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RESTRICTIVE COVENANTS IN MARYLAND EMPLOYMENT AGREEMENTS: A GUIDE FOR DRAFTING

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This article provides the Maryland lawyer with a practical guide for drafting restrictive covenants in employment agreements. The authors begin with a thorough analysis of the Maryland case law addressing this subject area. They recommend the types of provisions which will provide an employer with maximum protection against future competition by departing employees. The writers conclude with a section on suggested drafting techniques, keeping in mind that such provisions may have to withstand judicial scrutiny should litigation occur.

I. INTRODUCTION

The fragile nature of many employment relationships makes it imperative for employers to secure protection against future competition by departing employees. Protection can be obtained through a well-drafted restrictive covenant in an employment agreement; however, an attorney must be careful to draft in light of Maryland case law.

Sensitive and sophisticated legal questions arise when an attorney must determine how to protect trade secrets, private customer information and other confidential company materials to which an employee may have access. The protection must forestall the effects of future competition by present employees. Against this concern, the attorney must weigh the interests of employees who will be vigilant to any contractual language limiting their mobility in the marketplace. Furthermore, the public has a stake in the outcome of compromises negotiated between an employer and employee. Restrictive covenants also touch issues fundamental to the framework of the free society, including free-

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dom of contract, judicial interference in the market economy, restraint of trade, the protection of proprietary rights, the free flow of labor, and the possible equitable obligations of society in mitigating perceived unequal bargaining strengths between parties. A thorough and workable knowledge of the Maryland law on restrictive covenants in employment agreements will help the attorney in balancing these competing interests while providing the maximum possible protection for an employer.

This article provides the Maryland practitioner with a practical guide to the Maryland law addressing restrictive covenants in employment contracts.¹ The focus is on the realm of application, specifically, the principles attorneys should adopt when drafting a restrictive covenant so as to provide maximum protection for their clients. These same principles can, of course, be employed to analyze an existing restrictive covenant in a litigation or advisory setting. The method adopted to achieve the purpose of this article is to review the approximate two dozen Maryland decisions on the subject in order to identify the legal principles affirmed by the Maryland courts and the drafting guideposts which flow from such principles.²

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1. For a discussion of employee/employer rights absent an employment agreement containing restrictive covenants, see *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 37-39, 382 A.2d 564, 567-70 (1978). For a good discussion of Maryland Metals, Inc. v. Metzner, see 8 U. BALT. L. REV. 359 (1979).
 2. The history of cases on this subject is older than the two dozen Maryland cases discussed in this article. The earliest common law cases reflect a somewhat hostile attitude toward covenants not to compete in employment contracts. See, e.g., *Colgate Bachelor*, 78 Eng. Rep. 1097 (Q.B. 1602); *Anonymous*, 72 Eng. Rep. 477 (K.B. 1577); *Dyers Case*, Y.B. Mich. 2 Hen. 5., f. 5, pl. 26 (C.P. 1414). For a good discussion of these earlier cases, see Blake, *Employment Agreements Not to Compete*, 73 HARV. L. REV. 625, 629-37 (1960) [hereinafter cited as Blake].

The precursor of modern case law involving covenants in employment contracts is *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (Q.B. 1711). This 18th century decision set the foundation for more than two-and-one-half centuries of case law by articulating the "rule of reason" guidelines later adopted in Maryland and other jurisdictions. In *Mitchel*, the defendant subleased his bakery under an agreement in which he promised not to compete within the local area during the term of the lease. *Id.* The court noted a presumption against the validity of all restraints of trade, but upheld the enforceability of the restraint at issue because it was reasonable. *Id.* at 352. The *Mitchel* court distinguished between particular and general restraints. *Id.* at 349. The general restraint is one in which area or duration are unbounded, while a particular restraint is limited in scope. *Id.* at 352. General restraints were held to be *ipso facto* unreasonable, and therefore invalid, while particular restraints were held valid if supported by "good and adequate consideration involving a just and honest contract." *Id.* at 349, 352. Although the facts involved a business transfer, the principles articulated were applied by later courts directly to employment contracts.

Prior to this century, *Mitchel v. Reynolds* was "the fundamental authority to be applied in employee-restraint cases . . . [and] cases which fail to cite it are difficult to find." Blake, *supra* note 2, at 639. Early Maryland cases relied, in part, on *Mitchel*. For example, in *Guerand v. Dandelet*, 32 Md. 561 (1870), the court cited *Mitchel*, noting that "a contract . . . in unlimited restraint of trade, or of any particular vocation, is absolutely void, as being contrary to public policy, as well

II. CASE LAW

A. *The General Rule — Balancing Interests of the Employer vs. the Hardships on the Employee*

A restrictive covenant in an employment agreement must be “supported by adequate consideration and [be] ancillary to the employment contract.”³ If the covenant satisfies these two requirements, then the general rule in Maryland is that an employee’s agreement not to compete with his employer upon leaving employment will be upheld “if the restraint is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the business of the employer and [if the restriction] do[es] not impose undue hardship on the employee or disregard the interests of the public.”⁴ This rule establishes a balancing approach whereby the interests of the employer, the hardships on the employee and the interests of the public are weighed in order to determine whether a particular restriction will be sustained.⁵

There is relatively little discussion in any of the Maryland cases which actually addresses the third factor, the interests of the public.⁶

as oppressive in its operation upon individual industry.” *Id.* at 566. The court, consistent with *Mitchel*, noted that partial restraints of trade or employment may be lawful if reasonable and supported by sufficient consideration, while general restraints meeting the same criteria may not be. *Id.* While *Guerand* involved a restraint ancillary to the sale of a business, the principles adopted are inextricably linked to the reasonableness principles later articulated in employment contract cases. One of the earliest of these was *Deuerling v. City Baking Co.*, 155 Md. 280, 141 A. 542 (1928), in which a general “fair and reasonable” standard was applied in enforcing a restrictive covenant in an employment agreement. *Id.* at 287, 141 A. at 545. The standard set forth in *Deuerling* has been applied in later Maryland cases with little alteration. *See, e.g.*, *Silver v. Goldberger*, 231 Md. 1, 6-7, 188 A.2d 155, 158 (1963). As a consequence, Maryland courts have not veered substantially from the path forged nearly three hundred years ago in *Mitchel*.

3. *Tawney v. Mutual Sys., Inc.*, 186 Md. 508, 513, 47 A.2d 372, 375 (1946). *See also* *Blake*, *supra* note 2, at 626 n.3. The inference is that absent a larger transaction which legitimizes the restraint, such as an employment agreement or a sale of a business, a party cannot agree not to compete even upon the receipt of otherwise adequate consideration. *Id.*
4. *Becker v. Bailey*, 268 Md. 93, 96, 299 A.2d 835, 838 (1973) (quoting *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 123-24, 225 A.2d 288, 291 (1967); *MacIntosh v. Brunswick Corp.*, 241 Md. 24, 31, 215 A.2d 222, 225 (1965)).
5. *See* *Becker v. Bailey*, 268 Md. 93, 96, 299 A.2d 835, 838 (1973); *Massachusetts Indem. & Life Ins. Co. v. Dresser*, 269 Md. 364, 370, 306 A.2d 213, 217 (1973); *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 127, 225 A.2d 288, 293 (1967); *Deuerling v. City Baking Co.*, 155 Md. 280, 284, 141 A. 542, 543-44 (1928); *Hebb v. Stump, Harvey & Cook, Inc.*, 25 Md. App. 478, 487-88, 334 A.2d 563, 569, *cert. denied*, 275 Md. 749 (1975).
6. *But see* *Deuerling v. City Baking Co.*, 155 Md. 280, 284, 141 A. 542, 544 (1928), where the court stated:

The general public . . . are entitled to have the energy, industry, skill, and talents of all individuals freely offered upon the market, and it can easily be imagined that by unreasonable curtailment, through restrictive covenants contained in contracts of employment, the public at large

There are a few scattered comments indicating that a court need not concern itself with this aspect of the balancing test if a particular employer is not a monopolist.⁷ For the most part, however, this factor has only been given lip service in the cases. Therefore, it would appear that Maryland is ripe for an argument that a particular restrictive covenant is too wide because of the interests of the public. For example, if a particular employer is an especially dominant factor in a specific line of commerce, a restrictive covenant aimed at protecting such an employer may be susceptible to attack as contrary to the interests of the public.

Notwithstanding this potential, the Maryland cases have virtually always dealt with balancing the interests of the employer against the hardships on the employee.⁸ In this context Maryland has recognized only two types of employers' interests which are entitled to the protection of a restrictive covenant.⁹ The first involves trade secrets and other similar confidential information. For instance, where an employee can take trade secrets or other confidential information to a competitor which would thereby give that party a competitive advantage, then the former employer has a valid interest on which to base a restrictive covenant.¹⁰ The second recognized employers' interest requires that the employer's business be dependent in some way upon the employee to the extent that the employee's departure will, in fact, divert business away from the former employer because of something unique about the employee.¹¹ This second interest is usually expressed in terms of a continuum onto which all businesses fall. At one end of the continuum, a business is totally dependent on the personality, skill, knowledge or contacts of its employees for sales of its products or services. At the other end, a business is totally dependent either on the price or quality

might thereby be deprived of the services of individuals so essential to the progress, welfare, and happiness of mankind.

Id.

7. *See* Ruhl v. F.A. Bartlett Tree Expert Co., 245 Md. 118, 127, 225 A.2d 288, 293 (1967).
8. *See* Millward v. Gerstung Int'l Sport Educ., Inc., 268 Md. 483, 488-89, 302 A.2d 14, 17 (1973).
9. *Becker v. Bailey*, 268 Md. 93, 97, 299 A.2d 835, 838 (1973) (citing *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 225 A.2d 288 (1967)); *Silver v. Goldberger*, 231 Md. 1, 188 A.2d 155 (1963); *Tawney v. Mutual Sys., Inc.*, 186 Md. 508, 47 A.2d 372 (1946)).
10. *See* *E.L. Conwell & Co. v. Gutberlet*, 429 F.2d 527, 528 (4th Cir. 1970); *Head Ski Co. v. Kam Ski Co.*, 158 F. Supp. 919, 924 (D. Md. 1958). *See also* *Tawney v. Mutual Sys., Inc.*, 186 Md. 508, 521, 47 A.2d 372, 379 (1946) (recognizing trade secret and confidentiality provisions in employment agreements to be restrictive covenants).
11. *E.L. Conwell & Co. v. Gutberlet*, 429 F.2d 527, 528 (4th Cir. 1970); *Becker v. Bailey*, 268 Md. 93, 97, 299 A.2d 835, 838 (1973); *Budget Rent A Car, Inc. v. Raab*, 268 Md. 478, 482, 302 A.2d 11, 13 (1973); *Millward v. Gerstung Int'l Sport Educ., Inc.*, 268 Md. 483, 489, 302 A.2d 14, 17 (1973); *Tuttle v. Riggs-Warfield-Roloson, Inc.*, 251 Md. 45, 49-51, 246 A.2d 588, 590-91 (1968); *Tolman Laundry v. Walker*, 171 Md. 7, 12, 187 A. 836, 838 (1936).

of its products or services.¹² As long as a particular business can move somewhere along the continuum away from being totally dependent on the quality or price of its products or services, and somewhat dependent on the personality, skill, knowledge or contacts of the employee, then that business has a protectable interest which can support some form of restrictive covenant.¹³

If a particular business does not possess at least one of these two protectable interests, then there is nothing to balance against the obvious hardship on an employee who is saddled with a restrictive covenant. Accordingly, if there is no recognizable interest on the part of the employer, a restraint may not be enforced regardless of how reasonable it appears.¹⁴ For example, the United States Court of Appeals for the Fourth Circuit in *E.L. Conwell & Co. v. Gutherlet*¹⁵ was presented with one type of employment which was incapable of supporting any form of restrictive covenant. *Conwell* involved an engineer who inspected buildings after they were completed by his employer, a construction company.¹⁶ The engineer possessed no particular trade secrets, and the employer's business was in no way dependent upon the engineer's contacts, personality or skill to such an extent that his departure could conceivably divert business.¹⁷ Accordingly, the Fourth Circuit held that no restrictive covenant could be sustained, no matter how reasonable.¹⁸

A similar conclusion was reached in *Budget Rent A Car, Inc. v. Raab*.¹⁹ Budget's franchise agreement provided that upon termination the franchisee could not enter the rent-a-car business for a certain pe-

12. See *Millward v. Gerstung Int'l Sport Educ., Inc.*, 268 Md. 483, 488-89, 302 A.2d 14, 17 (1973). The *Millward* court noted:

[T]here is a distinction "between the cases where business success is attributable to the quality of the product being sold, and those where the personal contact of the employee with the customer is an important factor. In the latter case, the employer has a stronger need for protection against diversion of his business to the former employee who has had personal contacts with customers which the employer lacks."

Id. (quoting *Tuttle v. Riggs-Warfield-Roloso, Inc.*, 251 Md. 45, 49-50, 246 A.2d 588, 590 (1968)). See also, e.g., *Budget Rent A Car, Inc. v. Raab*, 268 Md. 478, 482, 302 A.2d 11, 13 (1973) (invalidating a restrictive covenant because the employee was unskilled and his services were not unique); *Tuttle v. Riggs-Warfield-Roloso, Inc.*, 251 Md. 45, 50, 246 A.2d 588, 590 (1968) (upholding a restrictive covenant, finding the employer's business dependent on the former employee's customer contacts); *Tolman Laundry v. Walker*, 171 Md. 7, 12, 187 A. 836, 838 (1936) (upholding a restrictive covenant because the employer was dependent on the former employee's loyalty, maintenance of secrets, and agreement not to compete); *Rosenstein v. Zentz*, 118 Md. 564, 85 A. 675 (1912) (invalidating a restrictive covenant because the services of the employee were not unique).

13. See *Tawney v. Mutual Sys., Inc.*, 186 Md. 508, 515-18, 47 A.2d 372, 376-77 (1946).

14. See *id.* at 519-20, 47 A.2d at 378.

15. 429 F.2d 527 (4th Cir. 1970).

16. 298 F. Supp. 623, 624-25 (D. Md. 1969), *aff'd*, 429 F.2d 527 (4th Cir. 1970).

17. 429 F.2d 527, 528 (4th Cir. 1970).

18. *Id.*

19. 268 Md. 478, 302 A.2d 11 (1973).

riod of time.²⁰ In this case the franchisee's wife established a rent-a-car business at the same location the day after Budget's franchise was terminated. Although the attorneys for both parties directed their attention primarily to whether the spouse's action was within the ambit of the restrictive covenant,²¹ the Court of Appeals of Maryland decided the case on other grounds. The court found that in this type of business the franchisor was not dependent on the uniqueness of the franchisee and that no trade secrets were involved.²² Consequently, no restrictive covenant, no matter how reasonable, could be enforced.²³

In both *Conwell* and *Budget*, the employers could have argued that they had a protectable interest because they had expended money to teach their employee or franchisee certain skills.²⁴ Even though these skills were not trade secrets, the employers could have contended that an employer should be entitled to prevent an employee from using these skills in competition with the employer for some period of time. In Maryland, however, a restrictive covenant has never been enforced merely because the employer may have taught the employee certain skills. For instance, although the Court of Appeals of Maryland did use taught skills in its balancing analysis in *Ruhl v. F.A. Bartlett Tree Expert Co.*,²⁵ it did not enforce the restrictive covenant without also finding that the employer depended on the contacts of the employee and that the employee's departure would divert business.²⁶ Therefore, taught skills alone will not be a sufficient basis upon which to support a restrictive covenant in Maryland.

B. The Permissible Scope of Restrictive Covenants in Employment Agreements: The Standard of Reasonableness

In most cases there is some dependence by the employer on the employee for the employee's contacts, skill or personality.²⁷ Where

20. *Id.* at 479, 302 A.2d at 12.

21. *Id.* at 481, 302 A.2d at 13. The restrictive covenant provided that the franchisee would not "directly or indirectly" enter the rent-a-car business after termination of the agreement. *Id.* See also *Tuttle v. Riggs-Warfield-Roloson, Inc.*, 251 Md. 45, 50, 246 A.2d 588, 590 (1968).

22. 268 Md. 478, 482, 302 A.2d 11, 13 (1973).

23. *Id.*

24. In *Conwell* this argument was raised but was rejected by the district court and ignored by the Fourth Circuit. The district court noted that the employee had not been subjected to any special program of instruction, but even if he had, this "would at most allow a claim for insignificant money damages, but would not be a basis for injunctive relief." 298 F. Supp. 623, 631 (D. Md. 1969), *aff'd*, 429 F.2d 527 (4th Cir. 1970).

25. 245 Md. 118, 126-28, 225 A.2d 288, 293-94 (1967).

26. *Id.* at 126-27, 225 A.2d at 293.

27. See, e.g., *Millward v. Gerstung Int'l Sport Educ., Inc.*, 268 Md. 483, 489, 302 A.2d 14, 17 (1973). The court noted that the personal contacts of an employee are an important factor, when it stated: "[T]he employer has a stronger need for protection against diversion of his business to the former employee who has had personal contacts with customers [of the] employer." *Id.*

such dependence exists or where trade secrets are involved, a court will weigh the employer's interest against the hardships on the employee to determine whether the restriction is too long in duration or too wide in area.²⁸

The Maryland courts have adopted a standard of reasonableness when evaluating the scope of restrictive covenants in employment contracts.²⁹ They look to the particular facts and circumstances of each case to determine if the duration of a restrictive covenant is reasonable.³⁰ For example, in cases where an employee serves customers on a route, if the employer does not know the identity of all the customers on the employee's route, then all that may be enforced is a very limited restriction.³¹ The hardship on the employer is not great because all the employer needs is time to replace the defecting employee, and as soon as the new employee begins, the customers can just as easily purchase from this employee as they did from the defecting one. Accordingly, in such a case, a two-year restriction may very well be unreasonable, while a three-month restriction is all that a court may enforce.³² On the other hand, in a situation where sales are dependent upon the contacts of the employee, and where the customer may only place one or two orders a year, a two- or three-year restriction may be quite

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28. See *E.L. Conwell & Co. v. Gutberlet*, 429 F.2d 527, 528 (4th Cir. 1970); *Millward v. Gerstung Int'l Sport Educ., Inc.*, 268 Md. 483, 489, 302 A.2d 14, 17 (1973); *Tuttle v. Riggs-Warfield-Roloson, Inc.*, 251 Md. 45, 50, 246 A.2d 588, 590 (1968); *Tawney v. Mutual Sys., Inc.*, 186 Md. 508, 521, 47 A.2d 372, 379 (1946); *Tolman Laundry v. Walker*, 171 Md. 7, 12, 187 A. 836, 838 (1936). See also *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 125, 225 A.2d 288, 292 (1967), where the court recognized that "[t]he extent and importance of the personal contact of the employee with the customers [is the main factor in] determining whether the restraint is a reasonable one for the protection of the employer's business." *Id.* The employer's interests in protecting customer contacts are discussed in *Blake*, *supra* note 2, at 653-54, cited in *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. at 125 n.1, 225 A.2d at 293 n.1.
29. See *Becker v. Bailey*, 268 Md. 93, 97, 299 A.2d 835, 838 (1973); *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 124, 225 A.2d 288, 291 (1967); *Deuerling v. City Baking Co.*, 155 Md. 280, 283, 141 A. 542, 543 (1928).
30. *Becker v. Bailey*, 268 Md. 93, 97, 299 A.2d 835, 838 (1973), where the court stated: "[A] determination must be made based on the scope of each particular covenant itself; and, if that is not too broad on its face, the facts and circumstances of each case must be examined." *Id.* See *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 124, 225 A.2d 288, 291 (1967); *Deuerling v. City Baking Co.*, 155 Md. 280, 283, 141 A. 542, 543 (1928). See also *Millward v. Gerstung Int'l Sport Educ., Inc.*, 268 Md. 483, 487-88, 302 A.2d 14, 16 (1973) (citing *Becker v. Bailey*, 268 Md. 93, 97, 299 A.2d 835, 838 (1973); *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 124, 225 A.2d 288, 291 (1967)).
31. See *Tawney v. Mutual Sys., Inc.*, 186 Md. 508, 521, 47 A.2d 372, 379 (1946); *Deuerling v. City Baking Co.*, 155 Md. 280, 287-88, 141 A. 542, 545 (1928); *Fulton Grand Laundry Co. v. Johnson*, 140 Md. 359, 362, 117 A. 753, 754 (1922).
32. See *Tawney v. Mutual Sys., Inc.*, 186 Md. 508, 521, 47 A.2d 372, 379 (1946); *Deuerling v. City Baking Co.*, 155 Md. 280, 287, 141 A. 542, 545 (1928); *Fulton Grand Laundry Co. v. Johnson*, 140 Md. 359, 362, 117 A. 753, 754 (1922).

reasonable.³³

Applying the reasonableness standard and tailoring the restriction to the facts occurs not only with respect to duration, but also with respect to area.³⁴ In *Tawney v. Mutual System, Inc.*,³⁵ the following restrictive covenant was at issue:

- (J) to keep secret the names of or any information relative to any past, present or prospective borrowers from and customers of their employers;
- (K) to refrain from using any information relative to such borrowers and customers and not to persuade any such borrowers or customers to do anything that might be to the disadvantage of their employers;
- (L) to so keep secret and to so refrain for a period of three years from the date of termination of the employment;
- (M) to refrain from engaging directly or indirectly in any business competitive with that of their employers in the Baltimore City trading area for a period of two years from the date of termination of the employment.³⁶

The *Tawney* case involved a manager of a loan office who left his employer and set up a competing business.³⁷ Paragraphs (J), (K) and (L) were primarily aimed at keeping secret the names of borrowers who had been dealing with the manager's former employer, and the court found evidence that there was often repeat business from those borrowers.³⁸ Paragraph (M), on the other hand, did not concern specific customers, but stated that the employee would not compete with the employer anywhere in Baltimore City.

At first glance, the selection of Baltimore City as the geographic area would appear reasonable. However, the court of appeals noted that there were hundreds of thousands of people in Baltimore City with whom neither the employee nor the employer had any contact during the term of employment.³⁹ Consequently, the employer and the employee were on a perfectly equal footing with respect to competing for

33. See *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 128-29, 225 A.2d 288, 293 (1967).

34. See *id.* at 128-29, 225 A.2d at 294. It has been held, however, that an unlimited area is, *ipso facto*, unenforceable. See *MacIntosh v. Brunswick Corp.*, 241 Md. 24, 31, 215 A.2d 222, 225 (1965), where the court held that "the restraint imposed by [the covenant] as to area is unlimited and, for that reason, the claim that the restraint was necessary to protect the business interests of the former employer is unreasonable." *Id.* (emphasis added). However, the same court has, under the proper circumstances, enforced a covenant unlimited in area, where it is limited to an identifiable group of customers. See *Gill v. Computer Equip. Corp.*, 266 Md. 170, 180-81, 292 A.2d 54, 59 (1972).

35. 186 Md. 508, 47 A.2d 372 (1946).

36. *Id.* at 511, 47 A.2d at 374.

37. *Id.*

38. *Id.* at 521, 47 A.2d at 379.

39. *Id.*

the business of such potential borrowers. The court found that there was no reason to restrict the employee from soliciting the business of such persons and, therefore, severed paragraph (M) from the employment contract and refused to enforce it, but, with little comment, agreed to enforce paragraphs (J), (K) and (L).⁴⁰

The court in *Tawney* determined that a restrictive covenant drawn in terms of a specific geographic area can only be enforced if that geographic area has a valid relationship to the business involved.⁴¹ Where an employee contacts all or most of the potential customers in a geographic area, then it is reasonable for a restrictive covenant to be drawn in terms of geography.⁴² However, in cases like *Tawney*, and in cases dealing with stockbrokers and many other service professions, there are simply too many potential customers in a geographic area which have never been contacted by either the employee or the employer. Therefore, in such cases the courts will not enforce a restrictive covenant drawn in terms of geography.⁴³ It must be remembered that a restriction should be "no wider" than "reasonably necessary for the protection of the business of the employer."⁴⁴ Territories such as the one in *Tawney* are simply wider than reasonably necessary to protect the interests of the employer.⁴⁵ When dealing with service employees such as stockbrokers or insurance salesmen, restrictive covenants should, therefore, be drawn in terms of whom the employee has dealt with, or in terms of the potential customers of the employer, but not simply in gross geographic terms.

Under the reasoning of *Tawney*, one could also argue that a restrictive covenant is wider than necessary if it restricts an employee from dealing with all of his employer's customers when the employee had contact with only some of these customers. Nevertheless, the Court of Appeals of Maryland, in *Tuttle v. Riggs-Warfield-Roloson*,

40. *Id.*

41. *Id.* See also *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 128-29, 225 A.2d 288, 294 (1967) (the court enforced a restrictive covenant couched in terms of geographic area, finding the restriction to have a valid relationship to the business activity of the employer).

42. See *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 128-29, 225 A.2d 288, 294 (1967); *Tawney v. Mutual Sys., Inc.*, 186 Md. 508, 520-21, 47 A.2d 372, 378-79 (1946).

43. See *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 128, 225 A.2d 288, 294 (1967); *Tawney v. Mutual Sys., Inc.*, 186 Md. 508, 521, 47 A.2d 372, 379 (1946). *But see* *Gill v. Computer Equip. Corp.*, 266 Md. 170, 180-81, 292 A.2d 54, 59 (1972) (involving a service profession and the court enforced a restrictive covenant for an unlimited geographic area when the restriction was limited to identifiable customers).

44. *Silver v. Goldberger*, 231 Md. 1, 6, 188 A.2d 155, 158 (1963).

45. See also *MacIntosh v. Brunswick Corp.*, 241 Md. 24, 31, 215 A.2d 222, 225 (1965); *Griffin v. Guy*, 172 Md. 510, 514, 192 A. 359, 361 (1937) (recognizing that a restrictive covenant drawn in terms of geographic area will only be enforced where such restriction is reasonable).

Inc.,⁴⁶ specifically stated that a restrictive covenant prohibiting an insurance salesman from dealing with his employer's customers was "valid and enforceable."⁴⁷ It does not appear, however, that the insurance salesman actually argued that the provision was too broad because it covered customers with whom he had no contact. Moreover, the equities in this case ran against the employee, since subsequent to his leaving, his employer agreed to amend the covenant excluding specific customers from its purview.⁴⁸ However, the one customer which was the subject of the litigation was not excluded.

Subsequent to *Tuttle*, the court of appeals in *Gill v. Computer Equipment Corp.*⁴⁹ upheld a restrictive covenant which applied to the customers of a particular division of an employer. The larger part of the contact with customers of that division had been the responsibility of the employee subject to the restrictive covenant.⁵⁰ The court reasoned that if the covenant in *Tuttle*, which applied to all customers, was valid then, *a fortiori*, the covenant in *Gill* was also valid.⁵¹ Accordingly, although the reasoning in *Tawney* could justify invalidating an "all customers" covenant, the holding in *Tuttle*, notwithstanding its peculiar facts, supports the validity of such clauses.⁵²

Tawney also illustrates that the Maryland courts tend to be more lenient with respect to their analysis of trade secret provisions.⁵³ For instance, the court of appeals has enforced restrictions against use and disclosure of trade secrets and other confidential information, where the restriction was so broad as to provide that the trade secret would never be disclosed or used anywhere in the world.⁵⁴ Therefore, the use of a trade secret provision may often be, as was the case in *Tawney*, more significant than the use of any other type of restrictive covenant.

The courts are not only concerned with the interests of the employer in determining the reasonableness of the particular restrictive covenant, but are also concerned with the relevant hardships on the particular employee.⁵⁵ In this regard, however, the courts have not

46. 251 Md. 45, 246 A.2d 588 (1968).

47. *Id.* at 49, 246 A.2d at 590.

48. *Id.* at 48, 246 A.2d at 590.

49. 266 Md. 170, 292 A.2d 54 (1972).

50. *Id.* at 180-81, 292 A.2d at 59.

51. *Id.* at 181, 292 A.2d at 59.

52. In light of the subsequent case of *Hebb v. Stump, Harvey & Cook, Inc.*, 25 Md. App. 478, 334 A.2d 563, *cert. denied*, 275 Md. 749 (1975) (discussed in detail at notes 80-87 and accompanying text *infra*), it is possible that a Maryland court faced with a challenge to an "all customers" covenant today would rewrite the covenant to apply only to customers with whom the employee had contact.

53. The protection of trade secrets is enforceable even apart from the written covenant. *See Head Ski Co. v. Kam Ski Co.*, 158 F. Supp. 919, 923 (D. Md. 1958).

54. *See id.* at 921. Since a trade secret is very easy for an employee to expropriate and disseminate to a third party in a foreign jurisdiction, restrictions concerning such property interests can be enforceable in an unlimited area.

55. *See Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 128, 225 A.2d 288, 293 (1967).

been very sympathetic to certain highly skilled employees, such as physicians or dentists, who are perceived to be able to start a new practice in another town.⁵⁶ Upon graduation from medical school, a doctor might work for an established physician and agree that upon leaving such employment he or she will not open a practice within ten miles of the established physician's business for a period of two years. In such a case, the established doctor does become dependent upon the personal relationship which develops between the young associate and the established physician's patients. Furthermore, the young doctor's departure may very well divert business from the established physician's practice. Therefore, the courts are willing to enforce reasonable restrictive covenants in this area.⁵⁷ The hardship on the young doctor is not perceived as being of great magnitude because he or she may still use his or her specialized skill to set up a practice outside the ambit of the restriction.

The best way to analyze the hardships a covenant creates for an employee is to place the different types of restrictive covenants on a continuum. At one end of the continuum are restrictive covenants which prohibit any type of competition. These are obviously very broad in scope and impose the greatest hardship on the employee. Somewhere in the middle of the continuum are restrictive covenants which restrain an employee from dealing with the employer's customers. This type of restriction is still broad, but not to the extent of the first example, and the hardship imposed on the employee is not as extensive. Finally, at the other end of the continuum are restrictive covenants which only prohibit an employee from soliciting customers of the employer. These are the least broad of the three examples and impose the least amount of hardship on the employee.⁵⁸

*Tuttle v. Riggs-Warfield-Roloson, Inc.*⁵⁹ involved a restrictive covenant similar to the second example illustrated above. In *Tuttle*, the covenant prohibited the employee from engaging in any insurance activities with his former employer's customers and was held to prevent such customers from dealing with the employee even where the employee had not solicited the business.⁶⁰ Had *Tuttle* involved only a non-solicitation restrictive covenant, it would not have prevented the customer from seeking out the employee, but would only have prevented the employee from soliciting the customer.⁶¹

The third type of restrictive covenant illustrated above, one which prohibits solicitation, is of great importance in Maryland since the

56. See *Warfield v. Booth*, 33 Md. 63, 69-70 (1870); Annot., 58 A.L.R. 156 (1929).

57. See *Warfield v. Booth*, 33 Md. 63, 69-70 (1870); Annot., 58 A.L.R. 156 (1929).

58. For a discussion of the different types of covenants, see *Gill v. Computer Equip. Corp.*, 266 Md. 170, 181, 292 A.2d 54, 59 (1972); *Tuttle v. Riggs-Warfield-Roloson, Inc.*, 251 Md. 45, 50, 246 A.2d 588, 590 (1968).

59. 251 Md. 45, 246 A.2d 588 (1968).

60. *Id.* at 50, 246 A.2d at 590.

61. See *id.* See also *Budget Rent A Car, Inc. v. Raab*, 268 Md. 478, 482, 302 A.2d 11, 13 (1973).

courts have been unanimous in their enforcement of such covenants.⁶² In fact, the court of appeals in *Millward v. Gerstung International Sport Education, Inc.*⁶³ went so far as to enforce a covenant which provided that the employee would never solicit the employer's customers.⁶⁴ Although the particular restrictive covenant in *Millward* was not attacked because of its excessive duration, it is still significant that the court of appeals enforced the covenant, without even mentioning its duration.

The degree of the hardship of the covenant on the employee has also been analyzed in terms of the cause of the particular employee's termination.⁶⁵ An identical restrictive covenant may be enforceable where the employment is discontinued for one reason and unenforceable if the employment is discontinued for another. Where an employee has left voluntarily or where the employee has been fired for cause, a court is more likely to enforce the restrictive covenant.⁶⁶ However, where the employee is discharged for a reason unrelated to his performance, then the court is less likely to enforce the same restrictive covenant.⁶⁷ For example, where the employee is dismissed because of a merger or because sales are generally down, resulting in a need to cut the sales force, Maryland courts are less likely to enforce the restrictive covenant.⁶⁸ Therefore, a draftsman might consider writing separate re-

62. See *Millward v. Gerstung Int'l Sport Educ., Inc.*, 268 Md. 483, 487-89, 302 A.2d 14, 16-17 (1973); *Deuerling v. City Baking Co.*, 155 Md. 280, 288, 141 A. 542, 545 (1928).

63. 268 Md. 483, 302 A.2d 14 (1973).

64. *Id.* at 485, 302 A.2d at 15. See also *Griffin v. Guy*, 172 Md. 510, 192 A. 359 (1937), where the court stated, "It is established that contracts in restraint of trade may be without limit as to time." *Id.* at 510, 192 A. at 361. It is questionable, however, whether this statement from *Griffin* is still the law in light of the general rule that such covenants may be no wider as to area and duration than is reasonably necessary. *Silver v. Goldberger*, 231 Md. 1, 6, 188 A.2d 155, 158 (1963).

65. See *MacIntosh v. Brunswick Corp.*, 241 Md. 24, 31, 215 A.2d 222, 225 (1965), where the court stated:

Moreover, since the employee was discharged through no fault of his own . . . and, as a result, the employee had been unemployed for more than two months because his previous training and experience had necessarily limited the type of work he could skillfully perform . . . , it is apparent that the duration of the restrictive covenant had the effect of imposing undue hardship on the employee.

Id.

66. See *Hebb v. Stump, Harvey & Cook, Inc.*, 25 Md. App. 478, 486-87, 334 A.2d 563, 568-69, *cert. denied*, 275 Md. 749 (1975), where the court stated:

In cases of termination "for cause" by the employer there are often engendered elements of hostility, ill will and malice . . . which would give greater rise, under such terminations "for cause," for the employer to be required to protect itself from the competition of an employee leaving its employ under such circumstances.

Id. See also *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 128, 225 A.2d 288, 293-94 (1967).

67. See *MacIntosh v. Brunswick Corp.*, 241 Md. 24, 31, 215 A.2d 222, 225 (1965); *Hebb v. Stump, Harvey & Cook, Inc.*, 25 Md. App. 478, 486-87, 334 A.2d 563, 568-69, *cert. denied*, 275 Md. 749 (1975).

68. See *MacIntosh v. Brunswick Corp.*, 241 Md. 24, 31, 215 A.2d 222, 225 (1965);

restrictive covenants for terminations which result through no fault of the employee.

III. THE DIFFERENT TYPES OF RESTRICTIVE COVENANTS WHICH MAY BE INCLUDED WITHIN AN EMPLOYMENT AGREEMENT

There are at least four types of restrictive covenants affecting competition after employment: an employee may be restricted from competing in any way with his or her employer; an employee may be restricted from dealing in any way with the customers of the employer; an employee may be restricted from soliciting the customers of the employer; and an employee may be restricted from using or disclosing the trade secrets or other confidential information of the employer.⁶⁹

In drafting a restrictive covenant, an attorney might analyze the business involved and pick and choose among these four to determine which are most applicable to a particular situation and, therefore, which should be included in an employment agreement. The practitioner might instead include all four of the covenants with a provision that all four are cumulative. The risk attendant to the latter decision is that a court might pick and choose between covenants and decide not to enforce the greatest restriction.⁷⁰ On the other hand, failing to pick the proper restriction might result in a court not enforcing any restriction.⁷¹ Therefore, it is advisable to take the route illustrated by *Tawney v. Mutual System, Inc.*,⁷² where several restrictive covenants are set out in separate paragraphs and where, even if a court severs one restrictive covenant, there are still several others remaining.⁷³

IV. WILL MARYLAND COURTS REWRITE A DEFECTIVE RESTRICTIVE COVENANT OR USE A "BLUE PENCIL" APPROACH?

Although the Maryland courts have severed separate restrictive covenants from an employment contract,⁷⁴ they have only once, arguably, rewritten a restrictive covenant.⁷⁵ Historically, if a restrictive cove-

Hebb v. Stump, Harvey & Cook, Inc., 25 Md. App. 478, 486-87, 334 A.2d 563, 568-69, *cert. denied*, 275 Md. 749 (1975).

69. Another categorization of covenants was recognized in *Deuerling v. City Baking Co.*, 155 Md. 280, 283, 141 A. 542, 543 (1928). This categorization includes: (1) covenants not to compete for a term after employment has ended; and (2) covenants not to work for someone else while employed with the contracting employer. *Id.*

70. *See Tawney v. Mutual Sys. Inc.*, 186 Md. 508, 521, 47 A.2d 372, 379 (1946).

71. *See MacIntosh v. Brunswick Corp.*, 241 Md. 24, 31, 215 A.2d 222, 225-26 (1965).

72. 186 Md. 508, 47 A.2d 372 (1946).

73. *See* notes 35-45 and accompanying text *supra*.

74. *See Tawney v. Mutual Sys. Inc.*, 186 Md. 508, 47 A.2d 372 (1946).

75. *See Hebb v. Stump, Harvey & Cook, Inc.*, 25 Md. App. 478, 334 A.2d 563, *cert. denied*, 275 Md. 749 (1975).

nant was overbroad, *e.g.*, if it applied to the entire country, the Maryland courts did not attempt to rewrite the covenant so that it applied only to Maryland.⁷⁶ If a covenant was overbroad, it was unenforceable and severed from the contract. Prior to 1975, the closest the Maryland courts had come to indicating any willingness to rewrite a restrictive covenant was in cases such as *Becker v. Bailey*,⁷⁷ where in dicta the court stated that it might have approved an injunction against solicitation of former customers where the covenant was directed at all forms of competition, but not solicitation in particular.⁷⁸ In *Becker*, the court pointed out that there was no evidence of such solicitation and, therefore, it did not reach the issue.⁷⁹

In 1975, however, the Court of Special Appeals of Maryland arguably rewrote a restrictive covenant in *Hebb v. Stump, Harvey & Cook, Inc.*⁸⁰ The restrictive covenant at issue was as follows:

It is further agreed that if, after this year (1971) you cease to be employed by Stump, Harvey & Cook, Inc. you will refrain, for a period of one year (or for a period of two years in the event of a renewal for an additional year or more) beginning with the date of such termination from engaging either directly or indirectly in writing or soliciting the writing of contracts of insurance of *our customers, and prospective customers* who were being actively solicited by us at or before the effective date of such termination.⁸¹

The court in *Hebb* first determined that prohibiting the employee from soliciting or writing contracts with prospective customers was too broad, and it therefore severed that provision.⁸² Secondly, the court determined that it would also be unreasonable to prevent the employee from soliciting or writing contracts of insurance with customers which the employee was already dealing with when he joined this employer.⁸³ Therefore, the court severed this class of customers from the restriction, notwithstanding the fact that this class of customers was not specifically mentioned.⁸⁴

The case is not clear, however, as to whether the court of special

76. See *MacIntosh v. Brunswick Corp.*, 241 Md. 24, 31, 215 A.2d 222, 225 (1965); *Brown v. Fraley*, 222 Md. 480, 484-85, 161 A.2d 128, 131 (1960). For a general examination of how other jurisdictions handle restrictive covenants that are overbroad in area, see Annot., 61 A.L.R.3d 397, 440 (1975 & Supp. 1981).

77. 268 Md. 93, 299 A.2d 835 (1973). See also *Anderson v. Truitt*, 158 Md. 193, 148 A. 223 (1929) (court recognized as unanswered the question of whether a court would enforce a less restrictive noncompetition provision than the one written in the employment contract).

78. 268 Md. 93, 102, 299 A.2d 835, 840 (1973).

79. *Id.*

80. 25 Md. App. 478, 334 A.2d 563, *cert. denied*, 275 Md. 749 (1975).

81. *Id.* at 481, 334 A.2d at 566 (emphasis added).

82. *Id.* at 487, 334 A.2d at 569.

83. *Id.* at 492, 334 A.2d at 571.

84. *Id.*

appeals reached its decision based on the reference to "our customers" in the covenant or based on the court's belief that it could rewrite covenants to enforce the parties' intentions. The court could have found that the term "our customers" was ambiguous and that the customers who the employee brought with him when he joined this employer were simply not within the restriction. Although the court mentioned this possible interpretation,⁸⁵ the court also cited Professor Williston for the proposition that restrictive covenants should be partially enforced even where they are too broad on their own terms.⁸⁶ In this regard, the court in *Hebb* quoted the following passage from Williston:

"Although a contract may contain excessively restrictive promises which are unenforceable, the contract may not be invalidated in its entirety where its general purpose is lawful. Moreover, although one of several covenants in restraint of trade is legally excessive, the separable restrictive promises, which are lawful, will be enforced. This is true where the restraint is over-broad in its definition of the circumscribed territory, its duration, the nature of the business activity affected, or the classes of persons with whom the promisor engages not to do business."⁸⁷

Although the above passage hardly establishes the proposition that overbroad covenants should be rewritten by the courts so as to give effect to the parties' intentions, Williston does cite with approval a single Alabama case in which the court clearly rewrote a restrictive covenant.⁸⁸ In this regard, Williston states, "[e]ven though the contract fails to define the territory covered, the court will interpret it in the light of the attendant circumstances, such as the influence of the business protected, to determine, if possible, the extent of territory intended to be embraced."⁸⁹

Notwithstanding the views of Williston, in the majority of cases from various jurisdictions, the courts have not rewritten covenants, but have followed what is known as the "blue pencil rule."⁹⁰ Professor Corbin has described the blue pencil rule as follows:

By this rule, the divisibility of a promise in excessive restraint of trade is determined by purely mechanical means: if the promise is so worded that the excessive restraint can be eliminated by crossing out a few of the words with a "blue

85. *Id.*

86. *Id.* at 490, 334 A.2d at 570.

87. *Id.* (quoting 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1647B, at 285-88 (3d ed. 1972), incorrectly cited by the court as 4 S. WILLISTON ON CONTRACTS § 1647B, at 287-88 (3d ed. 1961)).

88. *Davis v. Christopher*, 219 Ala. 346, 122 So. 406 (1929), cited in 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1647B, at 289 (3d ed. 1972).

89. 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1647B, at 289 (3d ed. 1972).

90. See 6A A. CORBIN, CONTRACTS § 1390, at 67 (1962).

pencil," while at the same time the remaining words constitute a complete and valid contract, the contract as thus "blue penciled" will be enforced.⁹¹

If the wording of the contract itself, however, provides no line of division, then the "blue pencil" will not be applied, and the entire restrictive covenant will be deleted.⁹²

Professor Corbin criticizes the "blue pencil" approach. He states that "[b]y some occult process, the courts adopting this rule convinced themselves that partial enforcement without the aid of a 'blue pencil' would be 'making a new contract for the parties' while partial enforcement in the wake of a 'blue pencil' is not."⁹³ Professor Corbin adopts the position of what he believes are the "best considered modern cases" where courts have "decreed enforcement as against a defendant whose breach has occurred within an area in which restriction would clearly be reasonable, even though the terms of the agreement imposed a larger and unreasonable restraint."⁹⁴ Accordingly, Corbin clearly adopts the position that a court should rewrite a restrictive covenant in order to enforce the intentions of the parties.

Other commentators have similarly approved this modern position, but with certain caveats. Both the *Restatement (Second) of Contracts* and Professor Blake take the position that a court should enforce a narrower restriction than the one written, even when this cannot be done simply by "blue pencilling," as long as it appears fair to do so.⁹⁵ Both authorities adopt this concept of fairness to insure that employers do not write excessively broad provisions unfairly, with knowledge that, at worst, courts will narrowly enforce those provisions. In this regard, Professor Blake states:

If the court is persuaded that the employer's policy and practice with respect to employee restraints generally is fair and designed only to protect legitimate interests, the court should tailor the covenant to provide such protection with the minimum burden to the employee. When it seems likely that the employer exacts the restriction for whatever advantage he

91. *Id.* at 67-68.

92. *Id.* at 69.

93. *Id.* at 68.

94. *Id.* at 70-71.

95. RESTATEMENT (SECOND) OF CONTRACTS § 184, Comment b (1981); Blake, *supra* note 2, at 683. The text of § 184 of the *Restatement* is similar to Williston's position in that it is not as clear as it could be. Its exact wording does not necessarily imply that a court should rewrite overly broad restrictive covenants where the intention of the parties can be gleaned. However, this is clearly what is done in Illustration 3 to Comment b. Moreover, the Reporter's Note specifically states that this section is rejecting the "blue pencil rule" of RESTATEMENT OF CONTRACTS § 518 (1932). Curiously, while Williston and § 518 of the first *Restatement* appear to be advocating different approaches, both were cited with approval in *Hebb v. Stump, Harvey & Cook, Inc.*, 25 Md. App. 478, 490-91, 334 A.2d 563, 570-71, *cert. denied*, 275 Md. 749 (1975).

can get from eliminating the employee's mobility and bargaining power, or that he has not accorded employees' interest sufficient weight in devising and administering the restraints, severance should be denied. Courts should not aid and abet the grasping or negligent employer by reforming an unreasonably restrictive covenant.⁹⁶

While Professor Blake focuses on employment contracts, the problem inherent in the analysis of both Professor Corbin and the *Restatement (Second) of Contracts* is that they unnecessarily confuse restrictive covenants associated with the sale of businesses with restrictive covenants found in employment contracts. Both Professor Corbin and the *Restatement (Second) of Contracts* use sale of business examples to illustrate why a court should rewrite an otherwise overly broad restrictive covenant.⁹⁷ The example given by both commentators can be paraphrased as follows: a seller of a local business agrees not to open a competing business in the entire state or nation. The seller then opens a competing business next door to that of the purchaser and argues that the restriction is overly broad and, therefore, not enforceable.⁹⁸ Clearly, in such a case, courts would be tempted to rewrite the restriction, notwithstanding that it is not susceptible to "blue pencilling." In the sale of a business case, however, it can be readily seen that the purchaser is entitled to some protection. In fact, at least one court has held that a seller of a business may not open a competing business within the same area, notwithstanding the fact that there is no written provision prohibiting such action.⁹⁹

Unlike the sale of business cases, there is often no analogous compelling reason to protect any employer from the competition of a defecting employee. The employer is already protected from many unlawful actions of a departing employee even though an employment agreement does not exist. For instance, the law protects the employer from the employee's solicitation of customers prior to leaving,¹⁰⁰ the

96. Blake, *supra* note 2, at 683-84. See also RESTATEMENT (SECOND) OF CONTRACTS § 184, Comment b (1981), which states:

[A] court will not exercise this discretion in favor of a party unless it appears that he made the agreement in good faith and in accordance with reasonable standards of fair dealing. . . . For example, a court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable.

Id.

97. 6A A. CORBIN, CONTRACTS § 1390, at 71-73 (1962); RESTATEMENT (SECOND) OF CONTRACTS § 184, Comment b, Illustration 3 (1981).

98. See 6A A. CORBIN, CONTRACTS § 1390, at 71-73 (1962); RESTATEMENT (SECOND) OF CONTRACTS § 184, Comment b, Illustration 3 (1981).

99. *Mohawk Maintenance Co. v. Kessler*, 52 N.Y.2d 276, 419 N.E.2d 324, 437 N.Y.S.2d 646 (1981).

100. *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 38, 382 A.2d 564, 568 (1978).

employee's taking of books, records or customer lists,¹⁰¹ and the employee's misuse of the employer's trade secrets.¹⁰² However, the law does not restrict an employee from competing with his or her former employer absent an employment agreement, notwithstanding that it may have been reasonable for the employer to restrict such activities in writing.¹⁰³ The law generally favors competition and the mobility of the labor force.¹⁰⁴ Accordingly, the position of the courts should be that an employer should either write a restrictive covenant properly and reasonably or risk having the entire restrictive covenant held unenforceable, or at best, "blue pencilled." This philosophy would better influence employers to write employment agreements as reasonably as possible, rather than asking courts to determine the fairness of the negotiating or bargaining process on some *ad hoc* basis.

In any case, it appears that the trend is towards courts rewriting restrictive covenants where to do so would give effect to the intentions of the parties, as long as it is believed that the agreement was made in good faith and in accordance with standards of fair dealing. Moreover, even though *Hebb v. Stump, Harvey & Cook, Inc.*¹⁰⁵ was decided by the Court of Special Appeals of Maryland, and although the facts of that case would have allowed the court to reach its finding without rewriting the covenant, the case, nevertheless, can be used to support this modern trend. Therefore, the possibility that a Maryland court will rewrite a restrictive covenant should not only be considered in the litigation context, but also when drafting restrictive covenants.

Assuming that *Hebb* does stand for the proposition that a court should attempt to rewrite certain provisions, a draftsman should also consider adding a provision to an employment contract which states that it is the intention of the parties that if any restrictive covenant in the employment agreement is determined to be overly broad, then the court should enforce it to the maximum extent permitted under law as to area and duration. Based on a very reasonable reading of *Hebb* and dicta in cases like *Becker v. Bailey*,¹⁰⁶ such a provision should be enforceable in Maryland.¹⁰⁷

101. See *Space Aero Prods. Co. v. R.E. Darling Co.*, 238 Md. 93, 208 A.2d 74, *reh'g denied and opinion supplemented*, 238 Md. 93, 208 A.2d 699, *cert. denied*, 382 U.S. 843 (1965).

102. *Id.* at 117, 208 A.2d at 86.

103. *Id.* at 113, 208 A.2d at 84.

104. *Id.*

105. 25 Md. App. 478, 334 A.2d 563, *cert. denied*, 275 Md. 749 (1975).

106. 268 Md. 93, 299 A.2d 835 (1973).

107. See *Becker v. Bailey*, 268 Md. 93, 299 A.2d 835 (1973); *Hebb v. Stump, Harvey & Cook, Inc.*, 25 Md. App. 478, 334 A.2d 563, *cert. denied*, 275 Md. 749 (1975).

V. DRAFTING RESTRICTIVE COVENANTS

A. *How to Draft a Restrictive Covenant*

Once the types of restrictive covenants to be included in an employment agreement are selected, then an attorney must decide how to write the restrictions. Possibly the best place to start is to determine how not to write a restrictive covenant. The restrictive covenant discussed in *E.L. Conwell & Co. v. Gutherlet*¹⁰⁸ is illustrative. The restriction in *Conwell* provided: "Should your employment with us be terminated for any reason you will not accept employment with a competitor or client of ours nor engage in a competing business venture within 150 miles of Baltimore for a period of three years after the termination."¹⁰⁹ Most attorneys might reason that this provision was held unenforceable because the 150-mile and three-year restrictions were unreasonable with respect to area and duration. Actually, the United States Court of Appeals for the Fourth Circuit never even reached these issues. It construed the restrictive covenant to contain two separate prohibitions: (1) the employee could not accept employment with a competitor or client; and (2) the employee could not engage in a competing business venture.¹¹⁰ The Fourth Circuit then concluded that only the second prohibition was modified with respect to 150 miles and three years and that the first prohibition contained no restriction whatsoever as to geography or duration.¹¹¹ Since the employer was attempting to enforce only the first restriction, the court held that it was totally unreasonable and unenforceable because it covered an infinite period and area.¹¹²

Based upon the court's determination in *Conwell*, the answer to the question of how to write restrictive covenants is to write them carefully. Restrictive covenants should be divided into separate paragraphs as much as possible and, if possible, into separate sentences. Each sentence should clearly answer the following questions: (1) how long?; (2) where or who?; and (3) what?

The "how long" question, of course, refers to duration. In this context, it should be remembered that the courts of Maryland have approved varying lengths of duration depending on the type of restrictive covenant at issue. Accordingly, the same contract might have a two-year period for dealing with customers, a three-year period for solicitation¹¹³ and an infinite period for the nondisclosure of trade secrets.¹¹⁴

Modification as to area is really either a "where" or "who" ques-

108. 429 F.2d 527 (4th Cir. 1970).

109. *Id.* at 528.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Tawney v. Mutual Sys., Inc.*, 186 Md. 508, 511, 47 A.2d 372, 374 (1946).

114. *See E.L. Conwell & Co. v. Gutherlet*, 429 F.2d 527, 528 (4th Cir. 1970); *Head Ski Co. v. Kam Ski Co.*, 158 F. Supp. 919, 923 (D. Md. 1958).

tion. Sometimes area is defined in terms of geography, but as seen in *Tawney v. Mutual System, Inc.*,¹¹⁵ it is often defined in terms of the people with whom the employee may not deal.¹¹⁶

Finally, although it has not been given a great amount of attention in Maryland, each restrictive covenant should also answer the question, "what"?¹¹⁷ What is the employee being restricted from doing? Is he or she restricted from competing in any way with the employer or only restrained from competing in certain ways? A salesman of one employer may take a non-sales job with the employer's competitor. Is the employee competing with the first employer? Similarly, there may be many allied fields which are somehow competitive with the employer's business. Is the employee restricted from taking the same type of employment, but in an allied field? At least one Maryland case has indicated that a restriction may be overbroad because it includes allied fields.¹¹⁸ Care should therefore be taken in defining what exactly it is that the employee is restricted from doing. An overbroad provision in this regard may be severed from the employment agreement on the theory that it is simply wider than necessary to protect the employer's business. Therefore, from the employer's point of view, there should be other less restrictive covenants available for enforcement. On the other hand, even in the absence of another less restrictive provision, an employer could hope that a court would adopt the approach used in *Hebb v. Stump, Harvey & Cook, Inc.*¹¹⁹ and rewrite the overbroad restriction.¹²⁰

B. Drafting Specific Provisions—Flexibility

When writing restrictive covenants, an attorney should also recognize that the employer's business will change over time and that the employment agreement should be written so that it is flexible enough to deal with such changes. For instance, employment agreements often state that the employee is restricted for two years after the "term of the employment agreement." Although the term of the employment agreement may be only two years, it is possible that the employee might be employed for fifteen or twenty years. Unless the employer amends the covenant to end when employment is terminated, he can be sure that the employee, upon departure, will argue that the restrictive covenant should be narrowly construed¹²¹ and that it became unenforceable after

115. 186 Md. 508, 47 A.2d 372 (1946).

116. *Id.* at 521, 47 A.2d at 379.

117. *See* *Becker v. Bailey*, 268 Md. 93, 96, 299 A.2d 835, 838 (1973); *MacIntosh v. Brunswick Corp.*, 241 Md. 24, 31, 215 A.2d 222, 225 (1965).

118. *MacIntosh v. Brunswick Corp.*, 241 Md. 24, 30-31, 215 A.2d 222, 225 (1965).

119. 25 Md. App. 478, 334 A.2d 563, *cert. denied*, 275 Md. 749 (1975).

120. *Id.* at 487, 334 A.2d at 570-71.

121. *Tawney v. Mutual Sys., Inc.*, 186 Md. 508, 521, 47 A.2d 372, 379 (1946). A restrictive covenant in an employment agreement is strictly construed against the party drafting it. *E.L. Conwell & Co. v. Gutberlet*, 429 F.2d 527, 528 (4th Cir. 1970);

two years of employment.¹²²

Although other jurisdictions have rejected this argument on the part of employees,¹²³ this issue has not been dealt with squarely in Maryland. There is authority in Maryland finding that provisions of a written employment contract continue as implied terms of employment after expiration of the written contract.¹²⁴ Therefore, the rule in other jurisdictions would probably be followed in Maryland. Nevertheless, an employee will not be able to make this argument if the employment agreement is drafted properly. It is therefore advisable to draft restrictive covenants so that the employee is prohibited from, for example, competing with or soliciting customers for a specific period of time after the cessation of employment.

Similarly, the termination provisions of an employment contract may state that the provisions of the agreement are null and void upon the happening of a specified event. However, many provisions, including restrictive covenants, are intended to continue beyond termination. Therefore, such provisions should be exempted from the termination provision.

Similar care should be taken with respect to arbitration provisions included in employment contracts. A broad arbitration provision might be used by an employee to prevent an employer from obtaining injunctive relief against the employee upon termination of employment. The employee would argue that all disputes are to be determined by arbitration and, therefore, until such arbitration is completed, the employer should not be permitted to seek injunctive relief from the court. Accordingly, arbitration provisions should make it clear that an employer is permitted to seek injunctive relief in order to enforce restrictive covenants both before and during arbitration proceedings.

The concept of fluidity should also be built into the employment agreement with respect to the territory covered or the functions performed by the employee. At the time the employment agreement is written, the employee may only be responsible for sales in one particular territory, but by the time the employee leaves, he or she may be servicing a much larger territory. If a restrictive covenant is to have a geographical limitation, then the geographical limitation should be written in terms of the area serviced by the employee, and not fixed at

Hebb v. Stump, Harvey & Cook, Inc., 25 Md. App. 478, 487, 334 A.2d 563, 567, *cert. denied*, 275 Md. 749 (1975).

122. See Art Wire & Stamping Co. v. Johnson, 141 N.J. Eq. 101, 102, 56 A.2d 11, 12 (1947).

123. *Id.*

124. Brandenburg v. S.F.&G. Co., 207 Md. 413, 114 A.2d 604 (1955) (where employment is continued beyond the term of an original contract, such employment is continued on the terms of the original contract). See also Hebb v. Stump, Harvey & Cook, Inc., 25 Md. App. 478, 334 A.2d 563 (restrictive covenants will be enforced and construed in accordance with the common sense intent of the parties), *cert. denied*, 275 Md. 749 (1975).

the point of initial employment. Furthermore, if a restrictive covenant is to prevent an employee from taking certain types of jobs with a competitor, then it, too, should be written broadly enough to encompass the possibility that the employee may expand his or her duties prior to termination.

C. Bonus Provisions

The obligation of many employers to compensate an employee with a bonus or other financial remuneration after termination requires the addition of another paragraph to the employment agreement. The provision should state that in addition to all other remedies the employer may have for violation of the restrictive covenants, the employer is also relieved of the obligation to make such bonus payments. Without such a provision, the breach of the restrictive covenant will likely be viewed as a nonmaterial breach which does not relieve the employer of the obligation to make bonus payments and, therefore, the employer's remedies will be restricted to seeking injunctive relief and obtaining damages flowing from the breach.¹²⁵ Including such a provision does not necessarily mean that it will be enforced. A court may find that an employee earned the bonuses for services rendered and thus only allow the employer to obtain injunctive and monetary relief flowing from the breach itself.¹²⁶ However, by including the suggested provision, the employer will at least be able to argue that he has the right to withhold such bonuses.

A more sophisticated approach to the bonus problem might be to attribute a specific portion of the salaries or bonuses earned by an employee to the employee's promise not to compete with the employer after termination. Then, the withholding of bonuses would be related to the breach of the restrictive covenant, giving the employer a strong argument against granting the bonuses for services rendered. In recent years, other jurisdictions have enforced restrictive covenants only if there was evidence of independent consideration for the restriction.¹²⁷ Although the Maryland courts have only raised this issue in passing,¹²⁸

125. *See Massachusetts Indem. & Life Ins. Co. v. Dresser*, 269 Md. 364, 306 A.2d 213 (1973).

126. *See MacIntosh v. Brunswick Corp.*, 241 Md. 24, 31, 215 A.2d 222, 225 (1965).

127. *See Beaver Prods., Inc. v. Johnston*, 335 So. 2d 59 (La. Ct. App. 1976); *James C. Green, Co. v. Kelley*, 261 N.C. 166, 134 S.E.2d 166 (1964); *Mail-Well Envelope Co. v. Saley*, 262 Or. 143, 497 P.2d 364 (1972); *Annot.*, 51 A.L.R.3d 825, 829-33 (1973 & Supp. 1981).

128. *See Becker v. Bailey*, 268 Md. 93, 96, 299 A.2d 835, 838 (1973) (court noted that a restrictive covenant in an employment agreement must be "supported by adequate consideration"); *Budget Rent A Car, Inc. v. Raab*, 268 Md. 478, 482, 302 A.2d 11, 13 (1973) (court recognized that a restrictive covenant will only be enforceable if it is supported by adequate consideration). Compensation for an employee's services may also be consideration for a restrictive covenant in the employment contract. *Deuerling v. City Baking Co.*, 155 Md. 280, 287, 141 A. 542, 544 (1928). The court will not inquire as to whether consideration is sufficient, but

the Maryland attorney might include a recitation relating the payment of bonuses or other remuneration to particular restrictive covenants. Such a provision would not only support the withholding of bonuses should a breach occur, but it would also deter the type of arguments accepted in other states which have invalidated restrictive covenants for lack of independent consideration.

D. Trade Secret Provisions

Since the Maryland courts tend to be liberal in enforcing trade secret provisions,¹²⁹ and since the provisions often give the employer the greatest possible protection,¹³⁰ great care should be taken in drafting them. Employees should be restricted from directly or indirectly using or disclosing confidential material and taking any copies of confidential material with them after employment is terminated. Moreover, the terms "trade secrets" and "other confidential information" should be carefully defined for purposes of the agreement. The employment agreement should state that it is presumed, or that the parties agree, that certain information, whether written or otherwise, constitutes trade secrets and confidential information. An illustrative list might include all information concerning customers, customer lists, costs, prices, earnings, products, formulae, compositions, machines, apparatus, systems, manufacturing procedures, prospective and executed contracts and other business arrangements, and sources of supply. The provision might state that all of the above are presumed to constitute confidential trade secrets and confidential information unless they are otherwise lawfully and readily available to the general public. This last caveat, in fact, need not even be included. An employer may take the position that the employee has agreed by contract not to disclose any information revealed to him or her and that all such information, whether confidential or not, is protected from use or disclosure should the employee decide to leave.

Maryland courts have on several occasions enforced very broad

only whether it is valuable. "It is the general rule that a valuable and not a sufficient consideration is all that is required, unless the disparity between what is given and what is received is such as to indicate fraud." *Griffin v. Guy*, 172 Md. 510, 516, 192 A. 359, 361 (1937). *Accord Blake*, *supra* note 2, at 631. *But see Tolman Laundry v. Walker*, 171 Md. 7, 11-12, 187 A. 836, 838 (1936). While the *Tolman* court expressly required "sufficient consideration," six months later, in *Griffin*, the same court interpreted the "sufficient consideration" requirement in *Tolman* to mean "valuable consideration." 172 Md. at 516, 192 A. at 361.

129. *See Head Ski Co. v. Kam Ski Co.*, 158 F. Supp. 919, 923 (D. Md. 1958).

130. It is a well-established rule in Maryland that restrictive covenants may be utilized to prevent the "future misuse of trade secrets" by employees. *E.L. Conwell & Co. v. Gutberlet*, 429 F.2d 527, 528 (4th Cir. 1970) (citing *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 225 A.2d 288 (1967); *Silver v. Goldberger*, 231 Md. 1, 188 A.2d 155 (1963); *Tawney v. Mutual Sys., Inc.*, 186 Md. 508, 47 A.2d 372 (1946)).

trade secret or confidentiality provisions.¹³¹ For example, in *Head Ski Co. v. Kam Ski Co.*,¹³² the parties entered into an agreement whereby the employee promised not to "divulge or impart any trade secret or company's business to any person, firm or corporation whatsoever."¹³³ The phrase "or company's business" arguably includes more than trade secrets in the usual sense. Although the issue was not raised, and although the covenant was being applied to a trade secret, the court, nevertheless, upheld the enforceability of the covenant, notwithstanding its arguable overbreadth.¹³⁴ Similarly, in *Ellicott Machine Corp. v. Wiley Manufacturing Co.*,¹³⁵ the employment contract at issue provided:

[I]t is understood that *all drawings and any other data furnished you* for use on the five purchase orders are for your sole use only in performance of those orders. It is further understood that the drawings and information contained thereon, and any other data, are not to be divulged to other parties or used any way not in the best interest of Ellicott Machine Corporation.¹³⁶

Again, although the language could have been attacked for its overbreadth, it was not. The provisions in *Ellicott* and *Head* are not necessarily broader than needed to protect the interests of the employer, but it is significant that the courts enforced the provisions without even considering this concept. In *Tawney v. Mutual System, Inc.*,¹³⁷ the contractual provision which was enforced by the court required the employer of the loan company "to keep secret the names of *or any information* relative to any past, present or prospective borrowers from and customers of their employers."¹³⁸ Again, although an argument could have been mounted against the breadth of the provision, no such argument was raised. Finally, in *C-E-I-R, Inc. v. Computer Dynamics Corp.*,¹³⁹ the court of appeals applied a broadly worded trade secret provision to confidential information without specifically deciding whether such information actually constituted a "trade secret."¹⁴⁰ The employee in *C-E-I-R, Inc.* had agreed not to "publish or *disclose any data or information related to [his] work* for C-E-I-R, Inc. of which [he had] knowledge."¹⁴¹ The information at issue concerned a prospective contract and, although such ephemeral information normally does not

131. See, e.g., *Head Ski Co. v. Kam Ski Co.*, 158 F. Supp. 919, 923 (D. Md. 1958).

132. 158 F. Supp. 919 (D. Md. 1958).

133. *Id.* at 921 (emphasis added).

134. *Id.* at 924.

135. 297 F. Supp. 1044 (D. Md. 1969).

136. *Id.* at 1051 (emphasis added).

137. 186 Md. 508, 47 A.2d 372 (1946).

138. *Id.* at 511, 47 A.2d at 378 (emphasis added).

139. 229 Md. 357, 183 A.2d 374 (1962).

140. *Id.* at 368, 183 A.2d at 380.

141. *Id.* at 360, 183 A.2d at 376 (emphasis added).

constitute a trade secret,¹⁴² the court held that the use of the information violated the covenant and that such use was, therefore, actionable.¹⁴³

Although Maryland courts have not squarely faced the question of whether trade secret covenants can be overly broad, other jurisdictions have. Section 104 of the Master and Servant Section of *American Jurisprudence Second* states:

An agreement which has been entered into between employer and employee, and which obligates the employee not to disclose the secrets of the employer's business, is valid and enforceable, although such a contract may be deemed invalid if it goes beyond the limits necessary to protect the employer's interests. The contract will not be enforced unless the obligation which is thereby imposed appears to be reasonably necessary to the protection of the employer's interests, which depends upon the peculiar facts in each case.¹⁴⁴

The New Jersey case of *Taylor Iron & Steel Co. v. Nichols*¹⁴⁵ is illustrative of the above principle. The agreement in *Taylor* prohibited the employee from divulging any information "relating to or regarding any process of steel-making" without regard to whether or not such information was secret information.¹⁴⁶ Employing words not dissimilar to the Maryland general rule in regard to restrictive covenants, the court in *Taylor* refused to enforce the contractual provision because "a contract in restraint of trade will not be enforced unless the restraint is no more than is reasonably required to protect the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public."¹⁴⁷

142. The RESTATEMENT OF TORTS § 757, Comment b (1938) states, in part, that a true trade secret

differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like.

Id.

143. *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 229 Md. 357, 369-70, 183 A.2d 374, 381 (1962).

144. 53 AM. JUR. 2D *Master & Servant* § 104, at 176 (1970 & Supp. 1981).

145. 73 N.J. Eq. 684, 69 A. 186 (1908).

146. *Id.* at 687, 69 A. at 186.

147. *Id.* at 686, 69 A. at 187. See also *Julius Hyman & Co. v. Velsicol Corp.*, 123 Colo. 563, 233 P.2d 977 (1951), where the court stated:

Whether a provision in an employment agreement requiring secrecy is enforceable, depends upon whether such a contract is reasonable, and this is dependent upon the peculiar facts in each case. Generally it may be said that an agreement by an employee, binding him to hold secret confidential information or knowledge acquired by him during his employment, and afterwards, and which is necessary for the protection of

Unlike the situation with other restrictive covenants, however, an employer in Maryland does not run the risk of losing all protection if an overly broad confidentiality provision is deemed unenforceable. If the employer can prove that the material being used or disclosed is a trade secret,¹⁴⁸ the employer has the right to enjoin its use and disclosure even absent an employment agreement.¹⁴⁹ Accordingly, it may

the employer's business and is reasonable in its terms, will be upheld as valid.

Id. at 610-11, 233 P.2d at 1002.

148. Maryland courts have consistently adopted the description of a trade secret presented in the RESTATEMENT OF TORTS § 757 (1938). *See* *Servomation Mathias, Inc. v. Englert*, 333 F. Supp. 9, 15 (M.D. Pa. 1971) (applying Maryland law); *Elicott Mach. Corp. v. Wiley Mfg. Co.*, 297 F. Supp. 1044, 1053 (D. Md. 1969); *Space Aero Prods. Co. v. R.E. Darling Co.*, 238 Md. 93, 110, 208 A.2d 74, 82, *reh'g denied and opinion supplemented*, 238 Md. 129, 208 A.2d 699, *cert. denied*, 382 U.S. 843 (1965).

The RESTATEMENT OF TORTS § 757, Comment b (1938) lists various factors to be used in determining if confidential information constitutes a trade secret. These include:

1. the extent to which the information is known outside of [the] business;
2. the extent to which it is known by employees and others involved in [the] business;
3. the extent of measures taken by [the employer] to guard the secrecy of the information;
4. the value of the information to [the employer] and to his competitors;
5. the amount of effort or money expended by [the employer] in developing the information;
6. the ease or difficulty with which the information would be properly acquired or duplicated by others.

Id. These factors are favorably quoted in *Space Aero Prods. Co. v. R.E. Darling Co.*, 238 Md. at 110, 208 A.2d at 82.

The RESTATEMENT OF TORTS § 757, Comment b (1938) further describes the subject matter to which the above factors may apply:

A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives the employer an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

Id. This language is cited with approval in *Space Aero Prods. Co. v. R.E. Darling Co.*, 238 Md. at 105, 208 A.2d at 79, and in *Mycalex Corp. v. Pemco Corp.*, 64 F. Supp. 420, 423 (D. Md. 1946), *aff'd*, 159 F.2d 907 (4th Cir. 1947).

149. A party is not privileged to reveal trade secrets even in the absence of an agreement or covenant. "The duty to protect an employer's trade secrets exists apart from a contract embodying the obligation." *Head Ski Co. v. Kam Ski Co.*, 158 F. Supp. 919, 923 (D. Md. 1958) (citing *DuPont de Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917); *Colgate-Palmolive Co. v. Carter Prods.*, 230 F.2d 855, 864 (4th Cir. 1956); RESTATEMENT OF AGENCY § 396(b) (1933)). Various Maryland cases have recognized the protection of trade secrets outside of the contractual setting. *See Mycalex Corp. v. Pemco Corp.*, 64 F. Supp. 420 (D. Md. 1946), *aff'd*, 159 F.2d 907 (4th Cir. 1947); *Space Aero Prods. Co. v. R.E. Darling Co.*, 238 Md. 93, 208 A.2d 74, *reh'g denied and opinion supplemented*, 238 Md. 129, 208 A.2d 699, *cert. denied*, 382 U.S. 843 (1965).

make good sense to be somewhat overbroad with respect to trade secret provisions, so long as the employer brings both a tort and contract action if suit is ever filed.¹⁵⁰

VI. CONCLUSION

The recommendations and analyses presented in this article can best come to life by example and, for that reason, a set of sample restrictive covenants is included as an appendix. The set is not meant to apply to all situations and, in light of the *ad hoc* nature of the cases and the many unanswered questions left by Maryland courts, there can be no guarantees that these provisions will be enforceable. Nevertheless, they are good examples of how such covenants can be written in light of applicable case law.

Notwithstanding the pitfalls which exist in regard to restrictive covenants found in employment agreements, the law in Maryland continues to favor the employer, and carefully drawn covenants should generally be enforced. In fact, the law in Maryland is much the same as it was in 1936 when the court of appeals in *Tolman Laundry v. Walker*¹⁵¹ established the theme that the customers and patronage secured by an employee for the benefit of the employer, and the resulting increased good will, become the property of the employer, however much their procurement is attributable to the employee's energy, personality, and skill.¹⁵² Since the employee was hired and rewarded to produce these results, the employer has the right to their enjoyment,¹⁵³ and a carefully drawn restrictive covenant can protect the employer's right to the maximum extent possible.

150. In fact, in *Taylor Iron & Steel Co. v. Nichols*, 73 N.J. Eq. 684, 69 A. 186 (1908), the employer successfully restrained the use of its trade secrets under its tort count even though the contract was found to be overbroad and unenforceable.

151. 171 Md. 7, 187 A. 836 (1936).

152. *Id.* at 12, 187 A. at 838.

153. *Id.*

APPENDIX

**Restrictive Covenant Excerpt from Standard
Employment Agreement**

The Employee acknowledges that his employment with the Company will, of necessity, provide him with specialized knowledge, which, if used in competition with the Company could cause serious harm to the Company. Accordingly, the Employee agrees:

a. For a period of one (1) year after he is no longer employed by the Company, the Employee will not engage, directly or indirectly, either as proprietor, stockholder, partner, officer, employee or otherwise, in any business which manufactures or sells products similar to those manufactured or sold by the Company at any time during the two (2) years preceding the Employee's termination of employment with the Company in any geographic area where the Company manufactured or sold products at any time during the two (2) years preceding such termination of employment.

b. For a period of eighteen (18) months after the Employee is no longer employed by the Company, the Employee will not, directly or indirectly, either as proprietor, stockholder, partner, officer, employee or otherwise, sell, offer to sell, or solicit any orders for the purchase of any products which are similar to those manufactured or sold by the Company during the two (2) years preceding the Employee's termination of employment with the Company, to or from any person, firm or entity which was a customer of the Company during the two (2) years preceding such termination of employment.

c. For a period of two (2) years after the Employee is no longer employed by the Company, the Employee will not, directly or indirectly, either as proprietor, stockholder, partner, officer, employee or otherwise, sell, offer to sell, or solicit any orders for the purchase of any products which are similar to those manufactured or sold by the Company during the two (2) years preceding the Employee's termination of employment with the Company, to or from any person, firm or entity which was a customer of the Company from whom the Employee solicited orders on behalf of the Company during the two (2) years preceding such termination of employment.

d. The Employee will not at any time during or after his employment by the Company, directly or indirectly, disclose to others any confidential information of the Company. While engaged as an employee of the Company, the Employee may only use confidential information of the Company for a purpose which is necessary to the carrying out of the Employee's duties as an employee of the Company, and the Employee may not make use of any confidential information of the Company after he is no longer an employee of the Company. All information, whether written or otherwise, regarding the Company's business, including information regarding customers, customer lists,

costs, prices, earnings, products, formulae, compositions, machines, apparatus, systems, manufacturing procedures, prospective and executed contracts and other business arrangements, and sources of supply are presumed to be confidential information of the Company for purposes of this Agreement, except to the extent that such information may be otherwise lawfully and readily available to the general public. The Employee further agrees that he will, upon termination of his employment with the Company, return to the Company all books, records, lists and other written, typed or printed materials, whether furnished by the Company or prepared by the Employee, which contain any information relating to the Company's business, and the Employee agrees that he will neither make nor retain any copies of such materials after termination of employment.

e. The provisions of subparagraphs a, b, c and d are cumulative. If any time period provided in subparagraphs a, b or c exceeds the time the Employee has been employed by the Company, then such time period will be deemed reduced to equal the time the Employee was employed by the Company. With respect to subparagraphs b and c, the customers of the Company include all persons, firms or entities which have purchased products from the Company during the relevant time periods, and all persons, firms or entities which control, or are controlled by the same person, firm or entity which controls such purchasers. In the event of a breach or threatened breach by the Employee of the provisions of subparagraphs a, b, c or d, the Company will be entitled to an injunction restraining the Employee from such breach and from rendering any services to any person, firm, or entity in breach of such paragraphs. Compliance with subparagraphs a, b, c and d is a condition precedent to the Company's obligation to make any payments of any nature to the Employee. The Employee further agrees to indemnify and hold harmless the Company from all damages and costs, including reasonable attorneys' fees, relating to the enforcement of subparagraphs a, b, c or d, incurred by the Company arising out of the Employee's breach or threatened breach of subparagraphs a, b, c or d. Nothing in this Agreement will be construed as prohibiting the Company from pursuing any other remedies available to it for a breach or threatened breach of subparagraphs a, b, c or d. The provisions of subparagraphs a, b, c, d and e will survive the termination of this Agreement.