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Chapter 7: Contracts

Noel G. Posternak

CHAPTER 7

Contracts

NOEL G. POSTERNAK*

§7.1. Employee covenants not to compete. There was little new from Massachusetts appellate courts in the area of contract law during the 1974 Survey year. There were, of course, the perennial landlord-tenant cases, construction contract disputes, etc., each turning on its own set of facts with no new principles of law emerging. But perhaps the most interesting of all the reported contract appeals during the past term were three involving employee covenants not to compete:[1] *All Stainless, Inc. v. Colby*;[2] *Marine Contractors Co. v. Hurley*;[3] and *National Hearing Aid Centers, Inc. v. Avers*.[4] Massachusetts decisions concerning the enforceability of restrictive covenants against competition by former employees have always been difficult to reconcile[5] and this continued to be true with these three cases.

It should be noted at the outset that the three 1974 cases arose out of non-competition covenants contained in employment contracts; restrictive covenants arising out of the sale of a business involve quite different considerations. Although non-competition covenants in both areas have similarities, it seems clear that courts have more carefully scrutinized post-employment restraints. This is due in part to a judicial determination that the parties to an employee covenant are often of unequal bargaining power.[6] Such a covenant may result in the em-

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*NOEL G. POSTERNAK is a partner in the law firm of Burns & Levinson, Boston.

§7.1. [1] The earliest recorded acceptance by a court of a covenant not to compete (in a business context) is Mitchel v. Reynolds, 24 Eng. Rep. 347 (K.B. 1711) reversing a line of decisions dating back to Dyer's Case, Y.B. 2 Hen. V, f. 5 pl. 26 (C.P. 1414). See generally L. Schwartz, Free Enterprise and Economic Organization 3-8 (4th ed. 1972); Blake, Employee Agreements Not to Compete, 73 Harv. L. Rev. 625, 629-46 (1960).

[2] 1974 Mass. Adv. Sh. 329, 308 N.E.2d 481.

[3] 1974 Mass. Adv. Sh. 737, 310 N.E.2d 915.

[4] 1974 Mass. App. Ct. Adv. Sh. 547, 311 N.E.2d 573.

[5] See All Stainless, Inc. v. Colby, 1974 Mass. Adv. Sh. 329, 337 n.2, 308 N.E.2d 481, 487 n.2.

[6] The question of unconscionability of employee covenants resulting from unequal bargaining power generally was not considered in the earlier cases. For example, in Becker College v. Gross, 281 Mass. 355, 183 N.E. 765 (1933), the Court's opinion began: "The defendant, *a man of full age, married and a father,* contends that he is not bound by his agreement under seal not to . . . solicit pupils . . . ." Id. at 356, 183 N.E. at 765 (emphasis added). The Court thereby implied that the employee would be held to the agreement he had made regardless of the relative bargaining power of the

ployee losing his only valuable economic asset—his specialized training, and it usually weakens his mobility and bargaining power during the course of his employment.

I. Prior Case Law in Massachusetts

Employment covenants not to compete will normally be enforced if the restraint is for a reasonable length of time and covers a geographical and product area reasonably necessary to protect the legitimate business interests of the employer. Illustrative of this "time and space" approach in Massachusetts is the 1922 case of *Sherman v. Pfefferkorn*.[7] While employed by Sherman as a laundry salesman, collector and delivery man, Pfefferkorn signed a contract in which he agreed to keep secret any information concerning the employer's customers, to refrain from doing anything to injure the good will of the employer's business, and to refrain from engaging in any branch of the laundry business in three specified towns for a period of three years following termination of employment. The employee was discharged for cause, and six months later he helped to incorporate a new laundry business which would operate within the proscribed territory. The Court, noting that Pfefferkorn disclosed customer information to the new concern with the result that the former employer lost several customers, followed the well-settled rule that "contracts restraining freedom of employment can be enforced only when they are reasonable and not wider than is necessary for the protection to which the employer is entitled and when not injurious to the public interest."[8] The decision accordingly restrained the defendant from soliciting customers in the three proscribed towns and from disclosing any confidential information about the laundry business gained during the course of his former employment.[9]

Two years after *Sherman*, the Court decided the case of *Chandler*,

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parties. See New England Tree Expert Co. v. Russell, 306 Mass. 504, 509, 28 N.E.2d 997, 999 (1940) (agreement assumed to be the product of equal bargaining power). Cf. Shawsheen Dairy, Inc. v. Keefe, 307 Mass. 30, 29 N.E.2d 157 (1940).

One exception to this early general failure to inquire into the relative bargaining positions of the employer and employee is Horn Pond Ice Co. v. Pearson, 267 Mass. 256, 166 N.E. 640 (1929). In this case the employer had requested its ice wagon drivers to sign contracts agreeing not to compete with its ice business for a period of five years within the territory it covered. The employees who refused to sign were told that some men were going to be laid off in the winter and that preference would be given to those who signed the contract. The employees agreed not to compete in order to keep their jobs; the Court held that under such circumstances the covenant would not be enforced. Id. at 258-59, 166 N.E. at 641.

[7] 241 Mass. 468, 135 N.E. 568 (1922).

[8] Id. at 474, 135 N.E. at 569. The Court quoted with approval similar language in the English case of Nordenfeldt v. Maxim Nordenfeldt Guns & Ammunition Co., [1894] A.C. 535, 565. 241 Mass. at 474, 135 N.E. at 570.

[9] 241 Mass. at 475, 135 N.E. at 570.

Gardner & Williams, Inc. v. Reynolds,[10] in which a ten-year time restriction in a novice embalmer's covenant not to compete was held reasonable and was enforced to prevent Reynolds from engaging in the undertaking business in Haverhill.[11] The employer, Chandler, had previously bought the stock, fixtures and good will of the J.W. Emerson Farrell Company, of which Reynolds had been the assistant manager. At the time of the sale, Chandler entered into an employment contract with Reynolds in which Reynolds acknowledged that Chandler had built up a large and profitable business by reason of its skillful methods of embalming and its ability to establish and maintain the good will of its customers through personal contact of its officers and employees with its patrons and the public generally; that because Reynolds was unfamiliar with the methods and details of the embalming business, the employer would have to devote considerable time to instructing him; and that this instruction would of necessity bring Reynolds into personal contact with the employer's patrons. Specifically, Reynolds agreed that he would "not enter into, either directly or indirectly, as employee, manager or proprietor, owner, stockholder, co-partner or otherwise, in the said City of Haverhill, Mass. and vicinity, the same, or similar business, which in any manner might be construed as being a competitive business" of the employer for a period of ten years after termination of his employment.[12] During the relatively short period of his employment, Reynolds had become a registered embalmer, had received both oral and written instructions by the employer as to the methods used in its undertaking and embalming business, had come in contact with the customers of the employer, and had been in charge of seventy-five funerals. The lower court found that the employer had sufficient cause to discharge Reynolds less than a year after the signing of this agreement.[13] Shortly after leaving Chandler's employ, Reynolds opened up an undertaking business approximately fifty yards from Chandler's establishment. Upon Chandler's suit to enforce the covenant, the Supreme Judicial Court upheld the contract and enjoined Reynolds from engaging in the undertaking business in Haverhill:

> An agreement for this period of time is not as a matter of law invalid as an unreasonable restraint of trade. . . . At the time when the plaintiff purchased the good will of the business of the defendant's employer it engaged the defendant to work for it, and one of the evident purposes of making the contract with him was to protect the good will which it then bought. The plaintiff agreed to teach the defendant its methods of doing business, its processes of embalming and to bring him personally into touch

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[10] 250 Mass. 309, 145 N.E. 476 (1924).
[11] Id. at 314-16, 145 N.E. at 478-79.
[12] Id. at 312, 145 N.E. at 478.
[13] Id.

with its customers. One of the purposes of the agreement was to prevent the defendant from taking advantage of the knowledge thus gained by engaging in a competing business in the territory named to the injury of the plaintiff.[14]

With respect to geographical restrictions, covenants have been upheld which not only forbid solicitation of former customers of the employer, but which ban any competing activity within a proscribed area.[15] In the case of *Boston & Suburban Laundry Co. v. O'Reilly*,[16] the Supreme Judicial Court reversed the trial judge's refusal to enjoin a former driver and salesman of the employer from soliciting any laundry business in Somerville and Medford for a period of two years.[17] The lower court ruling made a distinction between solicitation of old customers of the employer and the solicitation of new business within the same territory.[18] The Supreme Judicial Court, granting the broad injunction against soliciting anyone for laundry work in the two cities,[19] concluded:

> It must be recognized that in employing anyone as driver and collector for a laundry the employer introduces the person to a public capable of furnishing laundry business to which but for such introduction he might never be known. The difficulty of proving improper use of knowledge acquired and of connections established during the employment is very great.[20]

A similar general restraint was upheld in *Walker Coal & Ice Co. v. Westerman*,[21] where the Court entered a decree "restraining the defendant from directly or indirectly engaging, either personally or as an employee, in any branch of the ice business within the city of Worcester for a period of five years from the date when he left the employ of the plaintiff . . . ."[22] Westerman had argued that in his new position as manager of a competitor's wholesale ice business, he had not solicited any business away from his former employer nor used any information gained while working for Walker. The Court, however, noting that one of his new duties was to attempt to increase the business of his employer in Worcester, found that this obligation would conflict with the agreement he had made with his former employer.[23] In response to the argument that Walker had not shown

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[14] Id. at 314, 145 N.E. at 478.
[15] See All Stainless, Inc. v. Colby, 1974 Mass. Adv. Sh. 329, 337, 308 N.E.2d 481, 487.
[16] 253 Mass. 94, 148 N.E. 373 (1925).
[17] Id. at 97-98, 148 N.E. at 373-74.
[18] Id. at 97, 148 N.E. at 373.
[19] Id. at 98, 148 N.E. at 374.
[20] Id. at 98, 148 N.E. at 373-74.
[21] 263 Mass. 235, 160 N.E. 801 (1928).
[22] Id. at 240, 160 N.E. at 803.
[23] Id. at 239, 160 N.E. at 803.

any injury to its good will, the Court stated:

> The plaintiff was not required to defer commencement of proceedings for relief until it could be shown that the defendant had actually solicited customers of his former employer, and that injury to its business had been thereby, or by other unlawful means, accomplished. By reason of his employment by the plaintiff, the defendant had become familiar with its customers and had acquired information regarding the ice business that might be of value to its competitor, and which he was able at any time to disclose to his new employer. Such disclosure would constitute a breach of contract.[24]

In a later case brought by the same plaintiff, *Walker Coal & Ice Co. v. Love*,[25] an injunction was issued prohibiting another former ice driver from competing in the ice business, but the area restricted by the injunction was only that part of the city of Worcester constituting the route the defendant had used while in the plaintiff's employ and the one on which he had set up his own ice delivery business.[26]

The Massachusetts courts have often adopted the approach of remodeling portions of restrictive covenants to make them more reasonable and therefore enforceable:

> In determining whether a covenant will be enforced, in whole or in part, the reasonable needs of the former employer for protection against harmful conduct of the former employee must be weighed against both the reasonableness of the restraint imposed on the former employee and the public interest. . . . If the covenant is too broad in time, in space or in any other respect, it will be enforced only to the extent that it is reasonable and to the extent that it is severable for the purposes of enforcement.[27]

This technique was employed in *Edgecomb v. Edmonston*,[28] in which a covenant prohibited a former legal stenographer from engaging for five years in any line of trade similar to the former employer's business within Massachusetts. The Court enforced the covenant only to restrain the employee from conducting any similar business within the city of Boston and from soliciting the plaintiff's customers within the Commonwealth during the five year period.[29]

This narrower enforcement of restrictive covenants was also used in *Whiting Milk Cos. v. O'Connell*,[30] where the Court struck down a cove-

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[24] Id., 160 N.E. at 802. See Cedric G. Chase Photo. Labs., Inc. v. Hennessey, 327 Mass. 137, 139, 97 N.E.2d 397, 398 (1951).

[25] 273 Mass. 564, 174 N.E. 199 (1931).

[26] Id. at 566-67, 174 N.E. at 200.

[27] All Stainless, Inc. v. Colby, 1974 Mass. Adv. Sh. 329, 334, 308 N.E.2d 481, 485. See New England Tree Expert Co. v. Russell, 306 Mass. 504, 509, 28 N.E.2d 997, 999 (1940).

[28] 257 Mass. 12, 153 N.E. 99 (1926).

[29] Id. at 20-21, 153 N.E. at 102.

[30] 277 Mass. 570, 179 N.E. 169 (1931).

nant barring a former milk driver from interfering with Whiting's business in any place where it was carried on.[31] Whiting's business extended throughout the eastern part of the Commonwealth, but O'Connell and his new employer solicited business only in Brookline. The Court held that the covenant was unreasonably broad with respect to territory and could not be saved by the fact that the time duration was only ninety days.[32] The Court enjoined the new employer from selling dairy products to Whiting's customers residing in Brookline, and enjoined O'Connell from soliciting business or selling dairy products to any customers of Whiting whom he served while in Whiting's employ.[33] The new employer was restricted because it knew of O'Connell's "employment by the plaintiff and knew he was soliciting business from plaintiff's customers and intended he should do so."[34] Although the Court did not refer to the state of the economy at the time, the fact that the country was in an economic depression may explain the somewhat narrower enforcement of this covenant.[35]

Other decisions have construed covenants not to compete much more broadly. One such case is *Becker College v. Gross*,[36] which rather summarily dismissed the defendant's argument that the covenant not to solicit pupils from two named counties for a five year period was illegal and void as a restraint on competition.[37] The Court held that the college had the right to guard against future injury,[38] that Gross had not been stripped of earning capacity or wronged, and that he was "excluded in accord with his own agreement."[39] In *New England Tree Expert Co. v. Russell*,[40] another case which treats more leniently restrictive covenants, the plaintiff's business consisted of landscaping and line clearance operations for both private and public customers throughout New England. Russell had worked for the plaintiff as a supervisor of salesmen before he quit and started a private landscaping business from his home in Randolph. He had signed an agreement not to compete in New England for a period of three years. The master for the lower court modified the area restriction to cover certain parts of Massachusetts, Rhode Island and Connecticut.[41] The de-

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[31] Id. at 574, 179 N.E. at 170.

[32] Id. at 573-74, 179 N.E. at 170.

[33] Id. at 575, 179 N.E. at 170.

[34] Id. at 573, 179 N.E. at 170.

[35] Depressed economic conditions played a major role in the decision in Economy Grocery Stores Corp. v. McMenamy, 290 Mass. 549, 195 N.E. 747 (1935), to deny the plaintiff injunctive relief against a former employee continuing to work in a competing grocery business. Id. at 553, 195 N.E. at 749. The Court noted that to grant such relief might have deprived the employee of an opportunity to work. Id. It was also significant that McMenamy had been fired by the plaintiff employer without justifiable cause. Id. at 551, 195 N.E. at 748.

[36] 281 Mass. 355, 183 N.E. 765 (1933).

[37] See id. at 359-60, 183 N.E. at 766.

[38] Id. at 359, 183 N.E. at 766.

[39] Id. at 360, 183 N.E. at 766. See note 6 supra.

[40] 306 Mass. 504, 28 N.E.2d 997 (1940).

[41] Id. at 508, 28 N.E.2d at 999.

fendant argued, however, that the proscribed area should be only the route he had covered while employed by the plaintiff citing, *inter alia, Whiting Milk*.[42] Relying on the old maxim that what is reasonable depends upon the facts of each case,[43] the Court stated:

> [O]n the facts the present case is stronger for the plaintiff than were the facts in the cases upon which the defendant relies. The plaintiff's business is different from those where service is rendered on defined routes daily or weekly. The services of the plaintiff would probably not be rendered to most of its patrons more than once or twice a year. By their nature, the field of its operations would be somewhat extensive. The finding of the master that it would be unfair to the plaintiff to restrict the enforcement of the covenant to the area in which the defendant worked while in the employ of the plaintiff is supported by the other facts found. We cannot say that the space defined in the final decree is greater than is reasonably necessary to protect the good will of the plaintiff's business from competition by the defendant in violation of his covenant.[44]

The reasoning of most of the cases discussed above would give one the impression that a covenant not to compete which was made as a part of an employment contract and was reasonable as to time and space would be upheld without inquiry into whether a restraint is necessary at all. This is apparently partly due to the courts' recognition of the legitimate concern of employers that the cost of the initial period of orientation and training spent on a new employee would not be sufficiently protected without some deterrent to prevent a recent employee from going to a competitor with his newly acquired skill.[45] Employers urge that such restrictive covenants are the only available means of protection since personal service contracts are not specifically enforceable.[46] This employer's argument, however, did not prove persuasive in *Club Aluminum Co. v. Young*,[47] where the Supreme Judicial Court refused to uphold a covenant prohibiting a cooking utensil salesman from selling similar goods by a similar marketing plan for a period of one year.[48] Club Aluminum's selling technique involved private home demonstrations to groups of potential customers. Young received specialized training for a period of three months,

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[42] 277 Mass. 570, 179 N.E. 169 (1931). See text at notes 31-35 supra.

[43] 306 Mass. at 510, 28 N.E.2d at 1000. Accord, Marine Contractors Co. v. Hurley, 1974 Mass. Adv. Sh. 737, 743, 310 N.E.2d 915, 920; Sherman v. Pfefferkorn, 241 Mass. 468, 476, 135 N.E. 568, 570 (1922).

[44] 306 Mass. at 510-11, 28 N.E.2d at 1000. See also Saltman v. Smith, 313 Mass. 135, 143-45, 46 N.E.2d 550, 555-56 (1943).

[45] See text at notes 11-15 supra. But see Wilson v. Clarke, 470 F.2d 1218, 1222-23 (1st Cir. 1972).

[46] See Blake, Employee Agreements Not to Compete, 73 Harv. L. Rev. 625, 652 (1960).

[47] 263 Mass. 223, 160 N.E. 804 (1928).

[48] Id. at 228, 160 N.E. at 806.

after which he quit and went to work for a competitor. The Court pointed out that the same selling technique was used by at least three other competitors,[49] but did not indicate whether the new employer was among the three. In concluding that the fact that Young's training was extensive and costly would not be sufficient by itself to validate a covenant not to compete, the Court remarked:

> [A]n employer cannot by contract prevent his employee from using the skill and intelligence acquired or increased and improved through experience or through instruction received in the course of the employment. The employee may achieve superiority in his particular department by every lawful means at hand, and then, upon the rightful termination of his contract for service, use that superiority for the benefit of rivals in trade of his former employer.[50]

The analysis used in *Club Aluminum* was applied in the recent case of *Richmond Brothers, Inc. v. Westinghouse Broadcasting Co.*[51] Richmond Brothers operated a radio station in Boston and employed Jacoby first as an announcer and then as a late night talk show moderator. The employment contract included a restrictive covenant prohibiting Jacoby from engaging in the radio, television or advertising business anywhere in New England for at least three years after termination of his employment. Jacoby left Boston to work at another radio station, but returned three years later and joined a competitor radio station. The plaintiff sought to have the restrictive covenant enforced for another two years, but the Court denied relief:[52]

> While we recognize the unusual nature of the radio broadcasting industry, its relationship with the listening public and the unique nature of its performers, we are unable to perceive any business interest of the plaintiff which merits the length of "protection" it would receive by the enforcement of the covenant. Jacoby was not involved in the solicitation of advertisers while an employee of the plaintiff. Hence, he was not in a position whereby his competition with the plaintiff would result in any exploitation of previous con-

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[49] Id. at 225, 160 N.E. at 805.

[50] 263 Mass. at 226-27, 160 N.E. at 806. Accord, Abramson v. Blackman, 340 Mass. 714, 715-16, 166 N.E.2d 729, 730 (1960). Compare *Club Aluminum* with Chandler, Gardner & Williams, Inc. v. Reynolds, 250 Mass. 309, 145 N.E. 476 (1924), discussed in the text at notes 10-14 supra. In *Chandler,* the employee's knowledge gained while employed by Chandler posed a threat to Chandler's good will whereas no secret or confidential knowledge was transmitted to the employee in *Club Aluminum.* The amount of training would seem to be unrelated to the decisions in these cases.

One commentator has questioned the rationale of *Club Aluminum* in view of the fact that Young quit after only three months without giving a reason and without plaintiff's consent. Levin, Non-Competition Covenants in New England: Part II, 40 B.U.L. Rev. 210, 215 (1960).

[51] 357 Mass. 106, 256 N.E.2d 304 (1970).

[52] Id. at 111, 256 N.E.2d at 307-08.

> tacts and thereby injure the plaintiff's established business. Moreover, there was no evidence introduced which would indicate that the plaintiff had, in fact, lost any advertisers since Jacoby returned to the Greater Boston area. . . . Furthermore, the nature of the broadcasting industry is such that Jacoby was not in possession of any of the plaintiff's trade secrets or confidential information communicated to him during the course of his employment. . . .
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> . . . We are of opinion that the restrictive covenant in the 1965 contract is no longer reasonably necessary for the protection of the plaintiff's business. Enforcement of the covenant beyond the years of Jacoby's absence from Boston would merely be protecting the plaintiff against ordinary competition. It is not entitled to such protection.[53]

Although the Court in *Richmond Brothers* noted the lack of evidence of actual injury to the former employer's business,[54] it seems clear that the presence or absence of actual injury was not the controlling factor in the Court's decision.[55]

This survey of earlier cases points out that the decisions are not harmonious in their treatment of employee covenants not to compete. They are consistent, however, with the general rule that a covenant not to compete contained in a contract for personal services will be enforced if it is reasonable. Since each case is to be decided on its own particular facts, however, the decisions differ as to what factors will be controlling.

II. Decisions During the 1974 Survey Year

In *All Stainless, Inc. v. Colby*,[56] the employer sold stainless steel fasteners to industrial purchasers in New England and New York. Colby was employed as an outside salesman covering parts of Maine, New Hampshire and Massachusetts. Colby signed a contract which included a restrictive covenant against competing with All Stainless within New York and New England for a period of two years follow-

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[53] Id. at 110-11, 256 N.E.2d at 307, citing *Club Aluminum*, 263 Mass. at 227-28, 160 N.E. at 804. See Wilson v. Clarke, 470 F.2d 1218, 1221-23 (1st Cir. 1972).

[54] 357 Mass. at 110, 256 N.E.2d at 307.

[55] See text at note 50 supra; Walker Coal & Ice Co. v. Westerman, 263 Mass. 235, 239, 160 N.E. 801, 802 (1928). Cf. All Stainless, Inc. v. Colby, 1974 Mass. Adv. Sh. 329, 337, 308 N.E.2d 481, 487. The Court in the *All Stainless* case stated that equitable relief is not limited to persons formerly solicited or former sales customers to whom the employee might attempt to make sales; rather the covenant will generally encompass the territory covered by the former employee's activities. Id. The implication is that actual solicitation and injury are not prerequisites for specific enforcement of the covenant. Indeed, only when monetary damages are sought should the former employer be required to show actual injury. See Whiting Milk Cos. v. O'Connell, 277 Mass. 570, 574, 179 N.E. 169, 170 (1931).

[56] 1974 Mass. Adv. Sh. 329, 308 N.E.2d 481.

ing the termination of his employment. Seventeen months after he left the employ of All Stainless, Colby went to work as a salesman for Accurate Fasteners, Inc., a competitor of All Stainless. His new territory was carefully designed to be outside that which he covered while working for All Stainless. There was, however, an overlap of five towns, and All Stainless instituted an action to enforce the covenant not to compete and for damages for injury allegedly suffered as a result of Colby's breach.

The lower court had granted a preliminary injunction but subsequently found the restrictive covenant unreasonable in time and space.[57] The Supreme Judicial Court found the two year limitation reasonable,[58] but modified the area restriction to cover "the sales territory covered by [Colby] immediately prior to cessation of his employment by All Stainless."[59] In reducing the prohibited area, the Court stated:

> Clearly the geographical limitations on Colby's sales activities were far too broad. A former employer is not entitled by contract to restrain ordinary competition. . . . Any restraint must be consistent with the protection of the good will of the employer. The former employee must be in a position where he can harm that good will, perhaps (unlike the situation here) because of his knowledge of some business secret or confidential information . . . or perhaps (as here) because the former employee's close association with the employer's customers may cause those customers to associate the former employee, and not the employer, with products of the type sold to the customer through the efforts of the former employee. . . . All Stainless has shown that it had good will in the sales area served by Colby. . . .
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> The plaintiff has failed, however, to show that its good will could have been harmed through sales activity by Colby outside of the sales territory formerly assigned to him. We see, therefore, no justification for enforcement of the restriction beyond Colby's former sales territory.[60]

The Court acknowledged that restraints as broad as the one All Stainless requested had been upheld in the past, but explained that the lack of consistency resulted from the peculiar facts and circumstances which underlay the Court's exercise of its equity powers.[61] As shown by past cases, where a restraint to be imposed is broader than the area of the employee's former activity, it must be based on (1) "the employee's confidential knowledge of the employer's business and . . .

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[57] Id. at 332-33, 308 N.E.2d at 483-84. See id. at 334, 308 N.E.2d at 485.
[58] Id. at 335, 308 N.E.2d at 486.
[59] Id. at 333, 308 N.E.2d at 485.
[60] Id. at 335-36, 308 N.E.2d at 486.
[61] Id. at 337 n.2, 308 N.E.2d at 487 n.2.

the nature of the employee's duties for his new employer"[62] or (2) proof by the former employer "that such restraint is both reasonable and necessary" to protect his good will.[63] In this case, however, the Court analyzed the functions that Colby performed for All Stainless and declared that the reasoning of the cases modifying covenants not to compete dealing with route salesmen was applicable to Colby's situation: his sales function was limited to a distinct geographical area and it was only within that area that he posed any threat to the good will of All Stainless.[64] Finally, the Court ruled that since the period of the two year restriction had expired, All Stainless was entitled to recover damages arising from Colby's solicitation during that period of customers from the area now proscribed by the Court.[65] Colby was entitled to offset the damages awarded to All Stainless, however, in the amount of the financial injury attributable to the preliminary injunction that had restrained him from selling in areas outside the reasonable area covered by the covenant.[66]

In *Marine Contractors Co. v. Hurley*,[67] decided only two months after *All Stainless*, the Court upheld the granting of an injunction to prevent a former employee from competing in violation of a covenant not to do so. Marine, which performed specialized types of marine repair in the greater Boston area, employed Hurley as the general superintendent of the business, field supervisor, estimator and bidder. After informing Marine of his intention to terminate his employment, Hurley signed an agreement under which he promised not to compete with the Marine business within 100 miles of Boston for a period of five years. In return, the president of Marine agreed to make an immediate payment of Hurley's share in an employee pension trust (established by Marine and of which Marine's president was sole trustee) which would otherwise not have been paid out to him for five years. Soon after leaving the employ of Marine, Hurley started his own repair business within 100 miles of Boston with two other former Marine employees, and performed some work for former customers of Marine. Marine brought suit to enforce the restrictive covenant. Hurley attempted to have the covenant set aside on a number of grounds.

Hurley first contended that there was insufficient consideration to support his promise not to compete. The Court quickly dealt with this aspect of the appeal, holding that (1) the covenant was a sealed instrument because the parties' agreement contained the recitation that they had "set their hands and seals,"[68] and the rule that consideration is conclusively presumed for a promise under seal has been applied to

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[62] Id. at 336, 308 N.E.2d at 486.
[63] Id.
[64] Id.
[65] Id. at 337, 308 N.E.2d at 487.
[66] Id. at 338, 308 N.E.2d at 487-88.
[67] 1974 Mass. Adv. Sh. 737, 310 N.E.2d 915.
[68] Id. at 741 n.2, 310 N.E.2d at 918 n.2.

actions in law and to suits in equity in Massachusetts;[69] and (2) the acceleration of the trust payment to Hurley was sufficient consideration to support his promise not to compete and to authorize specific performance of its terms.[70] Hurley had also argued that, although he received a benefit from the plan, any detriment was to the independent trust fund and not to Marine, and therefore mutual consideration was lacking. In rejecting this argument, the Court reasoned that it was " 'not in all cases necessary that the consideration should move from the promisee to the promisor' "[71] in order to bind the promisor. The receipt of the trust benefits five years before they were due "constituted adequate consideration for his promise not to compete with Marine."[72]

Hurley further contended that the covenant constituted an unreasonable restraint of trade under section 515 of the Restatement of Contracts[73] and should not be enforced in equity. As a starting point, Hurley had argued that the covenant was not "ancillary" to his contract of employment with Marine.[74] The Court declared that Hurley misinterpreted the policy underlying the rule condemning non-ancillary agreements restricting employment. "The Restatement rule which declares unreasonable any non-competition agreement not ancillary to an employment contract is principally aimed at forestalling the use of covenants which have as their sole purpose the protection of the covenantee from ordinary competition."[75] The covenant here was not designed to restrict ordinary competition but rather was a proper exercise by Marine in seeking to protect its "accrued good will from possible incursions by Hurley . . . ."[76] The Court ruled that even though this could be considered to be a post-employment covenant, it was "ancillary" to Hurley's employment with Marine.[77]

His third argument was that the agreement imposed an "undue hardship" by preventing him from engaging in the business that he knew best.[78] In response, the Court observed:

> The consequence of every covenant not to compete, however, is that the covenantor is deprived of a possible means of earning his living, within a defined area and for a limited time. That fact alone does not make such covenants unenforceable. Hurley has not established any extraordinary hardship which would be caused him by the enforcement of his promise not to compete.[79]

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[69] Id. at 741, 310 N.E.2d at 919.
[70] Id. at 742, 310 N.E.2d at 919.
[71] Id., quoting Palmer Sav. Bank v. Insurance Co. of N. America, 166 Mass. 189, 196, 44 N.E. 211, 213 (1896).
[72] 1974 Mass. Adv. Sh. at 743, 310 N.E.2d at 919.
[73] Restatement of Contracts § 515, at 988-89 (1932).
[74] See id. § 515(e), at 989.
[75] 1974 Mass. Adv. Sh. at 744, 310 N.E.2d at 920.
[76] Id.
[77] Id. at 745, 310 N.E.2d at 920-21.
[78] See Restatement of Contracts § 515(b), at 989 (1932).
[79] 1974 Mass. Adv. Sh. at 745, 310 N.E.2d at 921.

The Court alluded to the absence of unequal bargaining power[80] and found that there was no "subsequent change in circumstances which might cause him unanticipated hardship."[81] He also argued that the non-competition would tend to create a monopoly,[82] but the Court found no evidence to support this argument.[83]

Finally, the agreement was found to be reasonable with respect to space.[84] "The geographical scope of the agreement coincides with the area in which Marine performs almost all of its work, and thus is precisely drawn to protect Marine's good will."[85] With respect to the five year time period, however, the Court indicated some discomfort.[86] Nevertheless, the Court noted that the injunction would last for only three years (two years having already elapsed) and found such three year period to be "not excessive or unreasonable."[87]

In *Marine Contractors,* the focus of the Court's attention seemed to be upon the *employer's* business, while in *All Stainless* the Court appeared to look to the *employee's* activities. Upon closer reading, however, the cases can be seen following the same rule for enforcement of non-competition covenants: the covenant will be enforced only to the extent that it reasonably protects the legitimate business interests of the employer which can be potentially harmed through competition by the former employee. In *Marine Contractors,* Hurley had general supervisory duties pervading all of Marine's activities, while in *All Stainless,* Colby worked as a salesman with a definite "route;" hence, the narrower enforcement in the latter case.

The Appeals Court distinguished the facts in *National Hearing Aid Centers, Inc. v. Avers*[88] from both *All Stainless* and *Marine Contractors* and refused to allow the employer to recover liquidated damages for violation of a covenant not to compete.[89] National held a franchise to sell hearing aids and accessories under two brand names in eastern Massachusetts, Maine, New Hampshire, and Vermont. Avers opened a discount house and signed an agreement to sell National's merchandise. The agreement included a provision that Avers would not disclose National's customer list nor would he sell hearing aids in Maine, New Hampshire, Vermont, or six counties in Massachusetts for a two year period after termination of the agreement. Avers terminated his

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[80] Id. See note 60 supra.

[81] 1974 Mass. Adv. Sh. at 745, 310 N.E.2d at 921.

[82] See Restatement of Contracts § 515(c), at 989 (1932).

[83] 1974 Mass. Adv. Sh. at 745, 310 N.E.2d at 921.

[84] Id. at 745-46, 310 N.E.2d at 921.

[85] Id. at 746, 310 N.E.2d at 921.

[86] Id.

[87] Id. Apparently, no damages were sought by Marine. Had Marine sought damages, the Court would have had to squarely face the issue of the reasonableness of the five year period.

[88] 1974 Mass. App. Ct. Adv. Sh. 547, 311 N.E.2d 573.

[89] Id. at 555, 311 N.E.2d at 578. The contract provided for liquidated damages of $5,000 for any breach. Id. at 549, 311 N.E.2d at 575. See Wilson v. Clarke, 470 F.2d 1218, 1223 (1st Cir. 1972).

contract with National[90] and started his own company selling hearing aids in Rhode Island with another former employee of National. They then enlarged their territory to include parts of Massachusetts which were included in the prohibited area in the covenant. National then brought an action, *inter alia,* to enforce the covenant and to obtain liquidated damages. The case was referred to a master who reported that there was a strong competitive market, that National used a promotional give-away program, that the sale of hearing aids did not require extraordinary skill or experience, and that the business was one in which there generally was only one sale made to a customer.[91] In its final decree, the lower court granted the injunction and awarded $5,000 in liquidated damages to National.[92] Although the injunction had expired before the case was heard on appeal, the Appeals Court stated that "the question of the validity of the restrictive covenant . . . is not moot since the provision for liquidated damages . . . is enforceable only if the circumstances of this case are such that the plaintiff has sustained the burden of justifying as reasonable the imposition of any restraint on competition."[93] Following the reasoning in *Marine Contractors,* the court framed the issue as whether "the defendant . . . was placed in a position to injure '[s]uch legitimate business interests . . . [as] trade secrets, other confidential information, or . . . the good will the employer has acquired through dealing with its customers.' "[94] After reviewing the master's findings, the Appeals Court found no basis to conclude that there was any confidential information that Avers could use to National's detriment.[95] Nor was there any indication that Avers could damage National's good will by soliciting National's customers.[96] Since the hearing aid business was a no-repeat sale enterprise, Avers was in no "position to exploit customer contacts made while employed by [National]."[97]

The court found no "other factors" which would justify restriction

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[90] An irony exists in both Club Aluminum Co. v. Young, 263 Mass. 223, 160 N.E. 804 (1928), see text at notes 47-50 supra, and *National Hearing* in that both use the strongest language in protecting the former employee's position, and yet they appear to have the weakest fact situations. Both employees involved had to be trained for their work, both quit within a relatively short period of time, and both then went to work for competitors who had not previously used the sales technique of the former employer.

[91] 1974 Mass. App. Ct. Adv. Sh. at 551-53, 311 N.E.2d at 577.

[92] Id. at 550, 311 N.E.2d at 576.

[93] Id. at 551, 311 N.E.2d at 576.

[94] Id., quoting Marine Contractors Co. v. Hurley, 1974 Mass. Adv. Sh. 737, 744, 310 N.E.2d 915, 920.

[95] 1974 Mass. App. Ct. Adv. Sh. at 552, 311 N.E.2d at 577. National had claimed that Avers breached his covenant by using its customer list, but the court found no evidence that a customer list existed. Id. at 551, 311 N.E.2d at 577.

[96] Id. at 552-53, 311 N.E. at 577-78. There was a threat that the former employee would solicit the former employer's customers in both All Stainless, Inc. v. Colby, 1974 Mass. Adv. Sh. 329, 336, 308 N.E.2d 481, 486, and Marine Contractors Co. v. Hurley, 1974 Mass. Adv. Sh. 737, 744, 310 N.E.2d 915, 920.

[97] 1974 Mass. App. Ct. Adv. Sh. at 553, 311 N.E.2d at 577.

of competition in this case.[98] Responding to National's claim that it had taught Avers a valuable selling method which he would now use to National's detriment, the court said:

> The most that can be said is that the defendant, as a result of his employment, gained a certain amount of experience (here only about five months) and some skill (which the master found was not difficult to acquire). These may have made him a more efficient competitor, but they cannot (consistent with the value accorded by our culture to upward mobility) be contracted away by a noncompetition agreement.[99]

Finding no reasonable grounds to uphold the restrictive covenant, the Appeals Court reversed the lower court and denied recovery of liquidated damages.[100]

As the cases show, there is no consensus that actual harm to an employer's good will must be shown nor that the area proscribed will be that of the employer's activities as opposed to that of the employee's. One generalization that can be made is that the likelihood that an employment covenant not to compete will be upheld increases if the employer can show that the relationship with the former employee was one of confidence and trust, and one which allowed the employee access to confidential information regarding the product and customers. Without some evidence of either actual injury or the potential for injury to his business, an employer is apt to have his restrictive covenant held unenforceable because he is not entitled to protection from "ordinary competition."

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[98] Id. at 554, 311 N.E.2d at 578. The court pointed to the fact that National made no allegation that Avers had actually attempted to sell hearing aids to its customers in support of the conclusion that Avers posed no threat to National's good will. Id. at 553, 311 N.E.2d at 578. But the implication is clear that this lack of *actual* injury to good will was not controlling; a potential harm, had it existed, would have been sufficient to enforce a valid covenant. See id. at 553, 311 N.E.2d at 577. See also note 55 supra.

[99] 1974 Mass. App. Ct. Adv. Sh. at 554, 311 N.E.2d at 578. Accord, Club Aluminum Co. v. Young, 263 Mass. 223, 160 N.E. 804 (1928). See text at notes 44-49 supra.

[100] 1974 Mass. App. Ct. Adv. Sh. at 555, 311 N.E.2d at 578.