to validate a fairly limited restriction. *Baggett* does not support greater tolerance of a post-employment restriction if the employee had executive functions.

As pointed out before, there is language in the cases in Georgia that states that each case of a post-employment restriction must be viewed in light of all relevant circumstances.[231] That language can always be cited in support of a restriction in a nontypical situation. *Griffin,* however, requires some territory definition,[232] and *Hulcher* stands for the proposition that the "worked in the territory" requirement will be read strictly.[233] Thus, if there is a broadly written territory restraint in an executive's employment contract, the executive's activities normally will not meet the "worked in the territory" test.

The enforceability of a nonsolicitation provision in an executive's employment contract is more difficult to predict. Pierre Mouyal, who was the employee in *W.R. Grace & Co. v. Mouyal*,[234] was apparently a fairly senior individual. The Georgia Supreme Court pointed out that after he left the Dearborn Division of W.R. Grace, he became an officer and director of a competitor.[235] There is, however, nothing in the opinion that indicates that Mr. Mouyal's position had a significant impact on the result.

The court's decision in *Mouyal* demonstrates an increasing tendency to be more tolerant of nonsolicitation, post-employment restraints, overruling prior precedent that required a specific territory for a nonsolicitation provision to be enforceable.[236] As pointed out above, Georgia courts have most often cited the need to protect the employer's customers from expropriation as the interest of the employer most worthy of protection.[237] *Mouyal* is a little over nine years old. One state has held that nonsolicitation provisions should be subjected to a

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229. *Id.* at 62, 449 S.E.2d at 860.

230. 231 Ga. App. 289, 498 S.E.2d 346 (1998).

231. *See* Herndon v. Waller, 241 Ga. App. 494, 496, 525 S.E.2d 159, 161 (1999); Sysco Food Serv. of Atlanta, Inc. v. Chupp, 225 Ga. App. 584, 585, 484 S.E.2d 323, 325 (1997); Electronic Data Sys. Corp. v. Heineman, 217 Ga. App. 816, 820, 459 S.E.2d 457, 461 (1995).

232. 215 Ga. App. at 62-63, 449 S.E.2d at 859-60.

233. 247 Ga. App. at 490-91, 543 S.E.2d 466.

234. 262 Ga. 464, 422 S.E.2d 529 (1992).

235. *Id.* at 464, 422 S.E.2d at 531.

236. *See* Edwin K. Williams & Co. v. Padgett, 226 Ga. 613, 176 S.E.2d 800 (1970).

237. *See supra* text accompanying notes 8-12.

lesser degree of scrutiny than general noncompete provisions.[238] The court's language in *Mouyal*, which argues that the law of noncompete provisions should accommodate modern business practices, indicates that the court will be less strict on "technical" errors in nonsolicitation restrictions.[239] It is difficult to predict, however, whether Georgia courts will become more tolerant of nonsolicitation restraints for employees generally or just for executives who have substantial responsibilities or for neither.

B. The Impact of the Executive's Bargaining Power and "Intermediate Scrutiny"

Normally, an executive will have wide responsibilities because of his management, technical, or professional expertise. Such expertise often will provide the executive with substantial bargaining power when negotiating an employment agreement with his employer. Indeed, the executive, at the commencement of his employment, may have received specific additional benefits, such as a signing bonus, stock options, or severance provisions. The employer may be able to contend that some of these benefits, for example, the severance package, were attributable, at least in part to the noncompete provision.[240] In such a case, the employer will contend that a lesser level of scrutiny should be applied.[241] Therefore, does the presence of some bargaining power by the executive support a more tolerant view of a noncompete provision?

The Georgia courts have referred to the *absence* of bargaining power by employees as a rationale for strict scrutiny of noncompete provisions.[242] The impact of the *presence* of bargaining power by the person subject to the restraint has become entangled in the analysis of restraints in partnership arrangements. As pointed out above, the Georgia Supreme Court has recently applied an "intermediate level" of scrutiny to restrictive covenants in partnership agreements.[243] Had

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238. Abbott-Interfast Corp. v. Harkabus, 619 N.E.2d 1337, 1341 (Ill. App. 1993).

239. 262 Ga. at 467, 422 S.E.2d at 532-33.

240. Jonathan M. Ocker & Gregory C. Schick, *Employment Agreements for New Economy Chief Executives*, 23 LOS ANGELES LAW. 21, 48 (2000).

241. This argument might be even more effective if the executive is working for a relatively small enterprise, a start up, or the executive's employer is organized in the form of a limited liability corporation, which has many characteristics of a partnership. For a case on limited liability companies, see *Pine Creek, LLC v. Pine Mount, LLC*, 253 Ga. App. 34, 558 S.E.2d 44 (2001).

242. Russell Daniel Irrigation Co. v. Coram, 237 Ga. App. 758, 760, 516 S.E.2d 804, 806 (1999); Johnstone v. Tom's Amusement Co., 228 Ga. App. 296, 299, 491 S.E.2d 394, 398 (1997).

243. *See supra* text accompanying notes 26-27.

Georgia courts clearly held that the intermediate level applies only to a traditional partnership agreement, the presence of this intermediate level analysis would rarely be relevant to an executive's situation. As will be demonstrated below, however, Georgia courts have provided some room to contend that "intermediate scrutiny" applies beyond the traditional partnership situation.

When the Georgia Supreme Court announced this new level of scrutiny, it pointed out two significant differences between a partnership and the typical employment agreement.[244] First, the court stated that when an employee enters into a noncompete agreement, he gets little more than a job. In a partnership agreement, the restrictions are often applicable to all partners.[245] Secondly, in an employment agreement, the employee has little or no bargaining power, whereas in a partnership situation, according to the court, the bargaining leverage is more nearly equal.[246] Indeed, in *Baggett*, the court of appeals stated that "the *key* inquiry in determining the level of scrutiny is the *relative bargaining power of the parties*."[247] And, recently the Georgia Court of Appeals stated the following in *Swartz Investments, LLC v. Vion Pharmaceuticals, Inc.*:[248]

> Nor do we believe that the type of contract should automatically determine the applicable level of scrutiny. Rather, we must look to the purposes behind the varying levels of scrutiny to determine which level is most appropriate for the contract before us. One starting point is the relative bargaining power of the parties.[249]

In addition, the courts have relied on a finding that the parties had relatively equal bargaining power to support intermediate scrutiny in cases concerning professional corporations involving medical personnel.[250] Apparently, for entities such as professional corporations, which are technically not partnerships but have many of the characteristics of partnerships, the courts look to bargaining power to determine whether to apply the partnership level of scrutiny.

There are recent cases, however, that oppose the trend of using bargaining power to determine the level of scrutiny. First, in *New*

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244. Rash v. Toccoa Clinic Med. Assocs., 253 Ga. 322, 320 S.E.2d 170 (1984).

245. *Id.* at 325, 320 S.E.2d at 172.

246. *Id.* at 326, 320 S.E.2d at 173.

247. 231 Ga. App. at 291 n.9, 498 S.E.2d at 350 n.9 (emphasis added). *See also* Pittman v. Harbin Clinic Prof'l Ass'n, 210 Ga. App. 767, 769-70, 437 S.E.2d 619, 622 (1993).

248. 252 Ga. App. 365, 556 S.E.2d 460 (2001).

249. *Id.* at 368-69, 556 S.E.2d at 462.

250. Delli-Gatti v. Mansfield, 223 Ga. App. 76, 477 S.E.2d 134 (1996); *Pittman*, 210 Ga. App. at 770-71, 437 S.E.2d at 622-23.

Atlanta Ear, Nose & Throat Associates v. Pratt,[251] the court stated that a restriction in an employment agreement is subject to strict scrutiny "independent of the relative bargaining power [of the parties]."[252] Second, there are three recent cases in which the court developed a new rule to apply strict scrutiny even though the parties had relatively equal bargaining power.[253] None of these three cases, however, is typical of employment situations. Two of these cases deal with restrictive covenants in lease agreements;[254] the third concerns a "noncircumvention" clause in an agreement that pertained to raising capital.[255] As will be seen, these cases make it difficult to predict how bargaining power will ultimately play out in the Georgia courts' analysis of noncompete provisions.

The facts in *Pratt* are somewhat complex. Plaintiffs were five physicians who had signed a series of noncompete provisions. The physicians had been affiliated with a medical group, and in November 1996, the owners of the medical group agreed to sell PSC Management Corporation ("PSC"). The court of appeals only says that the owners of the medical group did not include the five physicians, so one must assume that they were employees. In February 1997, the five physicians entered into employment agreements with New Atlanta Ear, Nose & Throat Associates, P.C., which had been formed to operate the assets of the medical group once it was sold to PSC. In addition, the five physicians "received" stock in PSC's parent corporation and in New Atlanta Ear, Nose & Throat Associates, P.C and, as a result, entered into shareholders agreements, apparently sometime in 1997. The five physicians then executed new, restated shareholder agreements in August 1999, which apparently contained the same restrictive covenants as the original shareholder agreements. There was also a March 1997 management agreement, but the court does not say who the parties were to that agreement or what, if any, relevance that agreement had.[256]

The court described the various restrictive covenants as follows:

> Four sets of restrictive covenants are found in the various agreements. The November 1996 asset acquisition agreement has a broad five-year

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251. 253 Ga. App. 681, 560 S.E.2d 268 (2002).

252. *Id.* at 684, 560 S.E.2d at 271.

253. *Herndon*, 241 Ga. App. 494, 525 S.E.2d 159; Swartz Invs., LLC v. Vion Pharm., Inc., 252 Ga. App. 365, 556 S.E.2d 460 (2001); Northside Hosp. v. McCord, 245 Ga. App. 245, 537 S.E.2d 697 (2000).

254. *Herndon*, 241 Ga. App. 494, 525 S.E.2d 159; *McCord*, 245 Ga. App. 245, 537 S.E.2d 697.

255. *Swartz Invs.*, 252 Ga. App. 365, 556 S.E.2d 460.

256. 253 Ga. App. at 681-82, 560 S.E.2d at 269-71.

> post-closing covenant preventing the former medical group from competing, soliciting, and hiring; the February 1997 employment agreements prohibit the defendants from post-termination competition for eighteen months; the March 1997 management agreement precludes the new medical group from engaging in various competitive activities with PSC for eighteen months after termination; and the August 1999 restated shareholder agreement prevents each shareholder from practicing medicine with other new medical group physicians for three years after termination.[257]

The five physicians sought to terminate their relationship with New Atlanta Ear, Nose & Throat Associates, P.C. and PSC and to open competing practices.[258]

The court treated the restrictive covenant in the employment agreement as subject to strict scrutiny.[259] The court did not discuss the relative bargaining power of the parties or the cases that had held that membership in a professional corporation should be treated as a partnership and subject to intermediate scrutiny. The court's only reference to bargaining power was as follows:

> The answer here is quite clear, as there were restrictive covenants contained in both the employment and shareholder agreements executed by the defendants. *Independent of the relative bargaining power of the parties*, *Russell Daniel Irrigation Co. v. Coram* held that where a party, in conjunction with the same transaction, has signed an employment and a partnership agreement with his employer, both of which contain restrictive covenants, then the restrictive covenant in the employment agreement is subject to strict scrutiny.[260]

Coram[261] will be discussed in more detail below. One should note, however, that the court in *Coram* made clear that plaintiff had relatively little bargaining power.[262]

In *Pratt* the fact that the five physicians obtained some stock ownership indicated that they had some ability to negotiate.[263] As pointed out above, less than a year before in *Swartz Investments,* the court stated that the type of contract should not automatically govern the level of scrutiny.[264] In *Pratt*, however, the court held that once one

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257. *Id.* at 682, 560 S.E.2d at 270.
258. *Id.*
259. *Id.* at 685, 560 S.E.2d at 271.
260. *Id.* at 684, 560 S.E.2d at 271 (emphasis added).
261. 237 Ga. App. 758, 516 S.E.2d 804 (1999).
262. *Id.* at 760, 516 S.E.2d at 806.
263. 253 Ga. App. at 684, 560 S.E.2d at 271.
264. 252 Ga. App. at 368-69, 556 S.E.2d at 463.

has characterized the agreement as an employment agreement, strict scrutiny applies "*independent of the relative bargaining power of the parties*."[265]

In addition to *Pratt*, the court of appeals has gone to considerable lengths in three cases, discussed below, to hold that even when the parties concede that the relative bargaining power is equal, strict scrutiny nonetheless applies.

The first case was *Herndon v. Waller*,[266] in which a Dr. Waller, who was a veterinarian, signed a lease to rent a building from another veterinarian, Dr. Herndon. The lease stated that "if Waller should decide 'to sever ties with (Herndon), (Waller) agrees not to operate as a Veterinarian for a distance of fifteen (15) miles and a period of two (2) years.'"[267] Waller filed a declaratory judgment action, stating that he intended to terminate the lease and open a clinic close to the building that he had leased from Herndon. Waller contended that the restriction was vague and unenforceable.[268] The court stated that it need not decide whether the restriction was too vague because, in its view, the restriction was not reasonable.[269]

The court in *Herndon* conceded that there was no issue of unequal bargaining power.[270] The court said, however, "there is no evidence that the lessee, Waller, received any consideration in exchange for the covenant not to compete."[271] The court then held that because the restrictive covenant was not made in connection with the sale of a business, it was subject to "'the severe scrutiny given restrictive covenants ancillary to an employment contract.'"[272] Next, the court pointed out that there was no ongoing veterinary practice on the premises when Waller entered into the lease and that Herndon had not practiced veterinary medicine for six years.[273] The court concluded that the restraint was not reasonable "in light of the nature of the business and the parties' situation."[274]

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265. 253 Ga. App. at 684, 560 S.E.2d at 271 (emphasis added).

266. 241 Ga. App. 494, 525 S.E.2d 159 (1999).

267. *Id.* at 494, 525 S.E.2d at 160.

268. *Id.*

269. *Id.* at 495, 525 S.E.2d at 160.

270. *Id.*

271. *Id.*, 525 S.E.2d at 161.

272. *Id.* at 496, 525 S.E.2d at 161 (quoting *Johnstone*, 228 Ga. App. at 300, 491 S.E.2d at 398-99).

273. *Id.*

274. *Id.* It is not clear why the restraint in *Herndon* was unenforceable, even if it properly was subject to severe or strict scrutiny. One can argue that *Herndon* supports the proposition that in order for a restrictive covenant to be enforceable, the party who is

In *Herndon*, the court's analysis was based on the assumption that a restrictive covenant must be treated as either ancillary to the sale of a business or as part of an employment agreement and subject to severe scrutiny. Apparently, the court thought that "intermediate scrutiny" applied only to partnerships and that the arrangement between Dr. Waller and Dr. Herndon clearly was not a traditional partnership. Given that there was no partnership, the court looked at the question as if it had to choose between the standards applicable to restrictive covenants ancillary to an employment agreement or to a sale of a business.[275] Relying on its observation that there was no evidence of any consideration for the covenant not to compete, the court chose the employment agreement analysis.[276]

The second lease case is *Northside Hospital v. McCord*.[277] Dr. McCord and the hospital entered into a contract under which the doctor and his medical group would be the exclusive provider of oncology services for the hospital. Dr. McCord was named the medical director of the oncology department at the hospital. The doctor and the hospital also entered into a "sublease" under which the doctor would establish a radiation oncology center.[278] The lease contained a noncompete provision that provided in part:

> [D]uring the term of this Sublease, and for a period of two (2) years following the expiration or termination of the term hereof, neither Subtenant, nor any shareholder, officer or director, or an affiliate of any of them, shall own any ownership interest in, manage, operate, control, participate in, be an employee of, or be involved, either directly or indirectly, with a radiation therapy/oncology center performing the services performed by Subtenant in the Premises, within a 25-mile radius of the Premises, other than the current facilities operated by Subtenant.[279]

The hospital argued that the bargaining power of the parties was relatively equal and that the sublease should not be subject to strict

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seeking to enforce the covenant must have a business to protect. There is language in the sale of business cases that deals with a similar issue. The buyer of a business will obtain a restrictive covenant from the seller to protect the goodwill the buyer is acquiring. If the buyer ceases to do business, the courts have stated that the buyer can no longer enforce the restrictive covenant against the seller. Jenkins v. Jenkins Irrigation, 244 Ga. 95, 98, 259 S.E.2d 47, 50 (1979). The buyer no longer has an interest to protect. One can argue that *Herndon* is support for the same concept, but the court does not articulate any rule.

275. 241 Ga. App. at 495-96, 525 S.E.2d at 160-61.

276. *Id.*

277. 245 Ga. App. 245, 537 S.E.2d 697.

278. *Id.* at 245-47, 537 S.E.2d at 697-99.

279. *Id.* at 246, 537 S.E.2d at 698.

scrutiny.[280] The court rejected that argument.[281] The court did not contest that the bargaining power was equal.[282] Instead, the court cited *Herndon* and stated that the trial court was "authorized" to find that the doctor had not received any consideration for the covenant not to compete.[283] The court then held that the restrictive covenant in this commercial lease was void for two reasons.[284] First, as pointed out above, the hospital had not shown that the clinic drew patients from the entire area of the geographic limitation.[285] Second, the court held that the use of the phrase "be involved with" made the scope of restriction too broad.[286] The court affirmed a preliminary injunction enjoining the enforcement of the noncompete provisions of the lease.[287]

In addition to these two lease cases, in *Swartz Investments,* cited above, the court dealt with a restriction imposed by an investment firm on a privately held company, Vion Pharmaceuticals, for which the Swartz firm was raising capital. The agreement contained a noncircumvention clause that stated that Vion Pharmaceuticals could not contact six named investors for a period of five years without the consent of Swartz Investments.[288] The court ruled that the restriction was a restrictive covenant.[289] It then determined the level of scrutiny to be applied.[290] The court agreed that the parties had equal bargaining power, but it stated that there was no evidence that Vion Pharmaceuticals received anything of value for the restriction.[291] The court concluded:

> This Court generally has applied the highest level of scrutiny where the parties have equal bargaining power, but where there is no consideration for the covenant at issue. . . . Accordingly, under the particular circumstances surrounding the noncircumvention clause in this case, we will apply the strict level of scrutiny generally applicable to employment contracts. In making this determination, however, we

280. *Id.* at 248, 537 S.E.2d at 700.
281. *Id.* at 249, 537 S.E.2d at 700.
282. *Id.* at 248-49, 537 S.E.2d at 700.
283. *Id.* at 249, 537 S.E.2d at 700.
284. *Id.* at 248, 537 S.E.2d at 699.
285. *Id.*
286. *Id.*, 537 S.E.2d at 699-700.
287. *Id.* at 245, 537 S.E.2d at 698.
288. 252 Ga. App. at 365-66, 556 S.E.2d at 461-62.
289. *Id.* at 368, 556 S.E.2d at 462.
290. *Id.* at 367-68, 556 S.E.2d at 462.
291. *Id.* at 369, 370, 556 S.E.2d at 463, 464.

> express no opinion as to the level of scrutiny applicable to noncircumvention clauses under different factual circumstances.[292]

In these three cases, the court could not have meant that the noncompete covenant was not supported by consideration. Lack of consideration means the covenant is not enforceable at all, not that it is subject to a higher level of scrutiny.[293] Historically, a court evaluates consideration by looking at the total transaction and by seeing if one party exchanges one set of promises for a set of promises from the other party. The court does not look at each element to determine whether there is separate and additional consideration for each element.[294] For example, Vion Pharmaceuticals agreed to several promises with Swartz Investments, one of which was the restriction the court held invalid, in exchange for certain promises by Swartz Investments.[295] One is also left to wonder why a party would agree to a noncompete provision if the party received nothing for the restriction when it had equal bargaining power and was represented by counsel. The court's logic in *Herndon, McCord*, and *Swartz Investments* is weak. Nonetheless, one has to consider those decisions in attempting to determine whether a post-employment restraint will be enforced.

Of course, determining that a restraint should be subject to intermediate scrutiny is not the end of the matter. One has to predict what intermediate scrutiny means. In Georgia it is not at all clear how an intermediate scrutiny analysis might impact the result when an employer seeks to enforce a noncompete provision. The courts have stated that if the noncompete agreement is ancillary to a sale of business, it can be of a much longer duration and would be subject to being "blue penciled."[296] In a recent case, a panel of the Georgia Court of Appeals did not apply the automatic "no blue pencil" rule and evaluated each restrictive covenant in a partnership agreement

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292. *Id.* at 370, 556 S.E.2d at 464 (citations omitted).

293. *Mouyal*, 262 Ga. at 465, 422 S.E.2d at 531.

294. Corbin on Contracts states: "A single and undivided consideration may be bargained for and given as the agreed equivalent of one promise or of two promises or of many promises. The consideration is not rendered invalid by the fact that it is exchanged for more than one promise. . . . Frequently a single consideration has been paid for a promise to transfer a business and stock of goods and a separately worded promise of forbearance to compete." 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 5.12 (revised ed. 1995); *see also* Keeley v. Cardiovascular Surgical Assocs., P.C., 236 Ga. App. 26, 31, 510 S.E.2d 880, 885 (1999).

295. 252 Ga. App. at 365-67, 369-71, 556 S.E.2d at 461-62, 463-65.

296. *See supra* text accompanying notes 23-25.

independently.[297] However, less than a year later in *Advance Technology Consultants, Inc. v. Roadtrac, LLC*,[298] the full Georgia Court of Appeals stated that the application of the ("no blue pencil") rule to a partnership agreement is an open issue.[299]

One could argue that with an intermediate level of scrutiny, under each of the three elements—duration, territory, and scope of activity—the court will be "somewhat" more tolerant. The case law is so indefinite as to duration (even under the strict scrutiny standard, a court approved a duration of five years), knowing that the duration might be "somewhat" longer is of little guidance. Under the "worked in the territory" test, it is difficult to see how a territorial restriction could be "somewhat" larger.[300] In *Baggett* the court stated that in an intermediate scrutiny case, the rules governing scope of activity are relaxed.[301] How relaxed is unclear.

The law in Georgia appears to be very unpredictable on the issue of how to treat a noncompete provision in an employment agreement with an executive who had some bargaining power. One can find language by which the court has indicated that some intermediate level of scrutiny might be appropriate. Certainly, there are cases in which the court has stated that the absence of bargaining power justified strict scrutiny.[302] On the other hand, there are other cases in which the court seems to totally ignore the responsibilities and negotiating power of the employee who is subject to the restraint. The best one can say is that a Georgia court is free to hold that if the executive had some bargaining power, his agreement should be subjected to "intermediate scrutiny," allowing approval of the restraint and ignoring a violation of some of the rules that would otherwise mandate striking down the restraint.

C. Noncompete Provisions Executed in Connection with the Acquisition of the Executive's Employer

The above discussion assumes that the executive entered into the noncompete provision when he became employed or upon assuming a new position with the same employer. Often, however, the executive

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297. Physician Specialists in Anesthesia, P.C. v. MacNeill, 246 Ga. App. 398, 404-05, 539 S.E.2d 216, 222-23 (2000).

298. 250 Ga. App. 317, 551 S.E.2d 735 (2001).

299. *Id.* at 321 n.16, 551 S.E.2d at 738 n.16.

300. *See MacNeill*, 246 Ga. App. at 404-06, 539 S.E.2d at 223-24 (applying the intermediate level of scrutiny in a case involving medical personnel but still holding the restraint to be unenforceable).

301. 231 Ga. App. at 294, 498 S.E.2d at 352.

302. *See, e.g.*, *Coram*, 237 Ga. App. at 760, 516 S.E.2d at 806; *Johnstone*, 228 Ga. App. at 299, 491 S.E.2d at 398.

signed the noncompete provision as part of the sale of his employer. The acquiring company may seek to have the former executive stay with the company for a specific period to help with the transition or because the acquiring company wishes to retain the executive's technological skills or other knowledge. The executive may desire a formal agreement that spells out his compensation with the new employer. Is such a noncompete provision ancillary to the sale of the business or to the employment agreement? The resolution of that issue can be crucial. If the court holds that the restraint should be analyzed as if it were a restraint entered into as part of the sale of a business, the restraint would be subject to the much more lenient standard and could be "blue penciled" by the court. The issue of when to apply the sale of business standard and when to apply the employment agreement standard has undergone a somewhat torturous history in Georgia.

In 1963, in *Insurance Center, Inc. v. Hamilton*,[303] the Georgia Supreme Court dealt with a restrictive covenant by an insurance agent who had sold his insurance business. On the same day that he sold his business, he became an employee of the acquiring company and signed an employment contract that contained a noncompete clause. The noncompete provision prohibited Hamilton from competing for three years after the *date of the contract* in three counties. After he was terminated, Hamilton brought suit seeking to have the noncompete provision invalidated.[304] The Georgia Supreme Court pointed out that the noncompete provision ran from the date of the contract, not from termination, as would normally be the case in an employment agreement, and that Hamilton had signed the employment contract containing the noncompete provision at the same time as the sale of the business.[305] After observing that noncompete agreements ancillary to the sale of a business were given greater latitude than those ancillary to employment agreements, the court cited several sale of business cases and employment cases and then held that the restriction was reasonable.[306]

The court in *Hamilton* at least indicated that even though the agreement was labeled an employment agreement, if it were part of the sale of a business, the enforceability of the restrictive covenant might be subject to less scrutiny.[307] Yet in 1970, in *Watkins v. Avnet, Inc.*,[308]

303. 218 Ga. 597, 129 S.E.2d 801 (1963).
304. *Id.* at 598-99, 129 S.E.2d at 802-03.
305. *Id.* at 601-02, 129 S.E.2d at 804-05.
306. *Id.* at 602-03, 129 S.E.2d at 805.
307. *Id.* at 601-03, 129 S.E.2d at 804-05.
308. 122 Ga. App. 474, 177 S.E.2d 582 (1970).

the Georgia Court of Appeals stated: "Although the contract here involved is clearly related to the sale of a business, and in this sense involves only one aspect of a larger transaction, it is nonetheless a contract of employment, and must be construed under the rules applicable to the latter."[309] There, the court dealt with an agreement that had been entered into by the former president and majority shareholder, who had sold his business and entered into an employment agreement that contained a restrictive covenant.[310] The court of appeals held that strict scrutiny applied and concluded the restraint was not enforceable without any substantial discussion of why the agreement "must be construed" as an employment agreement.[311]

The supreme court next dealt with the validity of a noncompete provision for an employee who had sold his business in *Dalrymple v. Hagood*.[312] There, the employee sold his real estate business and entered into an employment agreement in which he agreed "not to participate in the real estate business in Stephens County, Georgia for a period of [thirty-six] months," except as an employee of the company that had acquired his business.[313] The thirty-six month period apparently began to run at the time the employee sold his business. The court pointed out that the employment agreement had been signed contemporaneously with the sale documents and that the evidence supported the trial court's finding that the restrictive covenant was ancillary to the sale of the business.[314]

Then in 1983, in *White v. Fletcher/Mayo/Associates, Inc.*,[315] the supreme court dealt with the validity of noncompete provisions for an employee who had sold a small minority interest in a business to his new employer. Mr. White was an employee of an advertising and promotion firm and, through an employee stock plan, had acquired 4.62% of the stock of his employer. As part of the acquisition of the advertising and promotion firm, Mr. White sold his shares and executed an employment agreement with the acquiring company, who was his new employer. White was one of four employees who executed employment agreements. Sixty-five other employees owned stock and received the same consideration per share as White, but these employees were

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309. *Id.* at 476-77, 177 S.E.2d at 584.
310. *Id.* at 474-75, 177 S.E.2d at 583.
311. *Id.* at 476-77, 177 S.E.2d at 584.
312. 246 Ga. 235, 271 S.E.2d 149 (1980).
313. *Id.* at 235, 271 S.E.2d at 150.
314. *Id.* at 236, 271 S.E.2d at 150. Had the restrictive covenant not been ancillary to the sale of a business, it probably would have been invalid because it violated the rule concerning "in any capacity" in employment noncompete provisions.
315. 251 Ga. 203, 303 S.E.2d 746 (1983).

not required to sign any employment agreements. Soon after the merger, White was fired, and he brought suit to have the covenant declared void on the ground that the restrictions were overbroad.[316] The court rejected the argument that the restraint should be treated as ancillary to the sale of the business.[317] The court said:

> [W]e hold today that where a trial judge is asked to determine the enforceability of a noncompetition covenant which the buyer of a business contends was given ancillary to the covenantor's relinquishment of his interest in the business to the buyer, and not given solely in return for the covenantor's continued employment, the judge must determine the covenantor's status. If it appears that his bargaining capacity was not significantly greater than that of a mere employee, then the covenant should be treated like a covenant ancillary to an employment contract, and "[a]s such, it should be enforced as written or not at all."[318]

Under the facts of that case, the supreme court then held that Mr. White was a "mere employee" and that the restrictions should be treated under the standards applicable to employment agreements.[319]

Later, in 1989, the supreme court, in *Lyle v. Memar*,[320] again dealt with the question of the impact of the sale of a business on a related noncompete provision. Lyle sold all his stock in a company ("BME") to Memar, and at the time of the sale and as part of the sale agreement with Memar, Lyle executed a noncompete provision. Lyle also remained an employee of BME. Approximately eighteen months later, he executed an employment agreement with BME, which had a different noncompete agreement. Litigation developed over the enforceability of the noncompete provisions, and before the supreme court, both parties agreed that neither agreement standing alone was enforceable.[321] The court said: "We find now that if a contract for the sale of a business and an employment contract are part of the same transaction they may be construed together to supply missing elements and blue penciled to make overbroad terms valid."[322] The court in *Lyle*, however, held that

316. *Id.* at 203-04, 303 S.E.2d at 747-48.
317. *Id.* at 208, 303 S.E.2d at 751.
318. *Id.* (quoting Redmond v. Royal Ford, Inc., 244 Ga. 711, 715, 261 S.E.2d 585, 588 (1979)).
319. *Id.*
320. 259 Ga. 209, 378 S.E.2d 465 (1989).
321. *Id.* at 209-10, 378 S.E.2d at 466.
322. *Id.* at 210, 378 S.E.2d at 466.

the contract at issue in that case was not part of the same transaction.[323] The court explained that

> [s]ince the parties agree that neither agreement, standing alone, is valid, the question before [the court] is whether the contracts can be construed together to supply the missing terms. It is clear that the contracts cannot be so construed. The sales agreement was executed in November 1986. The employment contract attached to the complaint and construed by the court was executed in June 1988. These agreements are not contemporaneous. Further, the sales agreement was between Memar and Lyle as individuals. The employment contract was between Lyle as an individual and BME. Since the two contracts were neither contemporaneous nor between the same parties, it was error for the court to construe them together. We do not reach the question whether we would construe a contemporaneous employment agreement with the sales contract.[324]

Surprisingly, the court did not cite *White* in *Lyle* and did not inquire whether Mr. Lyle had bargaining capacity that was greater than that of a mere employee.

Shortly after *Lyle*, the Georgia Court of Appeals, in *Annis v. Tomberlin & Shelnutt Associates*,[325] dealt with a sale of a business followed by an employment agreement. The facts of *Annis* are complicated, involving multiple lawsuits. Basically, Mr. Annis sold stock in a closely held family corporation and became an employee of the acquiring company.[326] The court in *Annis* stated, initially, that it did not have to decide whether a restrictive covenant in an employment agreement that Mr. Annis executed should be treated as ancillary to the sale of a business or as ancillary only to an employment agreement.[327] The

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323. *Id.*

324. *Id.*, 378 S.E.2d at 466-67.

325. 195 Ga. App. 27, 392 S.E.2d 717 (1990).

326. *Id.* at 27-30, 392 S.E.2d at 719-21. Mr. Annis entered into three agreements as follows: a stock purchase agreement whereby he sold some of his stock; a second stock purchase agreement concerning future sales and containing an option to buy stock in the acquiring company; and an employment agreement. The original stock purchase agreements contained a covenant not to compete that ran for three years after the date of the agreement, September 27, 1985. The employment agreement prohibited competition within fifty miles of the company's principal office for three years after the termination of Mr. Annis' employment. Approximately two years after the original sale of the stock, Mr. Annis resigned and began competing with his former employer. Litigation ensued. That matter was settled, and the noncompete clause in the employment agreement was modified to run to March 1, 1989. After the parties executed the settlement agreement, further disputes arose. Both Annis and his employer instituted new litigation, which resulted in the decision discussed in the text. *Id.*

327. *Id.* at 30-31, 392 S.E.2d at 721-22.

court stated that the agreement was enforceable under either standard.[328] The court went on to say, however, that "[e]ven if the covenant were overbroad, it would be possible to blue pencil the agreement" because the restrictive covenant was part of the same transaction.[329] The court cited *Lyle* and *White* but did not clearly apply any rule.[330] It is apparent from the opinion, however, that Mr. Annis enjoyed considerable bargaining power and was not just a mere employee.

But the court in *Arnall Insurance Agency v. Arnall*,[331] which was decided approximately three months after *Annis*, reverted to the approach taken in *Watkins*.[332] Mr. Arnall entered into an employment agreement providing that for as long as the agreement was in force, and for two years thereafter, he would not engage in the insurance business in competition with Newnan Federal or any subsidiary of Newnan Federal.[333] Arnall simultaneously entered into an agreement to sell his insurance agency to DFS Financial, a subsidiary of Newnan Federal. Newnan Federal executed the purchase and sale agreement as guarantor. The purchase and sale agreement also contained a noncompete provision that ran for five years from the date of the agreement.[334] Both the purchase and sale agreement and the employment agreement provided that the respective restrictive covenant was "in addition to, and not in lieu of" any other restrictive covenant.[335] Newnan Federal then assigned the employment agreement to DFS. Slightly over five years after the sale of his business, Arnall resigned from DFS and began to compete in the insurance business against DFS.[336]

DFS sued Arnall for damages for breach of the noncompete provision in the employment agreement.[337] On appeal the court cited *Watkins* and held that even though the employment contract was part of a larger transaction, saying "[n]evertheless, we must construe the restrictive covenant contained in the employment contract as just that—a covenant contained in an employment contract."[338] The court then held that the

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328. *Id.*
329. *Id.* at 31, 392 S.E.2d at 722.
330. *Id.* at 30-31, 392 S.E.2d at 751-22.
331. 196 Ga. App. 414, 396 S.E.2d 257 (1990).
332. *Id.* at 418-19, 396 S.E.2d at 261.
333. *Id.* at 415, 396 S.E.2d at 258.
334. *Id.*
335. *Id.*
336. *Id.* at 416, 396 S.E.2d at 259.
337. *Id.* at 414, 396 S.E.2d at 258.
338. *Id.* at 419, 396 S.E.2d at 261. One member of the panel concurred in the result on other grounds. *Id.* at 419-20, 396 S.E.2d at 262.

restriction was too broad and invalidated the restriction.[339] On the facts presented, Arnall was considerably more than a mere employee. The court in *Arnall* did not cite *Annis*, *Lyle*, or *White.*

A little over a year after the decision in *Arnall*, in *S. Hammond Story Agency, Inc. v. Baer*,[340] the Georgia Court of Appeals relied on *White* to affirm a trial court's determination that a restrictive covenant was not enforceable.[341] In that case, Baer, a minority shareholder in an insurance firm, sold his interest in the firm, became an employee of the acquiring company, and entered into a restrictive covenant.[342] He contended that he entered into the noncompete agreement in his capacity as a "post-sale employee."[343] The new employer conceded that the restrictive covenant was not enforceable if it was deemed to be ancillary to an employment agreement. The new employer claimed, however, that the controlling shareholders, who had sold the insurance firm, had represented Baer in the negotiations. Therefore, Baer had more bargaining power than a typical employee.[344] The trial court found that Baer was a "mere employee," and the court of appeals affirmed, stating that the case was controlled by *White*.[345]

Then, in *Drumheller v. Drumheller Bag & Supply, Inc.*,[346] the Georgia Court of Appeals held that a broad restraint in an employment agreement should be treated under the standard applicable to covenants ancillary to the sale of a business.[347] Three employees, who each owned between 5% and 13.5% of the company stock prior to the sale, executed employment agreements "pursuant to the terms of the stock sales agreement" that contained a very broad restrictive covenant.[348] The court pointed out that the three employees were represented by counsel in the sale and that there was no "unfair pressure" exerted on them to sell their stock.[349] The court did not specifically hold that the employees in *Drumheller* had bargaining power greater than that of a

339. *Id.* at 417-18, 396 S.E.2d at 260.
340. 202 Ga. App. 281, 414 S.E.2d 287 (1991).
341. *Id.* at 281-82, 414 S.E.2d at 287-88.
342. *Id.* at 281, 414 S.E.2d at 287-88.
343. *Id.* The opinion is fairly sparse on the facts. One cannot tell from the opinion how large the minority interest was or whether the restrictive covenant was contained in the stock sale agreement or in an employment agreement.
344. *Id.* at 281-82, 414 S.E.2d at 287-88.
345. *Id.* at 282, 414 S.E.2d at 288.
346. 204 Ga. App. 623, 420 S.E.2d 331 (1992).
347. *Id.* at 626-27, 420 S.E.2d at 334-35.
348. *Id.* at 624, 420 S.E.2d at 333.
349. *Id.* at 626-27, 420 S.E.2d at 334-35.

mere employee, but one can infer from the court's discussion of the facts that the employees did have some heightened bargaining capacity.

The most recent case to deal with a noncompete restriction in connection with a sale of a business used the "mere employee" test. In *Hudgins v. Amerimax Fabricated Products,*[350] the court held that a noncompete provision in a stock purchase agreement concerning the sale of a family business was binding on a plant manager who was a family member.[351] The plant manager had sold his two percent nonvoting interest to the acquiring corporation and signed a noncompete provision.[352] Nonetheless, the court found that although the plant manager's interest was small, he had more bargaining power than a "mere employee."[353] In *Hudgins* the acquiring company did not retain the manager as an employee, so the covenant was part of the sale agreement.[354] On those facts, the court had no trouble holding that the agreement was ancillary to the sale of a business.[355]

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350. 250 Ga. App. 283, 551 S.E.2d 393 (2001).

351. *Id.* at 283-85, 551 S.E.2d at 394-95. *See also Pratt*, 253 Ga. App. 681, 560 S.E.2d 268 (involving the sale of medical practice), discussed in the text accompanying notes 251-65. The court, however, does not analyze the restraint under the sale of business cases. Apparently, the court felt that since the five physicians who were challenging the restraints were not included in the owners of the medical practice that was sold—even though they did receive some stock in the medical clinic's operating company and in the parent of the acquiring corporation as part of the transaction—the sale of business cases did not apply. The court, though, is very unclear about the contractual relationships of the various parties and does not discuss whether the five physicians had bargaining power greater than that of "mere employees."

352. *Hudgins*, 250 Ga. App. at 284, 551 S.E.2d at 395.

353. *Id.* at 286-87, 551 S.E.2d at 396. A federal court in Virginia held that the state would also adopt the "mere employee" test. Roto-Die Co. v. Lesser, 899 F. Supp 1515, 1519 (W.D. Va. 1995).

354. 250 Ga. App. at 286, 551 S.E.2d at 396.

355. *Id.* at 286-87, 551 S.E.2d at 396. There are two recent cases in which the federal courts, applying Georgia law, analyzed restrictive covenants that arguably were part of the sale of a business. In *Rinks v. Courier Dispatch Group, Inc.*, No. 1:01-CV-0678-JOF, 2001 U.S. Dist. Lexis 4728 (N.D. Ga. Apr. 11, 2001), the court relied on *Drumheller* as an alternative ground for denying a temporary restraining order. *Id.* at *10-11. There, the employee had previously owned twenty percent of a company, which she sold to her new employer. At the time of the sale, the employee signed a noncompete agreement. Subsequently, she was terminated. After her termination, Ms. Rinks threatened to sue her employer for sexual harassment and entered into a settlement agreement that contained a broadly written covenant not to sue. She then brought an action to have the noncompete provision declared unenforceable. *Id.* at *1-4. The court stated that plaintiff "certainly had the business savvy and acumen to negotiate" the noncompete clause and that there was a likelihood that the agreement would be treated under the sale of business standard. *Id.* at *10. Therefore, both because she was unlikely to prevail on the merits and because of the covenant not to sue, the court denied the motion for a temporary restraining order. *Id.*

Georgia courts have not articulated a clear approach on how to determine when a noncompete provision will be deemed ancillary to an employment agreement or when it will be deemed ancillary to the sale of the business. A methodology that is consistent with the cases is as follows: First, the court should determine whether the person subject to the restraint had bargaining power greater than that of a "mere employee."[356] If the person had only the bargaining power of a "mere employee," then Georgia courts will likely treat the noncompete provision as ancillary to an employment agreement. Second, if the employee had some bargaining power, then the court can still treat the noncompete provision as ancillary to an employment agreement depending on how the court evaluates a variety of factors. These factors include: Whether the employment agreement was entered into contemporaneously with sale of the business;[357] whether the employment agreement and the sale documents cross-reference each other;[358] what wording is used in any such cross-reference;[359] whether the covenant runs from the date of the sale as opposed to the termination of employment;[360] whether a substantial period has passed since the sale and the covenant is still in effect;[361] whether the two agreements are with the same entity;[362] and whether the person subject to the restraint was indeed employed by

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at *11. And in *In re Arbitration between Lanier Prof'l Servs., Inc. & Cannon*, No. 00-0723-BH-C, 2001 U.S. Dist. Lexis 3899 (S.D. Ala., March 8, 2001), the court dealt with a challenge to an arbitrator's ruling that under Georgia law a noncompete provision in employment contracts that had been entered into in connection with the sale of a business was unenforceable. The court upheld the arbitrator's decision, pointing out that the court's review of an arbitration award is limited and that the arbitrator had found that the individuals who were subject to the noncompete provision had only the bargaining power of "mere employees." *Id.* at *2, 4-7.

356. *White,* 251 Ga. at 205-06, 303 S.E.2d at 749. A recent case that applies this methodology to some degree is *Gale Industries, Inc. v. O'Hearn*, 257 Ga. App. 220, 570 S.E.2d 661 (2002). Gale Industries purchased Moultrie Insulation and entered into an employment agreement with O'Hearn, who was the manager of Moultrie but not a shareholder. While the Court did not determine whether O'Hearn was a "mere employee," the Court did hold that the restrictive covenant in the employment agreement should be treated as ancillary to an employment agreement and not ancillary to the sale of Moultrie Industries. The Court stated that Gale Industries had "superior bargaining power when it came to negotiating" with O'Hearn. *Id.* at 222, 570 S.E.2d at 663.

357. *Hamilton*, 218 Ga. at 598, 129 S.E.2d at 802.

358. *Drumheller*, 204 Ga. App. at 626, 420 S.E.2d at 334.

359. *Arnall,* 196 Ga. App. at 419, 396 S.E.2d at 261.

360. *Hamilton* 218 Ga. at 598-99, 129 S.E.2d at 802-03.

361. *Lyle*, 259 Ga. at 210, 378 S.E.2d at 466-67; *Arnall*, 196 Ga. App. at 419-20, 396 S.E.2d at 262 (Carley, J., concurring).

362. *Lyle*, 259 Ga. at 210, 378 S.E.2d at 466-67.

the acquiring company.[363] The decisions in this area probably will continue to be erratic because of the wide differences in results depending on how the restraint is characterized. If the restraint is ancillary to an employment agreement, normally, it will be subject to strict scrutiny. On the other hand, if the noncompete agreement is deemed to be ancillary to a sale of a business, it can be "blue penciled."[364]

All of the decisions cited above deal with the situation in which the employer is a small, privately held company. An executive could sign a noncompete agreement in connection with the sale of a large, publicity held corporation. There, the executive would tender his stock in the same manner as the other public shareholders. The executive may then sign an employment agreement with the acquiring company, which may or may not refer to the acquisition. Assuming that the court utilizes the methodology set forth above, the first task is to apply the rule set forth in *White*. The issue would be whether the employee had bargaining power or was a "mere employee." That issue, in turn, could depend on what role, if any, the executive played in the negotiations leading up to the sale of the business.[365]

The executive also may be subject to a noncompete agreement because he obtained a severance payment under a "change of control" agreement. In the usual case, the executive is an employee at will, and the change of control agreement becomes operative only if there is a change of control of the employer, normally when the employer is sold. Change-of-control agreements usually provide for substantial severance for the executive—a golden parachute—if he is terminated after the change of control. These agreements are entered into to keep key employees from leaving the company upon hearing that the employer might be sold. Such reports might be accurate or might be mere rumors. The presence of the change of control agreement gives the executive an incentive, sometimes a powerful incentive, to remain while a sale is being considered or negotiated and to stay during a transition period. In some such agreements, the executive can only leave when the acquiring company wishes him to do so or the severance package is forfeited. If

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363. *Hudgins*, 250 Ga. App. at 285, 551 S.E.2d at 396.

364. *See Drumheller*, 204 Ga. App. at 626-27, 420 S.E.2d at 334-35.

365. In addition to contending that a noncompete provision is ancillary to the sale of a business and not ancillary to an employment agreement, the employer may contend that the restrictive covenant should be upheld because the executive had considerable bargaining power. Indeed, the employer may argue that the sale itself provided the executive with additional bargaining leverage. Thus, the court could hold that while it is not prepared to rule that the restraint was ancillary to the sale of the business, the restraint was nonetheless subject to review under an intermediate scrutiny standard.

there is an acquisition, the acquiring company obtains the benefits of the change in control agreement, but if it terminates the executive, it must pay the severance.[366]

Having a noncompete provision in a change of control agreement also provides a tax advantage. If the executive is terminated as a result of the change of control, the amount of severance he can receive is limited by the anti-golden parachute provisions of the Internal Revenue Code.[367] These provisions, in effect, impose a confiscatory tax on certain excessive severance payments in a change of control situation. The IRS rules, however, state that payments in exchange for a noncompete provision are not counted against the maximum allowed under the anti-golden parachute rules.[368]

One should understand that change of control agreements are often not forced upon the employee but are eagerly sought after. To apply strict scrutiny to such agreements would be to protect employees from themselves. Nonetheless, in *Szomjassy v. OHM Corp.*,[369] the federal district court, applying Georgia law, held that such a change of control agreement was subject to strict scrutiny as an employment agreement.[370] While the court stated that "[i]n reaching its decision, the court also considers the relationship between the parties and their relative bargaining power,"[371] the court assumed that the agreement should be treated as an employment agreement.[372] Under strict scrutiny, the court found the covenant unenforceable.[373] Notwithstanding *Szomjassy*, there is an argument that change of control agreements should be subject to less scrutiny than a standard employment agreement. Certainly, one can contend that an executive that has obtained a lucrative golden parachute had significant bargaining capacity.

D. The Impact of Multiple Agreements Containing Noncompete Provisions

As pointed out above, executives may have signed two or more agreements that contain covenants restricting future competition. For example, such restrictions may be found in a stock option agreement or

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366. *See* Ocker & Schick, *supra* note 240, at 48.

367. I.R.C. § 280(G)(b)(2)(A)(ii) (2000).

368. *Id*. Szomjassy v. OHM Corp., 132 F. Supp. 2d 1041, 1053-58 (N.D. Ga. 2001).

369. 132 F. Supp. 2d 1041 (N.D. Ga. 2001). The Author served as General Counsel to OHM prior to and during the acquisition that triggered Mr. Szomjassy's change of control agreement, but was not involved in the Szomjassy litigation.

370. *Id.* at 1049, 1050.

371. *Id* at 1049.

372. *Id.*

373. *Id.* at 1051.

other form of deferred compensation, as well as in an employment agreement. The language may be identical to the restriction in the employment agreement or may be slightly different. The most important added complexity generated by two or more agreements concerns the "no blue pencil" rule.[374] If one of the restraints in one of the agreements is unreasonable, are all the restraints in all the agreements deemed unenforceable, or does the "no blue pencil" rule apply only to restraints in the same agreement?

There is authority that if the agreements are closely linked together, all the restraints fail if any one of them is unreasonable. In *Crowe v. Manpower Temporary Services*,[375] the employee signed two noncompete agreements in two separately signed employment agreements. The first covenant was found in an employment agreement, and the second was in a separately signed supplemental agreement. The covenant in the supplemental agreement was too broad.[376] The Georgia Supreme Court, stating that both covenants were "parts of the same overly broad covenant," invalidated both restraints.[377] In *A.L. Williams & Associates v. Stelk*,[378] the Eleventh Circuit, applying Georgia law, held that two different restrictive covenants in two different agreements were part of "a unitary contractual scheme" and that "[f]ailure of any one covenant voids all others of the same type."[379] The court pointed out in *Stelk* that each of the agreements cross-referenced the other and that they were both designed to accomplish the same purpose.[380]

A different approach was taken in *Coram*, a case that involved an employment agreement and a partnership agreement. There, Coram, who had been an employee for several years, purchased a limited partnership interest in his employer. The partnership agreement contained a noncompete provision. In addition to the partnership agreement and simultaneously with its execution, Coram entered into an employment agreement that had a different noncompete provision. After Coram left his employer, litigation developed, and on appeal, the

374. The Georgia Supreme Court has held that the presence of a stock option does not change the agreement from being ancillary to an employment agreement, as opposed to ancillary to the sale of a business. *Redmond*, 244 Ga. at 712-13, 261 S.E.2d at 587.

375. 256 Ga. 239, 347 S.E.2d 560 (1986).

376. *Id.* at 239-40, 347 S.E.2d at 561.

377. *Id.* at 240-41, 347 S.E.2d at 562.

378. 960 F.2d 942 (11th Cir. 1992).

379. *Id.* at 946.

380. *Id.* at 945 n.3.

enforceability of the noncompete provision in the employment agreement was at issue.[381]

The court held that the restraint in the employment agreement was subject to strict scrutiny for two independent reasons.[382] First, the court concluded that because the restriction was in an employment agreement, it was subject to strict scrutiny.[383] The court recognized that under its ruling the two noncompete restrictions would be subject to different levels of scrutiny, but it did not find that result troubling.[384] The court also found that Coram had the bargaining power only of a "mere employee" and therefore, the noncompete provision in the employment agreement was subject to strict scrutiny.[385] It is difficult to predict whether the court in *Coram* would have invalidated the covenant in the partnership agreement simply because the noncompete provision in the employment agreement was not enforceable. The statement that the two agreements would be subject to different levels of scrutiny implies that the court might have upheld the noncompete provision in the partnership agreement. Because only the employment restriction was before the court, that question was not discussed in *Coram*.

The question, however, was presented but not discussed in *Pratt*. As pointed out above, in *Pratt*, five physicians sought relief from restrictive covenants in employment agreements and in certain shareholder agreements.[386] The court followed the decision in *Coram* and subjected the different restrictions to different levels of scrutiny.[387] Moreover, in *Pratt*, the court found that one of the employment agreements was enforceable although the restrictions in the shareholder agreements were unenforceable.[388]

In *Pratt* the court held that the employment agreements should be subject to a different level of scrutiny, relying on *Coram* and stating:

> Here, there are the following additional factors differentiating the restrictive covenants in the employment contracts from those in the shareholder agreement: (i) at the time they entered into the employ-

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381. 237 Ga. App. at 758, 516 S.E.2d at 804. For some reason, the employer did not appeal the ruling that the noncompete in the partnership agreement was unenforceable. *Id.*

382. *Id.* at 759, 516 S.E.2d at 805.

383. *Id.*

384. *Id.*

385. *Id.* at 760, 516 S.E.2d at 806.

386. 253 Ga. App. at 682, 560 S.E.2d at 270.

387. *Id.* at 684, 560 S.E.2d at 271.

388. *Id.* at 687, 560 S.E.2d at 272, 273.

> ment agreements, the defendants were not shareholders of the new or former medical group, as they received no stock until the closing two months later; (ii) the employment agreements all specified that their restrictive covenants "shall be deemed, and shall be construed as separate and independent agreements"; and (iii) the restrictive covenant in the shareholder agreement indicated that it was in addition to the employment restrictive covenants in that it in no way relieved the shareholders of those separate employment obligations. Accordingly, we review the employment restrictive covenants under strict scrutiny.[389]

The court in *Pratt* assumed, without any discussion, that if the two agreements are subject to different levels of scrutiny, then the fact one is not enforceable does not render the other unenforceable, at least where the language in the agreements is similar to the language quoted above.

When faced with multiple agreements, each agreement must be analyzed separately. Assuming the correct level of scrutiny for each agreement can be determined and one of the agreements is not enforceable, it must be determined whether the restrictions are all part of "a unitary contractual scheme."[390] If so, one has an argument that the agreements should all be unenforceable. What constitutes a unitary contractual scheme is far from clear, and the law in this area is best described as muddled.

E. The Impact of Deferred Compensation Agreements Containing Noncompete Provisions

The possibility that there is a restrictive covenant in a stock option or other type of deferred compensation agreement raises an additional point. The employer may not seek an injunction but may seek the forfeiture of some financial compensation due to the executive, if the executive breaches the noncompete restriction. An analogous situation arose in *Smith Adcock & Co. v. Rosenbohm*.[391] There, the Georgia Court of Appeals struck down a provision in Rosenbohm's employment agreement that required him to make payments to his former employer, an accounting firm, if he provided services to any clients of his former firm.[392] The court analyzed that agreement in the same manner as employment agreements and found the agreement too broad because the employee was required to pay on any clients of his former firm, not just

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389. *Id.* at 684-85, 560 S.E.2d at 271.
390. *See A.L. Williams & Assocs.*, 960 F.2d at 946.
391. 238 Ga. App. 281, 518 S.E.2d 708 (1999).
392. *Id.* at 282, 285, 518 S.E.2d at 710, 711-12.

those to which he had provided services in the past.[393] The fact that the employer was not seeking an injunction had no impact on the court's decision. The court said that "'absent the terms of the agreement [Rosenbohm] would be free to compete without [paying for] the right to do so and without conditions.' Consequently, the agreement 'has the effect of lessening competition.' As such, it is in legal effect a covenant not to compete."[394]

In addition to the decision in *Rosenbohm*, there are several cases in which the court has been quite hostile to liquidated damage provisions that provided for certain payments if the former employee breached a noncompete provision or similar type restriction.[395] The courts probably would treat an agreement that required the executive to forfeit stock options or other deferred compensation if he breached a noncompete provision as a liquidated damages clause.[396] In Georgia a liquidated damage clause must be a reasonable estimate of damages, and such damages must have been difficult to ascertain at the time the parties entered into the agreement.[397] A deferred compensation forfeiture clause would probably not meet that test. Therefore, under Georgia law, if the employer seeks a forfeiture instead of an injunction for breach of a noncompete clause in an employment agreement, the restraint will be subject to strict scrutiny. A forfeiture provision does raise the stakes for the executive because the amount of compensation that will be forfeited may be quite significant, even if the chances of its enforcement are low.

III. SUMMARY OF THE ANALYSIS OF THE ENFORCEABILITY OF NONCOMPETE PROVISIONS EXECUTED BY EXECUTIVES

The review of a noncompete provision for an executive requires a careful analysis of the wording of the noncompete provision and a detailed factual inquiry. Simply relying on the wording of the restraint, in most cases, will not be sufficient. While one predicts how Georgia courts will rule in this area at one's peril, below is a summary of how one might analyze such a restraint.

First, there appear to be three major impermissible restrictions that will almost always invalidate a noncompete provision and, with the

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393. *Id.* at 284, 518 S.E.2d at 711.

394. *Id.* at 283, 518 S.E.2d at 710 (quoting Dougherty, McKinnon & Luby, P.C. v. Greenwald, Denzik & Davis, P.C., 213 Ga. App. 891, 893, 447 S.E.2d 94, 96 (1994)).

395. *See* Allied Informatics, Inc. v. Yeruva, 251 Ga. App. 404, 554 S.E.2d 550 (2001); Capricorn Sys., Inc. v. Pednekar, 248 Ga. App. 424, 427-28, 546 S.E.2d 554, 558-59 (2001); *Dougherty, McKinnon & Luby*, 213 Ga. App. 891, 447 S.E.2d 94.

396. *See Baggett*, 231 Ga. App. at 298-99, 498 S.E.2d at 355-56.

397. *Id.*

exception of the sale of a business situation, do not depend on the factual context. They are as follows: (1) if the provision is unlimited in time or the time of the restraint cannot be determined, the court will invalidate the restraint;[398] (2) if the restraint is unlimited in territory or the territory is as large as the United States and it *is not* a nonsolicitation restraint, then the restraint will not be valid;[399] (3) if the restraint *is* a nonsolicitation restraint, but limits the executive from soliciting customers with whom the executive did *not* have previous dealings, the restraint will not be enforced.[400]

Beyond these three major impressible restrictions, the factual context becomes more important, and Georgia courts may be more willing to overlook what may be called "technical errors" in drafting. For example, if one is dealing with a territory restraint that is "specified," then a factual inquiry into exactly what the executive did in the territory will be required.[401] Nevertheless, if the territory is large and the executive did not cover the territory in the same sense that a salesperson covers a territory, it is unlikely that the restriction will meet the "worked in the territory" test.[402] If the territory is small, a few counties or a radius of a few miles, and the executive does not serve the territory like a salesperson serves his territory, the precedent is limited. All one can say is that it appears that if the executive did some work in several locations in the territory, it should be upheld on the authority of *Baggett*.[403]

If one is dealing with a nonsolicitation restraint that is limited to customers with whom the executive dealt, the language of the restraint and the facts surrounding the executive's services for his former employer are all relevant. While one cannot cite a clear precedent, the court may be more willing to overlook "technical" defects in the drafting of the restraint. For example, the court might ignore the argument that the restraint prohibits accepting unsolicited customers.[404]

Assuming that one is dealing with an otherwise defensible territory or nonsolicitation restraint in the case of an executive, the court might easily rely on *Saxton* and disregard errors that were committed by the draftsperson concerning the scope of activity restriction.[405] Particular-

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398. Kuehn v. Selton & Assocs., 242 Ga. App. 662, 664, 530 S.E.2d 787, 790 (2000).

399. Am. Software USA, Inc. v. Moore, 264 Ga. 480, 482-83, 448 S.E.2d 206, 208-09 (1994).

400. *Mouyal*, 262 Ga. at 465-68, 422 S.E.2d at 531-35.

401. *Baggett*, 231 Ga. App. at 292-94, 498 S.E.2d at 351-52.

402. *Hulcher*, 247 Ga. App. at 490-92, 543 S.E.2d at 466-67.

403. *Baggett*, 231 Ga. App. at 292-94, 498 S.E.2d at 351-52.

404. *Compare Singer*, 250 Ga. at 377, 297 S.E.2d at 475, with *Covington*, 248 Ga. App. at 268-70, 546 S.E.2d at 40-41.

405. *See Saxton*, 220 Ga. App. at 807-09, 470 S.E.2d at 254-56.

ly, if the court feels that the executive is taking advantage of the employer or seeking to use unfairly information that he obtained while with the previous employer, the court is more likely to disregard the precise language of the noncompete provision and state that it considers the total restraint to be reasonable.[406]

If the employer can contend that the executive possessed some level of bargaining power, which will often be the case, one has to inquire into the facts surrounding the negotiations to determine whether there is evidence that there was separate consideration for the noncompete provision.[407] While trying to dissect negotiations after the fact to determine why a specific commitment was made is often difficult, apparently such a factual inquiry is required. If the court determines that the executive had some bargaining power and there was consideration for the noncompete provision, then the restriction might be subject to intermediate scrutiny and the court may be somewhat more tolerant of the restraint.[408] Basically, the court will be driven by its understanding of all the circumstances and its reaction to the factual presentation by the parties.

If the employer argues that the restraint is ancillary to the sale of a business, then the first issue is whether the executive was a "mere employee."[409] This analysis requires a detailed review of the executive's participation in the sale of his former employer. As pointed out above, however, even if the executive had some bargaining power, under the particular facts of the case, the court may still hold that the restraint is ancillary to an employment agreement, in which case the noncompete provision normally would be subject to strict scrutiny. But the court may still be willing to ignore technical drafting errors in the language of the noncompete provision, if the court feels that the executive had some bargaining power and if voiding the noncompete agreement would be unfair.

If there is more than one agreement, again the facts, including all the surrounding circumstances, are crucial. The issue will be whether the agreement constitutes a unitary contractual scheme.[410] If the court believes the agreements are one transaction, then it may hold all noncompete provisions subject to the same level of scrutiny or it may

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406. *See* Watson v. Waffle House, Inc., 253 Ga. 671, 324 S.E.2d 175 (1985).
407. *See Swartz*, 252 Ga. App. 369-71, 556 S.E.2d at 463-65.
408. *See Baggett*, 231 Ga. App. at 291, 498 S.E.2d at 350.
409. *See White*, 251 Ga. at 208, 303 S.E.2d at 751.
410. Crowe v. Manpower Temp. Servs., 256 Ga. 239, 240, 347 S.E.2d 560, 562 (1986).

apply different levels of scrutiny to each provision.[411] But if the agreements are all subject to strict scrutiny and if they are part of a unitary contractual scheme, then if one noncompete provision were deemed invalid, all noncompete provisions in all agreements would be invalid.[412] And finally, the analysis is the same regardless of whether the employer is seeking an injunction or a forfeiture.

This Article has focused on the current state of the law. In *Waffle House*, the Supreme Court of Georgia commented on criticism directed at its application of the law of restrictive covenants in Georgia. The court stated:

> The employment of [the three element] test in determining reasonableness has not been without criticism. In a dissent, former Chief Justice Jordan once wrote, "[t]en Philadelphia lawyers could not draft an employer-employee restrictive covenant agreement that would pass muster under the recent rulings of this court." Others have said that the test overly emphasizes mechanical rules and presumptions and therefore subjects the finding of reasonableness to artificial conditions. It has been suggested that a rule of reason in its most general form should be applied and that the court should exercise more discretion in its determinations by giving closer attention to the operation of each covenant in a particular factual setting. We can appreciate the concerns of both critics. It appears, however, that their criticisms seek different results. One calls for clearer guidelines for the drafter while the other calls for the application of additional subjective judgments so that better results will be reached. We believe both of these ends can best be served by retaining the three-element test of duration, territorial coverage, and scope of activity and utilizing it, not as an arbitrary rule but as a helpful tool in examining the reasonableness of the particular factual setting to which it is applied.[413]

But in attempting to steer a middle course between rules that are relatively clear to facilitate drafting and a wide-ranging reasonableness inquiry, the court has made it excessively difficult to predict whether any particular noncompete clause will be enforced. As pointed out above, there are three major impermissible restrictions that render a noncompete clause invalid in almost all situations.[414] If the noncompete agreement does not contain one of these errors, a full factual

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411. *Compare Crowe*, 256 Ga. at 240, 347 S.E.2d at 562 *with Coram*, 237 Ga. App. at 758-59, 516 S.E.2d at 805.

412. *Crowe*, 256 Ga. at 240-41, 347 S.E.2d at 561-62.

413. 253 Ga. at 672, 324 S.E.2d at 177-78 (citations omitted).

414. *See supra* text accompanying notes 382-89.

inquiry will be required, and even after all the facts are revealed, prediction is perilous.

When an executive is faced with seeking new employment, often he can have little certainty about whether a noncompete clause will be enforced. Litigation ensues, and litigation is expensive. Or because the executive cannot know if, under the particular facts of his situation, the restraint will be enforced, the executive must acquiesce. As a result, even an unenforceable covenant not to compete can have an *in terrorem* effect on the executive. The Georgia Supreme Court stated that one reason why it adhered to the "no blue pencil" rule, which prohibits the court from modifying a restraint to make it reasonable, was to discourage employers from drafting broad restraints and, thereby, requiring the employee to seek court intervention.[415] The lack of predictability in Georgia law may have the same effect.

There are three areas in which the Georgia courts could make the law of noncompete provisions easier to forecast. First, the Georgia courts should make clear when they are attempting to establish a "rule" and when they wish to establish a "standard." Professor Kaplow articulated the distinction between rules and standards:

> Arguments about and definitions of rules and standards commonly emphasize the distinction between whether the law is given content ex ante or ex post. For example, a rule may entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator. (A rule might prohibit "driving in excess of 55 miles per hour on expressways.") A standard may entail leaving both specification of what conduct is permissible and factual issues for the adjudicator. (A standard might prohibit "driving at an excessive speed on expressways.")[416]

In stating the law in Georgia, the courts should make clear when they are establishing a rule (a nonsolicitation covenant must be limited to customers with whom the employee dealt, for example) and when the court wants to establish a standard (the restriction must be for a reasonable time). One approach would be to state that in the employment context, there are only three general rules, the three major impermissible restrictions: unlimited time, unlimited territory, and limitless nonsolicitation.[417] The court could state other rules for

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415. *See* Richard P. Rita Personnel Servs. Int'l, Inc. v. Kot, 229 Ga. 314, 317, 191 S.E.2d 79-81 (1972) (relying upon Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960)).

416. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-60 (1992).

417. *See supra* text accompanying notes 382-89.

specific situations. For example, a medical professional who is working at a medical facility can be restricted only from competing in the area where the facility draws its patients. The court should be clear on when such rules apply. If a rule is applicable only to medical personnel or in franchise situations, it should be explicit. But once the courts have established a rule, they should adhere to it or explicitly overrule it. If the court wants to use standards, it is, of course, free to do so. There is, however, a price to be paid for vagueness, particularly in commercial law, when parties are attempting to conduct their affairs in light of the applicable law.

Second, the Georgia Supreme Court should also take the opportunity to resolve some of the confusion in the law concerning nonsolicitation restraints.[418] In the age of the Internet, when almost every business has a web site, trying to distinguish between soliciting customers and customers who seek out services without being solicited is an artificial exercise.[419] There also seems to be little justification for a scope of activity element in evaluating a nonsolicitation covenant. If the restriction prohibits the former employee from dealing with customers with whom he dealt and is reasonable in time, it does not seem necessary to make fine distinctions about the capacity in which the employee makes such contacts. In the vast majority of cases, the employee is providing the same type or similar services to his new employer as the employee provided to his former employer. The scope of activity element becomes a trap to invalidate restrictions written in the past or drafted by out of state counsel. Moreover, as pointed out above, the courts in Georgia sometimes, in effect, have chosen to ignore that element.

Third, the Georgia Supreme Court should clarify how the relative bargaining power of the employee and the employer will affect the analysis of a noncompete provision. The Georgia Supreme Court should make clear that restrictions in partnerships are subject to intermediate scrutiny because partners normally have more bargaining power. If a

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418. Clarity would be particularly helpful because many disputes may be resolved by arbitration. The courts should give the arbitrators as much guidance as possible. And there may be an increased tendency to use arbitration in light to the recent United States Supreme Court cases concerning the applicability of the Federal Arbitration Act to employment disputes. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Supreme Court made it clear that the Federal Arbitration Act, 9 U.S.C.S. §§ 1 to 2, applies to employment agreements. *Id.* This decision follows *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995), which held that the FAA should be broadly construed to realize full exercise of congress's power to regulate commerce. *Id.*

419. The Georgia Supreme Court should make it clear that *Singer* is overruled. 250 Ga. 376, 297 S.E.2d 473.

partner has only the bargaining power of a mere employee, any noncompete provision should be subject to strict scrutiny. Conversely, if an employee has substantial bargaining power, the agreement should be subject to intermediate scrutiny, regardless of whether the noncompete provision is in a partnership agreement, employment agreement, or other agreement. The recent Georgia Court of Appeals test, which contemplates an inquiry into whether there was some separate consideration for the noncompete provision, has no support in law or logic and should be abandoned. The courts still will have to develop rules and standards for the application of intermediate scrutiny. But, the focus will be on whether the person subject to the restraint had some bargaining power in the negotiations, not on the form of the agreement.

Uncertainty always will exist in the law governing the enforceability of covenants not to compete. Restrictions involving executives, which present a myriad of factual situations, will generate added complexity. That noncompete provisions will continue to be the subject of vigorous disputes is the only certainty.