

# AN UNCERTAIN FUTURE: GEORGIA'S POLICY ON RESTRICTIVE COVENANTS IN EMPLOYMENT CONTRACTS

## I. INTRODUCTION

The relationship of an employee to an employer is among one of the more complex and significant relationships in our society.<sup>1</sup> The employment relationship was originally considered a blend between the status of the individual and the right of contract. This led to a variety of legal rules based on public policy considerations and mutual assent between parties.<sup>2</sup> The development of contract law led many to become increasingly aware that an employment contract was far more complex than an ordinary contract for a discrete, singular transaction, and was sometimes guided by principles not traditionally within the realm of contract law.<sup>3</sup> This is primarily because the employment relationship often leads to unacceptable bargains due to the employer's inherent control over an employee and because the relationship deals with "human values of sustenance, security and survival."<sup>4</sup>

This Comment will focus primarily on one specific aspect of the employment contract: covenants not to compete. Covenants not to compete ("non-compete agreements") are agreements "generally part of a contract of employment or a contract to sell a business, in which the covenantor agrees for a specific period of time and within a particular area to refrain from competition with the covenantee."<sup>5</sup> The development of the law on non-compete agreements has been historically controlled by policy considerations which balance an employee's right to work, an employer's right to contract, and the public's right to unfettered

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1. 1 KURT H. DECKER, COVENANTS NOT TO COMPETE 1 (2d. ed. 1993)

2. *Id.* at 2.

3. *Id.*

4. *Id.*

5. Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 675 (2008).

competition.<sup>6</sup> Moreover, the paradigm shift from a labor and industrial economy towards an information and knowledge-based economy has increased the difficulty in understanding the competing interests between the parties and in discerning a pattern within non-compete jurisprudence.<sup>7</sup>

Georgia law in the area of non-compete agreements can be fairly described as greatly cluttered, disorganized and even a “swampy morass of conflicting interests and policies.”<sup>8</sup> The case law is filled with subtle distinctions due to the infinite number of permutations in factual and legal circumstances that may arise in employment. In 1990, the Georgia Legislature attempted to alter Georgia’s policy through the enactment of the Restrictive Covenant Act.<sup>9</sup> This Act generally permitted Georgia courts to “blue-pencil,” or sever, offending and unreasonable clauses from a non-compete agreement.<sup>10</sup> In 1991, the Georgia Supreme Court quickly held the Act unconstitutional under Article III, Section VI, Paragraph V(c) of the 1983 Georgia Constitution.<sup>11</sup>

In light of this tension between the Georgia courts and the legislature, the case law that has developed through the years is once again at the heart of the debate currently on the floor of the Georgia Legislature. On March 12, 2009, the Georgia House of Representatives passed House Bill 173. The Georgia Senate passed HB 173 on April 1, 2009. The bill is intended to set forth a statutory framework for enforcing restrictive covenants in employment contracts.<sup>12</sup> However, HB 173 goes further by fundamentally altering Georgia’s policy to allow courts to not only sever, but also modify restrictive covenants in employment contracts. The sponsor of the bill, Representative Kevin Levitas,

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6. Decker, *supra* note 1, at 22.

7. See Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721 (Spring 2002).

8. Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 917 (W. Va. 1982).

9. O.C.G.A. § 13-8-2(a)(2) (1990); *See infra* Part III.C.

10. O.C.G.A. § 13-8-2.1(g)(1).

11. *See* Rooney v. Jackson & Coker, Inc., 409 S.E.2d 522 (Ga. 1991); *See* Jackson & Coker, Inc. v. Hart, 405 S.E.2d 253 (Ga. 1991); *See infra* Part III.C.

12. H.B. 173, 150th Gen. Assem., Reg. Sess. (Ga. 2009).

supplemented HB 173 with House Resolution 178, a constitutional amendment, which would create the constitutional and statutory authority that the Georgia Supreme Court implicitly stated is necessary in order to adopt legislation of this type.<sup>13</sup> Therefore, HB 173 can only be enacted if the amendment is passed by the Georgia Legislature and submitted and approved by the citizens of Georgia through a referendum during the 2010 general election.<sup>14</sup>

While there is certainly a need for legislative clarity concerning the law of restrictive covenants in Georgia, this Comment argues that such a dramatic change is unnecessary and contrary to Georgia's historical policy rationale in this area. Before examining the proposed legislation, Part II will provide a brief summary of terminology used throughout the Comment. Part III will discuss the current state of restrictive covenant law in Georgia, including previous legislation. Part IV will provide an overview of the current legislation and testimony during subcommittee sessions. Part V will discuss economic and public policy considerations in non-compete law and trends in other states. Finally, in Part VI this comment will illustrate how the "modification" provision in the proposed legislation will have unintended results and is in direct contravention with Georgia's historical pro-employee policy.

## II. TERMINOLOGY AND KEY DEFINITIONS

### *A. Restrictive Covenants Generally*

In Georgia, there are four main types of restrictive covenants:<sup>15</sup> non-competition,<sup>16</sup> non-solicitation of customers,<sup>17</sup> non-recruitment of employees,<sup>18</sup> and non-disclosure of

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13. H.R. 178, 150th Gen. Assem., Reg. Sess. (Ga. 2009).

14. GA. CONST., art. X, § 1, ¶. 2 (1983).

15. *Albany Bone and Joint Clinic, P.C. v. Hajek*, 612 S.E.2d 509, 512 (Ga. Ct. App. 2005).

16. Generally, a non-competition covenant restricts a former employee from competing with the former employer in a specified area for a specified time. *Id.*

17. Non-solicitation covenants typically prohibit the solicitation of the former employer's customers. *Id.*

18. Non-recruitment covenants restrict a former employee's ability to

confidential information.<sup>19</sup> These types of restrictive covenants exist in contracts between an employer and an employee and serve to protect the employer's interest in property, confidential information, customer goodwill, business relationships and other economic advantages the employer has generated for the business over the years.<sup>20</sup>

Restrictive covenants in employment contracts are generally disfavored as potential restraints of trade which tend to lessen competition.<sup>21</sup> In Georgia, a restrictive covenant contained in an employment contract is considered to be a partial restraint of trade and will be upheld if the restraint imposed is not unreasonable, is founded on a valuable consideration, 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.<sup>22</sup> This judicially-created legal test is commonly known to be derived from the "rule of reason." The question of the reasonableness of the restraint arises most often in connection with covenants not to compete and agreements not to disclose and use confidential business information or trade secrets.<sup>23</sup>

As stated above, the main focus of this Comment will be to explore the enforceability of non-compete agreements. Because this Comment will also discuss non-solicitation agreements to some extent, it is necessary to distinguish the two. Although non-solicitation agreements are designed to protect different interests and are analyzed differently than non-compete agreements, they often overlap. A covenant not to compete prohibits the employee from performing competitive

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recruit the former employer's employees. *Id.*

19. Non-disclosure covenants limit a former employee's ability to use or to disclose confidential information that does not rise to the level of trade secrets. *Id.*

20. *Id.* Non-competition covenants may also exist ancillary to contracts for the sale of a business or those governing business partnerships or corporations. See *Habif, Arogeti & Wynne, P.C. v. Baggett*, 498 S.E.2d 346 (Ga. Ct. App. 1998) (professional partnership agreement); *Watson v. Waffle House, Inc.*, 324 S.E.2d 175 (Ga. 1985) (sale of business).

21. See *MacGinnitie v. Hobbs Group, LLC*, 420 F.3d 1234 (11th Cir. 2005).

22. *Palmer & Cay of Ga., Inc. v. Lockton Cos., Inc.*, 615 S.E.2d 752 (Ga. App. 2005).

23. *Id.*

activities in a certain geographic area for a certain period of time.<sup>24</sup> Thus, a non-compete agreement protects the employer's "investment of time and money in developing the employee's skills."<sup>25</sup> A covenant not to solicit prohibits an employee from soliciting some or all of the employer's clients for a limited time and sometimes in a limited geographic area.<sup>26</sup> Thus, a non-solicitation covenant protects the employer's "investment of time and money in developing customer relationships and goodwill."<sup>27</sup>

Another important characteristic of restrictive covenants in Georgia is that non-compete and non-solicitation covenants stand or fall together, while non-recruitment and non-disclosure covenants are evaluated separately from the rest of the covenants.<sup>28</sup> As a result, an invalid non-solicitation covenant will also invalidate an otherwise valid non-compete agreement and vice versa, but it will not invalidate an otherwise valid non-disclosure agreement.<sup>29</sup>

### *B. Enforceability and the Blue-Pencil Doctrine*

States have used a variety of approaches to determine the enforceability of non-compete agreements. The approaches can be visualized by considering them along a "spectrum of enforceability." By far the most restrictive states (those on the "unenforceability" end of the spectrum) are California, Montana, and Oklahoma which prohibit employers or severely limit them from enforcing non-compete agreements as a matter of public policy.<sup>30</sup> California's outright statutory prohibition on non-compete agreements<sup>31</sup> is frequently used as an academic case study by many scholars and is used to evaluate approaches taken in other states based on the perceived effect of non-

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24. *Habif, Arogeti & Wynne, P.C.*, 498 S.E.2d at 353.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Sunstates Refrigerated Servs., Inc. v. Griffin*, 449 S.E.2d 858, 859-61 (Ga. Ct. App. 1994).

29. *Id.*

30. Pivateau, *supra* note 5, at 677.

31. CAL. BUS. & PROF. CODE § 16600 (Deering 2009).

compete agreements on state economic conditions.<sup>32</sup> Other states will generally enforce non-compete agreements by applying some variation of the “reasonableness” standard described above.<sup>33</sup> Among these states, there are at least three schools of thought on how enforceability is most effective, all of which rely on the blue-pencil doctrine.<sup>34</sup>

The blue-pencil doctrine is defined as a “judicial standard for deciding whether to invalidate the whole contract or only the offending words.”<sup>35</sup> The doctrine is based upon an “understanding that there is not necessarily a sinister purpose behind an overbroad restrictive covenant” and courts will generally look at an employer’s good faith in determining whether to apply the doctrine.<sup>36</sup> The three schools of thought on application of the blue-pencil doctrine to enforce non-compete agreements are: (1) the “no-modification” approach, (2) the strict blue-pencil approach, and (3) the liberal blue pencil or “partial enforcement” approach.<sup>37</sup>

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32. See Christine M. O’Malley, *Covenants Not to Compete in the Massachusetts Hi-Tech Industry: Assessing the Need for a Legislative Solution*, 79 B.U.L. REV. 1215 (December 1999) (arguing that although California has a workable model to address needs in Massachusetts, a modified version of Colorado’s statute would strike a better balance); 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 (June 1999) (discussing the “serendipity” and “historical accident” of California’s adoption of an existing proposed legal code containing the strict prohibition of restraints on freedom employment); James 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 (Fall 2000) (stating that the formula for creating a sustainable technology-based agglomeration economy consists of a large number of extremely complex, interrelated factors).

33. Pivateau, *supra* note 5, at 677. In Georgia, courts examine reasonableness by scrutinizing a restriction’s duration, geographic limitation and the scope of the limited activity. See *W.R. Grace & Co., v. Mouyal*, 422 S.E.2d 529 (Ga. 1992) (holding that a restrictive covenant prohibiting a former employee from rendering services to any client of the employer must contain a territorial restriction expressed in geographic terms); See *infra* Part III.B.

34. Pivateau, *supra* note 5, at 682.

35. BLACK’S LAW DICTIONARY 183 (8th ed. 2004).

36. Pivateau, *supra* note 5, at 682.

37. *Id.*

The “no-modification” rule, also known as the “all-or-nothing” rule, precludes the use of the blue-pencil doctrine entirely.<sup>38</sup> In these states, courts cannot rewrite or strike overbroad provisions.<sup>39</sup> If the court determines that the restrictive covenant is not reasonable, it will not modify or eliminate provisions; it will simply refuse to enforce the agreement at all.<sup>40</sup> The strict blue-pencil approach allows a court to strike unreasonable contractual provisions, but the court is not permitted to revise or add language.<sup>41</sup> Finally, the liberal blue-pencil or “partial enforcement” approach provides the most flexibility for a court to substantively alter an agreement.<sup>42</sup> Under this approach, courts can modify or reform the agreement to the extent that it is reasonable, but cannot modify or reform the agreement more broadly than what is reasonably necessary to protect the employer.<sup>43</sup>

Georgia currently follows the “no-modification” rule for non-compete agreements in employment contracts. Although this Comment will focus on restrictive covenants ancillary to the employment contract, it is worth noting that Georgia courts will treat different types of restrictive covenants with varying levels of scrutiny depending on the relative bargaining power between the parties.<sup>44</sup> Employment contracts receive a strict scrutiny analysis (the “no-modification” rule), partnership agreements receive an intermediate level of scrutiny and contracts for the sale of a business enjoy “much less scrutiny.”<sup>45</sup>

Contracts for the sale of a business are the most lenient and courts will generally allow much longer temporal restrictions and sometimes even modify the contract by implementing the “blue-pencil theory of severability.”<sup>46</sup> However, as mentioned

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38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 683.

42. *Id.* at 688.

43. *Id.*

44. *Watson v. Waffle House, Inc.*, 324 S.E.2d 175, 177 (Ga. 1985)

45. See Jeffrey T. Rickman, *Noncompete Clauses in Georgia: An Economic Analysis*, 21 GA. ST. U. L. REV. 1107, 1119 (Summer 2005); *New Atlanta Ear, Nose & Throat Assocs. v. Pratt*, 560 S.E.2d 268, 271 (Ga. Ct. App. 2002).

46. Rickman, *supra* note 45, at 1119. The blue pencil doctrine of

above, in employment contracts, courts applying strict scrutiny will not blue-pencil an overbroad covenant to make it enforceable, but will instead strike down the entire covenant.<sup>47</sup> The Georgia Supreme Court's refusal to apply the blue-pencil theory is partly based on a policy determination that doing so would greatly chill employee competition.<sup>48</sup> The Eleventh Circuit provided a further explanation for refusing to use the blue-pencil theory:

[r]ecognizing that employees often choose not to challenge illegal covenants in hopes of maintaining good relations with former employers, the Georgia Supreme Court refuses to reform even reasonable employment covenants in order to discourage employers from fashioning overly broad covenants that will remain unchallenged in most instances.<sup>49</sup>

### *C. Trade Secrets and Non-Disclosure Agreements*

"Trade secret" is defined in the Georgia Trade Secret Act of 1990.<sup>50</sup> Trade secrets can be distinguished from physical

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severability allows one to cross out an unreasonable part of a contract to permit the remaining, presumably valid, sections to stand. *See* Steven E. Harbour, *Restrictions on Post-Employment Competition by an Executive Under Georgia Law*, 54 MERCER L. REV. 1133, 1136 (2003). However, a court may not write in a limitation in order to make the contract enforceable. *See* New Atlanta Ear, Nose & Throat Assocss v. Pratt, 560 S.E.2d 268, 273 (Ga. Ct. App. 2002). ("the blue pencil marks, but it does not write").

47. *See* Habif, Arogeti & Wynne, P.C. v. Baggett, 498 S.E.2d 346, 349 (Ga. Ct. App. 1998). *See also* Palmer & Cay, Inc. v. Marsh & McLennan Cos., 404 F.3d 1297, 1307 (11th Cir. 2005) (stating that "if employers were allowed to blue-pencil their agreements, they could load up non-competition agreements with oppressively overreaching terms and intimidate all but the litigation-hardy employees, then post-hoc excise offending provisions to avoid requested judicial invalidation").

48. *Howard Schultz & Assocs., of the Southeast, Inc. v. Broniec*, 236 S.E.2d 265, 269 (Ga. 1977).

49. *Palmer & Cay*, 404 F.3d at 1303-04.

50. *See* O.C.G.A. § 10-1-760. "Trade secret" means information, without regard to form, including, but not limited to technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public and which information: (A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can

personal property, the latter of which is provided greater legal protection. Trade secrets can also be distinguished from other confidential business information that does not rise to the level of a trade secret. A business may choose to protect a trade secret through an express non-disclosure agreement, but they are not required to do so.<sup>51</sup> However, a business must use a non-disclosure agreement—if enforceable—to protect any confidential information that does not satisfy the elements of a Georgia trade secret.<sup>52</sup> In Georgia, non-disclosure agreements are only enforceable if they are reasonably limited in the duration and the nature of the business interest sought to be protected.<sup>53</sup> Unlike non-compete agreements, non-disclosure agreements do not require a territorial limitation.<sup>54</sup>

Non-disclosure agreements are meant to protect and prevent the exploitation of the employer's "commercial intangibles," such as knowledge or information relating to the employer's business.<sup>55</sup> In this way, the underlying protectable interest is quite different than the interests Georgia courts have cited for non-compete and non-solicitation agreements and all three types have a relative effect on restraining trade. The courts apply a two-factor test for non-disclosure agreements: (1) whether the employer intends to protect confidential information regarding the business, including: trade secrets, operational methods, customer names and personnel data and (2) whether the covenant relates to protecting such information.<sup>56</sup> Due to the public policy favoring non-disclosures, court generally have more flexibility in upholding these types of agreements, even if the court strikes down the non-competition or non-solicitation covenant within the same agreement.<sup>57</sup>

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obtain economic value from its disclosure or use; and (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. O.C.G.A. § 10-1-761(4 A-B).

51. *Thomas v. Best Mfg. Corp.*, 218 S.E.2d 68 (Ga.1975).

52. *Lee v. Envtl. Pest & Termite Control, Inc.*, 516 S.E.2d 76 (Ga. 1999); *Durham v. Stand-By Labor of Georgia, Inc.*, 198 S.E.2d 145 (Ga. 1973).

53. *Lee*, 516 S.E.2d 76; *Nasco, Inc. v. Gimbert*, 238 S.E.2d 368 (Ga. 1977).

54. *Lee*, 516 S.E.2d 76.

55. *Id. at* 78.

56. *Durham*, 198 S.E.2d 145 (Ga. 1973).

57. *Sunstates Refrigerated Svcs.*, 449 S.E.2d 858, 860 (Ga. App. 1994).

*D. A Recent Illustration*

On February 18, 2009, the Georgia Court of Appeals decided *Global Link Logistics, Inc. v. Briles*,<sup>58</sup> which serves as an illustrative example of the Georgia courts' rigid stance in refusing to enforce non-compete agreements that contain no specificity. In 2006, Jim Briles entered into an employment contract with Global Link's predecessor in interest which contained a non-disclosure covenant as well as a non-compete and non-solicitation covenant.<sup>59</sup> At the time of the agreement, Briles acquired no ownership interest in Global Link. Later, he acquired an equity interest in Global Link in one of the transactions surrounding Global Link's purchase of the predecessor.<sup>60</sup> Briles left the company in 2007 and began working for a competitor shortly thereafter.<sup>61</sup> The Court of Appeals affirmed the trial court's holding that the restrictive covenants were unenforceable.<sup>62</sup> First, the court declined to consider this agreement as one ancillary to the sale of the business. The court found that even though Briles became part owner as a "result of the transaction," the covenant deserves strict scrutiny because Briles had "the bargaining power of only a mere employee at the time he *negotiated* the transaction."<sup>63</sup> Next, the court stated that the non-compete and non-solicitation agreements were broad and too indefinite to be enforceable because they failed to specify with particularity the activities that Briles was prohibited from performing, and because it purported to bar Briles from solicitation of all Global Link's

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58. *Global Link Logistics, Inc. v. Briles*, No. A08A1871, 2009 WL 386906 (Ga. Ct. App. Feb. 18, 2009).

59. *Id.* at \*1. The non-disclosure covenant prohibited Briles, without time limitation, from disclosing or using for his own purposes "the information (including lists of customers or potential customers), observations, customer and vendor relationships and data (including trade secrets) obtained by him while employed by the Company." *Id.* The non-compete covenant prohibited Briles from "engaging (whether as an owner, operator, manager, employee, officer, director, consultant, advisor, representative or otherwise), directly or indirectly in an Competitive Business for 24 months after his departure, and from soliciting any Global Link customer, present or future supplier or employee during that time. *Id.*

60. *Id.*

61. *Id.* at \*2.

62. *Id.*

63. *Id.* (emphasis in original)

customers, regardless of whether Briles had material contact with them.<sup>64</sup> Finally, the court also held the non-disclosure agreement unenforceable because it attempted to cover Briles' "observations" and lacked a time limitation, and was therefore overly broad.<sup>65</sup>

The *Global Link* case is a recent example of the difficulty employer's have in enforcing restrictive covenants that are not specific and narrowly drafted. One reason for this is because Georgia courts have fashioned many subtle rules, any of which can be used to invalidate an entire agreement. In this manner, Georgia courts have taken a decidedly pro-employee stance in non-compete agreements and have provided some rationale for their refusal to apply a blue-pencil theory. However, before examining this rationale along with other policy concerns<sup>66</sup>, it is first necessary to trace the origins of Georgia non-compete law in greater detail.

### III. CURRENT STATE OF THE LAW

#### A. *Brief History*

The earliest recorded case of restrictive covenants emerged in English common law.<sup>67</sup> In 1898, the Georgia Supreme Court

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64. *Id.* at \*3.

65. *Id.* at \*2.

66. See discussion *infra* part V.

67 In 1414, subsequent to the adoption of the Ordinance of Labourers, a judge refused to enforce a plaintiff's request to enjoin one of his former clothes dyers from working in the same town for six months. More than two hundred years later, in 1621, English courts carved an exception to the general rule that restraints on trade were absolutely void and enforced restraints limited to a specific geographic location. By 1711, the exception had become the general rule in the landmark case of *Mitchel v. Reynolds*, which established the modern framework for the enforceability of non-compete agreements and attempted to apply a rule balancing the interests of the employee with those of the employer. See MATT MARX ET AL., NONCOMPETES AND INVENTOR MOBILITY: SPECIALISTS, STARS AND THE MICHIGAN EXPERIMENT (2007), available at <http://www.hbs.edu/research/pdf/07-042.pdf> [hereinafter *Michigan Experiment Report*]; see also *Alger v. Thacher*, 36 Mass. 51, 52 (Mass. 1837) (stating that English common law had been considered old and settled since 1415 that restraints on trade are void).

decided the landmark case *Rakestraw v. Lanier*,<sup>68</sup> which explicitly stated Georgia's policy in the context of employment restrictive covenant contracts. In *Rakestraw*, two physicians entered into a partnership contract with a non-compete clause, stating that if the partnership were to dissolve, neither party would practice medicine within fifteen miles of the partnership base and that any violation of the agreement would result in a \$1,000 penalty.<sup>69</sup> When Lanier sought to enforce the contract, the Georgia Supreme Court stated the clause was unenforceable because it imposed overly broad geographic and temporal restrictions.<sup>70</sup> The Court thus established a reasonableness requirement which has had a lasting effect on Georgia restrictive covenant jurisprudence.<sup>71</sup>

### *B. The Rule of Reason in Georgia*

The Georgia Constitution declares void any contract which "may have the effect of or which is intended to have the effect of defeating or lessening competition."<sup>72</sup> Although restrictive covenants lessen competition to some degree by their very nature, Georgia courts have created a distinction between general and partial restraints of trade.<sup>73</sup> Restrictive covenants in employment contracts are considered partial restraints of trade and thus do not always violate the Georgia Constitution.<sup>74</sup>

The reasonableness requirement test established by Georgia courts states that a covenant restricting post-employment competition is enforceable if:

[1] the restraint imposed is not unreasonable, [2] is founded on a valuable consideration, [3] and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and [4] does not unduly prejudice the interests of the public.<sup>75</sup>

The reasonableness of a restrictive covenant is a question of

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68. *Rakestraw v. Lanier*, 30 S.E. 735 (Ga. 1898).

69. *Id.* at 735-736.

70. *Id.* at 741.

71. *See* Rickman, *supra* note 45, at 1112.

72. *See* GA. CONST., art. III, § 6, ¶. 5(c) (1983).

73. *See* *W.R. Grace & Co., v. Mouyal*, 422 S.E.2d 529 (Ga. 1992)

74. *Id.*

75. *Id.*

law for the court to determine, considering the nature and extent of the trade or business, the situation of the parties, and all other relevant circumstances.<sup>76</sup> In determining the reasonableness of restrictive covenants, Georgia courts will examine the restriction's duration, geographic limitation and the scope of the limited activity as a "helpful tool" in examining reasonableness of a particular factual setting to which it is applied.<sup>77</sup> Because the first prong of this test is the most imprecise, the duration, geographic limitation and scope of activity requirements are discussed in greater detail below. As a practical concern, the imprecision in this test and the legislature's failure to codify specific requirements has led to a lack of clarity for attorneys, as they attempt to draft non-compete agreements for their clients. This lack of clarity allows a court to use any particular and subtle rule to invalidate the agreement.

A court will not invalidate a restrictive covenant for lack of consideration unless "there be such gross inadequacy of consideration as to shock the conscience and amount in itself to [be] evidence of fraud, or be void for some other reason."<sup>78</sup> Generally, courts have held that when covenants are created at the time of hiring, the employment itself is adequate consideration for the covenant.<sup>79</sup> However, courts have differed on enforcement of restrictive covenants in cases where the employee signs a covenant after a period of continuous employment.<sup>80</sup>

Courts have found that it is generally unreasonable for an employer to restrict a former employee from post-employment solicitation in a geographic area where the employer has no business interest.<sup>81</sup> However, an employer does have a legitimate interest in preventing former employees from exploiting their personal relationships with the employer's

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76. *Id.* at 465.

77. *See Pittman v. Harbin Clinic Prof'l Ass'n*, 437 S.E.2d 619 (Ga. Ct. App. 1993).

78. *Breed v. Nat'l Credit Ass'n, Inc.*, 88 S.E.2d 15, 17 (Ga. 1955).

79. *See Landmark Fin. Servs., Inc. v. Tarpley*, 224 S.E.2d 736, 738 (Ga. 1976).

80. *See Mike Bajalia, Inc. v. Pike*, 172 S.E.2d 676 (Ga. 1970); *White v. Fletcher/Mayo/Assocs., Inc.*, 303 S.E.2d 746 (Ga. 1983).

81. *See W.R. Grace & Co., v. Mouyal*, 422 S.E.2d 529, 531 (Ga. 1992).

customers.<sup>82</sup> Thus, the territorial limitation must not be significantly larger than the area where the employee worked.<sup>83</sup> However, it is also possible for an employer to make a showing of a legitimate business interest in an area outside of which the former employee worked, and the court will consider the uniqueness of the business and whether the employer has anyone else who can adequately service the restricted area.<sup>84</sup>

There is very little guidance from the courts on the extent to which a restraint will prejudice the public interest. Generally, the public interest seems to favor employee mobility. In *Pregler v. C&Z, Inc.* the Georgia Court of Appeals invalidated a non-solicitation covenant explaining that because it prevented the employee from accepting business from unsolicited former clients, it unreasonably overprotected the employer's interest and had a negative impact on the employee and the "public's ability to choose the professional services it prefers."<sup>85</sup>

### *1. Cases Involving Duration*

Although there is no specific duration requirement, a clause that lacks a duration restriction will always be found unenforceable.<sup>86</sup> There is little guidance by the courts as to what duration will survive judicial scrutiny, but courts have occasionally held that two years or less is considered reasonable.<sup>87</sup> A court may also find a time restriction reasonable if it is described relative to the time it would take for the employer to assign a new employee to the task and reestablish

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82. *Wiley v. Royal Cup, Inc.*, 370 S.E.2d 744, 745 (Ga. 1988).

83. *Id. But see Habif, Arogeti & Wynne, P.C. v. Baggett*, 498 S.E.2d 346, 352 (Ga. Ct. App. 1998).

84. *Id. See also Nat'l Settlement Assocs. of Ga., Inc. v. Creel*, 349 S.E.2d 177, 179 (1986).

85. *Pregler v. C&Z, Inc.*, 575 S.E.2d 915, 916 (Ga. Ct. App. 2003).

86. *See Johnson v. Lee*, 257 S.E.2d 273, 275 (Ga. 1979); *Stahl Headers, Inc. v. MacDonald*, 447 S.E.2d 320, 322 (Ga. Ct. App. 1994).

87. *See Aladdin, Inc. v. Krasnoff*, 105, S.E.2d 730, 731 (Ga. 1958); *Habif, Arogeti & Wynne, P.C.*, 498 S.E.2d at 351; *but see Smith v. HBT, Inc.*, 445 S.E.2d 315 (Ga. Ct. App. 1994) (holding a five year non-compete that applied only in certain territories and to clients identified on a list was not unreasonable considering the specialized nature of HBT's agricultural and industrial supply business).

working relations with its customers.<sup>88</sup>

## 2. *Cases Involving Geographic Limitations*

When analyzing the geographic limitation requirement, it is again necessary to distinguish between a general non-compete provision and a non-solicitation restriction. A non-compete covenant may prevent an employee from accepting competing business (whether solicited or not) from any clients (whether previously contacted by him or not) within a given territory.<sup>89</sup> In a general non-compete provision, the territorial restriction must be “specific” and “reasonable.”<sup>90</sup> Georgia courts will generally enforce a territorial restriction limited to where the employer conducts business if the employer can prove the legitimate business interests it seeks to protect.<sup>91</sup> An important but seldom used exception to this general rule is that a court will enforce a territorial restriction even if the employer conducts no business in the area if the employer can prove it has “substantial contacts” in the region.<sup>92</sup> Courts will usually invalidate a non-compete agreement if the territorial limitation was not fixed at the time the covenant was executed,<sup>93</sup> or if it significantly exceeded the area serviced by the former employee.<sup>94</sup> In a recent

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88. *See* *Orkin Exterminating Co. v. Walker*, 307 S.E.2d 914, 916-17 (Ga. 1983).

89. *Id.*

90. *Kuehn v. Selton & Assocs., Inc.*, 530 S.E.2d 787, 790 (Ga. Ct. App. 2000); *See also Rickman, supra* note 45, at 1115.

91. *See* *Rollins Protective Servs. Co. v. Somers*, 289 S.E.2d 764 (Ga. 1982); *Howard Schultz & Assocs., of the Southeast, Inc. v. Broniec*, 236 S.E.2d 265, 267-68 (Ga. 1977); *See also Rickman, supra* note 45, at 1115-6.

92. *See* *Edwards v. Howe Richardson Scale Co.*, 229 S.E.2d 651 (Ga. 1976) (holding that although employer was not doing business within the territorial restriction, it did have substantial contacts in the territory based on the highly competitive nature of the employer’s business and the fact that the employer paid for the employee to attend a school to sharpen his skills).

93. *New Atlanta Ear, Nose & Throat Assocs. v. Pratt*, 560 S.E.2d 268, 272 (Ga. Ct. App. 2002) (striking down non-compete prohibiting physicians from working within an 8-mile radius of the employer’s offices because the office locations were not written into the contract).

94. *Wiley v. Royal Cup, Inc.*, 370 S.E.2d 744, 745-46 (Ga. 1988); *Kloville, Inc. v. Kinsler*, 238 S.E.2d 344, 345 (Ga. 1977); *But see* *Habif, Arogeti & Wynne, P.C. v. Baggett*, 498 S.E.2d 346 (Ga. Ct. App. 1998) (stating that the fact that the employee only worked in 9 of the 11 restricted

case, *Beacon Security Technology, Inc. v. Beasley*, the Georgia Supreme Court held that a non-compete agreement which prevented the employee from performing a number of activities within eight restricted counties was unenforceable because the employer failed to prove that the employee actually performed each of those activities within each of the restricted counties during his employment.<sup>95</sup> Finally, courts have produced mixed results in cases where the limitation is stated in vague terms.<sup>96</sup>

In contrast, a covenant not to solicit prohibits an employee from soliciting some or all of the employer's clients for a limited time and sometimes in a limited geographic area.<sup>97</sup> A non-solicit covenant, may prevent an employee from soliciting those clients with whom he had contact during his employment, but it may not preclude the employee from accepting unsolicited business from those clients.<sup>98</sup> In *W.R. Grace & Co., v. Mouyal*, the Georgia Supreme Court stated that a former employer may restrict solicitation of customers with whom the employee has had meaningful direct contact or prior dealings, regardless of whether they include a geographic limitation.<sup>99</sup> However, an employer may not restrict a former employee from contacting any of the employer's customers without including a specific geographic region.<sup>100</sup>

In *Trujillo v. Great Southern Equipment Sales, LLC.*,<sup>101</sup> the

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counties at the time of his termination did not render the covenant overbroad because "the law does not require exact precision").

95. *Beacon Sec. Tech., Inc. v. Beasley*, 648 S.E.2d 440, 442 (Ga. Ct. App. 2007).

96. *Hamrick v. Kelley*, 392 S.E.2d 518, 519 (Ga. 1990) (holding that a territorial limitation stated in terms of a radius of miles from an undefined term such as "metro-Atlanta" was too vague for enforcement); *But see Keeley v. Cardiovascular Surgical Assocs., P.C.*, 510 S.E.2d 880, 884-85 (Ga. Ct. App. 1999) (stating that where a city, as opposed to a metropolitan area, is designated as the center of the radius the limitation is not overly vague).

97. *Habif, Arogeti & Wynne, P.C. v. Baggett*, 498 S.E.2d 346 (Ga. Ct. App. 1998).

98. *Id.*

99. *Am. Software USA, Inc. v. Moore*, 448 S.E.2d 206, 208-9 (Ga. 1994); *W.R. Grace & Co., v. Mouyal*, 422 S.E.2d 529, 531 (Ga. 1992); *Rickman*, *supra* note 45, at 1117.

100. *Am. Software USA, Inc.* 448 S.E.2d at 208-9; *W.R. Grace & Co.*, 422 S.E.2d at 531; *Rickman*, *supra* note 45, at 1117.

101. *Trujillo v. Great S. Equip. Sales, LLC*, 657 S.E.2d 581 (Ga. Ct. App.

Georgia Court of Appeals appeared to greatly narrow the permissible scope of non-solicitation clauses. Great Southern, a company engaged in the business of selling transportation equipment, hired Ms. Sarah Trujillo to work as a salesperson.<sup>102</sup> Trujillo received on-the-job training, lists of Great Southern's customers, and introduction to many of the company's customers and suppliers.<sup>103</sup> Trujillo, a sales employee, argued that the customer non-solicitation provision was unenforceable under Georgia law because it extended beyond just the customers she personally contacted, and included customers about whom "the Employee had confidential or proprietary information because of his/her position with Employer."<sup>104</sup> The Court agreed with Trujillo and invalidated the provision as overbroad and unenforceable.<sup>105</sup> The Court stated that the provision was not a reiteration of the confidentiality clause but was rather "an effort to impermissibly broaden the class of customers whom Trujillo could not solicit."<sup>106</sup> Because the non-solicitation clause was unenforceable, the otherwise valid non-compete clause was also invalidated.<sup>107</sup>

### 3. *Cases Involving Scope of Activities*

The third and final requirement to determine whether a non-compete clause is reasonable is an evaluation of the scope of prohibited activity. Georgia law states that the contract must clearly describe the employer's business and the specific industry that the employee may not enter and must list the specific activities that the employer would like to prohibit the employee from practicing.<sup>108</sup>

In non-compete cases, a court will invalidate a clause if it prohibits the former employee from providing similar services

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2008).

102. *Id.* at 582.

103. *Id.*

104. *Id.* at 583.

105. *Id.*

106. *Id.* at 584.

107. *Id.*

108. *Wilson v. Ctr. Bros., Inc.*, 296 S.E.2d 589, 590 (Ga. 1982); *Howard Schultz & Assocs., of the Southeast, Inc. v. Broniec*, 236 S.E.2d 265, 268 (Ga. 1977); *See also Rickman*, *supra* note 45, at 1118.

to organizations that do not compete with the employer.<sup>109</sup> A clause which prohibits the former employee from working for a competitor in any scope or capacity will also be invalidated as too overbroad.<sup>110</sup> A covenant that requires the former employee to promise not to engage in or be employed by any business that is “similar to” the employer’s business is likewise too vague to be enforced.<sup>111</sup>

In non-solicit cases, the court will invalidate the covenant if it applies to all clients with whom the former employee worked, even if they ceased to be clients before the employee’s termination.<sup>112</sup> Courts will also not enforce agreements which preclude solicitation of the employer’s customers who become known to the former employee through casual conversation in the office.<sup>113</sup> A covenant that prohibits the former employee from contacting clients to sell them products unrelated to the former employer’s business will also be invalidated because it goes beyond what is necessary to protect the employer’s business interests.<sup>114</sup>

While there are a myriad of additional legal and business concerns that have not been mentioned, the cases above demonstrate that while the law is complex, it is predictable in nature despite lacking inherent clarity. The law is predictable

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109. *Habif, Arogeti & Wynne, P.C. v. Baggett*, 498 S.E.2d 346, 352 (Ga. Ct. App. 1998).

110. *Firearms Training Sys. v. Sharp*, 445 S.E.2d 538, 540 (Ga. Ct. App. 1994).

111. *Howard Schultz & Assoc.*, 236 S.E.2d 265; *but see* *Allen v. Hub Cap Heaven, Inc.*, 484 S.E.2d 259, 265 (Ga. Ct. App. 1997) (holding that covenant prohibiting, within a small geographic area and for a short time, a franchisee from owning or operating any “Hub Cap Heaven, Inc. type business” would not be too vague for enforcement if the former franchise owner was the “heart and soul” of the business).

112. *Gill v. Poe & Brown of Georgia, Inc.*, 524 S.E.2d 328, 331 (Ga. Ct. App. 1999) (stating that employer has no legitimate business interest in preventing an employee from soliciting business from clients who may have severed their relationship with the employer long before the employee’s termination).

113. *Morgan Stanley DW, Inc. v. Frisby*, 163 F. Supp. 2d 1371, 1378 (N.D. Ga. 2001).

114. *Allied Informatics, Inc. v. Yeruva*, 554 S.E.2d 550 (Ga. Ct. App. 2001); *see also* *Riddle v. Geo-Hydro Eng’rs, Inc.*, 561 S.E.2d 456, 458 (2002).

because attorneys are aware of the court's policy favoring employee mobility as a way of increasing competition. But the law also lacks clarity because attorneys and courts must currently navigate through countless decisions based on an infinite number of factual variations in the employment relationship. Judicial treatment of restrictive covenants has affected the legislature's attitudes and perceptions on future developments in this area, which are discussed below.

### *C. The 1990 Restrictive Covenant Act*

In 1990, the Georgia Legislature passed the Restrictive Covenant Act<sup>115</sup> which attempted to clarify and drastically alter Georgia law on restrictive covenants in employment contracts. The substantive portions of the 1990 Restrictive Covenant Act initially drew a distinction between "general" and "partial" restraints of trade.<sup>116</sup> General restraints of trade would remain invalid on public policy grounds while partial restraints, or those imposing reasonable restraints, would be permissible.<sup>117</sup> Although there were other specific substantive provisions included in the Act,<sup>118</sup> the most significant portion of the Act attempted to change Georgia's policy in enforcement of non-compete covenants by allowing courts to enforce valid parts of a covenant and disregard those parts contrary to public policy if the "restraint, considered as a whole, is not so clearly unreasonable and overreaching in its terms as to be unconscionable."<sup>119</sup>

In *Jackson & Coker, Inc. v. Hart*, the Georgia Supreme Court held the 1990 Restrictive Covenant Act unconstitutional.<sup>120</sup> The

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115. O.C.G.A. § 13-8-2(a)(2).

116. *Id.*

117. O.C.G.A. § 13-8-2.1.

118. See JAMES W. WIMBERLY, JR., GA EMPLOYMENT LAW § 2:17 (4th ed. 2009) (discussing the 1990 Restrictive Covenant Act and implications under Georgia's Constitution).

119. O.C.G.A. § 13-8-2.1(g)(1).

120. *Jackson & Coaker, Inc. v. Hart*, 405 S.E.2d 253 (1991). See GA. CONST., art. III, § 6, ¶. 5(c) (1983) ("The General Assembly shall not have the power to authorize any contract or agreement which may have the effect or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and

court in *Jackson* held the General Assembly overstepped its power with the blue-pencil provision and stated specifically that the language of the provision was an effort by the General Assembly to “breathe life into contracts otherwise plainly void or being impermissible under the Georgia Constitution, Article III, Section VI, Paragraph V(c).”<sup>121</sup> The sole dissenter, Chief Justice Clarke, did not see the blue pencil provision as unreasonable, but rather a questionable policy decision, arguing that the Constitutional provision merely “prohibits the legislature from enacting statutes which unreasonably restrain trade.”<sup>122</sup> More uncertainty was added to non-compete law in *Crosby v. Hospital Authority of Valdosta*,<sup>123</sup> when the United States District Court for the Middle District of Georgia discussed whether the court created “rule of reason” was itself a literal application in violation of the constitutional prohibition in Art. III, § 6, para. 5. The court first noted that the majority in *Jackson* did not even mention the rule of reason; and moreover, the statute at question in *Jackson* was “plainly not a codification of the rule of reason and indeed went considerably beyond that rule in permitting contracts or agreements restrictive in trade.”<sup>124</sup> The court further suggested that the majority in *Jackson* was simply taking issue with the lowered standard of enforceability for contracts restrictive of trade.<sup>125</sup> In what may be considered a flash of brilliant foresight, the court concluded by saying that, “doctrines such as the rule of reason traditionally go out with a bang, not a whimper.”<sup>126</sup>

The “bang” that the *Crosby* court described is at the heart of the debate currently in Georgia. Georgia has recently passed legislation to allow courts to modify restrictive covenants in employment contracts. However, it seems likely that the legislation can only be adopted through the passage and approval of the constitutional amendment. Although the current legislation is different from the 1990 Act, many of the

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void.”).

121. *Id.* at 372.

122. *Id.*

123. *Crosby v. Hosp. Auth. of Valdosta*, 873 F. Supp. 1568 (M.D. Ga. 1995).

124. *Id.* at 1580.

125. *Id.*

126. *Id.*

fundamental historical and policy rationales for favoring one theory over another remain unchanged. There is some concern, however, that the gravity of this doctrinal shift is perhaps not receiving the attention it fully deserves from authorities.

#### IV. HOUSE BILL 173

In April 2008, the Georgia House passed Resolution 1879 which established the House Study Committee on Restrictive Covenants in the Commercial Arena.<sup>127</sup> The main objective of the committee was to examine the proper functioning of restrictive covenants in today's marketplace and to fulfill the legislature's role in defining public policy in this area.<sup>128</sup> The committee was jointly chaired by Representative Kevin Levitas and Senator Judson Hill.<sup>129</sup> Representative Levitas stated that the legislature's role should be to "provide clear guidance to the courts regarding the sustainability of these private agreements between private contracting parties and how to make them fair to all parties."<sup>130</sup> Rep. Levitas added that some additional objectives of the committee are to provide certainty to parties and to create the ability to attract businesses into Georgia.<sup>131</sup>

The Committee produced a final report based on their own evaluations, from public testimony of six speakers, and from two written comments from local businessmen.<sup>132</sup> Although, most of the witnesses generally expressed support for the legislature's role in creating clarity in employment contracts,<sup>133</sup> there was some debate on how to best accomplish that goal. An attorney, Ben Fink, testified that the current state of the law in

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127. H.R. 1879, 149th Gen. Assem., Reg. Sess. (Ga. 2008), available at [http://www.legis.ga.gov/legis/2007\\_08/sum/hr1879.htm](http://www.legis.ga.gov/legis/2007_08/sum/hr1879.htm).

128. Press Release, Ga. H.R., Speaker Richardson Appoints Representative Levitas to Chair House Study Committee on Restrictive Covenants in the Commercial Arena (Aug. 26, 2008) available at <http://www.tradesecretslaw.com/tags/georgia/>.

129. *Id.*

130. *Id.*

131. *Id.*

132. H. STUDY COMM. ON RESTRICTIVE COVENANTS, RESTRICTIVE COVENANTS IN THE COMMERCIAL ARENA: FINAL REPORT (2008) available at <http://georgialegislativenetwork.com/reports/wp-content/uploads/2009/02/restrictivecovenants-finalreport-1-14-08.pdf>

133. *Id.*

Georgia is certain and predictable leading to short-lived litigation, while states with blue-pencil doctrines have laws that are more difficult to predict and expensive to litigate.<sup>134</sup> Mr. Fink also argued that attempting to gain uniformity with other states seems to be an illusory goal.<sup>135</sup> Attorney Bill Long added that although the current law is certain, he felt that the lack of clarity was attributable to the myriad of appellate court opinions across which the law is spread, rather than the legal standards themselves being unclear.<sup>136</sup> Mr. Long seemed to support legislation that would provide a summary of current law but stated that adding a blue-pencil provision would delay certainty for the longest possible time.<sup>137</sup> Thus, while Mr. Long seemed to support legislation that would provide greater ease of accessibility and clarity, he agreed that blue-pencil litigation is expensive to litigate.<sup>138</sup> Finally, attorney Les Schneider felt that the blue pencil doctrine was a useful tool, resulting in more out-of-court settlements.<sup>139</sup> Most of the witnesses agreed that providing for severability of non-competition from non-solicitation clauses would improve current law.<sup>140</sup> The Committee's findings and recommendations<sup>141</sup> stated in the Final Report resulted in the current legislation.<sup>142</sup>

Section 1 of HB 173 amends O.C.G.A. § 13-8-2(a)(2) by eliminating the partial restraint language and instead referring to "certain competitive activities, as provided in Article 4." Section 2 of HB 173 amends Chapter 8 by repealing the old 13-8-2.1. Section 3 of HB173 adds Article 4, which includes new code sections 13-8-50 through 13-8-59. Section 13-8-50 is a general policy statement.<sup>143</sup> Section 13-8-51 provides key

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134. *Id.* at 7.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 9.

142. H.B. 173, available at [http://www.legis.state.ga.us/legis/2009\\_10/pdf/hb173.pdf](http://www.legis.state.ga.us/legis/2009_10/pdf/hb173.pdf); H.R. 178, available at [http://www.legis.ga.gov/legis/2009\\_10/fulltext/hr178.htm](http://www.legis.ga.gov/legis/2009_10/fulltext/hr178.htm).

143. "The General Assembly finds that reasonable restrictive covenants contained in employment and commercial contracts serve the legitimate

definitions, including the definition for “modification.”<sup>144</sup> Section 13-8-52 states the applicable scope of parties that are affected by the bill. Section 13-8-53 provides some statutory guidance to employers and employees in drafting considerations. Section 13-8-54 contains the enforcement and modification provision.<sup>145</sup> The next sections (13-8-55 through 13-8-59) contain pleading requirements, standards of reasonableness, presumptions, and remedies respectively. Section 4 states that HB 173 is automatically repealed if an amendment is not ratified during the 2010 election. Finally, Section 5 repeals all laws in conflict. HR 178, the constitutional amendment, would amend Article III, Section VI, paragraph V, subparagraph (c) of the Georgia Constitution.<sup>146</sup>

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purpose of protecting legitimate business interests and creating an environment that is favorable to attracting commercial enterprises to Georgia and keeping existing businesses within the state. Further, the General Assembly desires to provide statutory guidance so that all parties to such agreements may be certain of the validity and enforceability of such provisions and may know their rights and duties according to such provisions.”

144. “‘Modification’ means the limitation of a restrictive covenant to render it reasonable in light of the circumstances in which it was made. Such term shall include: (A) Severing or removing that part of a restrictive covenant that would otherwise make the entire restrictive covenant unenforceable; and (B) Enforcing the provisions of a restrictive covenant to the extent that the provisions are reasonable.”

145. “In any action concerning enforcement of a restrictive covenant, a court shall not enforce a restrictive covenant unless it is in compliance with the provisions of Code Section 13-8-53; provided, however, that if a court finds that a contractually specified restraint does not comply with the provisions of Code Section 13-8-53, then the court may modify the restraint provision and grant only the relief reasonably necessary to protect such interest or interests and to achieve the original intent of the contracting parties to the extent possible.”

146. The relevant portion reads: “(3) In order to conform contracts with general laws relating to contracts that restrict competition during or after a term of employment or of a commercial relationship and in order to achieve the original intent of the contracting parties, a court may modify a contract that restricts competition during or after a term of employment or of a commercial relationship to cure any deficiencies relating to the competitive restrictions where the restrictions would, if left unmodified, contravene any provision of this Constitution or of the United States Constitution or would otherwise render the contract or any restrictive covenant contained in the contract unlawful and unenforceable.”

After some minor changes from the House Judiciary Committee, the Georgia House passed House Bill 173 by a vote of 137-22. Following additional consideration from the Senate Special Judiciary Committee, the Georgia Senate passed HB 173 on April 1, 2009. HR 178 will be considered next legislative session. Because the fate of non-compete law now lies in the hands of the people of Georgia, Part V will discuss some of the economic and public policy considerations underlying each theory of enforceability.

## V. COMPETING INTERESTS AND POLICY TRENDS

The law of post-employment restrictive covenants has been described as a “sea – vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long.”<sup>147</sup> This “support” takes the form of many competing interests, which can range from employee interest in job mobility,<sup>148</sup> employer interest in protecting their business secrets, society’s interest in a free and competitive labor market, and judicial interest in enforcing contracts.<sup>149</sup> Courts, legislators and scholars have continually redefined and reweighed these interests based on the peculiar and changing nature of the economic conditions within a particular geographic region.

### A. *The Information Economy and the New Employment Relationship*

Employees have traditionally been characterized according to their respective trade. Laborers are distinguished from professionals, blue-collar workers from white-collar workers, and people in manufacturing jobs from those in service jobs.<sup>150</sup>

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147. Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 105 N.E.2d 685, 687 (Ohio Ct. C.P. 1952).

148. Employee mobility can be defined as the “ease by which a skilled employee can leave one job, join another company, and immediately apply his or her skills.” Charles Tait Graves & James A. Diboise, *Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation?*, 1 ENTREPRENEURIAL BUS. L.J. 323 (2007).

149. See Stone, *supra* note 7, at 723.

150. Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal*

The transition of the American economy from a manufacturing-based economy to an information-based economy has forced many companies to shift their concentration from value gained from tangible assets to value gained from intangible assets: knowledge, experience and creativity of employees.<sup>151</sup> In this information age, the possession of individual knowledge, expertise and skill are the primary sources of institutional and individual advancement.<sup>152</sup> Moreover, the shift in the U.S. labor market away from labor intensive goods manufacturing toward knowledge-based service industries is expected to continue.<sup>153</sup>

The change in the economy has been accompanied by a change in the nature of the employment relationship.<sup>154</sup> This change has led theorists to develop the concept of the “psychological” contract.<sup>155</sup> The concept is based upon the premise that employees today are motivated not by guarantees of secure, long-term employment and generous retirement plans, but rather by promises that their “human capital” will be enhanced through training and experience, while their “social capital” is built through networking opportunities with other departments, vendors and customers.<sup>156</sup> The relationship between non-compete policy and human capital investment highlights the tension between the value of a company’s workforce and a firm’s ability to acquire and protect its knowledge-based property and business goodwill.<sup>157</sup> Employers are increasingly aware of the value provided by an employee’s creative services, particularly in high-tech companies and other

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*Protection for Human Capital Investment*, 27 BERKLEY J. EMP. & LAB.. L. 287, 288 (2006).

151. Ann C. Hodges & Porcher L. Taylor, III, *The Business Fallout From the Rapid Obsolescence and Planned Obsolescence of High-Tech Produces: Downsizing Non-Competition Agreements*, 6 COLUM. SCI. & TECH. L. REV. 3, 6 (2004-2005).

152. Stone, *supra* note 7, at 721.

153. Bishara, *supra* note 150, at 291.

154. *Id.* at 8.

155. See Sandra L. Robinson & Denise M. Rousseau, *Violating the Psychological Contract: Not the Exception But the Norm*, 15 J. ORG. BEHAV. 245, 246 (1994) (the “psychological” contract refers to an individual’s beliefs about the terms of his or her employment contract).

156. Stone, *supra* note 7, at 735-6.

157. Bishara, *supra* note 150, at 295.

knowledge-based industries.<sup>158</sup> Regardless of the method of enforcement of non-compete agreements within a particular state – with the exception of California – the courts ultimately balance competing public policy considerations to determine the reasonableness of a restraint. The changing nature of the economy and the employment contract has forced authorities to re-examine which approach is most suitable to fit the current environment.

### *B. Three Common Policy Approaches*

In general, courts have struggled to maintain a balance between (a) protecting healthy competition and employee mobility and (b) the need to protect legitimate business interests that may be compromised by the conversion of valuable information and business goodwill invested in the employee.<sup>159</sup> Non-compete law must adapt to acknowledge both this balance and the changing economic conditions described above. There are three common approaches when examining the policy interests that non-compete law seeks to protect: (1) the employer-rights approach, (2) the economic based employee-rights approach, and (3) the consequentialist employee-rights approach.

The first approach is a blend between law and economics, property rights, and contract and argues that non-compete agreements are an efficient tool to encourage and protect an employer's investment in human capital.<sup>160</sup> Because this approach tends to favor the employer, at the expense of employee mobility, a non-compete agreement can be said to inhibit any knowledge transfer from a departing employee to another firm.<sup>161</sup> Professor Gilson described this by using the term "knowledge spillovers."<sup>162</sup> Opponents of this theory argue that the decrease in employee mobility under this approach will lead to decreased knowledge spillovers, resulting in a chilling effect on technological innovation.<sup>163</sup>

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158. *Id.* at 296.

159. M. Scott McDonald, *Non-Compete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137, 141 (Fall 2003).

160. Bishara, *supra* note 150, at 298.

161. *Id.* at 306; *see infra*, Part C.

162. Gilson, *supra* note 32, at 621.

163. Bishara, *supra* note 150, at 306.

The second approach is similarly a law and economics approach, but argues that this chilling effect on innovation is a result of favoring overreaching employers at the expense of employee mobility and knowledge spillover.<sup>164</sup> The key ideas in this approach are that labor mobility in a knowledge economy will create “high-velocity” labor markets and that the lack of non-compete enforcement is a part of the legal infrastructure that allows for mobility.<sup>165</sup> This approach has been characterized mainly by describing the growth of California’s economy as a function of the state’s refusal to enforce non-compete agreements.<sup>166</sup> Another commentator has suggested that less restrictive non-competition laws are more likely to foster the growth of entrepreneurial, creative companies.<sup>167</sup> Especially in regions with high-tech industries, an overly-restrictive employee mobility regime inhibits the development of venture-backed innovation communities.<sup>168</sup>

A third approach relies on the consequentialist argument that non-compete agreements are undesirable because they restrict a worker’s freedom to maintain exclusive control over his or her labor.<sup>169</sup> This group primarily argues in favor of employees’ rights by finding that non-compete agreements (1) restrain trade and keep important information from the public, (2) cause an overall loss to society by depriving it of valuable services, and (3) fail to protect an employee’s unequal bargaining power.<sup>170</sup> This approach further emphasizes the sovereignty of the employee and challenges the firm’s ability to control post-employment activities.<sup>171</sup> In contrast to the effects on technological innovation described in the second approach above, the consequentialist employee rights model is generally

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164. *Id.* at 298.

165. *Id.* at 307. See Gilson, *supra* note 32; See Alan Hyde, *The Wealth of Shared Information: Silicon Valley’s High-Velocity Labor Market, Endogenous Economic Growth, and the Law of Trade Secrets*, Sept. 1998, available at <http://andromeda.rutgers.edu/hyde/wealth>.

166. See *infra* Part V.C

167. Graves, *supra* note 148, at 323.

168. *Id.* at 343.

169. Bishara, *supra* note 150, at 298.

170. *Id.* at 311. See Maureen B. Callahan, Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703 (1985).

171. Bishara, *supra* note 150, at 311.

more concerned with addressing equitable considerations as well as a public policy in favor of promoting autonomy.

Therefore, as a review, the employee mobility maximizing approach (little or no enforcement of non-competes) would encourage the formation of start-up companies because it would greatly lower the legal barriers to obtaining human capital and would be more employee-friendly.<sup>172</sup> This may, however, lead to circumvention of trade secret laws in an environment like the Silicon-Valley community.<sup>173</sup> Another downside is that this approach is not favored by employers and would discourage employer investment in general human capital.<sup>174</sup> The knowledge-services maximizing approach would allow strong enforcement of non-compete agreements and increase human capital investment but inhibits employee mobility and discourages innovation through knowledge exchange firms.<sup>175</sup> The competing policy interests can be further understood by highlighting the trends taken by various states.

### *C. Trends in Other States*

As noted previously, California has statutorily prohibited non-compete agreements, and as a result, as been the target of much commentary. By the mid-1990s, California's Silicon Valley had pulled ahead of Boston's Route 128 as the more successful innovation community. Professor Ronald Gilson's influential article, along with earlier articles, has argued that the success of Silicon Valley as a high-growth agglomeration economy is the result of California's refusal to enforce covenants not to compete.<sup>176</sup> Challenging the common belief that strong intellectual property laws are necessary to promote economic growth, Professor Gilson argued that knowledge spillovers form a necessary component of Silicon Valley's success.<sup>177</sup> However, Gilson cautioned that other regions may

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172. *Id.* at 318.

173. *Id.*

174. *Id.*

175. *Id.* at 319.

176. See ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1994) (comparing the industrial districts of California's Silicon Valley and Massachusetts's Route 128); Gilson, *supra* note 32, at 622-24; See Hyde, *supra* note 165.

177. Gilson, *supra* note 32, at 621.

not be able to emulate California's success and policymakers should consider characteristics of local industries.<sup>178</sup>

Gilson's article has produced at least one response which challenges his theory regarding non-compete agreements.<sup>179</sup> In his response, James Wood noted that venture financing and start-up success was also prevalent in regions where non-competition clauses are legal, such as Austin, Texas, and North Carolina's Research Triangle, and not just in Silicon Valley.<sup>180</sup> Thus, Wood suggests, Professor Gilson may have attributed undue importance to the absence of non-competition agreements in Silicon Valley. However, Wood seems to accept the more general theory that knowledge spillovers provide economic benefits.<sup>181</sup> Wood concludes by stating that the only certainty is that the formula for creating a sustainable technology-based agglomeration economy consists of a large number of extremely complex, interrelated factors.<sup>182</sup>

Recently, Gilson's theory has been confirmed through some empirical evidence. In 1985, Michigan enacted the Michigan Antitrust Reform Act, which effectively (and possibly inadvertently) reversed Michigan policy by allowing non-compete agreements.<sup>183</sup> Several researchers took this opportunity to exploit Michigan's policy reversal by conducting a natural experiment, presumably to test Professor Gilson's theory. The results of the study concluded that employee mobility decreased by 34% once non-compete agreements were enforced.<sup>184</sup>

Finally, in Massachusetts, courts generally honor covenants not to compete and either rely on the agreement as signed or modify the agreement to meet the common law standard.<sup>185</sup> Perhaps due to some of the same concerns raised in this Comment, Massachusetts has recently introduced legislation to follow California's approach and outlaw non-compete

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178. *Id.* at 576.

179. *See* Wood, *supra* note 32.

180. *Id.*

181. *Id.*

182. *Id.* at 65.

183. *Michigan Experiment Report* at 67.

184. *Id.* at 25.

185. O'Malley, *supra* note 32, at 1225.

agreements.<sup>186</sup> Although a majority of states have implemented some form of the blue-pencil doctrine, many courts and legislators have recently reevaluated the significance of favoring the employer rights approach in light of current economic conditions.

*D. A Retreat from Modernized Enforcement of Non-Compete Agreements*

Traditionally, the law of employee non-compete agreements was highly protective of the employee's interest in mobility and society's interest in free competition.<sup>187</sup> Gradually, however, many jurisdictions adopted less stringent approaches by broadening the scope of permissible non-compete agreements and by expanding the protectable interests.<sup>188</sup> Theoretically, these modernized non-compete agreements are not meant to punish the former employee, rather they are meant to protect the employer from unfair competition.<sup>189</sup> The modern approach has also been to recognize some form of a blue-pencil theory, whether it is strict blue-pencil theory or an approach allowing for reformation or modification, as is being considered in Georgia.<sup>190</sup> Proponents of the modification approach have criticized the common law approach for being too "mechanical," placing undue emphasis on whether covenants are separable and thereby glorifying form over substance.<sup>191</sup> Modification also allows the courts discretion to fashion reasonable terms that are consistent with the intent of the parties, and it prevents employer overreaching by allowing courts to refuse to enforce unreasonable provisions.<sup>192</sup> Supporting the adoption of the blue-pencil doctrine will thus

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186. See Wade Roush, *Legislator Drafting Bill to Outlaw Non-Compete Agreements in Massachusetts*, XCONOMY, December 16, 2008, available at <http://www.xconomy.com/boston/2008/12/16/legislator-drafting-bill-to-outlaw-non-compete-agreements-in-massachusetts/>.

187. Michael J. Garrison and John T. Wendt, *The Evolving Law of Employee Non-Compete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 122 (Spring 2008).

188. *Id.* at 122-129.

189. Pivatuea, *supra* note 5, at 676.

190. Garrison, *supra* note 187, at 130.

191. *Id.*

192. *Id.*

cater to the interest of both parties in the agreement and will ease the harshness of the current one-shot approach that employers face.<sup>193</sup> The blue-pencil doctrine may also add value to the justice system by allowing courts to achieve a balance in employment contracts.<sup>194</sup> Several scholars believe non-compete clauses may actually bolster employees' wages and spur companies to invest in informational and human capital.<sup>195</sup>

In contrast, some scholars have argued that a blue-pencil doctrine harms employees by allowing employers to draft overly broad provisions.<sup>196</sup> This problem is commonly referred to as the "in terrorem" effect on an employee. In addition, the doctrine creates confusion among the parties and the court system by lacking any flavor of certainty.<sup>197</sup> Because it is impossible to predict the construction of a non-compete agreement in blue-pencil states, the doctrine confuses employees by preventing them from understanding their rights.<sup>198</sup> The doctrine also leaves an employer to guess at how broadly to draft a covenant.<sup>199</sup> This confusion can also be seen in the legal system, as courts, already overburdened with deciding questions of reasonableness and legitimate business interests, must now take on an additional burden of rewriting the agreement.<sup>200</sup> This unpredictability and heightened judicial discretion will also cause an increase in the amount of litigation between parties.<sup>201</sup>

Taken as a whole, the modern approach in favor of blue-pencil doctrines represents a liberalization of rules enforcing non-compete agreements and shifts the balance toward the employer's interest in protecting its property and forestalling competition by former employees.<sup>202</sup> However, an analysis of recent court opinions reveals a new trend: a heightened judicial

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193. Rickman, *supra* note 45, at 1131

194. *Id.*

195. *Id.* at 1120.

196. Pivateau, *supra* note 5, at 689-690.

197. *Id.* at 691-2.

198. *Id.* at 691.

199. *Id.* at 692.

200. *Id.* at 693.

201. *Id.* at 693-4.

202. Garrison, *supra* note 187, at 135.

scrutiny for employee non-compete agreements.<sup>203</sup> This can be seen through recent efforts by courts to carefully limit the protectable business interests and limit the power of modification, as well as through legislative efforts to tighten restrictions on non-compete agreements.<sup>204</sup> Therefore, the emerging law and the scholarly commentary on economic and policy concerns suggest a retreat from the permissive modern approach toward a movement back to the restrictive doctrines of the common law.<sup>205</sup> This recent trend is supported by the changing nature of the employment relationship and the evidence displaying positive economic effects of restrictive non-compete agreements.<sup>206</sup>

#### *E. General Policy Considerations in Georgia*

Georgia courts have been very clear that the essential terms of a non-compete agreement, those relating to territorial limitations, duration and scope of activity, must not be vague, indefinite or uncertain.<sup>207</sup> Additionally, an employment contract inherently involves parties of unequal bargaining power and is thus considered a contract of adhesion.<sup>208</sup> Just as any other contract, a restrictive covenant must also be based upon sufficient consideration.<sup>209</sup> Without doubt, public policy considerations are the most predominant force courts employ to invalidate non-compete agreements, as they tend to place an unnecessary restraint on trade.<sup>210</sup>

In Georgia, whether a restriction is “not unreasonable” and whether it is “reasonably necessary” depends on the interest the court is seeking to protect. One of the interests the Georgia courts have cited is the employer’s need to protect customer relationships out of fairness to the employer’s investment in

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203. *Id.* at 135.

204. *Id.* at 135-148.

205. *Id.* at 135.

206. *Id.* at 173.

207. Thomas E. Jordan, *The Application of Contract Law to Georgia Non-Compete Agreements: Have We Been Overlooking Something Obvious?*, 41 MERCER L. REV. 723, 727 (1999).

208. *Id.* at 731.

209. *Id.* at 732.

210. *Id.* at 734-7.

resources and training for the employee.<sup>211</sup> Courts also seek to protect an employer's confidential information, but this interest is generally best protected through the use of a confidentiality agreement rather than a non-compete agreement.<sup>212</sup> In contrast, Georgia courts are very conscious of imposing an undue burden on an employee's freedom to seek meaningful future employment.<sup>213</sup> This is due primarily to the court's perception that employees have little bargaining power, which may be motivated in part by a paternalistic bias in favor of employees.<sup>214</sup> Finally, Georgia courts will occasionally cite the need to further economic development and prevent the monopolistic effect of a non-compete agreement.<sup>215</sup>

## VI. IMPLICATIONS OF HOUSE BILL 173

If enacted, HB 173 would create a dramatic change in the landscape of future non-compete jurisprudence in Georgia by giving courts the authority to modify agreements. Because HB 173 has now been adopted by the House and Senate, the next step is for the legislature and people of Georgia to ratify the amendment. The earliest this would occur is the 2010 general election. Although it is certainly the role of the legislature to identify Georgia's policy in regard to restrictive covenants, there is room for further debate on whether such a complete reversal of policy is necessary.

### *A. The Modification Provision Will Restrict Employee Mobility*

Current law prevents overly broad restrictions and requires employers to write their covenants with a certain degree of specificity or risk invalidation. Modification allows court discretion to fashion reasonable terms that are consistent with the intent of both parties. Proponents argue that the adoption of a modification provision will cater to the interest of both parties and will ease the harshness of the current one-shot approach that employers face. However, the unequal bargaining power

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211. See Rickman, *supra* note 45, at 1112; See also *Orkin Exterminating Co. v. Dewberry*, 51 S.E.2d 669, 671 (Ga. 1949).

212. See Rickman, *supra* note 45, at 1112-3.

213. *Id.*

214. See Harbour, *supra* note 46, at 1136.

215. *Id.*

between the employer and employee, coupled with the desire of most employees to maintain good relations with their employer, results in employees rarely challenging illegal restrictive covenants. If courts are allowed to modify restrictive covenants, employers no longer risk total invalidation and will have less of an incentive to draft narrow restrictions. Thus, the employer is encouraged to create more overly broad restrictions with the knowledge that the majority of them will not be challenged. By looking at restrictive covenant laws in other states, it is apparent that broad restrictions in the employer-employee environment significantly decrease employee mobility. In California, where non-compete agreements are illegal employee mobility has been significantly increased. Michigan has seen a 34% decrease in employee mobility following authorization of non-compete agreements. Thus, the implementation of the blue-pencil doctrine in Georgia will lead to an influx of overly broad restrictive covenants that will have the effect of restricting employee mobility.

#### *B. Recent Trends Favor Employee Mobility*

Through the implementation of the blue pencil doctrine, the legislature seeks to make restrictive covenants fair to all parties; however, the resulting deprivation to employee mobility outweighs the minimal employer interests that the law aims to protect. The movement towards an information-based economy and a retreat from modernized non-compete law favors employee mobility in Georgia, as less restrictive non-competition laws are more likely to foster the growth of entrepreneurial, creative companies. A decrease in employee mobility under the blue-pencil doctrine will lead to decreased knowledge spillover in Georgia, resulting in a chilling effect on the state's current growth in technological innovation.

However, it could be argued that the blue-pencil doctrine works as an efficient tool to encourage and protect employers' investment in human capital, and the doctrine's implementation could attract more businesses to Georgia. Additionally, the blue-pencil doctrine can help further protect an employer's confidential information, by allowing courts to reasonably modify the agreements instead of refusing to enforce the entire agreement. Nevertheless, the law has found that an employer's confidential information is generally best protected through the

use of a confidentiality agreement rather than a non-compete agreement. Furthermore, the freedom of mobility that the current law fosters encourages the formation of start-up companies because it greatly lowers the legal barriers to obtaining human capital and is more employee-friendly. According to Professor Gilson, a policy promoting employee mobility will lead to a positive growth of specialized industries. Georgia's economy is benefiting and will continue to benefit from its restrictive, employee-friendly outlook on non-compete agreements. For example, Atlanta already serves as a developing bioscience<sup>216</sup> and high-technology industry hub.<sup>217</sup>

One of the main reasons the legislature has cited for adopting a modification provision is to align it with the majority of states that already use such a doctrine. But many scholars have warned that policy reversals in restrictive covenants should be based on a comprehensive study of the economic conditions in a particular region. The legislature has produced little empirical evidence to show the economic conditions in Georgia necessitate such a reversal. Alternatively, Georgia's current approach is one reason why Georgia has recently emerged as a nationwide leader in the biosciences and high-tech industry. Georgia's history of refusing to apply the blue-pencil theory for the past 101 years, coupled with the state's economic development throughout that time, proves that valuing employee mobility over employer interests is best Georgia. Therefore, allowing the courts to modify restrictive covenants will not be beneficial for Georgia.

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216. Georgia is ranked ninth in the nation in number of biotech companies, with more than 200 firms in metro Atlanta alone. Atlanta serves as a domestic headquarters for major pharmaceutical companies and bioscience companies. These industries are supported by a research sector comprised of the Centers for Disease Control (CDC), as well as research departments of Emory University, The Georgia Institute of Technology and the University of Georgia. Metro Atlanta Bioscience Council, *available at* <http://www.atlantabioscience.com/industry.asp> (last visited Mar. 20, 2009).

217. Georgia is ranked twelfth in the nation in high-tech workers and fourteenth in terms of high-tech payroll. It is also ninth nationwide in high-tech establishments and fourteenth in venture capital investments. It is fifth in telecommunications services employment, sixth in software publisher's employment and sixth in internet services employment. *See* Glen Whitley, *Georgia's Tech Industry Adds 3,000 Jobs*, AEANET.ORG, April 2, 2008, *available at* [http://www.aeanet.org/PressRoom/prjj\\_cs2008\\_georgia.asp](http://www.aeanet.org/PressRoom/prjj_cs2008_georgia.asp).

*C. The Modification Provision Will Further Complicate the Law*

Apart from the considerations above, the adoption of a modification provision will increase the burden on the court. Currently, Georgia courts are required to be tedious in their calculation of reasonableness and legitimate business interests. Allowing courts to modify these agreements will further complicate the matter by exponentially increasing the amount of judicial subjectivity involved in interpretation. This will ultimately lead to a judicially imposed agreement and increase the amount of the judicial control over enforceability. The provision will also increase the burden on the courts by also requiring them to re-write the agreement. This will delay any certainty that the law provides and increase the backlog of litigation. Because it is impossible to predict the construction of a non-compete agreement, it will confuse employees, employers and the courts. The legislature must put the responsibility in the hands of the employers and employee at the front-end of the relationship, rather than requiring courts to modify contracts in an exercise of *post-hoc* adjudication.

## VII. CONCLUSION

The modification provision will have the unintended effect of restricting employee mobility and possibly decreasing overall economic growth in Georgia. Further, it will generate a burden on the court and promote judicial control over the parties, having the net result of increasing unpredictability in the law. Thus, Georgia should not allow courts to modify employment agreements.

Although the adoption of a modification provision is unnecessary, the legislature must take action to provide a clear and coherent picture of the law. There is currently a lack of clarity because the existence of a legitimate interest and the necessity of the restraints imposed by a non-compete are unavoidably peculiar to the particular employer, employee and job at issue. The legislature should provide a statute on the current state of the law in order to create greater clarity. This can be accomplished by clearly formulating non-compete policy goals and then by formalizing these goals into legislation to serve as guidance to parties and courts. The legislature should also focus on creating more incentives for employers and

employees to regularly review agreements and modify them according to the employee's changing duties and roles. Employers should be encouraged to make a deliberate effort to adhere to fundamental principles of contract formation and drafting. In this sense, an agreement that balances employment inequalities between parties and strives to achieve the true intent of the parties may be best accomplished by reorganizing the employment relationship from the bottom-up, rather than compelling the courts to interpret and repair relationships that have already been destroyed through litigation.

Georgia's decision on whether to adopt a constitutional amendment, and in turn, a policy allowing courts to modify non-compete agreements will conceivably create a paradigm shift and touch the lives of judges, attorneys, businesses and employees alike. The implementation of this doctrine will potentially create more confusion in the area of restrictive covenant law than there is now. Further, the blue-pencil doctrine does not coincide with Georgia case law and economic data that has historically favored employee mobility.

The legislature should instead consider creating a statute that creates greater clarity and works to promote the employment relationship.

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\* J.D. Candidate, May 2009, John Marshall Law School; B.S. North Carolina State University. I would like to thank Daniel Shaughnessy and Jeni Martin for all of their suggestions and their help with editing. I would also like to thank my parents and my sister for putting up with me and for providing me inspiration and encouragement.