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# NONCOMPETE AGREEMENTS BY THE FORMER EMPLOYEE: A FLORIDA LAW SURVEY AND ANALYSIS

KENDALL B. COFFEY\*

## I. INTRODUCTION

The employee's covenant not to compete<sup>1</sup> against his former employer is a promise often unenforced in most American courts.<sup>2</sup> Before the 1953 enactment of section 542.12, Florida Statutes,<sup>3</sup> such a covenant made in Florida was also frequently not given effect. Although Florida courts had the discretionary power to enforce covenants not to compete, discretionary enforcement generally translated into nonenforcement of these covenants. In response, the Florida legislature provided express statutory authorization for the enforcement of covenants not to compete in section 542.12. Although generally Florida courts faithfully apply this legislative mandate for enforcement of "noncompete agreements,"<sup>4</sup> certain limitations have been created to curtail the potential burden imposed by such agreements. Furthermore, recent judicial pronouncements reflect a possible disenchantment with the previous pattern of rigid appellate enforcement<sup>5</sup> which left little room for discretion in hardship cases.

Since the substantial case law construing section 542.12 and the recent developments which foreshadow a shift in the type of enforcement that can be anticipated in the future has not been collected and analyzed, this article will survey the case law and explore and analyze the status of developments and possible conflicts with regards to noncompetition agreements in Florida. It will conclude with a summary and recommendation.

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1. 53 AM. JUR. 2d *Master & Servant* § 106 (1970); BLACK'S LAW DICTIONARY 327, 329 (5th ed. 1979); 43A C.J.S. *Injunctions* § 95 (1978).

2. *E.g.*, Moore v. Dvoskin, Inc., 177 S.E.2d 708 (Ga. 1970); Karpinski v. Ingrassi, 320 N.Y.S.2d 1 (N.Y. 1971).

3. (1979).

4. *E.g.*, Miller Mechanical, Inc. v. Ruth, 300 So. 2d 11 (Fla. 1974); Flammer v. Patton, 245 So. 2d 854 (Fla. 1971).

5. See Uni-Chem Corp. v. Maret, 338 So. 2d 885 (Fla. 3d Dist. Ct. App. 1976); Troup v. Heacock, 367 So. 2d 691 (Fla. 1st Dist. Ct. App. 1979); Damsey v. Mankowitz, 339 So. 2d 282 (Fla. 3d Dist. Ct. App. 1976). See also U Shop Rite, Inc. v. Richard's Paint Mfg. Co., 369 So. 2d 1033 (Fla. 4th Dist. Ct. App. 1979).

## II. A HISTORICAL PERSPECTIVE

Prior to 1953, Florida shared the common law antipathy of most jurisdictions towards noncompetition agreements given by an employee to his employer.<sup>6</sup> Indeed, courts viewed noncompetition agreements in employment contracts far more harshly than restrictive covenants given by the seller of a business to the new owner. Whereas the courts tested the restraint imposed by the restrictive covenant simply against a standard of reasonableness in light of all attendant circumstances,<sup>7</sup> they invariably voided noncompetition agreements as contravening public policy.<sup>8</sup> This traditional hostility was anchored in a number of factors; among them, the desire to keep people productive, the fear that the employee and his family might become public charges because of his inability to work, the courts' aversion towards granting relief which effectively coerced specific performance, and the assumption that noncompetition agreements were unfair and worked undue hardship on the employee.<sup>9</sup> In the mid-1950's, the Florida Supreme Court noted that not a single Florida decision had ever enforced noncompetition agreements against former employees and that they had "generally been stricken down for 'lack of mutuality'".<sup>10</sup> In Florida the chief concern of the courts with regard to noncompetition agreements was that competition which served the public would be unnecessarily hampered by enforcing these agreements and that the employee and his family would become public charges as a result of enforcement.<sup>11</sup>

The common law enmity towards noncompetition agreements, however, resulted in severe problems for employers. They quickly discovered there was no secure legal device that could be used to limit the competitive advantage enjoyed by a former employee.

6. See *West Shore Restaurant Corp. v. Turk*, 101 So. 2d 123 (Fla. 1958); *United Loan Corp. v. Weddle*, 77 So. 2d 629 (Fla. 1955); *Wilson v. Pigue*, 10 So. 2d 561 (Fla. 1942); *Love v. Miami Laundry Co.*, 160 So. 32 (Fla. 1934).

7. *Arond v. Grossman*, 75 So. 2d 593, 595 (Fla. 1954). In *Arond*, the court enforced the noncompete agreement by finding that the offender was a former director of the plaintiff corporation. As a former fiduciary, he was bound by his promise to the corporation. See generally *Annot.*, 41 A.L.R.2d 15, 59 (1955).

8. *Love v. Miami Laundry Co.*, 160 So. 32, 34 (Fla. 1934).

9. *United Loan Corp. v. Weddle*, 77 So. 2d 629, 630 (Fla. 1955); *Love v. Miami Laundry Co.*, 160 So. 2d 32, 34 (Fla. 1934).

10. *Arond v. Grossman*, 75 So. 2d 593, 595 (Fla. 1954) (case arose prior to effective date of Florida's noncompetition statute).

11. *Love v. Miami Laundry Co.*, 160 So. 32, 34 (Fla. 1934).

Section 542.12 was enacted to provide a solution to this problem.<sup>12</sup>

With the passage of section 542.12, the longstanding judicial resentment of noncompetition agreements was legislatively relieved. The first subsection of the statute nevertheless codifies the traditional hostility against trade restraints. It states: "(1) Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind, otherwise than is provided by subsections (2) and (3) hereof, is to that extent void."<sup>13</sup>

Carving a crucial exception to this broad proscription against trade restraints, however, the second subsection provides:

One who is employed as an agent or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area, . . . so long as such employer continues to carry on a like business therein.<sup>14</sup>

Thus, while generally invalidating trade restraints, the statute expressly authorizes the enforcement of noncompetition agreements against an employee competing against his old employer.

In 1959, the Florida Supreme Court affirmed the constitutionality of the second subsection over objections that it violated due process by depriving a man of his livelihood.<sup>15</sup> Previously, most cases had already firmly established a judicial commitment toward enforcing the statute. In *Atlas Travel Service, Inc. v. Morelly*,<sup>16</sup> decided in 1957, the First District Court of Appeal acknowledged the legislative change in policy toward noncompetition agreements when the court noted that section 542.12(2) "clearly supersedes the common-law rule."<sup>17</sup> With respect to remedying noncompetition agreement violations, the court stated that trial court discretion regarding injunctive relief "shall be reasonably exercised to the end that the object of the statute may not be nullified" so long as courts avoid a result which is harsh, oppressive or unjust.<sup>18</sup>

Since the *Atlas Travel Service, Inc.* decision, almost three dozen Florida appellate decisions have attempted to define the scope and

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12. *Flammer v. Patton*, 245 So. 2d 854, 857 (Fla. 1971); *United Loan Corp. v. Weddle*, 77 So. 2d 629, 631 (Fla. 1955) (Drew, J., dissenting).

13. FLA. STAT. § 542.12(1) (1979).

14. FLA. STAT. § 542.12(2) (1979).

15. *Standard Newspaper, Inc. v. Woods*, 110 So. 2d 397 (Fla. 1959).

16. 98 So. 2d 816 (Fla. 1st Dist. Ct. App. 1957).

17. *Id.* at 818.

18. *Id.*

limitations of section 542.12(2). In these decisions, the courts have strictly construed the words of the noncompetition contract.<sup>19</sup> Nevertheless, with respect to the statutory language which is in derogation of common law, the courts have plainly taken a "broad view of the statute's application."<sup>20</sup>

This expansive viewpoint has obviously favored an employer seeking to hold a former employee to the promise not to compete. Cases construing the statute have broadened its scope, have allowed few defenses, and have virtually mandated injunctive relief to remedy violations.

### III. THE STATUTORY SCHEME

#### A. Section 542.12(2) as the Exclusive Basis for Enforcing Noncompetition Agreements

Florida's provision for noncompetition agreements is not presented as a separate, affirmative statutory authorization. Instead, it is cast as an exception to the general prohibition against trade restraints contained in section 542.12(1). Accordingly, Florida courts have said in dictum that restrictive covenants not expressly embraced by the "savings" clause of section 542.12(2) will be voided by the blanket proscription of section 542.12(1).<sup>21</sup> Under this view, therefore, section 542.12(2) merely provides an exclusive basis for relief. Hence, the question becomes whether a contract which impedes or restrains a former employee from exercising his lawful profession, trade or business falls within the ambit of subsection two and conforms with the requirement of reasonable limitations as to time and area.<sup>22</sup>

Unfortunately, the statute does not exclusively support this view.<sup>23</sup> In 1976, the Fifth Circuit Court of Appeals reviewed relevant Florida case law to conclude that section 542.12 is not "an exclusive list of non-competition [agreements] that do not contra-

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19. See, e.g., *Storz Broadcasting Co. v. Courtney*, 178 So. 2d 40 (Fla. 3d Dist. Ct. App. 1965). In *Storz*, the court emphasized the restraint of trade and personal liberty imposed by such agreements and ruled that they could not be extended "further than the language of the contract absolutely requires." *Id.* at 42.

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

21. E.g., *Cerniglia v. C & D Farms, Inc.*, 203 So. 2d 1 (Fla. 1967) (because the contract was not "reasonable" within the meaning of the statute, it was held unenforceable); *Bergh v. Stephens*, 175 So. 2d 787 (Fla. 1st Dist. Ct. App. 1965) (since the profession of medicine is not encompassed by "business," a covenant by a doctor fell without the statute and was unenforceable).

22. *Flammer v. Patton*, 245 So. 2d 854, 858 (Fla. 1971).

23. See *id.* at 857.

vene [Florida] public policy."<sup>24</sup> Instead, the Fifth Circuit concluded the statutory scheme merely reflects Florida's public policy that a satisfactory noncompetition agreement be reasonable.<sup>25</sup> Admittedly, it is presently unclear whether section 542.12(2) provides the exclusive basis to seek enforcement of a noncompetition agreement or whether it reflects the underlying policy that an agreement be reasonable. To date, no dispositive ruling provides an answer. In any event, courts have generally avoided the issue of exclusiveness by construing the words of section 542.12(2) with enough breadth to bring particular agreements within its purview.<sup>26</sup>

### B. Working for Another as Constituting "Engaging in a Similar Business"

Despite early confusion on the subject, "[i]t is now established that accepting employment in a similar business falls within the term 'engaging in a similar business' as used in the statute, and therefore is within the exceptions stated in [section] 542.12(2)."<sup>27</sup> Furthermore, in *Hunter v. North American Biologicals, Inc.*,<sup>28</sup> the Third District Court of Appeal concluded that accepting a position with a competitor different from that held with the first employer did not free the employee from the reach of section 542.12(2). Rather, the court noted that the trial court retained the discretion to determine whether the "similarity of positions" would adversely affect the court's ability to enforce a noncompetition agreement.<sup>29</sup>

### C. Scope of "One Who Is Employed"

The statute validates noncompetition agreements signed by "one who is employed" by the covenantor. Accordingly, in *Economic Research Analysts, Inc. v. Brennan*,<sup>30</sup> the defendant argued that because he had been merely an independent broker, rather than an

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24. *Wilkinson v. Manpower, Inc.*, 531 F.2d 712, 715 (5th Cir. 1976).

25. *Id.* at 715.

26. *E.g.*, *Economic Research Analysts, Inc. v. Brennan*, 232 So. 2d 219 (Fla. 4th Dist. Ct. App. 1970). In *Brennan*, the court found the covenant to be within the terms of § 542.12(2), "thus saving the agreement from the broad invalidating effect of Section 542.12(1)." *Id.* at 221.

27. *Storz Broadcasting Co. v. Courtney*, 178 So. 2d 40, 42 (Fla. 3d Dist. Ct. App. 1965). See also *Orkin Exterminating Co. v. Lefkowitz*, 169 So. 2d 336 (Fla. 3d Dist. Ct. App. 1964).

28. 287 So. 2d 726 (Fla. 4th Dist. Ct. App. 1974).

29. *Id.* at 728.

30. 232 So. 2d 219 (Fla. 4th Dist. Ct. App. 1970).

employee of the plaintiff, he had never been employed by the plaintiff for statutory purposes. The trial court agreed, and, finding section 542.12(2) inapplicable, dismissed the complaint pursuant to the broad proscription of section 542.12(1).<sup>31</sup>

The Fourth District Court of Appeal reversed, finding that the plaintiff had exerted significant control over the former salesman. Applying ordinary agency concepts, the court ruled that the defendant had been the plaintiff's "agent," and was therefore "one who [was] employed" for section 542.12(2) purposes.<sup>32</sup>

While this case may stand on its particular facts, the court's translation of "agent" into "one who is employed" is questionable. The law recognizes various distinctions between an employment relationship and an agency.<sup>33</sup> Presumably, the legislature understood such differences.<sup>34</sup> Because an agency relationship can be more limited than an employee-employer relationship, the statute probably was not intended to protect noncompetition agreements imposed upon an agent as opposed to a regular employee.

Less questionable is the other appellate construction of "one who is employed" found in *Brenner v. Barco Chemicals Division*.<sup>35</sup> In that case, the court ruled that a company's officer is "employed" for purposes of enforcing any noncompetition agreements he might execute.<sup>36</sup>

#### D. Professions as Constituting a Business

The conclusion that pursuing a profession was not tantamount to engaging in a business was briefly popular. The First District Court of Appeal in *Bergh v. Stephens* noted that: "Like the legal profession, the medical profession has for centuries been regarded and adjudicated to be a great and noble profession, as distinguished from a business, and it is so today."<sup>37</sup> This notion was forever interred, however, by the 1970 Florida Supreme Court deci-

31. *Id.*

32. *Id.* at 221. See also *Insurance Field Servs. v. White & White Inspection*, 384 So. 2d 303, 307 (Fla. 5th Dist. Ct. App. 1980).

33. See 53 AM. JUR. 2d *Master & Servant* § 3 (1970); BLACK'S LAW DICTIONARY 57 (5th ed. 1979); 2 FLA. JUR. 2d *Agency & Employment* § 2, at 139-40 (1977).

34. See *State Dept. of Pub. Welfare v. Galilean Children's Home*, 102 So. 2d 388 (Fla. 2d Dist. Ct. App. 1958); 30 FLA. JUR. *Statutes* § 112, at 273-74, § 119, at 282-83 (1974).

35. 209 So. 2d 277 (Fla. 3d Dist. Ct. App. 1968).

36. *Id.* at 278.

37. 175 So. 2d 787, 791 (Fla. 1st Dist. Ct. App. 1965). *Contra*, *White v. Allen*, 232 So. 2d 766 (Fla. 4th Dist. Ct. App. 1970) (term "business" includes a profession or a trade).

sion in *Akey v. Murphy*.<sup>38</sup> In that decision, the court held the business-profession distinction to be inapposite when enforcing a noncompetition agreement.<sup>39</sup>

### E. "Similar Business"

Few operative words of section 542.12 allow greater flexibility of construction than those referring to the statute's applicability to an employee engaging in a "similar business" to that of his former employer.<sup>40</sup> Recognizing the imprecision inherent in such wording, appellate decisions have entrusted interpretation of this section of the statute to the lower tribunals: "The trial court has jurisdiction to determine the issue of the similarity of positions and, in its discretion, to enforce the covenant in respect thereto."<sup>41</sup> While no Florida case has further defined a test for "similarity of position," a Georgia court sensibly suggested such criteria as the applicability of similar skills and experience, and, compellingly, whether the same customers would be natural objects of the two "similar" businesses.<sup>42</sup>

In substance, the "similarity" problem probably restates the question of whether two businesses are "competing;" a question earlier Florida courts have considered. Before Florida's enactment of section 542.12, the Florida Supreme Court in *Wilson v. Pigue*<sup>43</sup> imparted a functional analysis to the question of competition. "[T]he test appears to be that the injury begins when the scope and character of the employment by the rival business is such as to result in substantial interference with the business being the sub-

38. 238 So. 2d 94 (Fla. 1970).

39. *Id.* at 96-97.

40. FLA. STAT. § 542.12(2) (1979).

41. *Hunter v. North American Biologicals, Inc.*, 287 So. 2d 726, 728 (Fla. 4th Dist. Ct. App. 1974).

42. *Edwards v. Howe Richardson Scale Co.*, 229 S.E.2d 651 (Ga. 1976). See also *Mono-gram Indus., Inc. v. Sar Indus., Inc.*, 134 Cal. Rptr. 714, 719 (Ct. App. 1976), in which the court said:

That section permits a covenant not to engage in a business "similar" to the one sold. . . . The buyer's business need not use the same name or similar organization. . . . The language of the section insures that the competition is in fact such and not simply insubstantial and infrequent or isolated transactions.

The words of this California court are especially important in light of *Flammer v. Patton*, 245 So. 2d 854 (Fla. 1971). In *Flammer*, the Florida Supreme Court noted that Florida's statute was patterned after provisions of California and Oklahoma law. Accordingly, court decisions from those states, even those rendered after Florida adopted the statute, were considered by the court when rendering a decision. *Id.* at 859.

43. 10 So. 2d 561 (Fla. 1942) (injunction sought against former owner of business by party purchasing it from him).



ject of the contract."<sup>44</sup> This prestatutory standard of "substantial interference" seems well suited to guide the trial court's finding as to "similarity of positions."

A further dimension to the definition of "similarity" was added recently in a brief opinion of the Third District Court of Appeal. In *Puga v. Suave Shoe Corp.*,<sup>45</sup> the appellant challenged an injunction issued in favor of an employer who was preparing to launch a business activity "similar" to that being pursued by his former employee. With little elaboration, the court, affirming the trial court's decision, stated the trial court was acting within its discretion.<sup>46</sup> This result is consistent with the policy whereby the trial courts are generally left to decide the question of similarity.<sup>47</sup>

#### *F. Whether "Unreasonable" Agreements Are Within the Scope of Section 542.12*

The most persistently litigated issue with regard to the scope of section 542.12(2) arises from its sanction of noncompetition agreements for a "reasonably limited time and area."<sup>48</sup> Because courts have assumed that only noncompetition agreements within the specific terms of the statute can be enforced,<sup>49</sup> several cases have held that unreasonably broad agreements fall beyond the savings clause of section 542.12(2) and, thus, are wholly void.<sup>50</sup>

44. *Id.* at 563.

45. 374 So. 2d 552 (Fla. 3d Dist. Ct. App. 1979).

46. At the trial court level, *Suave Shoe* was No. 78-20720 (CA07) in the General Jurisdiction Division of Dade Circuit Court.

47. See *Hunter v. North American Biologicals, Inc.*, 287 So. 2d 726, 728 (Fla. 4th Dist. Ct. App. 1974). A more specific test for determining when preparatory activity is "similar" to operations actually underway has been enunciated by the United States District Court for the Southern District of New York: "Mere planning may not in itself constitute competition. But where, as here, affirmative steps are taken which go beyond the planning stage, planning ripens into actual competition." *De Long Corp. v. Lucas*, 176 F. Supp. 104, 123 (S.D.N.Y. 1959), *aff'd*, 278 F.2d 804 (2d Cir. 1960). Compare *Orkin Exterminating Co. v. Dewberry*, 51 S.E.2d 669 (Ga. 1949) (preparation to expand into new territory, not new business) with *United Aircraft Corp. v. Boreen*, 413 F.2d 694 (3d Cir. 1969) (corporation seeks recovery of damages from former employees); and *Waterfield Mortg. Co. v. O'Connor*, 361 N.E.2d 924 (Ind. Ct. App. 1977) (employment agreement contemplated expansion of business activity throughout the state). See also *Continental Group, Inc. v. Kinsley*, 422 F. Supp. 838 (D. Conn. 1976).

48. FLA. STAT. § 542.12(2) (1979).

49. See note 21 *supra*.

50. *Forrest v. Kornblatt*, 328 So. 2d 528 (Fla. 3d Dist. Ct. App. 1976); *Sanford Indus., Inc. v. Jaghory*, 223 So. 2d 77 (Fla. 3d Dist. Ct. App. 1969); *C & D Farms, Inc. v. Cerniglia*, 189 So. 2d 384 (Fla. 3d Dist. Ct. App. 1966), *aff'd*, 203 So. 2d 1 (Fla. 1967). See also *Davis v. EBSCO Industries, Inc.*, 150 So. 2d 460 (Fla. 3d Dist. Ct. App. 1963) (apparently did not void entire covenant; court merely declined to give it further effect).

The most significant of these rulings came with the 1967 Florida Supreme Court decision in *Cerniglia v. C & D Farms, Inc.*<sup>51</sup> With no statement of its rationale, the court affirmed a trial court finding that the noncompetition agreement was "too extensive, both as to time and area" to be given any force or effect.<sup>52</sup> The time restriction in *Cerniglia*, however, covered a twenty-year period and the area restriction encompassed all of the United States.<sup>53</sup>

Although cases such as *Cerniglia* have not been expressly overruled, they stand at odds with the current rule expressed in the 1971 Florida Supreme Court decision of *Flammer v. Patton*.<sup>54</sup> In *Flammer*, a former employee of a finance company was allegedly competing with his old employer in violation of a restrictive covenant. In mandating enforcement, the court said:

[I]t is within the discretion of the trial court to determine what limitations as to time and area would be reasonable under the circumstances. . . . [O]ffending contracts of this nature [are] void only to the extent that they do not meet the requirement of reasonable limitation contained in subsection 2 of the statute.<sup>55</sup>

Following this decision, appellate courts now almost invariably hold potentially unreasonable agreements enforceable, but construe them narrowly.

Despite a number of similar pronouncements which follow the rule of *Flammer*, a 1976 third district decision seems to reflect the otherwise discarded notion that unreasonable covenants are wholly unenforceable. *Forrest v. Kornblatt*<sup>56</sup> presents a terse affirmation of a ruling that the subject restrictive covenant failed to be "conscionable and . . . reasonably limited in time and area." This opinion, which cited no recent precedent, is probably an aberration. At the present time, the prevailing rule permits enforcement of unreasonable agreements within reasonable limitations.

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51. 203 So. 2d 1 (Fla. 1967) (involving restrictive covenant signed by former owner in favor of purchaser of business).

52. *C & D Farms v. Cerniglia*, 189 So. 2d 384, 385 (Fla. 3d Dist. Ct. App. 1966), *aff'd*, 203 So. 2d 1 (Fla. 1967).

53. *Id.*

54. 245 So. 2d 854 (Fla. 1971).

55. *Id.* at 859.

56. 328 So. 2d 528, 529 (Fla. 3d Dist. Ct. App. 1976).

G. *Applicability of Section 542.12 to Parties Other Than Original Parties to Noncompetition Agreements*

Although by its terms the statute applies only to the original parties to the agreement, attempts have been made to broaden its applicability to other parties affected by the noncompetition agreement. Courts have considered whether only the original employer can enforce the agreement as well as whether only the original covenanting former employee can be subject to its enforcement.

Turning to the first issue, it appears that the enforcing party must have some direct relationship with the covenantor before the benefit of section 542.12 can be claimed. In 1975, in *Manpower, Inc. v. Olsten Permanent Agency*,<sup>57</sup> the Second District Court of Appeal ruled that section 542.12 "cannot be extended to permit a third party beneficiary to enforce a covenant not to compete."<sup>58</sup> Previously, in *Nenow v. L. C. Cassidy & Son, Inc.*,<sup>59</sup> the same court found noncompetition agreements assignable, but in doing so, emphasized that subsequent to the assignment, the assignee had operated directly with the covenanting employee.<sup>60</sup> Thus, a direct relationship was created and was presumably accepted by the employee that was absent in the third party beneficiary case.<sup>61</sup> Extrapolating from both holdings, it would appear that a successor or assignee who never enjoyed any direct relationship with an employee could not enforce a noncompetition agreement against him.

On the other hand, the First District Court of Appeal ruled that a noncompetition agreement can be enforced not only against the competing employee, but also against his privies. In *Temporarily Yours-Temporary Help Services, Inc. v. Manpower, Inc.*,<sup>62</sup> a former employee of the plaintiff formed a rival corporation becoming its president and sole operating officer. The court found the noncompetition agreement enforceable against both the individual and the corporation. The court ruled that such covenants were chargeable against parties to the contract and "also [against] those identified with them in interest, in privity with them, represented by them or subject to their control."<sup>63</sup>

Adopting a contradictory position, the fourth district ruled in *U*

57. 309 So. 2d 57 (Fla. 2d Dist. Ct. App. 1975).

58. *Id.* at 59.

59. 141 So. 2d 636 (Fla. 2d Dist. Ct. App. 1962).

60. *Id.* at 639.

61. *Id.*

62. 377 So. 2d 825 (Fla. 1st Dist. Ct. App. 1979).

63. *Id.* at 827.

*Shop Rite, Inc. v. Richard's Paint Manufacturing Co.*<sup>64</sup> that agents, servants and/or employees of the culprit cannot be enjoined when they are "persons other than those party to the contract."<sup>65</sup> The *U Shop Rite, Inc.* dictum cannot be reconciled with the subsequent holding of *Temporarily Yours*, and its lack of detail impedes clear definition of its holding. It is difficult to support the *U Shop Rite, Inc.* opinion if it forbids injunctions directed to parties who induce an ex-employee's breach of a noncompetition agreement. Certainly inducing a breach of contract is actionable.<sup>66</sup> As long as the agents or privies of the party in breach are properly named defendants, there is no reason why they should not be subject to injunction against inducing and participating in breaches of a noncompetition agreement. Presumably, the legislature intended to prevent such abuses, and the first district's view is more consistent with such an intent.

#### IV. DEFENSES TO ENFORCEMENT

##### A. Harshness, Oppression or Offense to Public Policy

Assuming that a particular noncompetition agreement is within the scope of section 542.12(2), relatively few defenses may be raised as complete bars to its enforcement. Although courts have generally ruled that "unreasonable" agreements cannot be wholly invalidated, dicta in various cases suggest that truly egregious circumstances may warrant the wholesale obliteration of those covenants.<sup>67</sup> Such circumstances may include an "overriding public interest in having the restricted employee's services available" or a truly harsh and oppressive result threatening the former employee.<sup>68</sup>

While the precise contours of this defense are unclear, it seems certain that "a general finding that enforcement will produce 'unjust results' " will not suffice.<sup>69</sup> An illustration of circumstances that will warrant invalidation is found in comparing two cases considering covenants restricting employment of doctors.

In *Hefelfinger v. David*,<sup>70</sup> the First District Court of Appeal af-

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64. 369 So. 2d 1033 (Fla. 4th Dist. Ct. App. 1979).

65. *Id.* at 1034.

66. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 609 (5th Cir. 1967).

67. *See, e.g., Capelouto v. Orkin Exterminating Co.*, 183 So. 2d 532, 534 (Fla. 1966); *Atlas Travel Serv. v. Morelly*, 98 So. 2d 816, 818 (Fla. 1st Dist. Ct. App. 1957).

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

69. *Barco Chems. Div., Inc. v. Colton*, 296 So. 2d 649, 650 (Fla. 3d Dist. Ct. App. 1974).

70. 305 So. 2d 823 (Fla. 1st Dist. Ct. App. 1975).

firmed a trial court enforcement of a two-year noncompetition agreement in the Escambia County area against an Escambia County doctor. Although the court found that there was a need for pediatricians in the Pensacola area, it held that restraining the doctor from practice would not jeopardize the public health.

In a Third District Court of Appeal case, however, an attempt to exclude a medical doctor from practice in the Florida Keys met a different result. In *Damsey v. Mankowitz*,<sup>71</sup> the noncompetition agreement required the doctor to avoid practicing medicine between Boca Chica Key and Plantation Key for three years after termination of his employment.<sup>72</sup> In that case, the court reasoned:

The testimony also revealed a compelling need for defendant's services as a surgeon in the area and enforcement of the covenant would jeopardize the public health of the community. We conclude that under the circumstances the restrictive covenant in this agreement is unduly harsh and oppressive and affirm the appealed order.<sup>73</sup>

To date, this is the only Florida case which has affirmed the invalidation of a covenant based on public policy, or the need to avoid a harsh or oppressive result. Comparing *Hefelfinger* to *Damsey* demonstrates that the standard for complete invalidation is jeopardy to the public welfare, a hard test to meet.

#### B. *Contract Breach or Discharge by the Employer as an Employee's Defense to a Noncompetition Action*

Florida has recently adopted the general rule providing that an employer who has breached his agreement may not enforce the noncompetition agreement against the employee. A Texas court states the rule as follows:

It is well settled that an employer cannot wrongfully breach a provision of an employment contract that is favorable to the employee (such as reducing his wages without his consent and without contractual authority to do so) and then go into a court of equity to secure, by injunction, the enforcement of another provision favorable to it.<sup>74</sup>

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71. 339 So. 2d 282 (Fla. 3d Dist. Ct. App. 1976).

72. *Id.* at 283.

73. *Id.*

74. *Norris, Inc. v. Gafas*, 562 S.W.2d 894, 896 (Tex. Ct. App. 1978).

This traditional principle is an adjunct of the equitable "clean hands" maxim.<sup>75</sup> The principle was apparently adopted by the First District Court of Appeal in the 1979 decision of *Troup v. Heacock*.<sup>76</sup> The facts of *Troup* are laced with unconscionability. Robert Troup, an insurance agent, entered an employment contract to represent an insurance company. The contract provided a weekly draw of \$125 for Troup, no specific training for him, no express requirement that a quota of insurance be sold by Troup and a noncompetition agreement covering the Volusia-Flagler county area for three years. The insurance company unilaterally reduced the weekly draw to \$50 and finally fired Troup for reasons known only to his employer.<sup>77</sup> Finding that the employer had breached the agreement by reducing the employee's draw, the district court reversed the trial court's order enforcing the restrictive covenant while calling it "inverse peonage."<sup>78</sup>

The ruling in *Troup* recognizes the doctrine that an employer wrongfully discharging a worker may not thereafter restrain him from competition. If an employee's discharge is unaccompanied by wrongful conduct, however, Florida law is less clear. In all likelihood, it appears that a guiltless employer may discharge an employee and still prevent his competition. Two factors support this conclusion. First, absent employer wrongdoing, no case has based the enforceability of agreements upon the nature of the discharge and frequently they do not even indicate whether a worker quit or was fired.<sup>79</sup> Second, in the previously discussed *Hefelfinger* case, where an employee's discharge was considered, the appellate court enforced the noncompetition agreement in its entirety.<sup>80</sup>

Nevertheless, the issue is not free from doubt. A Fifth Circuit Court of Appeal's decision construing Florida law declined to enforce a noncompetition agreement based on the employer's act of termination even though no breach of contract by the employer was indicated. The court stated:

The no-competition clause was an integral part of the consultant

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75. 27 AM. JUR. 2d *Equity* §§ 136-44 (1966); BLACK'S LAW DICTIONARY 227 (5th ed. 1979); 30 C.J.S. *Equity* §§ 93-99 (1965); 12 FLA. JUR. *Equity* §§ 54-58 (1957).

76. 367 So. 2d 691 (Fla. 1st Dist. Ct. App. 1979).

77. *Id.* at 692.

78. *Id.*

79. See sources cited in note 88 *infra*. See also *Beiley, Wagner & Assoc., Inc. v. Wagner*, 238 So. 2d 115 (Fla. 3d Dist. Ct. App. 1970) (injunction denied when employee withdrew as employee and began to compete with former employer).

80. 305 So. 2d at 823.

contract and did not stand independently of it. . . . [W]hen Orkin terminated the agreement, rather than terminating Kaye's employment, it also terminated the no-competition requirement contained in the agreement. The clause ceased to have effect because the contract between the parties had ended.<sup>81</sup>

This reasoning, asserted without authority, is unpersuasive for two reasons. First, an employer who has complied with his contractual obligations should not forfeit those entitlements due him because he lawfully terminates one aspect of the bargain. A person discontinuing an arrangement expects the consideration already due as part of the agreement. Second, it would be unpractical to make the determinative question whether a worker leaves his employment voluntarily or otherwise, since such an approach would require extensive investigation of the circumstances surrounding the employee's termination.

## V. INJUNCTIVE RELIEF UNDER SECTION 542.12(2)

### A. Availability of the Noncompete Injunction

When an agreement is embraced by section 542.12(2) and cannot be voided through the use of an appropriate defense, then the agreement can be enforced by injunctive relief. A court of competent jurisdiction is provided the discretionary power to grant an injunction under section 542.12(2)(a).<sup>82</sup> Such discretion, however, has been subject to varying control by appellate courts. Although the language of the section purports to confirm a continuing role for trial court discretion when granting injunctions, appellate decisions from the beginning have narrowly channeled such discretion. In *Atlas Travel Service, Inc.*, the court stated that any exercise of discretion must not violate the object of the statute.<sup>83</sup> Other appellate holdings<sup>84</sup> following *Atlas Travel Service* culminated in the 1974 Florida Supreme Court pronouncement in *Miller Mechanical, Inc. v. Ruth*,<sup>85</sup> that although a court can award breach of contract damages in a noncompetition agreement violation situation, "the normal remedy is to grant an injunction." The court premised this

81. *Kaye v. Orkin Exterminating Co.*, 472 F.2d 1213, 1215 (5th Cir. 1973).

82. FLA. STAT. § 542.12(2)(a) (1979).

83. 98 So. 2d at 818.

84. See *Barco Chems. Div., Inc. v. Colton*, 296 So. 2d 649 (Fla. 3d Dist. Ct. App. 1974); *Data Supplies, Inc. v. Cowart*, 240 So. 2d 829 (Fla. 2d Dist. Ct. App. 1970); *Tasty Box Lunch Co. v. Kennedy*, 121 So. 2d 52 (Fla. 3d Dist. App. 1960).

85. 300 So. 2d 11, 12 (Fla. 1974).

conclusion on the realization that it is difficult to ascertain what damages have been suffered by the employer as a result of the employee's breach.<sup>86</sup> Indeed, in sharp contrast to the usual appellate deference to trial court injunctive discretion, roughly a dozen Florida appellate cases have reversed lower court refusals to grant injunctive relief.<sup>87</sup>

Correspondingly, trial court orders granting injunctive enforcement of noncompetition agreements have almost invariably been affirmed. In some instances, the entitlement to injunction can be adjudicated in summary judgment.<sup>88</sup> The only appellate reversal of an injunctive grant was the previously discussed *Troup v. Heacock* case. In *Troup*, the court's ruling did not reach the propriety of injunctive remedy because it found no liability. That decision held that because the employer had already breached the contract, the competing employee was not bound to the noncompetition clause in the contract.<sup>89</sup> Thus, even this unusual case does not conflict with the mainstream conclusion that an injunction is the presumptively valid remedy for noncompete violators.

In addition to confining the scope of trial court discretion, Florida case law has eroded another longstanding injunction principle. In 1974, the Fourth District Court of Appeal held that the following allegations stated a cause of action for injunctive relief under section 542.12(2):

- (a) The contract [was entered into].
- (b) The appellant's intentional direct and material breach thereof.

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86. *Id.*

87. See *Miller Mechanical, Inc. v. Ruth*, 300 So. 2d 11 (Fla. 1974); *West Shore Restaurant Corp. v. Turk*, 101 So. 2d 123 (Fla. 1958); *Empiregas, Inc. v. Thomas*, 359 So. 2d 15 (Fla. 1st Dist. Ct. App. 1978); *Foster & Co. v. Snodgrass*, 333 So. 2d 521 (Fla. 2d Dist. Ct. App. 1976); *Royal Servs., Inc. v. Williams*, 334 So. 2d 154 (Fla. 3d Dist. Ct. App. 1976); *Auto Club Affiliates, Inc. v. Donahay*, 281 So. 2d 239 (Fla. 2d Dist. Ct. App. 1973); *Lee v. Watsco, Inc.*, 263 So. 2d 241 (Fla. 3d Dist. Ct. App. 1972); *Data Supplies, Inc. v. Cowart*, 240 So. 2d 829 (Fla. 2d Dist. Ct. App. 1970); *Tasty Box Lunch Co. v. Kennedy*, 121 So. 2d 52 (Fla. 3d Dist. Ct. App. 1960). *Cf. Pensacola Assocs. v. Biggs Sporting Goods Co.*, 353 So. 2d 944 (Fla. 1st Dist. Ct. App. 1978) (trial court reversed in lessee noncompete case); *Aid, Inc. v. Cavero*, 386 So. 2d 281 (Fla. 4th Dist. Ct. App. 1973) (sale of stock).

Despite the seemingly clear doctrine presented by such cases, trial courts continue to resent noncompetition agreements leading to further reversals. *Answer All Tel. Secretarial Serv., Inc. v. Call 24 Inc.*, 381 So. 2d 281 (Fla. 5th Dist. Ct. App. 1980); *Chessick Clinic v. Jones*, 367 So. 2d 1028 (Fla. 2d Dist. Ct. App. 1979).

88. *E.g., Maimone v. Wackenhut Corp.*, 329 So. 2d 332 (Fla. 3d Dist. Ct. App. 1976).

89. 367 So. 2d at 691.



(c) No adequate remedy except by injunctive relief.<sup>90</sup>

By endorsing this formulation, the court suggested that irreparable harm is inherent in the breach of a noncompetition covenant and, therefore, is not a necessary matter of pleading or proof. Similarly, other courts have required only a clear showing that a reasonable noncompetition agreement is being violated. "[It] is not essential that the employer have some special or peculiar product, trade secret, or unique device. . . . [W]here, as here, the violation is clear . . . injunctive relief is appropriate and *should be granted*."<sup>91</sup> By focusing on the certainty of violation, cases seem to excuse the need to establish any particular impending prejudice or "irreparable harm" to the employer. To the extent that irreparable harm continues as a requisite for noncompetition injunctions, any such requirement is evidently met as a matter of law.

Cutting against this trend are 1976 decisions of the Third District Court of Appeal which seem to restore trial court discretion and irreparable harm as factors in the noncompetition injunction case. In *Damsey*, the court mentioned usual maxims of equitable discretion in approving the refusal to restrain a doctor from practicing medicine in the Florida Keys.<sup>92</sup> In *Forrest v. Kornblatt*, the court affirmed without explanation a refusal for an injunction as within the trial court's discretion.<sup>93</sup>

Also reaffirming the role of trial court discretion, the court in *Uni-Chem Corp. v. Maret*<sup>94</sup> receded from any position that would require a temporary injunction being issued before a chancellor had an opportunity to exercise his discretion in a dispute. Additionally, the *Uni-Chem Corp.* decision revitalized another tenet of injunctive relief; specifically, that irreparable harm would have to be shown before a temporary injunction could be issued.<sup>95</sup> Arguably, however, these pronouncements are limited to proceedings for preliminary relief. The *Uni-Chem Corp.* court recognized that it

90. *Hunter v. North American Biologicals, Inc.*, 287 So. 2d 726, 728 (Fla. 4th Dist. Ct. App. 1974). See also *Puga v. Suave Shoe Corp.*, 374 So. 2d 552 (Fla. 3d Dist. Ct. App. 1979). In *Puga*, the court ruled that any irreparable harm requirement would necessarily be satisfied in noncompetition cases because monetary damages would typically be difficult to ascertain and, hence, no adequate remedy would be available apart from an injunction.

91. *Foster & Co. v. Snodgrass*, 333 So. 2d 521, 522-23 (Fla. 2d Dist. Ct. App. 1976) (emphasis added).

92. 339 So. 2d at 282.

93. 328 So. 2d at 529.

94. 338 So. 2d 885 (Fla. 3d Dist. Ct. App. 1976).

95. *Id.* at 887.

was dealing with a request for a temporary injunction. The case had not yet proceeded to a full hearing and not all of the evidence had been presented to the court.<sup>96</sup> Fortifying the suggestion that *Uni-Chem Corp.* speaks only to temporary injunctions is the fact that any extension of such principles to final injunction cases would squarely conflict with the Florida Supreme Court ruling in *Miller Mechanical, Inc.* which supported the granting of an injunction.<sup>97</sup>

Even if restricted to preliminary injunctions, the *Uni-Chem Corp.* reasoning is suspect. Although the proffered distinction is consonant with ordinary proceedings in equity, it has no precedent in section 542.12 litigation. Indeed, the third district itself, in *Tasty Box Lunch Co. v. Kennedy*,<sup>98</sup> had previously reversed a trial court refusal to grant temporary relief without distinguishing between temporary and permanent injunctions. In *Tasty Box Lunch Co.*, an order of the chancellor denied the employer's application for a temporary injunction. The denial was premised on the unequal bargaining positions of the employer and employee and a lack of consideration on the part of the employer for the employee's noncompetition agreement. The agreement required the employee not to compete for six months in the territory last worked by the employee prior to his discharge. The third district, disagreeing, reversed and remanded. The court concluded that an unequal bargaining position was an inadequate basis to void the agreement, since all noncompetition agreements would probably be voided if an equal bargaining position was required. Also, the court found that the employer's promise to pay commissions was sufficient consideration for the employee's agreement. There was no distinction made by the court, however, between temporary and permanent injunctions.<sup>99</sup> Moreover, if such a distinction were made in a non-competition enforcement action it would ignore a critical reality expressed in another third district case: "Cases of this kind should be determined expeditiously, so as to prevent an employee's violation of such a contract to continue well into or beyond the non-competition period thereof. Delay in enforcement can operate to deprive the employer of the benefit of the contract."<sup>100</sup>

Unless preliminarily enjoined, a former employee may continue

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96. *Id.*

97. 300 So. 2d 11, 12 (Fla. 1974).

98. *Tasty Box Lunch Co. v. Kennedy*, 121 So. 2d 52, 54 (Fla. 3d Dist. Ct. App. 1960).

99. *Id.* at 53-54.

100. *Royal Servs., Inc. v. Williams*, 334 So. 2d 154, 157 (Fla. 3d Dist. Ct. App. 1976).

illicit competition until final judgment is rendered. Final judgment might easily occur after the period for noncompetition has expired. Technically speaking, this need not moot the employer's injunctive suit because the trial court could enjoin the competitive actions from the date of judgment until the running of a period equal to the originally prescribed term of noncompetition.<sup>101</sup> As a practical matter, however, such an injunction might come too late to prevent a permanent loss of clientele, trade expertise, and other assets which the noncompetition agreement sought to protect.

A final observation regarding the reach of *Uni-Chem Corp.* is the court's insistence that it was merely affirming the "action of the trial court [judge] on the record as was then presented to him."<sup>102</sup> Although the facts of the case are not presented in detail, it is clear that the decision deals with salesmen and not technicians whose minds are crammed with freshly appropriated trade secrets. Additionally, the noncompetition agreement provided for liquidated damages. While a liquidated damages provision is not an absolute bar to injunctive relief,<sup>103</sup> it may be a factor weighing against the need for an injunction.

So far, no decision other than *Uni-Chem Corp.* has espoused a temporary-permanent injunction dichotomy in a noncompetition enforcement action. Since the Florida Supreme Court and other district courts have attached a presumptive force to the injunctive remedy without making any such differentiation in these cases, it is unclear whether *Uni-Chem Corp.* will emerge as a harbinger.

### B. Prescribing the Scope of the Noncompete Injunction

Although the unreasonableness of a noncompetition agreement does not necessarily take it beyond section 542.12(2), the reasona-

101. See *Capelouto v. Orkin Exterminating Co.*, 183 So. 2d 532 (Fla. 1966). In *Insurance Field Servs. v. White & White Inspection*, 384 So. 2d 303, 306 (Fla. 5th Dist. Ct. App. 1980), the court ruled that a suit for injunction became moot once the contract's period for noncompetition had expired. Similarly, in *Royal Servs., Inc. v. Williams*, 334 So. 2d 154, 157 (Fla. 3d Dist. Ct. App. 1976), the court reversed a trial judge's denial of enforcement yet declined to remand the case because the contract period for enforcement had expired. To prevent such contracts from expiring during the pendency of an appeal after a trial court refuses enforcement, the Third District Court of Appeal suggested application to the appellate court for interim injunctive relief. *Id.*

102. 338 So. 2d at 887. As of this writing, the most recent pronouncement by the Third District Court of Appeal indicated that *Uni-Chem Corp.* will not be extended to permanent injunctions. See *Suave Shoe Corp. v. Fernandez*, No. 80-503 (Fla. 3d Dist. Ct. App. Dec. 2, 1980).

103. *Beery v. Plastridge Agency, Inc.*, 142 So. 2d 332 (Fla. 3d Dist. Ct. App. 1962).

bleness of the agreement is a primary factor considered by the courts when determining the scope of injunctive relief to be granted.<sup>104</sup> Reasonableness is primarily an issue for the trial court; appellate courts almost never disturb orders that give at least partial effect to noncompetition agreements.

Appellate court decisions nevertheless have provided some standards to guide lower court discretion. In general, the analysis for delineating reasonableness is a familiar balancing test between the employer's interest in preventing the competition and the oppressive effect on the employee.<sup>105</sup> The court's analysis should begin with consideration of the terms of the noncompetition agreement contained in the employment contract.<sup>106</sup> At the same time, the court should focus on the limitations as to time and geographical area as required by the statute.<sup>107</sup>

After beginning with the terms of the agreement, the next step is to determine whether the circumstances of the case mandate modification.<sup>108</sup> These circumstances can include facts developing after the execution of the noncompetition agreement, such as the defendant's subsequent ability to earn a living.<sup>109</sup>

Another factor determining how long and to what extent noncompetition will be enforced is the voluntariness of the employee's promise. To date, no court has ruled that an employee's lack of bargaining power compels invalidation. As one court has stated: "To hold that the agreement is unenforceable because the bargaining parties were not all on equal terms would void nearly all such agreements and this would defeat the purpose of the statute."<sup>110</sup> On the other hand, in a case in which the employee willingly entered into a noncompetition agreement, the court deemed this behavior to be "an important factor" favoring expansive enforcement.<sup>111</sup> In that case, the court observed that restrictions found in

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104. *Availability, Inc. v. Riley*, 336 So. 2d 668 (Fla. 2d Dist. Ct. App. 1976). See also *Akey v. Murphy*, 238 So. 2d 94 (Fla. 1970).

105. *Miller Mechanical, Inc.*, 300 So. 2d at 12.

106. *Flammer v. Patton*, 245 So. 2d at 859.

107. *Availability, Inc. v. Riley*, 336 So. 2d 668, 670 (Fla. 2d Dist. Ct. App. 1976).

108. *Id.*

109. *Compare American Bldg. Main Co. v. Fogelman*, 167 So. 2d 791 (Fla. 3d Dist. Ct. App. 1964) ("unreasonable to enjoin a man from his livelihood for more than a year") with *Availability, Inc. v. Riley*, 336 So. 2d 668 (Fla. 2d Dist. Ct. App. 1976) (defendant "well able to support himself and his family" notwithstanding injunction).

110. *Tasty Box Lunch Co. v. Kennedy*, 121 So. 2d 52, 54 (Fla. 3d Dist. Ct. App. 1960).

111. *Compare Auto Club Affiliates, Inc. v. Donahey*, 281 So. 2d 239, 244 (Fla. 2d Dist. Ct. App. 1973) (injunctive relief to enforce restrictive covenant against competition) with *Orkin Exterminating Co. v. Girardeau*, 301 So. 2d 38 (Fla. 1st Dist. Ct. App. 1974) (em-

agreements entered into throughout the United States appeared to be reasonable.

A further factor to be considered is the extent to which both the employer and the employee had contact with the restricted territory. No case has enforced a restriction beyond the region in which the employer actually did business.<sup>112</sup> Conversely, a trial court's refusal to enforce an agreement in the county in which eighty-five percent of the employer's business was conducted was held to be reversible error.<sup>113</sup>

The previous contacts between the employee and the restricted area are also important because if the employee does not have sufficient contact with the entire territory over which the employer's business extends, the noncompetition agreement might be unenforceable.<sup>114</sup> Thus, in *Orkin Exterminating Co. v Girardeau*,<sup>115</sup> a divided district court affirmed a trial court order limiting enforcement of a seven-county noncompetition agreement to the San Jose portion of Jacksonville. Although the employer operated throughout the restricted territory, the employee's labors had been expended primarily in one area.

A final ingredient of section 542.12 injunction analysis is whether trade secrets are implicated. This factor represents a valid business concern fully recognized even before the statute's enactment.<sup>116</sup>

No list of criteria can be exhaustive. Probably the closest any court has come to summarizing the main components of this balancing analysis was the discussion in *Akey v. Murphy* that: "[T]he restrictions were no greater than were necessary to protect petitioners' legitimate interests, were not unduly harsh and oppressive on the respondent, and were not injurious to the public interest."<sup>117</sup>

ployee told to accept noncompetition agreement or lose job).

Training is also an important factor. *Cf. Orkin Exterminating Co. v. Girardeau*, 301 So. 2d 38 (Fla. 1st Dist. Ct. App. 1974) (worker received only four hours of training from employer seeking injunction).

112. *See, e.g., U Shop Rite, Inc.*, 369 So. 2d at 1033.

113. *Availability, Inc. v. Riley*, 336 So. 2d 668, 670 (Fla. 2d Dist. Ct. App. 1976).

114. *Auto Club Affiliates, Inc. v. Donahey*, 281 So. 2d 239, 242 (Fla. 2d Dist. Ct. App. 1973).

115. 301 So. 2d 38 (Fla. 1st Dist. Ct. App. 1974).

116. *Fountain v. Hudson Cush-N-Foam Corp.*, 122 So. 2d 232, 234 (Fla. 3d Dist. Ct. App. 1960).

117. 238 So. 2d at 97.

## VI. CONCLUSION

Recent pronouncements by Florida courts suggest increasing reluctance to adhere to the rigid pattern of noncompetition agreement enforcement mandated in such Florida Supreme Court decisions as *Akey v. Murphy* and *Miller Mechanical, Inc. v. Ruth*. District court opinions since 1974 have not applied the stringent directives for enforcement called for by *Miller Mechanical, Inc.* which represents the most current high court ruling in this field. Moreover, the supreme court has not yet admonished such district court behavior.

This mild appellate relaxation follows the longstanding and invariable reluctance of trial judges to impose injunctions that, in practical effect, sentence a person to refrain from partaking in his livelihood. Such manifestations of leniency are understandable. The rigid rule of *Miller Mechanical, Inc.* seemingly offered no discretion for genuine hardship cases, while in *Uni-Chem Corp.*, the third district would return such discretion to the trial judge at least at the preliminary injunction level.

The problem with the *Uni-Chem Corp.* holding, and the difficulty apparently prompting the enactment of section 542.12, is that discretionary enforcement generally translated into nonenforcement. After all, even though discretionary parameters have always been theoretically available to enforce noncompetition agreements, the fact remains that no reported decision enforced one until section 542.12 was passed. Both judges and legislators apparently developed an all-or-nothing approach towards enforcing noncompetition agreements. A solution to this extreme approach can be found in further judicial development of criteria for enforcement previously referenced without elaboration in applicable cases. As far back as the initial decision of *Atlas Travel Service, Inc.*, courts have favored enforcement absent "harsh, oppressive or unjust" consequences. Unfortunately, these vague terms have not been further defined except for decisions declining enforcement against a fired worker and against a doctor whose services were urgently needed in the community.

The courts need to more specifically define the showing that must be made to overcome a statutory presumption favoring enforcement. One example of such a sufficient showing should be the inability of a worker to support a family if enjoined from a particular occupation in a particular region. While such a standard might seem difficult to define, it seems no more problematic than inquiries into impoverishment or financial ability made in other con-

texts of the law.

Another criterion worth further development is the extent to which an employee has voluntarily entered into a noncompetition agreement. Courts have previously refused to invalidate agreements on this basis by reasoning that unequal bargaining power is the unfortunate but inevitable reality behind each employee's covenant not to compete.<sup>118</sup> Minimally, however, courts could insist that such agreements appear conspicuously in any writings signed by the employee. Indeed, such agreements are at least as important as disclaimers of warranty which must be in bold face type to be effective.

Other factors in addition to financial hardship and voluntariness should be developed in specific terms by judicial or legislative classification. Only through such definition can courts avoid an all-or-nothing approach to enforcement while giving life to the unmistakable legislative mandate for presumptive enforcement.

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118. *Tasty Box Lunch Co. v. Kennedy*, 121 So. 2d 52 (Fla. 3d Dist. Ct. App. 1960).