

JENNER & BLOCK

Practice Series

ENFORCEMENT OF EMPLOYEE
RESTRICTIVE COVENANTS
UNDER ILLINOIS LAW

Terri L. Mascherin
R. Douglas Rees

Contributing Editors:

Tiffany E. Clements

Shelley K. Dufford

Anna W. Margasinska

Sarah R. McNally

Laura E. Pelanek

JENNER & BLOCK

Offices

- ◆ 353 N. Clark Street
Chicago, Illinois 60654-3456
Firm: 312 222-9350
Fax: 312 527-0484
- ◆ 633 West 5th Street
Suite 3500
Los Angeles, California 90071-2054
Firm: 213 239-5100
Fax: 213 239-5199
- ◆ 919 Third Avenue
37th Floor
New York, New York 10022-3908
Firm: 212 891-1600
Fax: 212 891-1699
- ◆ 1099 New York Avenue, NW
Suite 900
Washington, DC 20001-4412
Firm: 202 639-6000
Fax: 202 639-6066

Website

- ◆ www.jenner.com

Author Information

- ◆ Terri L. Mascherin
Partner
Jenner & Block
Tel: 312 923-2799
Fax: 312 840-7799
E-Mail: tmascherin@jenner.com
- ◆ R. Douglas Rees
Partner
Jenner & Block
Tel: 312 923-2837
Fax: 312 840-7237
E-Mail: drees@jenner.com

ABOUT THE AUTHORS

Terri L. Mascherin is a partner in Jenner & Block's Chicago office and a member of the firm's Litigation Department and the firm's Management Committee. Ms. Mascherin represents businesses and individuals in disputes over corporate transactions, partnerships, joint ventures, licenses, and contracts. Ms. Mascherin's work includes representing clients in cases involving trade secrets and employee restrictive covenants, both in litigation and in counseling to avoid litigation. Ms. Mascherin has extensive experience handling emergency hearings, trials, appeals, and arbitrations throughout the United States.

R. Douglas Rees is a partner in Jenner & Block's Chicago office and a member of the firm's Litigation Department. Mr. Rees regularly represents companies and employees in cases involving theft of trade secrets, breach of fiduciary duties, tortious interference, fraud, and employee restrictive covenants. Mr. Rees has extensive experience handling emergency litigation involving temporary restraining orders and preliminary injunctions. He counsels clients on methods to protect confidential information and other business interests; he also counsels clients on ways to avoid litigation when hiring employees or when leaving employment.

Contact Information for Ms. Mascherin:

Direct Dial: (312) 923-2799
Direct Fax: (312) 840-7799
E-Mail: tmascherin@jenner.com

Contact Information for Mr. Rees:

Direct Dial: (312) 923-2837
Direct Fax: (312) 840-7237
E-Mail: drees@jenner.com

TABLE OF CONTENTS

INTRODUCTION	1
I. TYPES OF RESTRICTIVE COVENANTS.	1
II. ENFORCEABILITY OF RESTRICTIVE COVENANTS.	2
A. The Restrictive Covenant Must Be Necessary To Protect A Legitimate Business Interest.	3
1. Near-permanent customer relationships.	3
a. Protectible interest found.	3
(1) Substantial investment in near- permanent customer relationships:	3
(2) Substantial contact with certain customers:	7
(3) Extensive marketing efforts and employee with no prior experience in industry:	9
(4) Where customers come to repose trust in particular seller with whom they have a relationship:	10
(5) Protectible business interest in medical practice:	11
b. No protectible interest found.	13
(1) No protectible interest in customers in highly competitive business without customer loyalty:	13
(2) Customers were employee's, not employer's:	16
(3) No investment in development of customers and no confidential information:.....	18
(4) No protectible business interest in law firm's clients:	19

(5)	True intent of covenant was not to protect customer relationships:	20
(6)	No protectible interest in “good will” of dissolved medical practice:.....	21
(7)	Medical practice had no protectible business interest in patients of hospital at which practice was precluded by contract from offering services:.....	21
(8)	No protectible interest in future clients:	22
2.	Access to trade secrets or confidential information.....	22
a.	Protectible interest found.....	22
(1)	Confidential pricing formula:	22
(2)	Confidential customer profiles:.....	23
(3)	Confidential product design:.....	24
(4)	Theft of computer files:	24
(5)	Inevitable disclosure of confidential information:.....	24
b.	No protectible interest found.....	27
(1)	Pricing formula not confidential:	27
(2)	General market strategies are not confidential:	29
(3)	General knowledge of automated system and customer information not confidential:	29
(4)	No access to confidential information or trade secrets:	30
(5)	Materials widely distributed and confidential information not specifically identified:.....	31

(6)	No confidential information where employer failed to take adequate measures to safeguard the information:.....	32
(7)	“Middleman’s” prices can be discovered from public information:	33
(8)	Salesman’s knowledge of customers cannot be considered confidential information of employer:	34
(9)	Employees are not trade secrets:.....	35
(10)	Information no longer confidential when employer disseminated information to client:.....	35
3.	Stability of Workforce	36
4.	Investment in goodwill as a legitimate business interest.....	38
B.	Restrictions Must Be Reasonable As To Duration, Geographic Area, and Scope of Prohibited Activity.	38
1.	Covenants unenforceable because no geographic or time limitation.....	38
2.	Covenants without geographic and time limits not <i>per se</i> unreasonable.....	41
3.	The geographic scope should be co-extensive with the plaintiff’s business territory.	42
4.	The scope of prohibited activity must be reasonably defined.....	45
a.	Activity restrictions upheld.....	45
b.	Activity restrictions rejected.	47
5.	Reasonable to enforce restrictive covenant for so long as employee receives deferred compensation.....	48
C.	Restrictive Covenants Must Be Supported By Adequate Consideration.	49

1.	Continued employment for “substantial period” is adequate consideration.....	49
2.	“Peppercorn” consideration insufficient to support injunction.	49
3.	Unenforceable contracts of adhesion.....	50
4.	Covenants requiring employer to fire employees who are not parties to an employment contract may not be enforceable.	51
D.	The Covenant Must Be Ancillary to a Valid Employment Agreement or Sale of Business.....	51
1.	Covenants ancillary to a valid employment agreement.....	51
2.	The enforceability of covenants with at-will employees.	51
3.	Covenants in independent contractor agreements.....	54
4.	Restrictive covenant ancillary to the sale of a business.....	54
a.	Employment agreement that was a precondition to closing held ancillary to sale of a business.....	55
b.	Covenant held ancillary to contemporaneous sale of business.	56
c.	Activity restraints preferable even in sale of business.	56
d.	No protectible interest in 10-year-old goodwill.	57
5.	Covenants ancillary to the formation of a new business or joint venture.	57
III.	CONSTRUCTION OF RESTRICTIVE COVENANTS.....	58
A.	“Blue-penciling” Rejected.	58
B.	“Blue-penciling” Upheld.	60
C.	Restrictive Covenants Construed Against the Drafter.....	62

IV.	INJUNCTIONS.....	62
A.	Injunction Granted or Affirmed (or Denial Reversed).	62
1.	Illinois State Cases.....	62
2.	Federal Cases Within the Seventh Circuit	66
B.	Injunction Denied or Reversed.	68
1.	Illinois State Cases.....	68
2.	Federal Cases Within the Seventh Circuit.....	72
C.	Injunction May Be Awarded in Arbitration.....	73
D.	Contempt Action to Enforce a TRO or Injunction.....	73
V.	MISCELLANEOUS ISSUES INVOLVING RESTRICTIVE COVENANTS.	74
A.	Existence of Restrictive Covenant May Give Rise to Post-Employment Fiduciary Duty.	74
B.	Attorneys’ Fees.....	74
1.	Attorneys’ fees not recoverable where new employer pays employee’s legal bills.....	74
C.	Successor Employer May Enforce Restrictive Covenant.....	75
D.	Enforceability of Restrictive Covenants in the Legal Profession.....	75
E.	Enforceability of Restrictive Covenants in the Medical Profession.....	77
1.	Restrictive covenants involving physicians may be unenforceable on public policy grounds.....	78
2.	Prohibition against corporations practicing medicine may bar enforcement of covenant not to compete in physician’s employment contract.....	79
3.	Covenants void under Illinois Medical Practice Act prohibitions against fee-splitting.....	81
F.	Other Defenses to Enforcement of Restrictive Covenants.....	81

1.	Employer’s breach of employment contract precludes enforcement of restrictive covenant.	81
2.	Breach of the implied covenant of good faith and fair dealing by employer precludes enforcement of restrictive covenant.	84
3.	Covenant void because it violates a state law.	84
4.	Employer may not enforce restrictive covenant against employee for subsequent employment under a different agreement.	85
G.	A Contract Provision Restricting One Employer’s Ability to Hire Employees of Another Employer Is Not a Restrictive Covenant.	85
H.	Viability of a Motion to Dismiss.	86
1.	Motion to dismiss granted.	86
2.	Motion to dismiss denied or reversed.	87
TABLE OF CASES		Appendix

ENFORCEMENT OF EMPLOYEE RESTRICTIVE COVENANTS UNDER ILLINOIS LAW

INTRODUCTION

Restrictive covenants present a legal tug of war. On one side stands the employee with the right to use his or her general skills and knowledge to pursue a chosen occupation. On the other side stands the employer with the right to protect its legitimate business interests from unfair competition.

Because restrictive covenants affect competition, they are subject to strict scrutiny by Illinois courts. They will be enforced only if they are ancillary to a valid employment agreement or to the formation or sale of a business, supported by adequate consideration, and reasonably limited to protect legitimate business interests.

This outline is intended to aid those needing to draft, enforce or challenge restrictive covenants. It collects and summarizes cases dealing with restrictive covenants in employment contracts and sale agreements under Illinois law. Although we have attempted to avoid editorials and errors, any that exist should be attributed to us alone.

I. TYPES OF RESTRICTIVE COVENANTS.

There are generally three types of restrictive covenants: (a) covenants not to compete; (b) covenants not to solicit; and (c) covenants not to disclose confidential information. A good (though unpublished) discussion of these covenant is found in *Trailer Leasing Co. v. Associates Commercial Corp.*, No. 96 C 2305, 1996 WL 392135 (N.D. Ill July 10, 1996); *see also The Agency, Inc. v. Grove*, 362 Ill. App. 3d 206, 214, 839 N.E.2d 606, 613-14 (2d Dist. 2005) (discussing covenants not to compete); *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 292 Ill. App. 3d 131, 137, 685 N.E.2d 434, 440-41 (2d Dist. 1997) (discussing covenants not to solicit); *Donald McElroy, Inc. v. Delaney*, 72 Ill. App. 3d 285, 291-94, 389 N.E.2d 1300, 1306-08 (1st Dist. 1979) (discussing covenants not to disclose confidential information); *C.H. Robinson Worldwide, Inc. v. Command Transp., LLC*, No. 05 C 3401, 2005 WL 3077998 (N.D. Ill. Nov. 16, 2005).

Most of the cases discussed in this outline involve covenants not to compete. Non-competition agreements are closely scrutinized because, by definition, they restrain free trade. *Office Mates 5, North Shore, Inc. v. Hazen*, 234 Ill. App. 3d 557, 599 N.E.2d 1072 (1st Dist. 1992) (also discussed at pages 13 to 14).

Non-solicitation covenants are similarly scrutinized to ensure that they do not unreasonably restrict competition. *Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 589 N.E.2d 640 (1st Dist. 1992) (also discussed at page 9). One wrinkle is that Illinois law does not impose a geographic limitation on covenants not to solicit where an employer does business nationwide, if

the covenant is designed to prevent an employee with particularized customer knowledge from using that knowledge to solicit customers with whom he or she had contact. *Corroon & Black of Illinois, Inc. v. Magner*, 145 Ill. App. 3d 151, 165-66, 494 N.E.2d 785, 793 (1st Dist. 1986).

Non-disclosure covenants impede the public interest in promoting competition through the free-flow of information. *North American Paper Co. v. Unterberger*, 172 Ill. App. 3d 410, 415-16, 526 N.E.2d 621, 624 (1st Dist. 1988). Although non-disclosure agreements generally must be reasonably limited as to duration and geographic scope and must also be limited to protect what truly qualifies as proprietary, confidential information, a confidentiality agreement that remains effective for all time and contains no geographical boundaries may be deemed reasonable and enforceable depending on whether the information remains confidential or subject to protection under the Illinois Trade Secrets Act. *Coady v. Harpo, Inc.*, 308 Ill. App. 3d 153, 161-62, 719 N.E.2d 244, 250-51 (1st Dist. 1999); 765 ILCS 1065/8(b)(1).

II. ENFORCEABILITY OF RESTRICTIVE COVENANTS.

To ensure that restrictive covenants protect legitimate business interests rather than simply stifle competition, they must be ancillary to either the formation or sale of a business or an employment agreement. *Hamer Holding Group, Inc. v. Elmore (Hamer I)*, 202 Ill. App. 3d 994, 1007, 560 N.E.2d 907, 915 (1st Dist. 1990) (also discussed at pages 54-56); *Loewen Group International, Inc. v. Haberichter*, 912 F. Supp. 388 (N.D. Ill. 1996), *confirmed in*, No. 93 C 7377, 1997 WL 627545 (N.D. Ill. 1997), *aff'd in part, rev'd in part*, Nos. 97-3825, 97-3877, 1998 WL 796076 (7th Cir. Nov. 9, 1998) (also discussed at page 11). Covenants related to those underlying agreements protect somewhat different interests. A covenant ancillary to the sale of a business protects the buyer of the business from having the former owner or employee walk away from the sale with the company's customers and goodwill. On the other hand, a covenant ancillary to an employment agreement protects the employer from having an employee take either "near-permanent" customers or confidential customer or business information. *Loewen*, 912 F. Supp. at 392.

Because of these different interests, the law provides that a covenant ancillary to the formation or sale of a business need only be reasonable in duration, geographic area, and scope of prohibited activity. *See Advent Electronics, Inc. v. Buckman*, 112 F.3d 267 (7th Cir. 1997) (also discussed at pages 54, 72) (requiring covenant that was ancillary to the sale of a business to protect a legitimate business interest). A covenant ancillary to an employment agreement must meet a stricter standard: in addition to being reasonable in scope, it also must be necessary to protect either "near-permanent" customer relationships or confidential information. *Audio Properties, Inc. v. Kovach*, 275 Ill. App. 3d 145, 148, 655 N.E.2d 1034, 1037 (1st Dist. 1995) (also discussed at page 17); *Hamer I*, 202 Ill. App. 3d at 1007, 560 N.E.2d at 915-16; *Loewen*, 912 F. Supp. at 392;

Thus, to be enforceable under Illinois law, an employee restrictive covenant must be (1) necessary to protect a legitimate business interest, (2) limited in terms of duration, geographic scope, and prohibited activity, (3) supported by sufficient consideration, and (4) ancillary to a valid employment agreement or sale of a business.

A. The Restrictive Covenant Must Be Necessary To Protect A Legitimate Business Interest.

Where an employee restrictive covenant is ancillary to an employment agreement, Illinois courts will not enforce the restriction unless it is needed to protect either (1) near-permanent customer relationships, or (2) confidential or trade secret information. As discussed in Part II.D.4, the restrictive covenant is ancillary to the formation or sale of a business, courts also recognize the value of the investment in goodwill as another legitimate business interest.

1. Near-permanent customer relationships.

In determining whether a near-permanent customer relationship exists to justify a restrictive covenant, most courts in Illinois now look first to the “nature of the plaintiff’s business” to determine whether it is the type of business that provides unique products or services that engender customer loyalty. *See, e.g., Millard Maintenance Service Co. v. Berrero*, 207 Ill. App. 3d 736, 566 N.E.2d 379 (1st Dist. 1990) (also discussed at page 22). If the business is in a highly competitive industry that engages in common business or sales techniques, the court is unlikely to find near-permanent customer relationships. *See, e.g., Office Mates 5, North Shore, Inc. v. Hazen*, 234 Ill. App. 3d 557, 599 N.E.2d 1072 (1st Dist. 1992) (also discussed at pages 13-14). As a check, or in a close case, the court (particularly in the First District) might go on to apply the seven-factor test articulated in the *Agrimerica* case discussed below. Those seven factors are: (1) the number of years required to develop the customers; (2) the amount of money invested to acquire the customers; (3) the degree of difficulty in acquiring customers; (4) the extent of personal contact by the employee; (5) the extent of the employer’s knowledge of its customers; (6) the duration of the customers’ association with the employer; and (7) the continuity of the employer-customer relationships. Cases applying both the nature of the business test and the more detailed seven-factor test are discussed below.

a. Protectible interest found.

(1) Substantial investment in near-permanent customer relationships:

Agrimerica, Inc. v. Mathes, 199 Ill. App. 3d 435, 557 N.E.2d 357 (1st Dist. 1990), *abrogated on other grounds by Roy v. Coyne*, 259 Ill. App. 3d 269, 630 N.E.2d 1024 (1st Dist. 1994). Mathes was a sales representative for Agrimerica, which was in the business of producing and marketing “specialty” ingredients to enhance animal feed. He executed a restrictive covenant prohibiting him from selling or attempting to sell any product that competed with Agrimerica’s products to any entity that had been a client of Agrimerica during the two years preceding Mathes’ termination. The covenant extended for the lesser of 24 months or the period during which Mathes was employed by Agrimerica.

The appellate court analyzed seven factors to determine whether there existed near-permanent customer relationships: (1) the number of years required to develop the customers; (2) the amount of money invested to acquire the customers; (3) the degree of difficulty in acquiring customers; (4) the extent of personal contact by the employee; (5) the extent of the employer’s

knowledge of its customers; (6) the duration of the customers' association with the employer; and (7) the continuity of the employer-customer relationships. Based on those factors, the court held that Agrimerica had near-permanent relationships with its customers. The court relied on evidence that Agrimerica had invested hundreds of thousands of dollars in research to develop new customers; it took Agrimerica a substantial amount of time to develop each new customer; Mathes had extensive personal contact with the customers (a factor favoring Mathes); Agrimerica had extensive knowledge about its customers; most of Agrimerica's customers had been purchasing from the company for over five years; the customers who switched to Mathes' new employer changed suppliers primarily because of price differentials; and Mathes would not have come into contact with Agrimerica's customers had it not been for his employment with Agrimerica. Accordingly, the appellate court reversed the trial court's order denying injunctive relief.

Though courts have continued to apply the seven-factor test used in *Agrimerica*, the trend has been to examine first the nature of the business before engaging in the seven-part analysis. See, e.g., *Midwest Television, Inc. v. Oloffson*, 298 Ill. App. 3d 548, 699 N.E.2d 230 (3d Dist. 1998) (also discussed at page 50); *Audio Properties, Inc. v. Kovach*, 275 Ill. App. 3d 145, 655 N.E.2d 1034 (1st Dist. 1995) (also discussed at page 16); *Abbott-Interfast Corp. v. Harkabus*, 250 Ill. App. 3d 13, 619 N.E.2d 1337 (2d Dist. 1993) (also discussed at page 41); *Springfield Rare Coin Galleries, Inc. v. Mileham*, 250 Ill. App. 3d 922, 620 N.E.2d 479 (4th Dist. 1993) (also discussed at page 14); *Office Mates 5, North Shore, Inc. v. Hazen*, 234 Ill. App. 3d 557, 599 N.E.2d 1072 (1st Dist. 1992) (also discussed at pages 13-14); see also *Henri Studio, Inc. v. Outdoor Marketing, Inc.*, No. 96 C 8198, 1997 WL 652351 (N.D. Ill. Oct. 14, 1997) (applying the nature of the business test and noting that where the business is engaged in sales, the seven-factor *Agrimerica* test has "little use"), *vacated pursuant to settlement*, 1998 WL 569303 (N.D. Ill. Aug. 3, 1998).

Hanchett Paper Co. v. Melchiorre, 341 Ill. App. 3d 345, 792 N.E.2d 395 (2d Dist. 2003). Melchiorre was a sales representative for Hanchett, a company in the business of distributing packaging products like corrugated boxes, adhesive, and related items. As a condition of employment, Melchiorre agreed that upon leaving the company he would not work for one year with an entity located within 50 miles of Hanchett that was also competing for Hanchett's customers. Melchiorre also agreed not to reveal any confidential information, including customer names and price lists. Melchiorre left Hanchett after 12 years, and almost immediately began working for Stamar, a competitor to Hanchett. Hanchett sought a preliminary injunction to prevent Melchiorre from soliciting customers that he serviced while working at Hanchett. The trial court granted Hanchett's injunction.

The appellate court affirmed the injunction. Employing the seven *Agrimerica* factors, the court agreed that a near-permanent relationship could be ascertained from the facts, and therefore determined that the trial court had not abused its discretion in finding a protectible business interest. The court found it significant that it took years for Hanchett to develop its customer base, that Hanchett invested millions of dollars to acquire and cultivate customer relations, and that Hanchett protected its customer information through a password-protected computer system. For the fourth *Agrimerica* factor, the court also noted that although Melchiorre had significant personal contact with the customers, this factor did not necessarily militate in his favor because he was merely a seller of Hanchett's products. The court also found it significant that Hanchett

took great care to acquire and retain information related to its customers' specific needs, that two-thirds of Hanchett's top 300 customers had been customers for more than five years, and that 90 percent of Melchiorre's customer list had been with Hanchett for more than five years.

Dam, Snell & Taveirne, Ltd. v. Verchota, 324 Ill. App. 3d 146, 754 N.E.2d 464 (2d Dist. 2001). DST provided accounting and financial consulting services. Mary Miller, an unlicensed accountant, brought the majority of her preexisting clients with her to DST. Her employment contract with DST prohibited her from performing accounting services for any of DST's clients if she left the company. The trial court entered an injunction barring Miller from performing accounting services for any DST clients, including Miller's preexisting clients. Miller appealed, arguing that DST had no protectible interest in clients that voluntarily left DST. Miller further argued that the restrictive covenant was overbroad because it prevented her from providing accounting services to *all* of DST's clients rather than just those she had come in contact with during her employment by DST.

The appellate court affirmed, finding that DST had developed a near-permanent relationship with its customers, and that the restrictive covenant was not overbroad. The court explained that DST had formed long term business relationships with *all* its clients, and that Miller had both gained and used confidential information concerning the specific needs of DST's clients while working for the company.

Midwest Television, Inc. v. Oloffson, 298 Ill. App. 3d 548, 699 N.E.2d 230 (3d Dist. 1998). Oloffson worked for ten years as a radio personality for an FM station in Peoria. His employment agreement prohibited him for a period of one year following his termination from working for another station within 100 miles of his employer's broadcast tower. After Oloffson's lawyer told him (incorrectly) that the restriction was unenforceable, he went to work for a competitor. The trial court entered a preliminary injunction against Oloffson.

The appellate court affirmed. First, the court held that the "nature of the business" test set forth in *Office Mates* (also discussed at pages 13-14) was met, because the evidence showed that radio broadcasting is a highly competitive business, that Oloffson was a "quasi-professional," and that radio personalities are important to stations because they attract and maintain listeners and advertisers. The court also found that Midwest demonstrated that Oloffson offered a unique "product" to listeners and advertisers because many followed him when he transferred between Midwest's AM and FM stations, and because listeners can utilize only one station at any given time. Next, the court applied the seven factors set forth in *Agrimerica*, and held that Midwest had a near-permanent relationship with its listeners and advertisers. The court also concluded that the one-year, 100-mile restriction that prevented Oloffson from performing the same job functions at a competitor was reasonable. Finally, the court rejected Oloffson's defenses that Midwest had failed to perform in good faith by delaying his bonus, that the restrictive covenant was an unconscionable contract of adhesion, and that Midwest had waived its rights by not enforcing similar restrictions against other employees.

Lyle R. Jager Agency, Inc. v. Steward, 253 Ill. App. 3d 631, 625 N.E.2d 397 (3d Dist. 1993). The Jager Agency sold insurance to private individuals and businesses. Steward's employment contract prohibited Steward from soliciting Jager's present and former customers.

The trial court entered an injunction barring Steward from soliciting all Jager customers except those who were Steward's clients when he was associated with a prior employer.

The appellate court affirmed, concluding that the agency had developed a near-permanent relationship with its customers where 75% of Jager's customers had maintained insurance with the agency for nine years and 90% of Jager's business was renewed annually. Jager had expended considerable sums in developing and maintaining client files, demonstrating an intent to establish long-term client relationships. The court considered the salary and high commissions paid to Steward, and the fact that Jager paid Steward's travel and entertainment expenses. In response to Steward's argument that "but for" his employment Jager would not have had contact with clients Steward had engaged, the appellate court noted that Jager wrote a large volume of business for commercial clients, an area in which Steward had received "substantially less" practical experience from his former employer.

Steward argued that information contained in Jager's customer files was not confidential because the information was obtained from the customers themselves, and because Jager's files were not locked and were accessible to anyone at the agency. The appellate court rejected this argument. The court determined that where information is compiled and organized at a single location, the compiled information is valuable because the compilation is not easily obtained or accessible to the public. In addition, certain of Jager's information, such as premium work sheets, was not available to the public.

Tyler Enterprises of Elwood, Inc. v. Shafer, 214 Ill. App. 3d 145, 573 N.E.2d 863 (3d Dist. 1991). Shafer was Tyler's general sales manager. Tyler developed, marketed and sold fertilizers lawn care products. While he was employed by Tyler, Shafer entered into a written stock option agreement which contained a restrictive covenant prohibiting Shafer from participating in a competing business within a 50-mile radius of Elwood, Illinois for a three-year period after termination of his employment. While still employed by Tyler, Shafer and another Tyler employee formed a competing business. When Tyler became aware of the business, it terminated Shafer's employment. Shafer continued to operate the competing business and solicited Tyler's customers. The trial court entered a preliminary injunction to enforce the restrictive covenant.

The appellate court upheld the preliminary injunction, finding that Tyler had a protectible business interest due to its near-permanent relationships with its customers. Tyler had developed its customer base over a 10-year period, and Shafer had established contact with the customers solely as a result of his work for Tyler. Shafer had worked closely with Tyler's customers, and had received invaluable information about the customers' needs as a result of his employment with Tyler. Shafer had hired away nearly all of Tyler's sales force because he recognized the need to have a sales force that had a cultivated clientele. The court presumed that Shafer's diversion of Tyler's clientele constituted irreparable harm.

Preferred Meal Systems, Inc. v. Guse, 199 Ill. App. 3d 710, 557 N.E.2d 506 (1st Dist. 1990). Preferred Meal Systems brought a suit for injunctive relief against three high-ranking former officers, claiming that they had used confidential information to develop a competing business while still employed by Preferred. Only one of the former officers, Guse, had entered into an agreement not to compete with Preferred. Preferred was in the business of furnishing

“pre-plated” meals to schools, senior citizen programs and day care centers. Guse had been President and a Director of Preferred. Guse’s employment contract prohibited Guse from disclosing Preferred’s confidential information or trade secrets, and barred Guse from competing with Preferred for a period of one year after his termination. The trial court entered an injunction prohibiting Guse from competing with Preferred or consulting with the new business, except in relation to customers that contract pursuant to a public bid.

The appellate court reversed the trial court’s ruling that Preferred could not have near-permanent client relationships with customers who contract pursuant to public bid. Preferred had introduced evidence establishing that it spent years researching and getting to know its clients before it was in a position to bid on their contracts, and that even public customers were free to consider questions of service, reliability and a relationship of trust over price in the bidding process. The court determined that Preferred did have a near-permanent relationship with its public customers. The court noted that once Preferred has succeeded in winning a contract in the public school system, the school had the option to renew the contract without public bid each year.

(2) *Substantial contact with certain customers:*

Appelbaum v. Appelbaum, 355 Ill. App. 3d 926, 823 N.E.2d 1074 (1st Dist. 2005) (also discussed at pages 18-19). J.W. Appelbaum was a salesman for Penguin Food, a family-run company in the business of buying and selling seafood. J.W. entered into an employment contract containing a restrictive covenant prohibiting J.W. from contacting any of Penguin’s customers or suppliers. Although the appellate court found the covenant to be overly broad, the court enforced the restriction that prevented J.W. from contacting customers for whom he was a primary or secondary contact while employed at Penguin, as well as suppliers from whom J.W. was the primary contact while employed at Penguin.

PCx Corp. v. Ross, 209 Ill. App. 3d 530, 568 N.E.2d 311 (1st Dist. 1991). While employed by PCx, Ross signed an employment agreement containing a restrictive covenant which prohibited Ross, for a period of 24 months following her termination, from soliciting business from PCx’s customers with respect to any line of products which PCx sold at the time of her termination. The restrictive covenant also prohibited Ross from using confidential information obtained through her employment with PCx, and defined confidential information to include all knowledge or information that she acquired through her employment. Ross resigned her position with PCx, went to work for a competitor, and immediately began soliciting PCx’s clients.

The trial court entered an injunction prohibiting Ross and her new employer, for a period of 24 months, from doing business with six of PCx’s customers with respect to the line of products that PCx carried as of Ross’ termination. PCx appealed, arguing that the trial court erred in limiting the injunction to six customers. Ross and her new employer cross-appealed. On the second appeal, the appellate court held the trial court’s decision to limit the scope of the injunction to six customers was supported by the manifest weight of the evidence. The remaining customers from whom Ross had solicited business on behalf of her new employer had already been customers of the new employer or had been outside of Ross’ territory when she was employed by PCx. The court also affirmed the trial court’s decision that PCx had not shown

Ross had used confidential information in soliciting other clients. Finally, the appellate court upheld the trial court's ruling that the "line of product" restriction in the restrictive covenant should be construed to refer to generic types of products, rather than products made by particular manufacturers.

Henry v. O'Keefe, No. 01 C 8698, 2002 WL 31324049 (N.D. Ill. Oct. 18, 2002). Henry and O'Keefe together ran a company providing catalog consulting services. Each owned 50% of the stock of the company and shared equally in the net income. O'Keefe decided to retire from the company, and sold her shares to Henry. Before leaving, she entered a restrictive covenant that enjoined her from soliciting previous customers belonging to Henry-O'Keefe Direct Marketing ("HODM"). O'Keefe remained retired for 10 months until she decided to get back into the catalog consulting business. At that time, she contacted previous customers to HODM, informing them that she was coming out of retirement but could not work for them until the restrictive covenant ran its course. Henry filed a claim for a breach of the restrictive covenant, among other things.

The district court granted an injunction to Henry. The court discussed the difference between O'Keefe's contacting previous customers and soliciting them, because only the latter was prohibited by the restricted covenant. The court determined that O'Keefe's letters to previous customers constituted solicitation even though it included a disclaimer. The court found that O'Keefe's letter was intended as a solicitation for a business relationship that would take effect following the prohibited period in the agreement, and was thus a prohibited solicitation regardless of whether or not O'Keefe subjectively intended to violate the agreement's terms. In addition to granting Henry an injunction, the court extended the restrictive covenant for another twelve months with regard to the four previous customers that O'Keefe improperly solicited.

CUNA Mutual Life Insurance Co. v. Kuperman, No. 97 C 6228, 1998 WL 409880 (N.D. Ill. July 7, 1998). Kuperman was a CUNA representative who provided financial advice and sold financial products to members of Motorola's credit union, among others. His employment contract included a non-solicitation provision that prohibited Kuperman from undertaking any marketing plans directed at credit union members for a period of 24 months after termination of his employment. Kuperman quit his job and went to work for a brokerage firm, where he used files and computer data that he had copied from CUNA to send a mass mailing solicitation letter to all customers he had serviced while working at CUNA. CUNA sought injunctive relief, alleging claims of breach of contract, breach of fiduciary duty and misappropriation of trade secrets. The magistrate judge entered a recommendation and ruling recommending the entry of a preliminary injunction. Kuperman filed objections and the court accepted the magistrate's ruling in its entirety, granting CUNA's motion for a preliminary injunction. The court found that evidence suggested that CUNA did have a "near-permanent" relationship with its customers, and that Kuperman would not have had access to the credit union customers but for his employment with CUNA. The court also found that CUNA had taken adequate steps to protect the confidentiality of the information at issue.

(3) *Extensive marketing efforts and employee with no prior experience in industry:*

Arpac Corp. v. Murray, 226 Ill. App. 3d 65, 589 N.E.2d 640 (1st Dist. 1992). Arpac was in the business of manufacturing shrink-wrap packaging machinery. Murray, who had never before worked in the shrink-wrap industry, was Arpac's vice president of marketing and sales, responsible for taking all actions necessary to market Arpac's products. Arpac sold approximately 80 to 85 percent of its products to distributors, the largest of which had been customers of Arpac for an average of five years. At the end of his three-year term of employment, Murray went to work for a newly formed competitor. Murray was president and sales manager of the new company.

The trial court entered a preliminary injunction restraining Murray and his new employer for a period of two years from soliciting any persons who had been Arpac customers during the previous five years. The court also enjoined Murray from influencing employees to leave Arpac, and from competing in Arpac's business for two years. The appellate court affirmed the trial court's ruling that Arpac had a protectible proprietary interest in its customers. Arpac spent a large amount of money on maintaining its long-term customers, spent considerable time and money on training programs for its employees, on trade shows, and on the education of its distributors, and insured that its employees maintained personal contact with Arpac's customers. One of Arpac's customers testified that his company and Arpac were like "partners" who operated with each other's long-term interests in mind. In view of this evidence, the fact that Arpac's customers occasionally did business with other shrink-wrap manufacturers was not determinative.

The court rejected Murray's contention that the increase in Arpac's customer base was due to his efforts. The court noted that Arpac's product was sophisticated and expensive, and that Arpac was required to devote a great deal of time and effort to selling its product. The court also determined that, but for his employment with Arpac, Murray would not have had any contact with Arpac's customers. (Murray was a South African national who came to the United States solely for the purpose of working with Arpac, and had not had any prior contact with the shrink-wrap industry.) The court also rejected Murray's argument that Arpac had not shown the possibility of irreparable injury, because Murray had left Arpac to set up a company that competed directly with Arpac.

The appellate court held that the portion of the preliminary injunction restraining Murray from soliciting Arpac's employees to leave the company was reasonable in view of evidence that two key employees had followed Murray to the new company, and the company had an interest in protecting the stability of its work force. (See pages 36-38 for further discussion of viability of stable work force theory.) The court held the non-solicitation portion of the injunction was adequate to protect Arpac's protectible business interest in its customers.

On the other hand, the appellate court reversed the trial court's ruling that end-user customers should be included within the scope of the preliminary injunction. The court found that the evidence did not support a finding that end-users who purchased through distributors were Arpac's customers. The court also struck down the portion of the preliminary injunction that prohibited Murray from working in any capacity in the shrink-wrap business nationwide.

The court rejected Murray's argument that the restrictive covenant must be struck down in its entirety because the court determined that some of its provisions were unreasonable.

RKI, Inc. v. Grimes, 177 F. Supp. 2d 859 (N.D. Ill. 2001). RKI produced and sold tubes and pipes. Grimes was an RKI salesman. Grimes accepted a position with a competing company and, before resigning, downloaded information from RKI's computer database. Grimes then used that information to solicit RKI's customers for his new employer. To cover his trail, Grimes defragmented his computer hard drive on several occasions, and his new employer also tried to cover up the theft by deleting data from its computers.

Following a bench trial, the court entered judgment for RKI, finding that RKI had a near-permanent relationship with its customers because RKI's products were not fungible, RKI provided training to its customers in connection with the products, and RKI invested substantial time and money to develop longstanding relationships. Moreover, Grimes had no background in the tube and pipe industry prior to his employment at RKI. The court also noted that Grimes had acquired confidential information through his employment which he tried to use to his advantage after leaving the company. RKI had developed that information over many years and at considerable expense, took reasonable measures to protect its confidential information, and received a competitive advantage from it.

(4) *Where customers come to repose trust in particular seller with whom they have a relationship:*

Outsource International, Inc. v. Barton, 192 F.3d 662 (7th Cir. 1999). Outsource provides temporary workers to companies located throughout the United States. Barton worked for five years as a staffing consultant for one of Outsource's competitors. In 1998, Outsource acquired that competitor, and Barton continued to work for Outsource under his old employment contract, which prohibited him for a period of one year following his termination from disclosing confidential information about Outsource or its customers, and from competing with Outsource within a twenty-five mile radius of Barton's home office or territory. Barton resigned from Outsource and opened his own temporary staffing agency within twelve miles of an Outsource office. Barton hired several Outsource employees and began working for several clients that he had serviced while working for Outsource. The district court granted Outsource's motion for preliminary injunction.

The appellate court affirmed. Applying the "nature of the business" test, the court determined that Outsource had a near permanent relationship with its clients because it enjoyed both customer loyalty and name recognition due to an elaborate employee screening and customer service system, and "but for" Barton's employment at Outsource, he would not have had contact with the customers he took from Outsource. Judge Posner dissented from the decision, stating that the disposition of the case was correct "from the standpoint of substantive justice," but concluding that an Illinois court would not have enforced the covenant because Outsource's customer list and wage information were not secrets and there was no evidence that Barton relied on the list, obtained workers other than through radio and newspaper advertisements, or obtained customers other than through standard sales techniques.

Loewen Group International, Inc. v. Haberichter, 912 F. Supp. 388 (N.D. Ill. 1996), *confirmed in*, No. 93 C 7377, 1997 WL 627545 (N.D. Ill. 1997), *aff'd in part, rev'd in part*, Nos. 97-3825, 97-3877, 1998 WL 796076 (7th Cir. Nov. 9, 1998) (also discussed at pages 45, 54). Loewen Group purchased a funeral home that employed Haberichter, a 31-year employee. Haberichter agreed to stay on pursuant to an employment agreement that contained an agreement not to compete within a ten-mile radius for a period of ten years from the date of the purchase agreement, or three years from the date of termination of his employment. While still employed by Loewen, Haberichter took steps to establish his own funeral home business. Loewen terminated his employment, and Haberichter thereafter opened a competing funeral home within the prohibited ten-mile radius.

The district court entered a preliminary injunction against Haberichter (but within just a five-mile radius instead of the agreement's ten-mile radius), finding that Loewen sold services rather than goods, and that Loewen had demonstrated that it had near permanent customer relationships. "[W]here the quality of the seller's service is difficult to determine by simple inspection, customers come to repose trust in a particular seller, and that trust is a valuable business asset, created by years of careful management, that the employee is not allowed to take away with him" (quoting *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 948 (7th Cir. 1994)).

(5) *Protectible business interest in medical practice:*

Mohanty v. St. John Heart Clinic, 225 Ill. 2d 52, 866 N.E.2d 85 (2006) (also discussed at page 78-79). In *Mohanty*, the Illinois Supreme Court upheld a covenant that restricted doctors from practicing medicine within a small geographical area, but did not specifically address whether the clinic had protectible interests in either near permanent customer relationships or confidential information. By affirming the appellate court's decision, the court agreed with the appellate court that the clinic had a protectible interest in the "practice of medicine," which was not limited to "the practice of cardiology and possibly internal medicine" as viewed by the circuit court. The appellate court reached this conclusion because Drs. Mohanty and Ramadurai not only practiced cardiology but also saw patients with other problems and made referrals.

Prairie Eye Center, Ltd. v. Butler, 329 Ill. App. 3d 293, 768 N.E.2d 414 (4th Dist. 2002). Butler, an ophthalmologist, entered into an employment contract with Prairie Eye Center that contained a covenant prohibiting Butler from practicing medicine in Sangamon County, or within ten miles of any Prairie office, once his employment terminated. Butler left Prairie, and opened an office within two miles of a Prairie location. The trial court issued an injunction enforcing the restrictive covenant except as to patients who had a prior relationship with Butler because the covenant would prevent those patients from being treated by the doctor of their choice. The trial court relied on *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 693 N.E.2d 358 (1998), in which the Illinois Supreme Court found a covenant not to compete between a law firm and its former lawyers to be against public policy.

The appellate court reversed, holding that *Dowd & Dowd* did not apply to medical practice cases, Prairie had a protectible interest in Butler's preexisting patients, and the covenant not to compete was enforceable as to those patients. The court held that the existence of a legitimate business interest is inferred in medical practice cases from the nature of the

profession, and noted that Butler could have negotiated for the right to treat his patients after terminating his employment with Prairie.

After the trial court entered an injunction, Butler filed a counterclaim against Prairie, to which Prairie filed a motion to find Butler in contempt. At trial, the court found Butler in contempt of court, and awarded Prairie attorney's fees, lost profits, and damages for the diminished value to Prairie's business. Butler appealed, but with no success as the appellate court affirmed the trial court's determination. It held that the covenant not to compete in Butler's employment contract was enforceable, Prairie's protectible interest included patients Butler treated and developed during prior medical practice, that there was sufficient evidence to support lost profit damage award, and award of both monetary damages and an injunction preventing Butler from practicing medicine for two years was not an abuse of discretion.

Sarah Bush Lincoln Health Center v. Perket, 238 Ill. App. 3d 958, 605 N.E.2d 613 (4th Dist. 1992). Perket was employed by the Sarah Bush Lincoln Health Center as its director of physical medicine and rehabilitation. The trial court entered a preliminary injunction enforcing a restrictive covenant prohibiting Perket from "directly or indirectly providing physical medicine and rehabilitation services" in the county for one year from the date of her termination. Perket appealed the injunction, arguing that the complaint did not allege a sufficient basis for a finding of a protectible business interest.

On appeal, without discussing the specific allegations of the health center's complaint, the appellate court reviewed prior cases enforcing restrictive covenants against medical professionals, and held "the showing of a proper protectible interest was inherent in the relationship alleged in the complaint" because Perket was a medical professional. The court upheld the injunction.

Retina Services, Ltd. v. Garoon, 182 Ill. App. 3d 851, 538 N.E.2d 651 (1st Dist. 1989). Retina Services provided retinal surgery at eight Chicago-area hospitals. Garoon had entered into a series of written employment contracts with Retina Services. As a result of his employment with Retina Services, Garoon was granted staff privileges at five of the hospitals at which Retina Services practiced. Retina Services terminated Garoon's employment, and Garoon continued to practice at the five hospitals, in violation of his covenant not to compete. Retina Services sought to enforce only the portion of the restrictive covenant that prevented Garoon from practicing at the five hospitals for a two-year period. The trial court held that the covenant was unenforceable because Retina Services did not establish near-permanent customer relationships and because the geographic scope of the covenant was overbroad.

On appeal, Retina Services argued that the goodwill inherent in a medical practice is a protectible business interest and, therefore, that Retina Services was not required to show a protectible business interest specifically in the five hospitals at which the defendant had agreed not to compete. The appellate court reviewed several Illinois Supreme Court decisions enforcing covenants not to compete in medical practice cases and held: "the Illinois Supreme Court's consistent enforcement of such covenants in the medical practice field, where the duration and geographic scope is reasonable, demonstrates its recognition that a professional's medical practice is a protectible business interest." The court reversed the trial court's decision denying the injunction.

Compare Carter-Shields, M.D. v. Alton Health Institute, 317 Ill. App. 3d 260, 739 N.E.2d 569 (5th Dist. 2000) (also discussed at pages 79-80) (finding that restrictive covenants in physician employment agreements violate patients' freedom to choose a doctor, and thus violate public policy), *aff'd on other grounds, vacated as advisory*, 201 Ill. 2d 441, 777 N.E.2d 948 (Ill. 2002); *Danville Polyclinic, Ltd. v. Dethmers*, 260 Ill. App. 3d 108, 631 N.E.2d 842 (4th Dist. 1994) (purpose of restrictive covenant was to keep physician connected with clinic so that he would contribute to financing construction, rather than to protect clinic's relationships with patients) (also discussed at page 20).

For more cases on the enforceability of restrictive covenants in the medical profession, see Part V.E. below.

b. No protectible interest found.

(1) *No protectible interest in customers in highly competitive business without customer loyalty:*

Office Mates 5, North Shore, Inc. v. Hazen, 234 Ill. App. 3d 557, 599 N.E.2d 1072 (1st Dist. 1992). Office Mates was a local franchise of an office support personnel placement agency. Hazen and Greenberg were Office Mates account executives responsible for matching candidates with particular hiring needs of Office Mates' clients. Their employment agreements contained a one-year restrictive covenant barring them from providing placement services to any customers with whom they had contact during the year before their termination, from engaging in the personnel placement business for one year within a 50-mile radius of Office Mates' location, and from using any information relating to Office Mates' business. Hazen and Greenberg left Office Mates and took jobs with a competitor. Office Mates sued for violation of the employment agreement, for violation of the Illinois Trade Secrets Act, and for intentional interference with Office Mates' contractual relations. The trial court denied Office Mates' motion for a preliminary injunction. The trial court found that Office Mates had not shown either a near-permanent relationship with its clients or confidential or trade secret information.

The appellate court affirmed, stating it is difficult for an employer to enforce a restrictive covenant "where the nature of the plaintiff's business does not engender customer loyalty as with a unique product or personal service, and customers utilize many suppliers simultaneously to meet their needs" An employer in a highly competitive industry in which businesses rely heavily upon their sales force and basic sales techniques is unlikely to be able to establish near-permanent customer relationships. The evidence showed that potential clients for office support personnel placement are not secret, that these customers do not typically fill their hiring needs from only one placement agency, and that office services placement agencies develop clientele relatively easily through the use of cold calling and specialized directories. The court then applied the seven factors set forth in *Agrimerica*, and came to the same conclusion, finding the lack of duration and continuity of Office Mates' customer relationships to be most telling. Approximately one-half of Office Mates' customers never returned, and two-thirds of them remained customers for less than two years.

The court also rejected Office Mates' argument that Hazen and Greenberg had acquired confidential information about Office Mates' customers while in its employ. Office Mates had

not shown that Hazen and Greenberg had used information concerning Office Mates' candidates, Office Mates kept only basic information concerning its customers that was readily available to anyone in the business capable of locating a directory and placing a cold call, and Office Mates' list of customers who had paid it a fee in the past was not proprietary because businesses needing office support personnel could be ascertained readily from public information.

Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc., 292 Ill. App. 3d 131, 685 N.E.2d 434 (2d Dist. 1997). Lawrence & Allen operated an employee outplacement agency with at-will employees. One of those employees left to join Cambridge, a competitor. Lawrence & Allen sued Cambridge for tortious interference. The trial court entered summary judgment for Cambridge, finding that there was no enforceable contract.

The appellate court affirmed. The court declined to follow the first district's decision in *Creative Entertainment, Inc. v. Lorenz*, 265 Ill. App. 3d 343, 638 N.E.2d 217 (1st Dist. 1994) (also discussed at page 51), and held that a restrictive covenant may be ancillary to an oral, at will employment relationship. Nevertheless, the court then held that the scope of the covenant at issue, which prohibited the employee from soliciting any client of the plaintiff firm anywhere in the United States, was unreasonable. While a covenant not to solicit need not have a geographic limit, this covenant was not limited to clients with whom the employee had contact, did not distinguish among past, current, or prospective clients of the firm, and there was no evidence that the employee's clients were located throughout the United States. The court also held that the non-competition clause in the covenant was unreasonably overbroad because it covered the entire United States. The court declined to blue-pencil the covenant to limit the scope of the non-solicitation or non-competition clauses. In addition, the court held that there was no legitimate business interest to justify the covenant. Applying the "nature of the business" test espoused in *Office Mates*, the court held that Lawrence & Allen did not have near-permanent customer relationships because the employee outplacement business is highly competitive, clients tend to use several out placement firms, contracts are generally awarded through a bidding process, and the identities of clients are easily ascertainable. Finally, the court held that Lawrence & Allen failed to present any evidence that the employee actually tried to use for his own benefit any information that Lawrence & Allen claimed was confidential.

Springfield Rare Coin Galleries, Inc. v. Mileham, 250 Ill. App. 3d 922, 620 N.E.2d 479 (4th Dist. 1993). Springfield Rare Coin Galleries deals in rare coins and precious metals. Mileham was Springfield's former employee who served as a middleman in the purchase and sale of precious metals. Springfield sought and obtained a preliminary injunction restraining Mileham from competing with Springfield in Sangamon County for two years based upon a non-compete provision in Mileham's employment contract. However, at trial on damages, the trial court held the restrictive covenant unenforceable.

The appellate court affirmed, holding Springfield had no near-permanent relationships with its customers. The court noted that the factors used by the first district in *Agrimerica* to determine whether near-permanent customer relationships exist may prove helpful, but need not be used when the nature of the employer's business is plainly either the provision of professional services or the sale of non-unique goods. The court noted "a near-permanent relationship is generally absent from businesses engaged in sales." Here, the court found no near-permanent relationship because Springfield's business was in the nature of sales, Springfield sold a

non-unique product, its customers did business with its competitors and were generally known to Springfield's competitors and readily ascertainable through telephone directories or specialized directories, and Springfield obtained many of its customers through cold calls.

Henri Studio, Inc. v. Outdoor Marketing, Inc., No. 96 C 8198, 1997 WL 652351 (N.D. Ill. Oct. 14, 1997), *vacated pursuant to settlement*, 1998 WL 569303 (N.D. Ill. Aug. 3, 1998). Henri Studio makes and sells lawn and garden ornaments. Outdoor Marketing was its independent sales representative under an employment agreement that included a covenant not to solicit Henri Studio's customers for a two-year period after any termination of the agreement. After Henri Studio terminated the agreement, Outdoor Marketing signed on as a sales representative for one of Henri Studio's competitors and started soliciting some of Henri Studio's customers. The court denied Henri Studio's motions for temporary restraining order and preliminary injunction because Henri Studio did not show that it had either near permanent customers or confidential information.

In an opinion that thoroughly canvasses Illinois law, the court noted first that a non-solicitation covenant that seeks to protect existing customers need not have a geographic limit. Nevertheless, the covenant must still be necessary to protect a "proprietary interest" in near permanent customers or confidential information. In examining the question of "near permanency," the court applied the "nature of the business test," noting that where the nature of the business is sales, which rarely involve near permanent customers, the seven-factor test under *Agrimerica* has "little use." The court found that Henri Studio's customers routinely purchase lawn and garden statuary from multiple manufacturers, and that in those circumstances, the time and money Henri Studio spent engendering customers' goodwill was insufficient to satisfy the near permanency requirement. The court also found that Henri Studio's customer list was not confidential because Henri Studio had shared it with various sales representatives and because the customer names were available in various public directories. The court also ruled that while there is a presumption of irreparable harm where a terminated employee solicits former clients, that presumption was rebutted by Henri Studio's eight-month delay in seeking an injunction. The court also concluded that both the balancing of the hardships and the public interest favored allowing Outdoor Marketing to compete.

Bankcard America, Inc. v. American Timeshare Associates, Inc., No. 93 C 6362, 1994 U.S. Dist. LEXIS 12205 (N.D. Ill. Aug. 29, 1994). Bankcard was in the business of marketing credit card marketing services. Bankcard brought an action to enforce a restrictive covenant against its former sales representative, Katz, and his new company. The restrictive covenant barred Katz from competing in that business for a period of one year following termination of his employment. Katz testified that he developed all of his accounts through his own "cold calls," and paid his own sales and service expenses. Several witnesses testified that Katz had signed the agreement after he was told that if he signed the last page, he could negotiate the terms later.

The court held the restrictive covenant was unenforceable. Bankcard did not show that it assigned any clients to Katz; instead, Katz was expected to generate his business through his own efforts. Bankcard provided no training to Katz and Katz covered all of his own expenses. In addition, Bankcard did not show that it cultivated near-permanent relationships with customers. The industry is highly competitive, and the form agreement Bankcard used permitted termination

upon 30 days' notice. Bankcard offered no evidence of the duration of its customer relationships. Instead, Katz testified that Bankcard attempted to frustrate his efforts to establish long-term relationships by urging him to use a "hit and run" approach to sales. Finally, the court rejected Bankcard's argument that Katz's agreement should be evaluated as a contract ancillary to the sale of a business. The court found there was no evidence that Katz's agreement with Bankcard constituted a "sale" of the merchant accounts.

(2) Customers were employee's, not employer's:

Com-Co Insurance Agency, Inc. v. Service Insurance Agency, Inc., 321 Ill. App. 3d 816, 748 N.E.2d 298 (1st Dist. 2001). Com-Co, an insurance agency, sued its former employee for breaching a restrictive covenant by soliciting business from agency customers who were also the former employee's friends and relatives. The trial court found that the agency had no protectible interest in those clients, and granted defendant's motion for summary judgment. The appellate court affirmed, concluding that the employee would have known his friends and relatives even if he had never worked for Com-Co. The evidence also showed that the employee generally refrained from soliciting clients he came to know by virtue of his employment at Com-Co.

Audio Properties, Inc. v. Kovach, 275 Ill. App. 3d 145, 655 N.E.2d 1034 (1st Dist. 1995). Audio Properties provided post-production services for radio, television, and other media. Kovach was a sound engineer who worked for Audio Properties under an employment contract containing a covenant barring him from competing with Audio Properties (1) within a four-mile radius, and (2) on work for customers to whom, to Kovach's knowledge, Audio Properties had provided services during the term of Kovach's employment. The trial court denied Audio Properties' motion for preliminary injunction to enforce this restrictive covenant.

The appellate court affirmed, holding that Audio Properties made no effort to show that Kovach had been privy to confidential information, and that Audio Properties did not meet its burden of proving that it had near-permanent relationships with its customers. Most notably, Audio Properties had not shown that the clients who use its studios were its customers rather than the customers of individual sound engineers, because the record showed that repeat customers specifically requested sound engineers, including Kovach, by name.

LSBZ, Inc. v. Brokis, 237 Ill. App. 3d 415, 603 N.E.2d 1240 (2d Dist. 1992). LSBZ owned/was a hair salon. Brokis was a stylist. The trial court entered a preliminary injunction enforcing a restrictive covenant barring Brokis, a hairstylist, from working with a competing salon within an 8 to 10-mile radius of the plaintiff's salon for a period of three years.

The appellate court reversed, holding that the salon had not shown a near permanent relationship with its clientele. The evidence showed the salon was not required to devote a great deal of time to develop customers. The salon did not advertise, and had no difficulty acquiring clients by word of mouth. Likewise, the salon did not make a substantial investment to train the stylist; she was a licensed cosmetologist when she went to work for the salon and did not receive most of her training from the salon. Most significantly, the court determined the salon had not shown that the persons who went to it for hairstyling services were its customers, rather than the customers of the individual hairstylist who serviced them. The evidence showed customers went

to the salon not for the salon's product, but for the particular employee's services. The court found that the salon did not even have much knowledge of its customers. Finally, the salon did not establish any continuity of relationship with its customers. Rather, the evidence tended to show that the stylist had started with a small number of customers referred to her by the salon and had built her own clientele through referrals by those customers.

Rapp Insurance Agency, Inc. v. Baldree, 231 Ill. App. 3d 1038, 597 N.E.2d 936 (5th Dist. 1992). Baldree was a salesperson with Rapp Insurance. Baldree admitted that before he left his employment, he had copied agency files which he had compiled on customers while working for Rapp. The trial court denied a preliminary injunction to enforce a restrictive covenant prohibiting Baldree from transacting any business with any customer of Rapp Insurance for a period of three years after termination of his employment.

The appellate court affirmed, holding Rapp had not demonstrated near-permanent relationships with its customers. The court found, on the basis of its own experience, that "the nature of most general insurance policies is "somewhat transient," and held the evidence established that the files Baldree had taken from Rapp were files on his own customers. Because Baldree had only been employed with Rapp for three years, the court determined that those customer relationships could not have existed any longer than three years, and "the mere potential to become a long-standing customer is not sufficient." Rapp did not show it had made any substantial investment to obtain or maintain its clientele and, because most of Baldree's clients were obtained through "cold calls," the court could not say that Baldree would not have had contact with those clients "but for" his employment with Rapp. The information in the customer files that Baldree took from the agency did not contain proprietary or confidential information, because the files Baldree had copied were files he had prepared on his own customers. Access to the information in those files was not restricted, and Baldree could easily have duplicated the information in the files by contacting his own former customers. The court also held that the former employee would have had contact with those clients absent his employment with the agency, and that nothing about the former employee's association with the agency helped him to sell them insurance through the new employer.

Quixote Transportation Safety, Inc. v. Cooper, No. 03 C 1401, 2004 WL 528011 (N.D. Ill. Mar. 12, 2004). QTS hired Cooper to sell its transportation safety equipment, including crash cushions, flexible posts, and changeable message signs to Middle Eastern governments and government contractors. Before working for QTS, Cooper had more than thirty years of experience in the field and had sold traffic products in the same region on behalf of several other companies and his own company, the HSP Group. As part of his contract with QTS, Cooper agreed not to "become directly or indirectly associated" with any organization dealing in "any technologies or products competitive with or similar to [QTS's] products." After seventeen years with QTS, Cooper chose not to renew his contract. QTS sought an injunction to keep him from selling crash cushions on behalf of Barrier Systems, one of QTS's competitors.

The court denied QTS's offensive motion for summary judgment, finding that there was a genuine issue of material fact regarding whether QTS had a legitimate business interest to justify the enforcement of the restrictive covenant. First, QTS had not shown that it had near-permanent relationships with its customers and it was unlikely to have such relationships because QTS sold goods rather than services. Second, QTS had failed to demonstrate that Cooper's contact with his

customers was solely attributable to QTS and not one of the other companies he previously represented. Finally, QTS failed to show that Cooper had access to and used trade secrets or other confidential information, an element the court was unwilling to infer from “the mere fact that [Cooper] assumed a similar position at a competitor.” In addition, the court noted that even assuming QTS had a legitimate business interest, the covenant could be too broad to be enforced as written because it applied in perpetuity.

(3) *No investment in development of customers and no confidential information:*

Appelbaum v. Appelbaum, 355 Ill. App. 3d 926, 823 N.E.2d 1074 (1st Dist. 2005) (also discussed at pages 7, 34 and 63). J.W. Appelbaum worked as a salesman for Penguin Foods, a family business involved in buying and selling seafood. J.W. signed an employment contract containing a restrictive covenant prohibiting him for a period of 24 months following the termination of his employment from contacting either directly or indirectly any of Penguin’s suppliers or customers. After eighteen years, J.W. left Penguin and formed a company that competed directly with Penguin. J.W.’s partner, William Appelbaum, contacted Penguin’s customers and suppliers. When J.W.’s former customers contacted him directly, he told them he could not sell to them due to the covenant.

The trial court entered a preliminary injunction prohibiting J.W. and William from contacting 29 of Penguin’s suppliers and 233 of the 262 customers who purchased from Penguin in 2003. J.W. and William appealed. The appellate court upheld part of the preliminary injunction that prohibited J.W. and William from contacting customers for whom J.W. was a primary or secondary contact while employed Penguin, and from contacting any suppliers for whom J.W. was the primary contact while employed by Penguin. The appellate court vacated all other provisions of the preliminary injunction because Penguin failed to show it had a protectible business interest in its customer information. The court held that Penguin failed to show it had near-permanent relationships with its suppliers and customers. Under the *Office Mates* nature of the business test, Penguin failed to show buying and selling seafood was a unique business. Penguin also failed under the seven factor test established in *McRand*, 138 Ill. App. 3d at 1051-54, because Penguin failed to show it had any difficulty forming relationships with suppliers and customers or that it spent money securing suppliers or developing customers. The court ruled that customer preferences and credit information were not confidential information.

Label Printers v. Pflug, 206 Ill. App. 3d 483, 564 N.E.2d 1382 (2d Dist. 1991) (also discussed at page 71). Pflug was a sales representative for Label Printers. He was assigned a particular geographical area and list of clients on which to call. After being warned that he was going to be terminated for poor sales performance, Pflug quit his job and went to work for a competitor. Pflug proceeded to solicit business from customers of Label Printers, some of whom were also customers of his new employer. The trial court entered a preliminary injunction prohibiting Pflug from soliciting customers to whom he had made sales while employed by Label Printers and who had been assigned to him during his employment, or who were prior clients of Label Printers.

The appellate court reversed, holding Label Printers had not presented evidence establishing near-permanent customer relationships. To the contrary, the evidence established that most printing customers do business with several printers, and that business could be

developed without substantial investment, often on the basis of cold calls. The appellate court also found that Pflug had not been privy to any confidential or trade secret information about Label Printers' operations, and that Label Printers did not keep its customer information confidential. In fact, Label Printers did not even maintain a customer list.

Learning Curve International, LLC v. Chansons Du Kakawi, Inc., No. 98 C 2360, 1998 WL 565149 (N.D. Ill. Aug. 31, 1998). Learning Curve developed, manufactured and marketed toys and related products for children. Chansons Du Kakawi ("CK") was a Canadian corporation that also developed and marketed children's toys. CK granted Learning Curve a renewable twenty-year license to a series of children's characters developed by CK. The prototypes were not favorably received in market tests, and when CK refused to remedy those and other problems, Learning Curve terminated the agreement. The agreement included a non-competition clause, which, in the event of breach by CK, prevented CK for a period of three years from creating for itself or others any goods or services that were the same as or similar to the goods and services that were the subject of the agreement. Learning Curve sought to enjoin CK from creating any works or services based on that intellectual property, and sought enforcement of the non-competition provision.

The court dismissed Learning Curve's claim to enforce the restrictive covenant, finding that Learning Curve had not alleged a protectible business interest recognized by Illinois courts. The only recognized interests are goodwill, long-term clients and confidential information. The court found that, in the "absence of allegations that [Learning Curve] gave defendants proprietary information or that defendants' use of it would harm [Learning Curve], any interest [Learning Curve] may have in such information cannot be the basis for enforcing the restrictive covenant." The other protectible interest cited by Learning Curve was its monetary investment in the development of the product line. The court held that Learning Curve has "not found a single Illinois case in which the expenditure of money was held to be a protectible business interest justifying enforcement of a restrictive covenant."

(4) *No protectible business interest in law firm's clients:*

Williams & Montgomery, Ltd. v. Stellato, 195 Ill. App. 3d 544, 552 N.E.2d 1100 (1st Dist. 1990) (also discussed at page 71). The trial court denied Williams & Montgomery's motion for a preliminary injunction to prohibit two former non-equity partners who had left the firm from soliciting clients of the firm. The former partners had both signed written non-competition agreements that prohibited them, for two years following termination of their employment, from soliciting the firm's clients in Cook, Lake, DuPage, Will and McHenry counties. The agreement defined a "client" as anyone who had been a client of the firm during the two years preceding termination of employment.

The appellate court affirmed the denial of the injunction, finding that Williams & Montgomery did not have a protectible interest in its client relationships. Williams & Montgomery did not keep the identity of its clients confidential, and the former partners had not been privy to any confidential information about the clients. Williams & Montgomery's relationships with its clients were not near-permanent because those clients regularly retained other firms in the Chicago area. The court noted "common sense suggests that insurance defense firms are more likely to share clients than doctors or veterinarians."

For more cases on restrictive covenants in the legal profession, see Part V.D. below.

(5) *True intent of covenant was not to protect customer relationships:*

Danville Polyclinic, Ltd. v. Dethmers, 260 Ill. App. 3d 108, 631 N.E.2d 842 (4th Dist. 1994). Polyclinic recruited Dethmers to serve as an orthopedic surgeon in its clinic, making Dethmers an employee of the corporation. Dethmers' employment agreement contained a clause barring him from competing with the clinic within a 50-mile radius of the Danville city limits for five years. Most of the physicians who were shareholders in Polyclinic were partners in a partnership known as Middlefork, which was formed to hold title to real estate on which a new clinic building was to be located. Polyclinic endeavored to have all the physicians who worked for the clinic contribute to the construction of the new building. Dethmers refused to participate, and was discharged from his employment. The trial court denied Polyclinic's motion for preliminary injunction to enforce the restrictive covenant in Dethmer's employment contract with the clinic.

The appellate court affirmed, holding that Dethmers' employment agreement "does not seem to create a close relationship between the Polyclinic and the patients of the physicians," and that the purpose of the restrictive covenant in the agreement was not to protect Polyclinic's relationship with its patients, but to keep Dethmers connected with the clinic so that enough physicians would be involved to finance construction of the clinic's new building. Thus, Polyclinic failed to show either a near-permanent relationship between the clinic and Dethmers' patients or an intent to protect Polyclinic's interests in its patient relationships. In *dicta*, the court held it was proper for the trial court to admit parol evidence confirming representations made to Dethmers when he signed the employment agreement, because Illinois courts would hold that an employer's bad faith provides cause to hold a restrictive covenant unenforceable.

Southern Illinois Medical Business Associates v. Camillo, 190 Ill. App. 3d 664, 546 N.E.2d 1059 (5th Dist. 1989) (also discussed at page 72). SIMBA was a partnership formed by four pathologists. SIMBA hired Camillo to develop business from nursing homes. When Camillo was first hired he did not have a written employment contract. Camillo later gave notice that he intended to terminate his employment. To persuade Camillo to stay with SIMBA, SIMBA entered into a one-year written employment contract with Camillo. That contract contained non-competition and non-solicitation clauses which prohibited Camillo from engaging in a competitive business within a 50-mile radius of any of SIMBA's offices, and from soliciting any of SIMBA's clients for two years after termination of his employment. Camillo formed his own competing business while still employed by SIMBA. While he was still employed by SIMBA, Camillo actively solicited some of SIMBA's clients on behalf of his new business. The trial court granted a preliminary injunction restraining Camillo from violating certain non-competition and non-solicitation clauses in his employment agreement.

The appellate court reversed the entry of the injunction, finding SIMBA did not have a legitimate protectible business interest in any of its clients. The court adopted the First District's test for determining whether a near-permanent relationship exists with customers, and found that SIMBA had not presented any evidence to establish how long it took for SIMBA to develop a client or how much money SIMBA spent to develop clients. The court noted that three of

SIMBA's original nursing home clients had been with the company for 12 years, but even their contracts allowed the clients to cancel their relationship within 30 days' notice. One long-standing client had done just that. The court found that the additional accounts that Camillo had developed were short-term customer relationships which were formed because of Camillo's efforts, and not because of his association with SIMBA. In addition, the court specifically found that the circumstances of the execution of the restrictive covenant demonstrated that SIMBA had requested the covenant not to protect its own legitimate business interests but to ensure that Camillo would not become a competitor.

See Eichmann v. National Hospital & Health Care Services, Inc., 308 Ill. App. 3d 337, 719 N.E.2d 1141 (1st Dist. 1999) (also discussed at pages 22, 38, and 54).

(6) *No protectible interest in “good will” of dissolved medical practice:*

Frazier v. Dettman, 212 Ill. App. 3d 139, 569 N.E.2d 1382 (2d Dist. 1991) (also discussed at page 71). A partner in a dissolved dental practice sued Dettman, a former dentist employed by the partnership for breaching a covenant not to become affiliated with a competing dental practice within the same county for two years after the termination of his employment. The trial court refused to issue the requested preliminary injunction. On appeal, the partnership argued that the restrictive covenant was enforceable because the partnership's interest in its medical practice is a protectible business interest. The appellate court agreed, but held that it made no sense to protect the partnership's relationship with its patients in this case because those patients would no longer be serviced by the partnership. The court also rejected the partnership's argument that the partners of the dissolved partnership had an interest in maintaining the partnership's goodwill. The court stated “the reputation of a professional partnership, such as partnerships of attorneys or physicians, depends upon individual skill of its members, and there is generally no goodwill to be distributed as an asset upon the dissolution of such a firm.” The court also concluded that the individual partners of the dissolved partnership could not enforce the restrictive covenant because they were not parties to the employment agreement.

(7) *Medical practice had no protectible business interest in patients of hospital at which practice was precluded by contract from offering services:*

Taimoorazy v. Bloomington Anesthesiology Service, Ltd., 122 F. Supp. 2d 967 (C.D. Ill. 2000). Bloomington Anesthesiology Service was a medical practice providing anesthesiology services to hospitals in central Illinois. Taimoorazy and Benyamin were physicians employed by the practice. After they were terminated, then incorporated an anesthesiology practice and obtained privileges at BroMenn hospital in McLean County. Bloomington was precluded by contract with another hospital from providing services at BroMenn.

The court entered summary judgment for Taimoorazy and Benyamin, finding that Bloomington did not have a protectible interest in any patients at BroMenn hospital. The court explained that Taimoorazy and Benyamin had not actively solicited patients at BroMenn in

violation of their covenants not to compete, but were “merely present and available” to provide services at a hospital where Bloomington was precluded from offering its services.

(8) No protectible interest in future clients:

Eichmann v. National Hospital & Health Care Services, Inc., 308 Ill. App. 3d 337, 719 N.E.2d 1141 (1st Dist. 1999). The court held that a restrictive covenant could not be enforced as to future customers. As a matter of law an employer cannot have a protectible interest in future customers, and any restriction regarding future customers was a *per se* illegal attempt to prevent competition. (Also discussed at pages 38 and 54.)

2. Access to trade secrets or confidential information.

a. Protectible interest found.

(1) Confidential pricing formula:

Lifetec, Inc. v. Edwards, 377 Ill. App. 3d 260, 880 N.E.2d 188 (4th Dist. 2007) (also discussed at page 63). Edwards was a sales representative for Lifetec, a dealer of medical devices and related products. His employment agreement contained non-competition, non-solicitation, and non-representation covenants that prohibited him from competing with the company, selling and leasing medical products, or assisting in the sale or lease of medical products within Lifetec’s territory for two years. While still employed by Lifetec, Edwards accepted a sales representative position with Patterson, Lifetec’s competitor, to sell the same medical products in the same territory as Lifetec. The trial court granted Lifetec’s motion for preliminary injunction.

At issue on appeal was whether Lifetec had “protectible confidential information” that Edwards learned from his employment and later used for his own benefit. The court held that Edward’s knowledge of the information relied upon for calculating quotes given to customers constituted confidential information. Edwards was aware of open quotes when he left, which made it possible for him to know if Lifetec could adjust its bid downward to undercut a Patterson bid. The court also held that there was sufficient evidence for the trial court to conclude that Lifetec presented a fair question whether Edwards disclosed the confidential information or used it while at Patterson. The trial court did not abuse its discretion by granting Lifetec’s motion for a preliminary injunction.

Millard Maintenance Service Co. v. Bernero, 207 Ill. App. 3d 736, 566 N.E.2d 379 (1st Dist. 1990) (also discussed at pages 49 and 65). Millard Maintenance was a janitorial contractor and Bernero worked as one of its janitors. During his employment with Millard, Bernero signed a covenant prohibiting him from working for a competitor of Millard in Cook, Lake or McHenry counties for a period of two years following his termination. Bernero left his employment with Millard and subsequently submitted proposals to several of Millard’s customers. The trial court entered a preliminary injunction prohibiting Bernero from using or disclosing Millard’s confidential information and from contacting or soliciting Millard’s customers. The trial court denied Millard’s request for an injunction prohibiting Bernero from soliciting customers who were not then customers of Millard or who plaintiff had not serviced at the time he left Millard.

The appellate court affirmed, rejecting Bernero's argument that the restrictive covenant was not supported by adequate consideration, finding that Bernero's continued employment was adequate consideration. The court next held that Millard had a protectible business interest in its pricing formula because Bernero was privy to confidential information about that formula. The court specifically rejected Bernero's argument that only trade secret information gives rise to a protectible business interest. Millard's pricing formula was based in large part upon Millard's confidential worker's compensation and liability insurance claims, and Millard regarded its customer information as confidential and kept that information under lock and key. The court also affirmed the trial court's finding that Millard had near-permanent relationships with its customers, because Millard devoted substantial resources to developing its clientele and maintained close contact with its clientele, the majority of Millard's customers had done business with Millard for more than 15 years, and Bernero would not have had contact with the customers but for his employment with Millard. Finally, the court held the injunction was reasonable because it did not prohibit Bernero from soliciting clients who were not current customers of Millard, or for whom Bernero had not performed services at the time of his termination. The court likewise found that the two-year and three-county restrictions were reasonable.

(2) Confidential customer profiles:

The Agency, Inc. v. Grove, 362 Ill. App. 3d 206, 839 N.E.2d 606 (2d Dist. 2005). The Agency was in the business of providing temporary workers for various businesses in Northeast Illinois. The company maintained a password-protected computer database of information about its clients, including business cycles, contract expiration dates, credit information, personnel preferences, placement history, likes, dislikes, and idiosyncrasies. The Agency kept this information in an unlocked file cabinet in the hiring and training director's office. Grove was a sales representative for The Agency. As a condition of her employment, she agreed not to disclose any of the company's confidential information or, if she should leave the company, work for any competing business within a 35 mile radius for 14 months. Grove eventually left The Agency to work for a competing personnel firm, taking with her a list of customer information she had compiled. Ten months later, The Agency filed suit seeking a preliminary injunction. The trial court denied relief, holding that the covenant was unenforceable because The Agency did not have either near-permanent customer relationships or confidential information to protect.

The appellate court reversed the trial court's determination that The Agency did not have protectible confidential information. The Agency's client profiles, the court noted, went far beyond simple customer lists that could be duplicated using business directories, and included valuable information about business cycles and personnel preferences that was generally unknown to competitors in the industry. The court similarly found it relevant that The Agency was apparently unique in recording personal details about its clients' representatives and emphasizing one-on-one relationships. The court concluded that a competitor's acquisition of this information might provide an unfair competitive advantage. The Agency's failure to keep this information under lock and key did not lessen its confidentiality because keeping file cabinets locked during the day would be impractical for any business, and other steps, such as placing the files in a manager's office, kept the information out of the public eye. Accordingly, the court remanded for the trial court to examine whether Grove had violated the confidentiality

agreement by sharing information from the client profiles with anyone at her new place of employment.

(3) Confidential product design:

RRK Holding Co. v. Sears, Roebuck and Co., 563 F. Supp. 2d 832 (N.D. Ill. 2008). RRK Holding, a tool maker, and Sears, a retail franchise, entered into a nondisclosure agreement regarding RRK Holding's trade secret, a combination power tool. Shortly after RRK Holding shared the confidential design of the product with Sears, Sears began to sell its version of the combination power tool. The court noted that Sears sold the combination tool as designed by RRK Holding rather than simply selling the component parts and accessories. The court found that this was sufficient evidence to support the jury's verdict that Sears misappropriated RRK Holding's trade secret in violation of the non-disclosure agreement.

(4) Theft of computer files:

RKI, Inc. v. Grimes, 177 F. Supp. 2d 859 (N.D. Ill. 2001) (also discussed at page 10). The court enforced non-disclosure and non-competition covenants based on evidence that Grimes, an RKI salesman, down-loaded confidential information from RKI's computer system, shared it with his new employers, and tried to cover up his trail. The court noted that this is a textbook case of how *not* to leave one's employment.

(5) Inevitable disclosure of confidential information:

PepsiCo, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995). PepsiCo and Quaker competed in the "sports drink" market. In late 1994, one of PepsiCo's general managers who had knowledge of PepsiCo's pricing and distribution systems announced he was leaving to join Quaker. The general manager was not bound by a covenant not to compete. He was, however, bound by a broad confidentiality agreement that required him not to disclose or use "at any time" confidential information he obtained while at PepsiCo. PepsiCo sought an injunction to prevent the general manager from divulging its trade secrets, and also from assuming any duties at Quaker related to beverage pricing, marketing, and distribution. The district court entered the injunction, which included prohibiting the general manager from performing any duties at Quaker related to the pricing, marketing, and distribution of beverages for five-and-a-half months.

The Seventh Circuit affirmed the injunction, citing evidence that the general manager had extensive, intimate, and current knowledge about PepsiCo's confidential strategic goals for marketing and distributing sports drinks. The court determined that this was particularized information that went beyond "general skills and knowledge," and that it was inevitable that the general manager would use or disclose that information in performing similar duties at Quaker. The court stressed that it was affirming the injunction because it was not a permanent injunction, but instead extended "no further than necessary." This decision stands as the leading case supporting an injunction based on the "inevitable disclosure doctrine" under Illinois law.

PRG-Schultz International, Inc. v. Kirix Corp., No. 03 C 1867, 2003 WL 22232771 (N.D. Ill. Sept. 22, 2003). PRG developed a computer program that helped auditing departments identify lost profits due to payment errors. Defendants Nathanael and Aaron Williams signed confidentiality agreements to protect confidential information about the program. In January 2001, both defendants left PRG and formed Kirix, a company that soon developed its own auditing software program. PRG sued Kirix for trade secret misappropriation and for breaching the contractual provision relating to disclosure of confidential information. Defendants moved for summary judgment.

The district court denied defendants' motion for summary judgment on those counts. Relying on *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995) (also discussed at page 24), the court held that a reasonable jury might find an employer liable for misappropriation as a consequence of hiring a competitor's employee and placing the employee in a position resulting in the inevitable disclosure or use of trade secrets. The court also denied summary judgment on the contractual breach claim because plaintiff had raised a genuine issue of material fact as to whether its auditing program was confidential and whether defendants used it to create their own auditing program.

YCA, LLC v. Berry, No. 03 C 3116, 2004 WL 1093385 (N.D. Ill. May 7, 2004) (also discussed at pages 32, 37 and 61). YCA was a consulting firm that provided computer training classes and software to corporations. YCA hired Berry as a consultant subject to an employment agreement providing that, should his employment with the company end, he would not disclose any of its confidential information, recruit any of its employees, or solicit any of its customers for two years. Five years later, Berry and several colleagues left YCA to start a competing consulting firm. YCA sued, alleging that Berry breached his obligations under the restrictive covenants.

The court granted Berry's motion for summary judgment in part and denied it in part. The court first determined that the non-solicitation clause was not unreasonably broad, despite its unlimited geographic scope, because it was limited to only those customers with whom Berry had material contact. The court rejected Berry's argument that he had not solicited YCA's customers but rather was solicited by them, noting that Illinois law defines solicitation broadly and that the truthfulness of Berry's claims regarding who solicited whom was a jury question. Regarding the non-disclosure clause, the court agreed with Berry that any customer lists or training and marketing materials disclosed to the general public could not be protected. Further, the "skill blocks" that YCA claimed to have helped Berry develop could not be protected, as Illinois law recognizes that covenants do not apply to "general skills, knowledge and expertise" acquired on the job. But the court did recognize that as the head of the rival consulting firm's marketing department, Berry might inevitably disclose confidential information he learned as a member of YCA's marketing team. Accordingly, Berry was not entitled to summary judgment as to this aspect of the non-disclosure covenant. Finally, as to the covenant not to recruit employees, the court held that the discussions Berry and several other employees had about the competing consulting firm while still employed with YCA might constitute recruitment. That covenant, however, was overbroad, and rather than apply it to the recruitment of *any* employee for *any* business, the court revised it to cover only those cases in which Berry attempted to recruit YCA associates who were in possession of confidential information. Thus revised, the covenant not to recruit was enforceable, and the court denied summary judgment.

RTC Industries, Inc. v. Haddon, No. 06 C 5734, 2007 WL 2743583 (N.D. Ill. Sept. 10, 2007). RTC Industries provided in-store merchandising services to clients. Haddon was RTC's Vice President of Customer Business Development. During his employment, RTC and Haddon executed an agreement containing a covenant not to compete that prohibited Haddon from providing services for two years to any competitor that would involve the "actual or threatened" use of confidential information. While still employed with RTC, Haddon accepted a position with DCI Marketing, RTC's competitor, and shared confidential information about a DCI employee planning to join RTC. RTC sued Haddon for breaching his fiduciary duty and violating the covenant not to compete.

Haddon filed a motion for partial judgment on the pleadings. *First*, Haddon argued that the covenant not to compete amounted to an overbroad blanket prohibition on competition and was unenforceable as a matter of law. The court disagreed, and found that the no-compete agreement was an activity restriction, not a blanket restriction. Haddon was only prohibited from providing services that involved the "actual or threatened" unauthorized use of confidential information. The court found that RTC had a legitimate interest in protecting its confidential information.

Second, Haddon argued that the non-compete clause was an improper procedure for protecting confidential information. The court disagreed, and found that the no-compete clause at issue was similar to one addressed by the Seventh Circuit in *Pepsico, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995) (also discussed at page 24). In *Pepsico*, the Seventh Circuit held that a plaintiff could establish trade secret misappropriation by proving that the defendant's new employment would inevitably lead the defendant to rely on the plaintiff's trade secrets. The court distinguished this case from *Service Centers of Chicago, Inc. v. Minogue*, 180 Ill. App. 3d 447, 535 N.E.2d 1132 (1st Dist. 1989) (also discussed at pages 27 and 71), where the confidentiality agreement was overbroad because the definition of confidential encompassed all information related to the employer's business. In contrast, the covenant at issue here was appropriately limited to the "actual or threatened" use of confidential information. Therefore, the court held that the covenant not to compete was not overbroad.

Strata Marketing, Inc. v. Murphy, 317 Ill. App. 3d 1054, 740 N.E.2d 1166 (1st Dist. 2000) (also discussed at page 27). Murphy was a sales representative for Strata, a company that developed software programs to analyze market research data and leased these software programs to customers. As part of her employment agreement, the parties executed a covenant not to compete and a non-disclosure agreement that prohibited Murphy from providing services to a competitor of Strata. Murphy resigned and immediately started working as a sales representative for Marketing Resources Plus ("MRP"), Strata's principal competitor.

Strata sought temporary restraining order to prevent Murphy from working with MRP. Murphy and MRP moved to dismiss the complaint on the grounds that the covenant not to compete was overly broad and Strata failed to state a claim under the Illinois Trade Secrets Act ("ITSA"). The district court denied Strata's motion for TRO and granted the defendants' motion to dismiss. Strata appealed the dismissal of the complaint but not the denial of the motion for TRO.

The appellate court affirmed in part and reversed in part. *First*, the court declined to evaluate the covenant not to compete claim, on *res judicata* grounds. *Second*, the court adopted the reasoning of *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995) (also discussed at page 24), and held that plaintiffs in Illinois can rely on inevitable disclosure under ITSA. According to the Court, Strata sufficiently stated a claim for trade secret misappropriation and inevitable disclosure.

Liebert Corp. v. Mazur, 357 Ill. App. 3d 265, 827 N.E.2d 909 (1st Dist. 2005). Liebert manufactured and sold computer network protection equipment. Zonatherm was the exclusive supplier of Liebert products in the Chicago area. The parties executed a Representative Agreement that contained a confidentiality covenant. While still employed by Zonatherm, the defendant sales representatives incorporated Aerico, a company that competed directly with Liebert. Liebert sought a preliminary injunction to prevent Zonatherm's former employees from using Liebert's trade secrets in the form of customer lists and bids and sale quotations. The trial court denied Liebert's motion for a preliminary injunction, and Liebert appealed.

The appellate court reversed the denial of the preliminary injunction as to Zonatherm's former territory sales manager, Mazur, but affirmed the denial of the preliminary injunction as to the rest of the employees. Relying on *Strata Marketing, Inc. v. Murphy*, 317 Ill. App. 3d 1054, 740 N.E.2d 1166 (1st Dist. 2000) (also discussed at page 26), the court reversed the trial court's finding that there was no fair question on inevitable disclosure. According to the court, Mazur's alleged testimony that he deleted all the Liebert and Zonatherm files that he copied was suspicious. The court remanded for the lower court to enter a preliminary injunction to prevent Mazur from misappropriating Liebert's price books.

b. No protectible interest found.

(1) Pricing formula not confidential:

Service Centers of Chicago, Inc. v. Minogue, 180 Ill. App. 3d 447, 535 N.E.2d 1132 (1st Dist. 1989) (also discussed at page 26). When Minogue was hired, he signed a confidentiality agreement which provided that the information and materials he received during his employment were confidential and trade secrets. The agreement prohibited Minogue from disclosing or using any confidential or trade secret information or material provided to him by Service Centers, and provided that Minogue would bear the burden of proving that his new employment did not involve the use of Service Centers' confidential information or trade secrets. The covenant contained no geographical limitation. The trial court entered a preliminary injunction restraining Minogue and his new employer from using any trade secrets or confidential information that Minogue had obtained during his employment with Service Centers, and restrained the defendants from providing services to Lutheran General Hospital, a Service Centers customer for which Minogue had provided services.

The appellate court reversed, holding that Service Centers had not met its burden of showing that there was information in its pricing mechanism that was not generally known in the medical records storage industry. In particular, Service Centers did not introduce any evidence "concerning the amount of time, money or effort involved in compiling" the pricing mechanism.

The court also recognized that “an employee may derive some benefit from his access to the collective experience of his employer’s business.” Thus, to the extent the pricing mechanism contained components derived from years of experience in Service Centers’ business, the employee was free to take and use that knowledge in his later pursuits. Finally, the court held the confidentiality agreement was overbroad because it defined all information that the employee received in the course of his employment as confidential and was unrestricted in duration and geographical scope. *But see* Illinois Trade Secrets Act, 765 ILCS 1065/8(b)(1) (1993) (providing that “a contractual or other duty to maintain secrecy or limit use of a trade secret shall not be deemed to be void or unenforceable solely for lack of durational or geographical limitation on the duty”).

Hecny Transportation, Inc. v. Chu, 430 F.3d 402 (7th Cir. 2005). George Chu served as the Chicago station manager for Hecny Transportation, a freight forwarding business. Hecny and Chu entered into a profit sharing agreement with a provision barring Chu from competing with the company for two years after leaving that employment. Chu resigned, and Hecny sued, alleging that Chu had violated the covenant by allowing another freight company to operate at the Chicago station while he was managing it. The district court granted Chu’s motion for summary judgment, finding that Hecny did not have a legitimate business interest that would make the covenant enforceable. Hecny could not prove that it had confidential information to protect, because it had admitted that its business procedures were like those of any other freight business, that its pricing was readily available within the industry, and that it had not kept any of that information confidential. The court also concluded, without explanation, that it was “clear that Hecny does not have near permanent customers.”

The Seventh Circuit affirmed the district court’s denial of the injunctive relief because Chu’s covenant had expired long ago as the district court allowed this lawsuit to linger on its docket for seven years before a decision.

Unisource Worldwide, Inc. v. Carrara, 244 F. Supp. 2d 977 (C.D. Ill. 2003) (also discussed at page 36). Unisource was a distributor of printing and paper products. Four defendants entered into covenants not to compete as a condition of their employment at Unisource. Each of these defendants resigned from Unisource and subsequently commenced work for Midland Paper Company. Some of the defendants solicited customers familiar to them from their time at Unisource. Unisource filed a motion for a preliminary injunction, asserting that defendants’ conduct was in breach of the restrictive covenants, and that defendants misappropriated Unisource’s trade secrets to obtain the business of Unisource’s former customers.

The court held the vast majority of the defendants’ covenants not to compete were unenforceable on grounds of scope and duration. Specifically, the court held unenforceable any covenant not to compete lasting more than twelve months, any covenant prohibiting defendants from encouraging other Unisource employees to quit, and any covenant prohibiting the defendants from doing business with customers and products that they had never dealt with while working at Unisource. The court enforced these covenants that were limited to prohibiting prohibiting one of the defendants from working with two specific customers he worked with while at Unisource, for a period of six months after resignation.

The court also held that there were no protectible trade secrets at issue. The identities of customers and suppliers were not a trade secret because they were readily available in the marketplace. The pricing information was not a trade secret because competitors could obtain price information directly from the customer who knew the pricing formula, and because there was abundant evidence that sharing of information by a customer was a common event. Moreover, knowledge about cost information such as profit margins and mark-ups was not a trade secret because this information was relevant only to pricing, which the court determined could be discovered from the customer's knowledge of non-confidential pricing information. The court also held that personnel information, including what employees did, what they cost, and how effective they were, was not a protectible trade secret because Unisource did not have a protectible interest in its workforce. Lastly, general information regarding customer coverage, staffing, and how Unisource conducts its business were not protectible trade secrets because such information was general knowledge within the industry.

(2) *General market strategies are not confidential:*

Grand Vehicle Works Holdings Corp. v. Frey, No. 03 C 7948, 2005 WL 1139312 (N.D. Ill. May 11, 2005)) (also discussed at page 44). Frey and Fish were high level employees for GVH and its subsidiary, Workhorse. As part of a stock option agreement, Frey and Fish entered into agreements containing non-competition and non-solicitation provisions. The court found the non-competition provision to be unenforceable because it was not narrowly tailored to protect GHV's protectible interests. The court found that market strategies were not confidential information and that GVH had failed to show that either Frey or Fish used confidential or competitive information.

(3) *General knowledge of automated system and customer information not confidential:*

Delta Medical Systems v. Mid-America Medical Systems, Inc., 331 Ill. App. 3d 777, 772 N.E.2d 768 (1st Dist. 2002) (also discussed at page 69). Delta sold and serviced various kinds of medical diagnostic equipment utilized by hospitals and clinics, including mammography equipment manufactured by Lorad. In February 2002, Delta terminated its dealership agreement with Lorad, and announced that it would become dealer for Siemens Medical Systems. Defendants Donati and Ottum resigned from employment at Delta and joined Mid-America, a newly formed company that would sell Lorad equipment as a competitor to Delta. Delta filed a claim for injunctive relief, alleging that the defendants misappropriated trade secrets by using its confidential customer data to set up Mid-America's business. Customer data encompassed such things as the identity of customers, the needs and preferences of customers' decision-makers, model numbers and identification numbers of equipment used by customers, service history of customers' equipment, the terms of the service contracts, etc. The circuit court entered a preliminary injunction prohibiting Mid-America from continuing to solicit Delta's customers and from using or disclosing Delta's customer data.

The appellate court reversed, finding that Delta failed to raise a fair question as to whether the customer data was a protectible trade secret within the meaning of the Illinois Trade Secret Act. Therefore, the court held that the trial court abused its discretion in granting the

preliminary injunction. The court found that Delta's Lorad customer list could be duplicated with little effort because Lorad could provide Mid-America with a list of its customers' identities, and because such a list could be generated from merely looking at the yellow pages or from a FOIA request. As for the service history of the equipment, the court found that Delta failed to raise a fair question as to whether such service history was a protectible trade secret because it did not demonstrate whether the service history it compiled on its customers necessarily had any current value to its customers. The court also held that Delta failed to raise a fair question as to whether terms of the service contracts were protectible secrets since being the first to integrate key industry terms into a contract does not turn what would otherwise be general knowledge into a trade secret. The court held Delta failed to raise a fair question as to whether customers' own information, including their service preferences, could be considered a protectible secret when Delta had no control over what the customers did with their own information. Lastly, the court held that Delta failed to raise a fair question as to whether key customer contacts within the organization were protectible trade secrets because there was no evidence that Delta had spent a great deal of time, energy, and effort in nurturing those relationships. The court also found it significant that Delta did not guard its interests with a restrictive covenant on the defendants, and that no affirmative measures were taken to protect the contacts in defendant's address book.

Capsonic Group v. Swick, 181 Ill. App. 3d 988, 537 N.E.2d 1378 (2d Dist. 1989) (also discussed at page 72). Swick was an automation engineer with Capsonic, which was in the business of designing and manufacturing composite plastic and metal parts which were produced through a process known as insert molding. Swick had entered into a restrictive covenant that prohibited him from disclosing customer names or addresses or trade secrets learned during his employment with Capsonic. In addition, for two years after termination of his employment, the restrictive covenant prohibited Swick from competing with Capsonic in connection with any customer or known prospective customer of Capsonic, by advising or participating in any competing business. Swick accepted a job with a competitor and was fired by Capsonic. Capsonic did not contend that Swick took with him a particular design or process which he then used in the competitor's business. Rather, Capsonic contended that it provided Swick with expertise in how to design an automated system, and that Capsonic's overall expertise in that field was a trade secret.

The trial court denied Capsonic's request for a preliminary injunction, finding that Capsonic did not establish the existence of trade secrets or confidential information that would constitute a protectible business interest. The appellate court agreed, holding that this was precisely the type of general knowledge that an employee has a right to take with him from his employment. The appellate court also rejected Capsonic's argument that its customer information was confidential. The court found that Capsonic produced on long-term contracts with which it would be very difficult for competitors to interfere. The court concluded "Capsonic's concern appears to be that now another company in the industry may become more adapted to automated production and cause competition in the future. This is an attempt to restrict competition *per se* and will not be encouraged by the courts."

(4) *No access to confidential information or trade secrets:*

Shapiro v. Regent Printing Co., 192 Ill. App. 3d 1005, 549 N.E.2d 793 (1st Dist. 1989) (also discussed at page 71). Shapiro was the grandson of the founder of Regent Printing, and worked for Regent for seven years. A year after his employment began, Shapiro entered into a

written employment agreement with Regent which contained a restrictive covenant prohibiting Shapiro for a period of two years following termination of his employment from using or disclosing any information obtained while he was employed by Regent and from soliciting or accepting business from anyone who was a customer of Regent during the year preceding his termination.

Shapiro resigned from Regent and went to work for ARLA Graphics. He sued to enjoin Regent from interfering with his business activities after Regent notified certain of its customers that Shapiro was contractually prohibited from doing business with them. Regent filed a counterclaim and sought an injunction enforcing the restrictive covenant. The trial court enjoined Shapiro and ARLA Graphics from doing business with certain customers of Regent Printing for a period of two months. The trial court refused to enforce the two-year restrictive covenant because it found that the covenant lacked sufficient consideration. Even though the issue was not raised in Regent's pleadings, the trial court entered a two-month preliminary injunction on the ground that Shapiro had breached his fiduciary duty by soliciting Regent's customers while he was still employed by Regent.

The appellate court reversed. The court first found that the trial court had improperly entered a permanent injunction, because the terms of the trial court's order concluded the rights of the parties with respect to the merits. Accordingly, to uphold the injunction, it was necessary for the appellate court to find that Regent had shown more than merely a substantial likelihood of success on the merits. The court then held that while there was sufficient consideration for the restrictive covenant, Regent had not met its burden of proving a protectible business interest. Shapiro had not been privy to confidential information or trade secrets and, although the evidence might have been sufficient to raise a fair question concerning whether Regent had near-permanent relationships with its customers for purposes of supporting a preliminary injunction, it was not sufficient to support a permanent injunction.

(5) *Materials widely distributed and confidential information not specifically identified:*

George S. May International Co. v. International Profit Associates, 256 Ill. App. 3d 779, 628 N.E.2d 647 (1st Dist. 1993) (also discussed at pages 47 and 70). May provided business management consulting services to small and medium-size companies throughout the United States and Canada. May claimed that it had a protectible interest in certain of its surveys, manuals and forms, and that the combination of these materials described a unique consulting method. The trial court denied May's request for a preliminary injunction to stop several former employees and their newly formed business from, indefinitely, using any information used or possessed by May, from using any client information obtained by or disclosed to the former employees, from using business materials the same as or similar to May's, and from competing for a six-month period with any client that was a client of May's during the preceding year.

The appellate court upheld the denial of a preliminary injunction. The court held May had not demonstrated a protectible interest under the Trade Secrets Act because it failed to demonstrate that the information was secret enough to be of economic value. May's manuals were routinely distributed to thousands of trainees before any confidentiality agreements were executed, certain of May's forms were given to prospective clients, and it was unclear whether penalties for violation of May's sign-out procedures were enforced. Most importantly, May did

not identify in its manuals specifically what information it considered confidential, while at the same time May admitted that the manuals also contained much commonly known information. The court also held May failed to demonstrate that the information it sought to protect was beyond the realm of general skills and knowledge of anyone with a basic understanding of accounting, finance or sales.

The court also held that even if the information were confidential, the geographic scope of the covenants was unreasonably broad and the covenants did not specify the activities in which the former employees could not engage. The covenants barred the former employees from working in areas they were assigned to or could have been sent to, even though the employees did not actually work in all of those areas.

Thomas & Betts Corp. v. Panduit Corp., No. 93 C 4017, 1999 WL 261861 (N.D. Ill. Apr. 8, 1999). Thomas & Betts, an electronics company, sued a former employee for violating a non-disclosure agreement which prohibited him from disclosing or using both “information of a private, confidential, or secret nature,” and any “other information which in any way relates” to the company’s business. The employee moved for summary judgment, arguing the agreement was overbroad, and therefore unenforceable.

The court found that the provision restricting the disclosure of confidential information was sufficiently specific to be valid and enforceable. The court noted that the company had specific procedures for identifying information as confidential and repeatedly reminded its employees that confidential information was not to be released to anyone outside the company. Moreover, the employee had not shown that this restriction prevented him from working for another company. On the other hand, the court found the second provision to be overbroad and unenforceable, finding that “other information” might include information that was otherwise available to the public. Because this provision could be excised from the agreement, the court struck it and enforced the remainder of the agreement.

See also YCA, LLC v. Berry, No. 03 C 3116, 2004 WL 1093385 (N.D. Ill. May 7, 2004) (holding that YCA’s training and marketing materials did not constitute confidential information because YCA distributed its training materials to every attendee of its training classes and distributed its marketing materials to every potential customer) (also discussed at pages 25, 36 and 61).

(6) *No confidential information where employer failed to take adequate measures to safeguard the information:*

Arcor, Inc. v. Haas, 363 Ill. App. 3d 396, 842 N.E.2d 265 (1st Dist. 2005) (also discussed at pages 58 and 68). Arcor manufactured customized metal tubes. Haas worked for Arcor from 1983 until he resigned in November 2004. During his employment, Haas entered into two non-compete agreements, one contained in his 1987 employment contract and one contained in a 1998 shareholder’s agreement. After leaving Arcor, Haas, along with one of Arcor’s former customers and one of Arcor’s former suppliers, formed Jadtis, a company in direct competition with Arcor. Jadtis sold metal tubes to eleven of Arcor’s former customers. Arcor brought suit, claiming Haas misappropriated trade secrets and breached the two noncompetition covenants.

Arcor moved for a preliminary injunction. The trial court found the two noncompetition covenants to be overbroad and unenforceable because there was no geographic restriction and the provisions constituted a “blanket prohibition on competition.” But the trial court found Arcor’s customer information to be a protectible trade secret and issued a preliminary injunction prohibiting Haas from using or disclosing customer information he gained while employed at Arcor. Haas appealed.

The appellate court reversed the lower court’s grant of a preliminary injunction because Arcor failed to present sufficient evidence to establish that its customer information could be protected as a trade secret. The only step Arcor took to keep customer secrets confidential was requiring employees to sign a confidentiality agreement, and the appellate court found this, without more, was insufficient to show that Arcor took adequate steps to protect its customer lists. In *dicta*, the appellate court stated that had Arcor taken additional measures to protect its customer lists, such as requiring a computer password or keeping track of hard copies of lists, then that may have been sufficient to find the customer lists to be trade secrets.

In addition, the appellate court refused to blue-pencil the overly broad restrictive covenants because Arcor did not ask the trial court to modify the provisions, thus waiving its right to raise the issue on appeal. The court noted that even if Arcor had raised the blue-penciling issue with the lower court, it would be improper for a court to modify the agreement because it would require the court to write a new agreement.

Fisher Investments, Inc. v. Carlson, No. 04 C 6619, 2004 WL 2496474 (N.D. Ill. Nov. 2, 2004) (also discussed at page 72). Carlson entered into an employment contract with Fisher containing a restrictive covenant prohibiting him from disclosing or using confidential information for the purpose of competing with Fisher. Carlson terminated his employment with Fisher and began contacting and attempting to solicit business from Fisher’s clients, using client information he gained through his employment with Fisher.

The trial court denied Fisher’s motion for a temporary restraining order, finding it was unlikely to succeed in enforcing the restrictive covenant. First, the court refused to enforce the covenant not to compete because it lacked time and geography restrictions, which the court believed would make it unenforceable under Illinois law. Second, the court ruled that Fisher failed to show that lists of clients and potential clients were confidential information. Because Carlson had access to those lists from his home office, could make hard copies of the lists, and was given no instruction on how to dispose of the lists when he was done using them, Fisher failed to show it took sufficient measures to safeguard the information and keep it secret.

(7) “Middleman’s” prices can be discovered from public information:

Springfield Rare Coin Galleries, Inc. v. Mileham, 250 Ill. App. 3d 922, 620 N.E.2d 479 (4th Dist. 1993) (also discussed at page 4). Springfield claimed as confidential its customer lists, information regarding the financial reliability of its customers, its pricing policies, and the training it imparted to Mileham in the authentication and valuation of rare coins and collectibles. The trial court held a restrictive covenant was unenforceable because Springfield had not established that Mileham had become privy to confidential information.

The appellate court affirmed, determining that the customer names were readily ascertainable through public means, that Springfield had not invested “great expense” in developing its client base, that financial information regarding the creditworthiness of customers was readily available from credit reporting services, and that Springfield’s pricing policies were based upon nothing other than its desired profits and publicly available information based on prices of scrap metals. The court also held that the basic trade instruction Springfield provided to Mileham was not confidential.

(8) *Salesman’s knowledge of customers cannot be considered confidential information of employer:*

Callahan v. L.G. Balfour, 179 Ill. App. 3d 372, 534 N.E.2d 565 (1st Dist. 1989). Callahan sold school rings for L.G. Balfour Company. Callahan sued Balfour for breach of his employment contract and fraud. Balfour counterclaimed, asserting that Callahan was not entitled to additional compensation under his contract because he had breached a restrictive covenant in the employment contract that prohibited him from accepting employment with Balfour’s competitors within two years after his discharge from Balfour. The restrictive covenant contained a liquidated damages provision entitling Balfour to withhold as liquidated damages any sums that might be due to the employee upon breach of the restrictive covenant. The trial court entered summary judgment for Balfour on the breach of contract claim based on the covenant not to compete.

The appellate court reversed the grant of summary judgment. The court held that the liquidated damages provision was an improper penalty because it was not a reasonable forecast of the actual damages Balfour would suffer from the employee’s breach of the restrictive covenant. The court then held that the restrictive covenant was not enforceable because it was not “reasonably necessary for the protection of a legitimate business interest.” Balfour did not have near-permanent customer relationships because Balfour could win a contract at a school one year and lose the contract there the next. The court also concluded that Callahan did not have confidential information about Balfour’s customers, and Balfour did not have a protectible business interest in Callahan’s familiarity with the customers assigned to him. “[A] salesman’s knowledge of or familiarity with customers is very similar to its personal skills and therefore cannot be considered the property or protectible interest of his employer.” Finally, the covenant not to compete was not enforceable because it was overly restrictive and unduly burdensome. The geographic scope of the covenant—Chicago and seven surrounding counties—would force Callahan to relocate. The inconvenience that this would cause Callahan would be great, particularly when balanced against the minimal benefit to Balfour of enforcement of the restrictive covenant.

Appelbaum v. Appelbaum, 355 Ill. App. 3d 926, 823 N.E.2d 1074 (1st Dist. 2005) (also discussed at pages 7, 18 and 63). The appellate court refused to enforce a restrictive covenant that an employee entered into with Penguin, a family owned company in the business of buying and selling seafood. The court found that Penguin had no protectible interest in its customer information because customer preferences and credit information were not confidential information.

(9) *Employees are not trade secrets:*

Flexicorps, Inc. v. Trend Technologies, Inc., No. 01 C 1754, 2002 WL 31018353 (N.D. Ill. Sept. 10, 2002). Flexicorps, a temporary employment services provider, sued its competitor, Remedy, under the Illinois Trade Secret Act (“ITSA”) for hiring away most of Flexicorps’s workforce after Trend Technologies, Inc. replaced Flexicorps with Remedy as its primary employee vendor. Employees left Flexicorps once Trend announced that Remedy would be the new vendor and that if the workers wanted to continue their employment at Trend, they would have to become employees of Remedy.

The district court disagreed with Flexicorps’ claim that Remedy violated the ITSA by hiring away Flexicorps’ carefully screened inventory of temporary employees and therefore granted Remedy’s motion for summary judgment on this issue. The court held that Flexicorps’ workforce was not a trade secret for the purposes of the ITSA. The court noted that Flexicorps did not have a property interest in its individual employees under the ITSA, even though it spent considerable effort and expense to recruit them. Flexicorp’s claim also failed because there was no allegation that Remedy used Flexicorp’s confidential recruiting process to entice the employees away from Flexicorp, or that the employees themselves were privy to Flexicorps’ trade secrets.

(10) *Information no longer confidential when employer disseminated information to client:*

Carus Chemical Co. v. Calciquist, Inc., 341 Ill. App. 3d 897, 793 N.E.2d 931 (3d Dist. 2003) (also discussed at page 69). Employee (Charlton) held technical and marketing positions at Carus Chemical Company that gave him access to trade secrets and confidential information. During his employment with Carus, Charlton signed a confidentiality agreement that prohibited him from disclosing or using any confidential information after his employment ended. Charlton ended his employment with Carus and started working for one of its competitors, Calciquist. While working at Calciquist, Charlton wrote a letter to a customer comparing Calciquist’s and Carus’s products.

The trial court entered a temporary restraining order prohibiting Charlton and Calciquist from making comparisons between Carus and Calciquist’s products. After the order was granted, Carus attached a copy Charlton’s letter in a bid proposal, stating that Carus’s product is used as a benchmark by its competitors. Charlton and Calciquist moved to dissolve the injunction because Carus itself had made the purported confidential information public. They also sought sanctions under Illinois Supreme Court Rule 137. The trial court denied the motions.

The appellate court dissolved the preliminary injunction because the information was no longer confidential when Carus republished the information to a prospective customer, removing the threat of irreparable harm. The court ruled that the trial court did not abuse its discretion in refusing to impose sanctions on Carus.

Tax Track Systems Corp. v. New Investor World, Inc., 478 F.3d 783 (7th Cir. 2007). Tax Track and New Investor entered into a non-disclosure agreement that required New Investor to return any confidential information to Tax Track or destroy the information upon termination of the license agreement between the parties. Tax Track claimed that after New Investor terminated

the licensing agreement, it plagiarized a series of confidential memoranda and letters created by Tax Track.

The appellate court affirmed the trial court's finding that the memoranda and letters were not confidential because Tax Track did not sufficiently seek to protect the information. Rather, Tax Track widely disseminated the information to prospective clients and discussed the information with others without requiring a confidentiality agreement. Thus, Tax Track did not have a protectible interest in the information.

3. Stability of Workforce

Illinois state and federal courts have reached different conclusions regarding how Illinois law treats covenants not to solicit or recruit a former employer's employees. In the Illinois State Court case of *Arpac v. Murray* and in the federal case of *Malone v. CORT Furniture*, the courts found that an employer had a legitimate interest in protecting the stability of its workforce. But in *Unisource v. Carrara*, the federal district court stated that *Arpac* was a "misapplication of Illinois law" and held that near permanent customer relationships and confidential information were the only two legitimate business interests under Illinois law. In 2004, the federal district court in *YCA v. Berry* sought to settle the disagreement concerning the treatment of no-recruitment clauses under Illinois law. The court held that no-recruitment clauses should be upheld only to the extent that they prevent former employees from recruiting competitors' employees who possess confidential business information. These cases are discussed below:

Arpac Corp. v. Murray, 226 Ill. App. 3d 65, 589 N.E.2d 640 (1st Dist. 1992) (also discussed at pages 9, 47, 62 and 64). Murray was Arpac's VP of marketing and sales. His employment agreement contained various restrictions, including a covenant not to compete and a covenant prohibiting him from "inducing any employees, agents, or sales personnel of Arpac to terminate any relationship with Arpac." Murray left Arpac to work as the president and sales manager of a new competitor. Arpac sued to enforce the restrictive covenant. The trial court entered a preliminary injunction restraining Murray from, among other things, influencing key employees to leave Arpac. The appellate court affirmed, concluding that Arpac had an interest in protecting the stability of its work force. As noted below, this case has been criticized.

Malone v. CORT Furniture Corp., No. 02 C 1729, 2002 WL 1874819 (N.D. Ill. Aug. 13, 2005). Malone's employment contract with CORT contained a no-solicit provision that prohibited him for eighteen months from soliciting or hiring CORT's former or current employees. When Malone terminated his employment with CORT, CORT sought to obtain a preliminary injunction enforcing the no-solicit provision. The court entered the preliminary injunction. As a small business, the court found that CORT had a legitimate business interest in maintaining a stable workforce, especially in light of the fact that many of its employees performed key roles in the business.

YCA, LLC v. Berry, No. 03 C 3116, 2004 WL 1093385 (N.D. Ill. May 7, 2004) (also discussed at page 25). Berry worked for YCA as a consultant and signed a "Confidentiality/Non-Disclosure/Restrictive Covenants Agreement" that included a clause barring him from recruiting YCA employees. This clause prohibited him from "directly or indirectly by assisting others, recruit or hire, or attempt to recruit or hire, any other associate of YCA, or induce or attempt to

induce any associate of YCA to terminate association with YCA.” Berry left YCA and began soliciting YCA employees. YCA sued to enforce the agreement. The federal district court tried to harmonize the *Arpac* and *Unisource* decisions. The court held that “Illinois law declares a covenant not to recruit enforceable, to the extent that it supports the employer’s legitimate business interest in guarding its confidential information from potential competitors.” The court held that that YCA’s no-recruit clause was unenforceable because it was not narrowly tailored to ensure the protection of YCA’s confidential information. For the clause to be enforceable, it needed two limitations: (1) the provision should have been limited to bar Berry from recruiting YCA associates who might possess confidential information; and (2) the provision should only prohibit Berry from recruiting associates on behalf of YCA competitors. The contract also contained a provision that invited blue-penciling: “in the event a court should determine not to enforce a covenant as written due to overbreadth, you specifically agree that said covenant shall be enforced to the extent reasonable, whether said revisions be in time, territory, or scope of prohibited activities.” The court ruled that “this clause both empowers and requires the Court to attempt reform of Berry’s overly broad covenant of non-recruitment.” The court reformed the non-recruitment clause to limit its scope to prevent Berry from recruiting for YCA’s competitors those YCA associates who potentially possessed confidential information.

Unisource Worldwide, Inc. v. Carrara, 244 F. Supp. 2d 977 (C.D. Ill. 2003) (also discussed at page 28). McCormick was a sales representative for Unisource. McCormick’s employment agreement prohibited him from “inducing or encouraging any employee of Unisource to leave the employment of Unisource, or otherwise soliciting or hiring any such employee for six months following termination.” Unisource cited the *Arpac* case to justify the restriction. The federal court ruled (in dicta) that “*Arpac Corp.* represents a misapplication of Illinois law . . . [because] the only two legitimate interests that may give rise to a covenant not to compete in Illinois are near permanent relationships with customers, and confidential information or trade secrets.” The court held that the provision was unreasonable and unenforceable under Illinois law.

Pactiv Corp. v. Menasha Corp., 261 F. Supp. 2d 1009 (N.D. Ill. 2002). In 2000, Menasha considered purchasing Pactiv’s Glacier-Cor business. During the due diligence process, Menasha received access to Glacier-Cor’s confidential financial information and key employers. Menasha and Pactiv entered into a confidentiality agreement that included a restriction that precluded Menasha from hiring any of Pactiv’s management-level employees for a period of three years without Pactiv’s prior consent. Menasha chose not to buy Glacier-Cor, but hired some employees. Pactiv sued to enforce the confidentiality agreement. Applying Illinois law, the federal district court found that even though Pactiv might have a legitimate protectible interest in prohibiting Menasha from misusing the confidential information, the non-solicitation provision was overly broad to protect this interest because it prohibited Menasha from hiring Pactiv employees who did not have any knowledge in connection with Glacier-Cor. The court held that the non-solicitation provision was unenforceable and declined to blue-pencil the provision because the requested modification would have required the court to make fact determinations that it was not prepared to make. The court enforced other restrictions.

See also Flexicorps, Inc. v. Trend Technologies, Inc., No. 01 C 1754, 2002 WL 31018353 (N.D. Ill. Sept. 10, 2002) (also discussed at page 35) (rejecting request for a preliminary injunction to prevent competitor from hiring away employees).

4. Investment in goodwill as a legitimate business interest.

Courts may enforce restrictive covenants when necessary to protect the goodwill (such as customer contracts and intellectual capital) purchased in the sale of a business (also discussed at pages 51 through 57). *See, e.g., Central Water Works Supply, Inc. v. Fisher*, 240 Ill. App. 3d 952, 608 N.E.2d 618 (4th Dist. 1993); *Decker, Berta & Co., Ltd. v. Berta*, 225 Ill. App. 3d 24, 587 N.E.2d 72 (4th Dist. 1992); *Hamer Holding Group, Inc. v. Elmore*, 202 Ill. App. 3d 994, 560 N.E.2d 907 (1st Dist. 1990).

B. Restrictions Must Be Reasonable As To Duration, Geographic Area, and Scope of Prohibited Activity.

1. Covenants unenforceable because no geographic or time limitation.

Eichmann v. National Hospital & Health Care Services, Inc., 308 Ill. App. 3d 337, 719 N.E.2d 1141 (1st Dist. 1999). Eichmann was an insurance executive. He entered into an independent contractor agreement that prohibited him from soliciting or competing for his employer's existing and future customers. The trial court entered summary judgment in favor of Eichmann, finding that the covenants were unreasonable as a matter of law. On appeal, the employer argued that the trial court should have applied a less strict standard in assessing the reasonableness of the covenants because Eichmann, as an independent contractor, had more bargaining strength than an employee. The employer also argued that the covenants were reasonable and that, if they were not, the court should have modified them.

The appellate court affirmed summary judgment in favor of Eichmann, ruling that Illinois law applies the same standard to restrictive covenants contained in both independent contractor and employment agreements. The court held the covenants were unreasonable because they had no geographic or temporal limitations. The court explained that, although the absence of a geographic restriction does not automatically invalidate a covenant restraining a particular activity, the restriction must be reasonably related to protecting customers that an employee develops as a result of his or her employment. Here, the restrictions covered *any* existing customer, regardless of whether Eichmann developed a relationship with the client while working for his former employer. Moreover, Eichmann was prohibited under the agreement from competing with his former employer for *future* customers. The court found, as a matter of law, that an employer cannot have a protectible interest in future customers, and that the restriction with respect to future customers was a *per se* illegal attempt to prevent competition. Finally, the court held the trial court did not err in refusing to modify the agreement. The fairness of the restraint initially imposed is a relevant consideration in determining whether to modify an agreement, and the restrictive covenants were so unreasonable that drastic modifications of the agreement would be necessary.

Perman v. ArcVentures, Inc., 196 Ill. App. 3d 758, 554 N.E.2d 982 (1st Dist. 1990). ArcVentures was in the business of selling prescription drug services to customers through a Home Pharmacy Division. Perman signed a non-disclosure agreement during the course of his employment that prohibited him from disclosing customer lists and business information either during or after the termination of his employment. When Perman consistently failed to meet his

performance goals, ArcVentures terminated his employment. Perman sued for breach of an employment contract, arguing that a non-disclosure and confidentiality agreement gave him a right to continued employment. The trial court entered summary judgment in favor of the defendant-employer, finding that Perman did not have an enforceable employment agreement. The appellate court considered whether the non-disclosure agreement was enforceable in the course of determining whether that agreement could give rise to a contract for permanent employment. The court determined that the non-disclosure agreement was “patently unreasonable” because it had no geographic or time limitation. The appellate court affirmed the trial court’s ruling that the confidentiality agreement did not give rise to a contract for permanent employment.

Dryvit Systems, Inc. v. Rushing, 132 Ill. App. 3d 9, 477 N.E.2d 35 (1st Dist. 1985) (also discussed at page 86). Rushing worked as a regional sales manager for Dryvit, a company that did business both nationally and internationally. A year into his employment, Rushing signed a two paragraph agreement that contained a restrictive covenant prohibiting him from working for a competitor in the continental United States for a period of two years. Four years later, he quit and began working for a competitor. Dryvit filed an action for preliminary injunction 15 months later seeking to enforce the restrictive covenant. Rushing filed motion for judgment on the pleadings, arguing that the geographic scope was *per se* void as a restraint of trade and unreasonable. Dryvit filed for leave to amend the scope of its sought relief to prohibit Rushing from soliciting customers he contacted during his employment. The court denied leave and granted motion for judgment on the pleadings.

The appellate court affirmed the judgment on the pleadings. The court noted that an enforceable restrictive covenant must be reasonable as to time, geographic scope and activity. The court noted that the restrictive covenant was extremely broad, prohibiting Rushing from engaging in competitive business anywhere in the United States. The court concluded that the unlimited geographic scope on competitive activities and the additional restriction from association with a corporation whose activities are competitive in the United States was “patently beyond the needs of the employer to protect his interests and [was] unduly harsh on the employee.”

Nobel Biocare USA, Inc. v. Lynch, No. 99 C 5774, 1999 WL 958501 (N.D. Ill. Sept. 15, 1999). Nobel Biocare moved for a temporary restraining order against Lynch, its former employee, and his new employer, alleging breach of a restrictive covenant and misappropriation of trade secrets. Nobel sought to prevent Lynch from disclosing or using the identities of 20 Nobel customers that accounted for 80% of Nobel’s sales, or soliciting business from any of those customers. It also sought to prevent Lynch from performing services for his new employer or any other competitor of Nobel that would require him to reveal or rely on confidential information he learned while at Nobel. The court granted Nobel’s motion under the misappropriation of trade secrets theory but denied relief for breach of the restrictive covenant, finding that the covenant was void *per se* under California law and unreasonable under Illinois law. On its face, the covenant prohibited Lynch from working for any competitor of Nobel anywhere in the United States for two years. The court refused to “blue-pencil” the covenant to make it reasonable because it required extensive revision in “length, geography and permissible jobs and duties.”

Systemax, Inc. v. Schoff, No. 97 C 5014, 1997 WL 467545 (N.D. Ill. Aug. 13, 1997) (also discussed at pages 53 and 90). Systemax sought to enforce covenants contained in an “Employee Agreement Regarding Proprietary and Confidential Information, Patents and Trade Secrets” that prohibited Schoff from contacting Systemax’s customers for one year following the termination of his employment, from soliciting or selling to Systemax’s customers for one year following termination of his employment, and from soliciting Systemax’s employees at any time. Schoff moved to dismiss these claims. The court granted the motion to dismiss Systemax’s claim to enforce the covenant against soliciting employees, finding the covenant unenforceable because it contained no time limitation. The court refused to modify the time period where the employer had overreached in the first place. The court denied the motion to dismiss the other counts, holding that the covenants pertaining to customers were not inherently invalid on public policy grounds, but expressing strong concerns about their breadth.

Telxon Corp. v. Hoffman, 720 F. Supp. 657 (N.D. Ill. 1989) (also discussed at pages 51 and 72). Telxon designed and marketed hand-held computer systems used to review inventory by recording product codes and quantities. Hoffman was employed by Telxon as a District Systems Manager responsible for customers in Illinois and Wisconsin. In connection with his employment, Hoffman executed a restrictive covenant prohibiting him for a period of one year after termination of his employment from owning or being employed by a business that competes with Telxon, and from using or disclosing Telxon’s trade secrets or confidential information. Hoffman resigned from Telxon and went to work for a competitor as Regional Systems Manager for a region covering Illinois and Wisconsin.

The court refused to issue an injunction enforcing the restrictive covenant. First, the court found under Illinois law that, after a full trial on the merits, the court would likely conclude that the employment agreement was an unenforceable contract of adhesion, because Telxon required all of its employees to sign the same restrictive covenant and did not inform the defendant prior to his employment that his execution of a restrictive covenant would be a condition of his employment. The court also held that the restrictive covenant was unreasonable because it contained no geographic limitation. The court determined that Telxon had not made a showing that a world-wide restriction was necessary to protect Telxon’s legitimate interests. The lack of a geographic limitation was particularly unreasonable in light of the fact that the restrictive covenant was not limited only to certain activities. The court specifically refused to “blue-pencil” the covenant to make it reasonable. The court held that the non-disclosure clause was unreasonable because it contained no time limitation.

See also Health Professionals, Ltd. v. Johnson, 339 Ill. App. 3d 1021, 791 N.E.2d 1179 (3d Dist. 2003) (also discussed at page 84); *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 292 Ill. App. 3d 131, 685 N.E.2d 434 (2d Dist. 1997) (also discussed at page 14); *Callahan v. L.G. Balfour*, 179 Ill. App. 3d 372, 534 N.E.2d 565 (1st Dist. 1989) (also discussed at page 34); *Fisher Investments, Inc. v. Carlson*, No. 04 C 6619, 2004 WL 2496474 (N.D. Ill. Nov. 2, 2004) (also discussed at page 33); *Quixote Transportation Safety, Inc. v. Cooper*, No. 03 C 1401, 2004 WL 528011 (N.D. Ill. Mar. 12, 2004); *Ken-Pin, Inc. v. Vantage Bowling Corp.*, No. 02 C 7991, 2004 WL 783092 (N.D. Ill. Jan. 20, 2004); *Pactiv Corp. v. Menasha Corp.*, 261 F. Supp. 2d 1009 (N.D. Ill. 2003) (also discussed at pages 37 and 60); *Stunfence, Inc. v. Gallagher Security (USA), Inc.*, No. 01 C 9627, 2002 WL 1838128 (N.D. Ill.

Aug. 12, 2002); *Roberge v. Qualitek International, Inc.*, No. 01 C 5509, 2002 WL 109360 (N.D. Ill. Jan. 28, 2002).

2. Covenants without geographic and time limits not *per se* unreasonable.

Coady v. Harpo, Inc., 308 Ill. App. 3d 153, 719 N.E.2d 244 (1st Dist. 1999) (also discussed at page 73). Coady was a producer of “The Oprah Winfrey Show.” Coady resigned, claiming constructive termination, and sought a judgment declaring that her restrictive covenant was void and unenforceable. The covenant required Coady to keep confidential, during and after her employment, all information about Ms. Winfrey, her private life, and Harpo’s business activities that she learned while employed at Harpo. The trial court dismissed the action, finding that the confidentiality agreement protected a legitimate business interest and its restrictions were reasonable. The trial court also held that the parties must submit their dispute to binding arbitration as required by the contract.

The appellate court held that the issue whether a confidentiality agreement is valid and enforceable is a matter of law for the courts, rather than arbitrators, to determine. However, the court affirmed the finding that the confidentiality agreement was enforceable, even though it had no time or geographic limit. The court explained that, where trade secrets and confidential information are involved, a confidentiality agreement is not unenforceable simply because it lacks time or geographic limitations. The court noted that the agreement at issue did not restrict Coady’s ability to work in any occupation, at any time.

Abbott-Interfast Corp. v. Harkabus, 250 Ill. App. 3d 13, 619 N.E.2d 1337 (2d Dist. 1993). Abbott manufactured fasteners, and Harkabus was a former Abbott salesman. In 1977, the parties entered into an employment agreement containing a provision in which Harkabus agreed that, in the event of the termination of his employment, he would not solicit for one year or canvas, divert, take away, accept orders or interfere with any of Abbott’s business customers’ trade or patronage, wherever the customers were located. The agreement also contained a provision that the employee could not make use of his knowledge of the identity of Abbott’s customers, customer lists, methods of operation and obtaining business, pricing, processes, techniques, systems, formulas and any information contained in an Abbott customer history book or other trade secrets. The contract also provided that invalid, illegal or unenforceable provisions of the contract were severable. The trial court entered judgment on the pleadings, holding the restrictive covenant unenforceable because it had no geographic limitation.

The appellate court reversed, holding that only in extreme cases should a court find a restrictive covenant invalid on its face. The absence of a geographic limitation was not necessarily fatal where the purpose of the restrictive covenant was to protect the employer from losing customers to a former employee who, by virtue of his prior relationship, gained special knowledge and familiarity with the customer’s requirements. A trial court may modify a contract so that it comports with the law or sever unenforceable provisions, particularly when the contract contains a severability clause. The court recognized an exception, however, where the enforcement of one provision in a contract will render the entire contract void even with the severability clause. This can occur where the agreement contains otherwise unenforceable provisions labeled as “essential.”

Henri Studio, Inc. v. Outdoor Marketing, Inc., No. 96 C 8198, 1997 WL 652351 (N.D. Ill. Oct. 14, 1997) (also discussed at page 15), *vacated pursuant to settlement*, 1998 WL 569303 (N.D. Ill. Aug. 3, 1998). The court noted that while a non-solicitation covenant that seeks to protect existing customers need not have a geographic limit, it still must be necessary to protect a “proprietary interest” in near permanent customers or confidential information. The court denied the former employer’s motion for a preliminary injunction where the former employer (a seller of lawn and garden ornaments) could not show either near permanent customers or confidential information.

3. The geographic scope should be co-extensive with the plaintiff’s business territory.

Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc., 378 Ill. App. 3d 437, 879 N.E.2d 512 (1st Dist. 2007). Cambridge manufactured and sold commercial and industrial space heating equipment. Deger worked for Cambridge as a sales representative under an employment contract containing post termination non-competition and non-solicitation clauses. After Cambridge terminated Deger, Deger was hired by Brucker, Cambridge’s competitor in the Midwest. Cambridge sued Brucker for tortious interference with contract. The trial court entered judgment notwithstanding the verdict, finding that the non-competition covenant was unreasonable and therefore unenforceable as a matter of law.

The appellate court affirmed and held that the non-competition clause was both unreasonable in its geographic scope and in its restrictions on the post termination activities. The court explained that to determine if the territorial scope of the covenant was reasonable “courts generally look[ed] to whether the restricted area [was] coextensive with the area in which the employer [was] doing business.” Deger’s employment contract prohibited him from engaging in post termination competing activities “anywhere in the United States and Canada.” Because Cambridge did not have a market in all Canadian provinces, the court ruled that the geographic scope of the non-competition clause was broader than necessary to protect Cambridge’s legitimate interests. The contract also prohibited Deger from engaging “in any activity for or on behalf of Employer’s competitors, or engage in business that competes with Employer.” The court found that this language would have barred all activities on behalf of competitors, regardless of whether they were actually competitive. Restrictions on activities “should be narrowly tailored to protect only against activities that threaten the employer’s interest.” The court held that the blanket bar on all activities for competitors was overbroad and unenforceable.

In *dicta*, the court also pronounced the non-solicitation clause invalid on its face due to the sweeping restrictions it placed upon former employees’ contacts with Cambridge’s customers. The court stated that a “nonsolicitation clause is only valid if reasonably related to the employer’s interest in protecting customer relations that its employees developed while working for the employer.” Cambridge’s clause extended broadly to “any customer, employee or representative of Employer,” without regard to whether Dodge had contact with them as a Cambridge employee, and included companies that became customers after Deger left Cambridge. The court held that the non-solicitation clause was far broader than necessary to protect Cambridge’s interest in preventing Deger from abusing the specific client relationships he built up as Cambridge’s employee.

Midwest Television, Inc. v. Oloffson, 298 Ill. App. 3d 548, 699 N.E.2d 230 (3d Dist. 1998). As discussed at page 4, the employment contract in this case imposed a one-year, 100-mile covenant not to compete on a radio personality. Because the radio station's broadcast range was 90 miles, the court found the 100-mile restriction to be "coextensive with the employer's business territory" and therefore reasonable. The one-year restriction also was reasonable because the radio station showed it took a year or more to develop its listeners and advertisers.

Office Electronics, Inc. v. Adell, 228 Ill. App. 3d 814, 593 N.E.2d 732 (1st Dist. 1992). OEI was in the business of manufacturing and selling printing used in data processing and other business applications. Adell's employment agreement contained a restrictive covenant in which she acknowledged that OEI had a proprietary interest in its customers and promised that she would not, for a period of one year following termination of her employment, "directly or indirectly solicit orders from, sell or render services to any customer solicited, sold or serviced" by her while she was employed with OEI, with respect to any product or service sold by OEI. The trial court denied OEI's motion for a preliminary injunction to enforce a non-competition agreement against a former salesperson. The trial court held the restrictive covenant was overbroad and unenforceable because it applied to prospective customers whom OEI solicited but who never became customers of OEI and to persons who were once OEI customers but did not remain customers, and because the order applied to all of OEI's products and services, regardless whether Adell had been involved in the sale of those products or services.

The appellate court affirmed. The court first held that the trial court had not erred in refusing to conduct an evidentiary hearing on OEI's motion for a preliminary injunction, because Adell had filed a verified answer and the parties agreed on the essential facts supporting OEI's complaint. The court determined that the evidence OEI claimed it would have presented concerning 88 particular customers whom OEI wished to bar Adell from soliciting would not have affected the trial court's decision, because the trial court's ruling hinged upon the court's interpretation of the restrictive covenant as broader than the relief OEI requested. (Consider adding sentence clarifying blue penciling issues such as: The appellate court declined to reverse the trial court's decision to deem the restrictive covenant overbroad and unenforceable rather than modify the covenant to reflect the narrower relief OEI sought. The appellate court also determined that OEI's allegations of irreparable injury and absence of adequate legal remedy were merely conclusory and were not supported by sufficient factual allegations to support a preliminary injunction.

Hess Newmark Owens Wolf, Inc. v. Owens, 415 F.3d 630 (7th Cir. 2005). Hess Newmark Owens Wolf (HNOW) was a small, recently formed company that provided advertising, public relations, and promotional services to motion picture studios. Owens was one of the principals who had formed the company as well as the proprietor of Owens Group, Inc. (OGI), a promotions firm serving Ohio, Kentucky, and the Indianapolis area. Owens and the other three principals agreed when forming their venture that they would limit their work in the movie-promotion business to HNOW for the duration of their stock ownership and for three years thereafter. That restriction applied to any part of the country in which HNOW did business, with the exception of the area in which OGI was already operating. Five years into the existence of HNOW, Owens began using OGI to sell consulting services to one of HNOW's rivals, assisting that firm in setting up offices on the east coast. HNOW fired Owens and sought an injunction to prevent her from working for anyone else in the movie-promotions business, with the exception

of OGI in its reserved area of operation. The trial court found that Owens had violated the covenant by performing consulting work prohibited by her agreement with HNOW in an area in which HNOW sought to compete. The court further held, however, that HNOW was not entitled to injunctive relief because it could not show that it had lost any particular account to its competition as a result of Owens' actions, and thus could not establish irreparable injury.

The Seventh Circuit reversed, holding that under Illinois law, HNOW did not have to demonstrate that it had lost any particular account to show that Owens had caused irreparable injury. Owens' ongoing competition with HNOW was itself a sufficient basis for relief. The court also rejected Owens' contention that the covenants were unreasonable because they provided a national ban; the text of the covenants limited them to areas where HNOW did business or had plans to do business within three years. Finally, the court noted that in agreeing to the covenants, Owens had also agreed that "the length of time, scope and geographic coverage" of the covenants was reasonable. Because Owens was an intelligent entrepreneur represented by counsel at the time she signed this agreement, the court concluded that the Illinois courts would hold it to be enforceable.

Grand Vehicle Works Holdings Corp. v. Frey, No. 03 C 7948, 2005 WL 1139312 (N.D. Ill. May 11, 2005). From 1999 to 2003, Frey was president of Workhorse, a subsidiary of Grand Vehicle Holdings (GVH) that makes stripped chassis for motor homes. Until 2003, Fish was Workhorse's Vice-President of Sales and Marketing. In connection with a stock option grant, Frey and Fish entered into agreements with GVH which contained non-competition and non-solicitation provisions. The non-competition provision prohibited Frey and Fish for twelve months after termination of employment from "engaging in, rendering services to, assisting, participating in the affairs of, or otherwise being connected with, any person or enterprise . . . which is a Competing Business." "Competing Business" was defined as "any person or enterprise engaged in, or planning to engage in any business that is in any respect competitive with the business of the Company, and such business requires the employee to act in any capacity which, directly or indirectly involves the manufacture, design, assembly, servicing, integration, installation and/or sale, lease, resale or marketing of products anywhere in North America that are similar to the products" sold or marketed by GVH. The non-solicitation provision prohibited Frey and Fish from recruiting or soliciting GVH employees or customers. Frey left Workhorse in 2003 and began working for Universal Trailer, whose subsidiary, Haulmark, converts semi-truck chassis into motorcoaches. After Fish was not hired as president of Workhorse, he interviewed with and was hired by Universal. Frey took part in the interviewing process and the decision to hire Fish. Fish then told another Workhorse employee, Monda, that a position was available at Haulmark. Fish extended an offer to Monda.

GVH sued Fish and Frey for breach of the non-competition and non-solicitation provisions in the contract. The court granted Fish and Frey's motion for summary judgment in part. The court ruled the non-competition portion of the contract was unenforceable because the provision was not narrowly tailored to protect GVH's protectible interests. First, after finding marketing strategies do not constitute confidential information, the court found GVH failed to show that Fish or Frey used confidential or competitive information while employed at Universal Trailer. Second, the court held the activity restraints in the non-competition provision were overbroad because they prohibited Fish and Frey from working in any company in the world that sold components in North America. The court denied defendant's motion for summary judgment

on GVH's claim for breach of the non-solicitation provision in the contract. The court found there was a genuine issue of material fact regarding whether Frey and Fish breached the non-solicitation provision.

Loewen Group International, Inc. v. Haberichter, 912 F. Supp. 388 (N.D. Ill. 1996), *confirmed in*, No. 93 C 7377, 1997 WL 627545 (N.D. Ill. 1997), *aff'd in part, rev'd in part*, Nos. 97-3825, 97-3877, 1998 WL 796076 (7th Cir. Nov. 9, 1998). As discussed in more detail at page 11 above, the disputed covenant in this case restricted a funeral home employee from competing within a ten-mile radius of two Loewen Group funeral homes located in the Chicago suburbs. The district court reduced the geographic restriction to a five-mile radius, finding that the majority of Loewen's business came from within five miles. The Seventh Circuit reversed, ruling that the geographic scope did not need to be limited to the area from where the "majority" of the employer's business was derived, but rather only needed to be "coextensive with the employer's business territory." "Because a substantial (one-fifth) of Loewen's business was located between five and fifteen miles," a restriction of up to fifteen miles was reasonable.

4. The scope of prohibited activity must be reasonably defined.

a. Activity restrictions upheld.

Mohanty v. St. John Heart Clinic, 225 Ill. 2d 52, 866 N.E.2d 85 (2006) (also discussed at pages 78-79). The Illinois Supreme Court held that particular activity restrictions in physician employment contracts that prohibited doctors from the entire practice of medicine within a small geographical area were reasonable. The physicians argued that prohibiting "the practice of medicine" was an unreasonably broad activity restriction, because their former employer, St. John Heart Clinic, specialized only in cardiology. The court disagreed, finding that all specialties are "inextricably intertwined" with the practice of medicine. Further, these physicians could easily find employment elsewhere, because the restricted territories (a five-mile and two-mile radius of St. John's offices) covered only a "narrowly circumscribed area of a large metropolitan area," Chicago. The trial court entered temporary restraining orders against the physicians to prohibit them from violating the restrictive covenants. The trial court denied St. John's motion for a preliminary injunction following a hearing, finding that prohibiting the doctors from the entire practice of medicine was overly broad and unreasonable.

The appellate court reversed, holding that the activity provision was reasonable. The court reasoned that because the doctors were licensed to practice medicine, not just their specialties of cardiology and internal medicine, they could treat patients for conditions outside their specialty, thereby placing them in direct competition with the clinic.

Smith v. Burkitt, 342 Ill. App. 3d 365, 795 N.E.2d 385 (5th Dist. 2003). The Smiths purchased an arts and crafts business from the Burkitts. As part of the purchasing agreement, the parties executed a covenant not to compete that prohibited the Burkitts from competing directly or indirectly with the Smiths for five years within Franklin County, Illinois. The purchase agreement did not describe the nature of the business that was sold. The Smiths filed a complaint alleging that the Burkitts violated the covenant not to compete. The Burkitts filed a motion to dismiss and the trial court granted the motion. The circuit court held that the agreement between

the parties did not encompass the sale of goodwill and regardless, the covenant not to compete was unreasonable and therefore unenforceable.

The appellate court reversed. First, the appellate court held that the purchase agreement included the sale of goodwill even though it was not specifically listed as a transferred asset in the agreement. The court relied on other provisions in the contract that would be rendered superfluous without the sale of goodwill. Second, the court found that the covenant not to compete was not too vague or unreasonable. The defendants argued that the covenant was vague because it prohibited the defendants from competing without specifying which business activities were restricted. The court noted that the complaint sufficiently alleged that the business purchased pertained to arts and crafts, and if true, the covenant was not unreasonable. Ultimately, the court declined to determine the issue on a motion to dismiss because the contract did not specify the nature of the business.

Hamer Holding Group, Inc. v. Elmore (Hamer I), 202 Ill. App. 3d 994, 560 N.E.2d 907 (1st Dist. 1990) (also discussed at pages 54-55). The appellate court noted that the nature and scope of the business at issue is “a factual question intimately connected to the enforceability of the restraint.” The court remanded for a determination whether the restrictive covenant was related to the nature and scope of plaintiff’s business at the time the employee left.

Business Records Corp. v. Lueth, 981 F.2d 957 (7th Cir. 1992). Lueth was a key employee for a company that sold election equipment to local governments. The company was sold to BRC, which required the seller to provide a noncompetition agreement signed by Lueth. Lueth received valuable stock options in exchange for the agreement. After Lueth decided to leave and join a competitor, BRC obtained an injunction. The Seventh Circuit affirmed, finding that (1) the restrictive covenant was ancillary to the sale of the business, and (2) the scope of the covenant was reasonably limited in terms of time (two years), geography (Illinois), and prohibited activity (the same activities Lueth had performed at BRC).

Baird & Warner Residential Sales, Inc. v. Mazzone, 384 Ill. App. 3d 586, 893 N.E.2d 1010 (1st Dist. 2008). Baird & Warner was an independent real estate broker with over 30 offices in the Chicagoland area. Mazzone was the manager of Baird & Warner’s Lincoln Park office. As a condition of her employment, Mazzone entered into Compensation Agreement containing a non-solicitation clause prohibiting her from soliciting or hiring any of Baird & Warner’s employees for one year after her employment. After Mazzone resigned from her position with Baird & Warner, she joined Prudential as the manager of Prudential’s Michigan Avenue office. Baird & Warner sued, alleging violation of the restrictive covenant. The trial court dismissed the complaint, ruling that the non-solicitation clause was unreasonable and overbroad because it was not limited to the Lincoln Park office.

The appellate court reversed and reiterated the rule that “a restrictive covenant may be valid and enforceable if its terms are reasonable and necessary to protect a legitimate business interest of the employer.” The court noted that to determine if a restrictive covenant was reasonable courts generally consider the hardship caused to the employee, the effect upon the general public, the geographic and temporal scope of the restrictions, as well as the activities restricted. The court stated that the trial court erred in granting the motion to dismiss because the reasonableness of the restrictive covenant was a fact-based question that could not have been

resolved on a motion to dismiss. The court ruled that, even if the non-solicitation clause encompassed all Baird & Warner's Chicagoland offices, it was not unreasonable as a matter of law. The court pointed out that Mazzone was free to solicit thousands of other employees from other companies, and the agreement extended only one year after her employment with Baird & Warner.

b. Activity restrictions rejected.

Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc., 378 Ill. App. 3d 437, 879 N.E.2d 512 (1st Dist. 2007) (also discussed at page 42). The appellate court noted that restrictions on activities "should be narrowly tailored to protect only against activities that threaten the employer's interest." The court found that a blanket bar on all activities for competitors was overbroad and unenforceable.

Sheehy v. Sheehy, 299 Ill. App. 3d 996, 702 N.E.2d 200 (1st Dist. 1998). Plaintiff John Sheehy purchased a funeral home from his twin brother James. The purchase agreement contained a covenant not to compete within a ten-mile radius for a period of four years from the date of the agreement. Following the purchase, James Sheehy became employed by a funeral home with branch locations within the restricted area; however, his employment location was outside of the ten-mile radius. John Sheehy brought suit alleging that James had breached the covenant by taking employment with the competing company, by attending continuing education classes and meetings within the restricted area, and by acting as a funeral director at cemeteries located within the ten-mile radius.

The trial court denied John's motion for injunctive relief, and the appellate court affirmed. The court found that a restriction that would prevent James from being employed outside the restricted zone was unreasonable and a violation of public policy. The court further ruled that "any interpretation of the covenant that preclude[d] defendant from attending continuing education classes or business meetings regarding his employment as a funeral director, and further preclude[d] him from entering cemeteries within the ten-mile radius, would be an unreasonable restraint on trade as to time and territory and [was], therefore, unenforceable."

George S. May International Co. v. International Profit Associates, 256 Ill. App. 3d 779, 628 N.E.2d 647 (1st Dist. 1993) (also discussed at pages 31-32, and 70). The appellate court reiterated the rule that restrictive covenants are valid only if they are "reasonable in temporal and geographic scope and extend as far as is reasonably necessary to protect the employer's legitimate business interests." The court rejected the restrictive covenants at issue in part because they did not specify what activity was prevented and because the covenants extended to areas in which the defendants never worked.

Arpac Corp. v. Murray, 226 Ill. App. 3d 65, 589 N.E.2d 640 (1st Dist. 1992) (also discussed at page 36). The appellate court struck down as overbroad the portion of the restrictive covenant that prohibited the employee from working in any capacity in the industry nationwide.

Credit Suisse First Boston, LLC v. Vender, No. 04 C 7631, 2004 WL 2806191 (N.D. Ill. Dec. 3, 2004). Vender worked as a securities broker for Credit Suisse First Boston (CSFB).

During his employment, Vender entered into a loan agreement with CSFB. As part of the agreement, Vender agreed to give CSFB 30-days' notice before terminating employment and to refrain from engaging in "competitive activity" or "solicitation" for an additional 30 days following termination. "Competitive activity" was defined as "any affiliation with any other business entity that is engaged in the same activities as CSFB." Vender left his employment without giving 30-days' notice and immediately began working with Jefferies, one of CSFB's competitors. Vendor also sent materials to CSFB's clients, including information on how to transfer their accounts from CSFB to Jefferies.

CSFB sought a preliminary injunction against Vender to enforce the terms of the restrictive covenant. The court entered a preliminary injunction preventing Vender from soliciting the customers he serviced at CSFB and soliciting CSFB employees. The court refused to enforce the non-competition portion of the covenant. The court found the competitive activity provision prohibiting any affiliation with CSFB's competitors to be unreasonable because it prevented an employee from seeking a new job until the 60-day period expired, and because it was unnecessary to protect the CSFB's interest in preventing former employees from soliciting clients.

5. Reasonable to enforce restrictive covenant for so long as employee receives deferred compensation.

Scheffel & Co., P.C. v. Fessler, 356 Ill. App. 3d 308, 827 N.E.2d 1 (5th Dist. 2005). Fessler was a certified public accountant, shareholder, and officer of Scheffel & Co., an accounting firm. Fessler became a partner at Scheffel in 1980 and was required to sign a partnership agreement containing a restrictive covenant. Scheffel incorporated the business in 1986 and required Fessler, along with all the other partners, to sign a preincorporation agreement containing (1) an involuntary retirement clause providing that Fessler must retire upon approval of 2/3 of the shareholders; and (2) a covenant not to compete, restricting Fessler from practicing public accounting within 50 miles of any city in which the corporation has an office for a period of the greater of either five years or the entire period that he receives deferred compensation. Scheffel forced Fessler to retire.

Fessler sought a declaratory judgment that the covenant not to compete was unenforceable. The trial court held the covenant was reasonable, but reduced the temporal limitation to two years and the geographic limitation to any county where Scheffel has an office. That ruling was affirmed by the appellate court.

After continued litigation, Scheffel moved for a preliminary injunction to extend the covenant not to compete for as long as Fessler continued to receive deferred compensation. Because the deferred compensation provision was not argued or discussed in the first trial, the court considered it as a new issue. The trial court held the deferred compensation provision was reasonable and entered a preliminary injunction enforcing the covenant not to compete indefinitely. The appellate court affirmed the trial court's decision, but modified the injunction. The court concluded because this was a new issue, the trial court was not bound to follow its prior decision of the two-year time restriction, but modified the language of the order to enforce the covenant not to compete for so long as Fessler continues to receive deferred compensation.

(See pages 58-61 for further discussion regarding the blue-penciling of restrictive covenants by courts.)

C. Restrictive Covenants Must Be Supported By Adequate Consideration.

1. Continued employment for “substantial period” is adequate consideration.

Millard Maintenance Service Co. v. Bernero, 207 Ill. App. 3d 736, 566 N.E.2d 379 (1st Dist. 1990) (also discussed at pages 22-23). Millard was hired in 1980 and signed an employment agreement with a restrictive covenant. Millard signed additional agreements in 1981 and 1985. He worked until 1989. The appellate court held that his continued employment for a substantial period of time was sufficient consideration to support the restrictive covenant.

Curtis 1000, Inc. v. Suess, 24 F.3d 941 (7th Cir. 1994). Two weeks after Suess was hired by Curtis in 1969, he signed a restrictive covenant. In the ensuing years he signed three similar agreements, most recently in 1985. He left Curtis in 1993. Curtis sued to enforce the 1985 covenant. The Seventh Circuit held that under Illinois law, Suess’s eight years of employment following the 1985 covenant was sufficient consideration because it was a substantial period of continued employment.

Diamond Blade Warehouse, Inc. v. Paramount Diamond Tools, Inc., 420 F. Supp. 2d 866 (N.D. Ill. 2006) (also discussed at pages 67-68). The court held that covenants not to compete and not to solicit were supported by adequate consideration where employee Marino received \$250,000 and a promise of continued employment for twelve years in exchange for agreeing to the covenants.

2. “Peppercorn” consideration insufficient to support injunction.

Brown and Brown, Inc. v. Mudron, 379 Ill. App. 3d 724, 887 N.E.2d 437 (3d Dist. 2008). Gunderson was an employee of John Manner Insurance Agency (JMI) since 1997. Brown purchased JMI in 2002. After the acquisition, Gunderson and other employees were required to sign an employment agreement, which included restrictive covenants that prohibited the employee from soliciting or servicing any of Brown’s customers or disclosing any confidential information for two years after employment with Brown ended. Gunderson signed the agreement. Seven months after the acquisition, she resigned and joined a competing agency. Brown sued Gunderson, alleging breach of the employment agreement’s restrictive covenant and misuse of confidential information.

The trial court found that there was no credible evidence to show that Gunderson had solicited any of Brown’s customers, taken a customer list, or done anything in violation of the restrictive covenant and granted summary judgment. The appellate court affirmed the decision on independent grounds. The appellate court held that the employment agreement was not legally enforceable because seven months of continued employment was not sufficient consideration under Illinois law to support the restrictive covenant.

Mid-Town Petroleum, Inc. v. Gowan, 243 Ill. App. 3d 63, 611 N.E.2d 1221 (1st Dist. 1993). Mid-Town was a seller and distributor of petroleum products and Gowan was a former Mid-Town sales representative and sales manager. Gowan's employment contract prohibited him from soliciting business from Mid-Town's customers for an 18-month period following Gowan's termination of employment. The employment contract was the first written employment contract Gowan had with Mid-Town in fourteen years, and prior to signing the contract, Gowan was repeatedly advised that he must sign the contract or be fired. After Mid-Town agreed to promote Gowan to Sales Manager, Gowan signed. Within seven months, Mid-Town reduced Gowan's job responsibilities and Gowan resigned. After leaving Mid-Town, Gowan admittedly immediately began to solicit Mid-Town customers with whom Gowan had previously done business. The trial court denied Mid-Town's request for a preliminary injunction.

The appellate court affirmed the denial of a preliminary injunction, finding the employment contract lacked consideration because Gowan only continued to work for Mid-Town for seven months after signing the contract. The court held that Gowan would not have continued employment with Mid-Town without the offer to become sales manager. Although Mid-Town argued on appeal that any consideration is sufficient to support a contract, the court held that "while a peppercorn can be considered sufficient consideration to support a contract in a court of law, a peppercorn may be insufficient in a court of equity to support a prayer for the issuance of a preliminary injunction."

3. Unenforceable contracts of adhesion.

Midwest Television, Inc. v. Oloffson, 298 Ill. App. 3d 548, 699 N.E.2d 230 (3d Dist. 1998) (also discussed at page 4-5). The court rejected a radio personality's argument that his one-year, 100-mile covenant not to compete was an unconscionable contract of adhesion. The radio personality had successfully renegotiated his contract over several years and he had received the benefit of guaranteed employment and promised pay raises.

New Medico Associates, Inc. v. Kleinhenz, No. 90 C 6782, 1991 WL 105600 (N.D. Ill. May 31, 1991). New Medico operated a nationwide string of rehabilitation clinics specializing in neurological injuries. The defendants were a licensed nurse and a social worker who signed agreements containing a covenant that prohibited them from working for any business "similar to" New Medico's existing or proposed business for a period of two years following their termination. The defendants terminated their employment and went to work for a company that did work similar to New Medico's work. New Medico sued to enforce the restrictive covenant. The defendants moved for summary judgment, contending that the covenant was unenforceable. The defendants both submitted affidavits stating that they did not have other employment options available to them at the time that New Medico insisted that they sign the restrictive covenants. The federal district court, applying Illinois law, held that the restrictive covenant was an unenforceable contract of adhesion. The court reasoned that the restrictive covenant was a "boilerplate" provision, that the defendants were not made aware of the requirement of signing a restrictive covenant until after they had quit their previous jobs, and that the defendants had already begun their employment with New Medico when they were instructed to sign the contracts.

See also *Telxon Corp. v. Hoffman*, 720 F. Supp. 657 (N.D. Ill. 1989) (also discussed at pages 40 and 72).

4. Covenants requiring employer to fire employees who are not parties to an employment contract may not be enforceable.

Freund v. E.D. & F. Man International, Inc., 199 F.3d 382 (7th Cir. 1999). Freund, a commodities broker, entered into an employment contract with a brokerage firm. The contract contained a non-competition provision that provided that after his termination all personnel hired by him would be fired. The employees in question were not aware that they would lose their jobs under the covenant. After Freund was terminated, the firm retained several employees in violation of the agreement. Freund sued for damages. The district court held that the covenant was unenforceable. The Seventh Circuit affirmed, holding that concealment of the agreement from the employees was wanton, and “that a gratuitous interference with employment is unenforceable in Illinois.”

D. The Covenant Must Be Ancillary to a Valid Employment Agreement or Sale of Business.

1. Covenants ancillary to a valid employment agreement.

Scherer v. Rockwell International Corp., 766 F. Supp. 593 (N.D. Ill. 1991), *aff'd*, 975 F.2d 356 (7th Cir. 1992). Scherer worked for an off-set printing business that was acquired by Rockwell. Scherer entered into a written employment contract with Rockwell that contained a restrictive covenant prohibiting him from soliciting orders from or doing business with any Rockwell customers for three years after the termination of his employment. After Rockwell terminated Scherer’s employment for sexual harassment, Scherer filed a declaratory judgment action seeking to have a restrictive covenant in his employment contract declared unenforceable. Scherer argued that the restrictive covenant was unenforceable because Rockwell had breached the employment agreement and because it was overbroad. The court first held that Rockwell had not breached the employment contract. The court then determined that the restrictive covenant was ancillary to a valid contract and supported by adequate consideration. The court held Scherer had waived his challenges to the overbreadth of the restrictive covenant and to Rockwell’s protectible business interest. Accordingly, the court held the restrictive covenant was enforceable.

2. The enforceability of covenants with at-will employees.

There is conflicting authority in Illinois as to the enforceability of restrictive covenants arising from an at-will employment relationship. In *Creative Entertainment*, discussed below, the appellate court (First District) found that a restrictive covenant was invalid because the employee never signed an employment contract, thus was an at-will employee. Since 1994, Illinois state and federal cases have upheld restrictive covenants that are ancillary to at-will employment. These cases found that a valid employment relationship is sufficient to validate a restrictive covenant.

Creative Entertainment Inc. v. Lorenz, 265 Ill. App. 3d 343, 638 N.E.2d 217 (1st Dist. 1994). Eight months after Lorenz began working for Creative Entertainment, he signed a letter containing a restrictive covenant. Lorenz had no separate employment contract with Creative Entertainment. The trial court dismissed a count of Creative Entertainment's complaint in which it sought to enjoin Lorenz from contacting or soliciting Creative Entertainment's customers for a period of two years following termination of his employment.

The appellate court affirmed, holding that Creative Entertainment did not prove that the covenant was ancillary to a valid employment contract. The letter Lorenz had signed did not set forth a length of time for his employment, there were no negotiations of the terms of employment, and the employment terms were not in writing. In fact, Creative Entertainment conceded that Lorenz's employment was at will. Thus, the restrictive covenant was a "naked agreement" and was not ancillary to an employment contract. "The sole purpose of the agreement was to restrain trade." The court rejected Creative Entertainment's argument that the restrictive covenant was ancillary to an oral employment agreement. **Note that most courts have since rejected the holding in *Creative Entertainment* and have ruled that a restrictive covenant may be ancillary to an at-will employment relationship.**

Abel v. Fox, 274 Ill. App. 3d 811, 654 N.E.2d 591 (4th Dist. 1995). Fox worked for a house cleaning service for several years under an oral at-will employment agreement. She signed a covenant not to compete some time after her employment began. The trial court dismissed Abel's complaint seeking to enforce the covenant, relying upon *Creative Entertainment* and holding that the covenant was *per se* unenforceable because it was not ancillary to an enforceable employment contract.

The appellate court reversed, disagreeing with the holding in *Creative Entertainment*. The court reviewed the historical origin of the rule cited in *Creative Entertainment*, and determined that to be enforceable, a covenant not to compete need only be ancillary to a transaction or a valid relationship. Because an oral at-will employment relationship is a valid relationship, a covenant not to compete in the context of such a relationship is not *per se* unenforceable.

Metropolitan Life Insurance Co. v. Kaufman, 275 Ill. App. 3d 1126, 692 N.E.2d 872 (1st Dist. 1995) (table). In this case the court followed *Abel* and declined to follow *Creative Entertainment*. The court reversed an order dismissing a claim to enforce a restrictive covenant agreement that was ancillary to an oral, at-will employment agreement.

Woodfield Group, Inc. v. DeLisle, 295 Ill. App. 3d 935, 693 N.E.2d 464 (1st Dist. 1998). Woodfield Group was in the business of computer hardware and software sales. DeLisle, a sales manager who had worked for the company for several years, executed a restrictive covenant that prohibited her from soliciting or accepting sales of any hardware or software from customers or active prospects of Woodfield for a period of 18 months following termination of her employment. The covenant also prohibited her for the same period from soliciting or influencing any person who had a business relationship with Woodfield to discontinue or reduce that relationship, and from disclosing any confidential information for the same period.

After DeLisle went to work for a company engaged in the same business and market area, Woodfield filed suit claiming that DeLisle had breached the restrictive covenant by soliciting and accepting sales from Woodfield customers, and by disclosing confidential information to her new employer. The trial court dismissed Woodfield's complaint. Relying upon *Creative Entertainment*, the court held that there was no employment contract to which the restrictive covenant could be ancillary.

The appellate court reversed, rejecting the holding in *Creative Entertainment*, and adopting the reasoning of the Fourth District in *Abel v. Fox*, and the Second District in *Lawrence & Allen, Inc. v. Cambridge* (also discussed at page 59). The court held that a restrictive covenant may be ancillary to an employment relationship even though there is no written employment agreement and the employment is at will.

Applied Micro, Inc. v. SJI Fulfillment, Inc., 941 F. Supp. 750 (N.D. Ill. 1996). Schmitt worked for Applied Micro as a computer systems program analyst subject to a non-solicitation agreement. After Schmitt went to work for a competitor, Applied Micro sought to enforce the non-solicitation agreement Schmitt signed during her employment. Relying on *Creative Entertainment*, Schmitt argued that the non-solicitation agreement was unenforceable because it was not ancillary to a valid employment agreement because she was not furnished a contract setting forth the terms and conditions of her employment, including its length and her compensation. The former employer argued that *Creative Entertainment* was called into serious question by the Fourth District in *Abel v. Fox*. Faced with a split of authority, the court predicted that the Illinois Supreme Court would agree with the conclusion in *Abel v. Fox* that employment relationships, no matter how configured, may be supplemented by covenants not to compete.

Systemax, Inc. v. Schoff, 972 F. Supp. 439 (N.D. Ill. 1997) (also discussed at pages 40 and 90). Systemax sued for breach of non-solicitation covenants contained in an "Employee Agreement Regarding Proprietary and Confidential Information, Patents and Trade Secrets." Schoff had been an at-will employee of Systemax, and signed the Agreement at Systemax's insistence over six months after he was hired. Schoff moved to dismiss Systemax's claims to enforce the Agreement on the basis that there was no enforceable employment contract between Systemax and Schoff, relying on the Illinois appellate court's decision in *Creative Entertainment*. The federal district court denied the motion to dismiss, following the Seventh Circuit's decision in *Curtis 1000, Inc. v. Suess*, 24 F.3d 941 (7th Cir. 1994) (also discussed at page 48), and reasoning that the Illinois Supreme Court likely would reject the First District's decision in *Creative Entertainment* and likely would adopt the Fourth District's analysis in *Abel v. Fox*. In *dicta*, the court noted that, in a case that arose within Cook County, a federal district court would be required to follow the First Circuit's decision in *Creative Entertainment*.

Diamond Blade Warehouse, Inc. v. Paramount Diamond Tools, Inc., 420 F. Supp. 2d 866 (N.D. Ill. 2006) (also discussed at pages 49 and 67-68). Diamond Blade sued its sales representative who went to work for its competitor in the diamond tip sawblade business. The court found that the employment agreement provided that the restrictive covenants were independent of all other agreements of the parties, thus meeting the requirement that the covenants be ancillary to a valid contract and subordinate to the contract's main purpose.

3. Covenants in independent contractor agreements.

Eichmann v. National Hospital & Health Care Services, Inc., 308 Ill. App. 3d 337, 719 N.E.2d 1141 (1st Dist. 1999) (also discussed at page 38). In *Eichmann*, the plaintiff worked as an independent contractor for the defendant. The parties executed a written agreement containing two restrictive covenants. The independent contractor sought a declaration that the restrictive covenants were unenforceable. The employer argued that the trial court erred in applying the standards applicable to restrictive covenants in employment contracts, rather than the standards applied to cases involving sales of businesses, partnerships and other business agreements. The appellate court disagreed. The court held that while the parties were not in an employer-employee relationship, no business was sold and no transfer of goodwill was involved, the agreement was more analogous to an employment contract than to a sale of a business. The court further ruled that Illinois law does not hold restrictive covenants contained in an independent contractor agreement to a less strict standard than those in employment contracts.

4. Restrictive covenant ancillary to the sale of a business.

Courts will apply a lesser standard of “reasonableness” if an employee restrictive covenant is found to be ancillary to the sale of a business.

Advent Electronics, Inc. v. Buckman, 112 F.3d 267 (7th Cir. 1997). Advent Electronics sold electronic components and services through distributors in nine states. It purchased Buckman’s company, which manufactured and distributed electronic components. The Asset Purchase Agreement contained a two-year covenant not to compete. Advent kept Buckman on as a general manager, but later terminated his employment after his branch failed to meet sales quotas. Buckman started competing and Advent obtained a preliminary injunction. The district court entered the injunction proposed by the magistrate judge, who tailored the injunction to conform to the terms of the covenant not to compete. The injunction (and the non-compete) prohibited Buckman from manufacturing electronics components, even though Advent admitted it was not a manufacturer. The Seventh Circuit vacated the injunction and remanded, directing the district court to determine whether Advent had a legitimate business interest that would be protected by the injunction.

Loewen Group International, Inc. v. Haberichter, 912 F. Supp. 388 (N.D. Ill. 1996). Loewen purchased the funeral home business of Donovan and Schaer Funeral Homes (D & S) (also discussed at page 45). At the time of the sale, Haberichter was the assistant manager at D & S. Pursuant to the purchase agreement, Loewen was obligated to offer continuing employment to Haberichter provided that he entered into a non-competition agreement. On the same day Loewen and D & S closed the sale, Haberichter signed an employment agreement with Loewen that contained a covenant not to compete. Soon after, Haberichter began making plans to set up a competing funeral home. Loewen sued for breach of the non-competition covenant. The district court granted Haberichter’s motion for summary judgment, ruling that Loewen’s claims were preempted by federal labor law. The Seventh Circuit reversed and remanded. Loewen then moved for a preliminary injunction. The trial court discussed different standards that govern the enforceability of a restrictive covenant, depending on whether the covenant is ancillary to the sale of business or ancillary to an employment agreement. To determine whether a covenant is ancillary to the sale of a business, the court considered “facts bearing on the intent of the parties

to protect the integrity of the sale,” such as (a) whether the covenant was a condition precedent to the sale, (b) whether the covenant was incorporated into the sale agreement, and (c) when the parties signed the sales agreement compared to when they signed the restrictive covenant. The court ruled that Haberichter’s continued employment was not a condition precedent to the sale of D & S to Loewen. Although Loewen was obligated to offer Haberichter employment, the purchase agreement explicitly relieved Loewen of this obligation if Haberichter did not wish to accept. The court also found that the covenant was not incorporated into the purchase agreement. Finally, the court found that although the deal to purchase D & S was closed at about the same time Haberichter signed the employment agreement, the actual purchase agreement was signed two months before the closing date. Therefore, the court concluded that the employment agreement was not signed to protect the integrity of the sale of D & S to Loewen.

a. Employment agreement that was a precondition to closing held ancillary to sale of a business.

Hamer Holding Group, Inc. v. Elmore (Hamer I), 202 Ill. App. 3d 994, 560 N.E.2d 907 (1st Dist. 1990). Elmore was the sole owner and Chief Executive Officer of AMCO Realty, a company which had been sold to a division of Hamer. As part of the sale of AMCO’s business to Hamer, Elmore had entered into an employment agreement containing a covenant not to compete. The covenant prohibited Elmore from engaging in a competing business within a 75-mile radius of downtown Chicago during his employment, and from consulting with or providing services to Hamer’s clients, or from competing with Hamer, for a period of three years following his termination. The agreement also provided that Elmore would not disclose or use any confidential information obtained during his employment. Elmore terminated his employment and established a competing property management firm.

The trial court denied Hamer’s motion for a preliminary injunction to enforce a restrictive covenant in Elmore’s employment contract. Hamer argued on appeal that the trial court applied an improperly strict standard in determining whether the restrictive covenant was enforceable. Hamer argued that the court should have treated the restrictive covenant as ancillary to an agreement for sale of a business and applied the more lenient standard of enforceability of such covenants.

The appellate court reversed. The court first held that because the trial court had applied a “preponderance of the evidence” standard in ruling on Hamer’s request for injunctive relief, the order denying the injunction was in effect a decision on the merits. The court then noted that Illinois courts consider the intent of the parties to determine whether a restrictive covenant is ancillary to the sale of a business. The court found that Elmore’s restrictive covenant was ancillary to the sale of his business, because its execution was a precondition to the closing of the sale, and because the evidence established that Hamer considered Elmore’s services to be an indispensable asset. Accordingly, the trial court should have considered only whether the restriction was “reasonable as to time, geographical area and scope of prohibited business activity.” The court stated, “[t]he inquiry into reasonableness is composed of three parts: the restriction must not be greater than necessary to protect the buyer, oppressive to the seller or injurious to the general public.” The court remanded for a determination of the scope of activity which would be prohibited under the restrictive covenant and whether that restriction was reasonable, and affirmed the trial court’s finding that the restrictive covenant was reasonable

with respect to its duration and geographical scope. (For summary of the opinion after remand in this case, see page 57.)

b. Covenant held ancillary to contemporaneous sale of business.

Health Professionals, Ltd. v. Johnson, 339 Ill. App. 3d 1021, 791 N.E.2d 1179 (3d Dist. 2003) (also discussed at page 84). The parties executed a noncompetition, nondisclosure, and nonsolicitation agreement as part of the purchase of defendant's outstanding shares of a previously jointly owned business. The defendants attempted to violate the restrictive covenant, and the trial court granted a preliminary injunction. On appeal, the court voided part of the noncompetition agreement that violated an Illinois law, prohibiting payment for a refusal to bid on a State contract.

Decker, Berta & Co., Ltd. v. Berta, 225 Ill. App. 3d 24, 587 N.E.2d 72 (4th Dist. 1992). Decker Berta, an accounting firm, brought this action against its former partner, Berta. Contemporaneously with the sale of his interest in the firm to his partner's father, Berta entered into an employment agreement that contained a covenant not to compete. The covenant prohibited Berta from engaging in the accounting business within a 35-mile radius of the firm for three years after the termination of his employment. The contract also acknowledged that the firm's customer list was a "valuable, special, and unique asset" of the firm's business and contained a covenant against use or disclosure of the customer list. The trial court issued a preliminary injunction against the Berta, reasoning that the covenant was reasonable and ancillary to a sale of a business. The appellate court agreed that the restrictive covenant was ancillary to the sale of the business. The employment agreement acknowledged the contemporaneous sale of the business. Pursuant to the sale, Berta was relieved of personal liability for the firm's considerable debt. The appellate court also upheld the trial court's finding that the restrictive covenant was reasonable as to geographic scope and duration.

c. Activity restraints preferable even in sale of business.

Howard Johnson & Co. v. Feinstein, 241 Ill. App. 3d 828, 609 N.E.2d 930 (1st Dist. 1993). SWA was an actuarial firm in which the defendants were shareholders. In connection with the sale of SWA to Howard Johnson, defendants received cash and stock in Howard Johnson and were employed by Howard Johnson. Before the merger, the shareholders had signed non-competition agreements. The agreements prohibited them for a period of three years after termination of their employment from soliciting or accepting business from former Howard Johnson clients or active client prospects. These restrictions did not apply to services previously not provided by Howard Johnson. The agreements further provided that if the solicitation/acceptance provisions were violated, the prohibitions would extend for an additional four years from the date of the violation. The former employees claimed the non-compete restrictions were superseded by the merger agreement and related shareholder agreements, which covered the same subject matter. The defendants also argued the restrictions were unreasonably broad. The trial court entered a preliminary injunction against the former employees. The trial court held that the non-competition agreements had not been superseded by the merger agreement and shareholders' agreements and that the non-competition agreements were ancillary to the sale of a business and reasonable in their terms.

The appellate court affirmed, holding the non-competition and shareholders' agreements did not cover the same subject matter. The court also held that the non-competition agreements were not unreasonable because they contained "activity restraints," which did not purport to prohibit all competition, noting "[a]ctivity restraints are subject to a less stringent test of reasonableness than that which is applied to restrictions with a geographical limitation." The court also rejected the employees' argument that the non-competition agreements were unreasonably broad because they prohibited not only solicitation but acceptance of business from former Howard Johnson clients. Noting that such restrictions are upheld even in the case of employment contracts, the court held "the rationales for upholding such restrictions where they are ancillary to the sale of a business were even greater. Without the protection of such a restriction, the buyer would face the possibility of losing to the seller the main asset of the sale, *i.e.*, the seller's client base." The court then held that the duration of the non-competition provisions was reasonable because the parties had negotiated those terms with equal bargaining power, and that enforcement of the provisions would not injure the public because there were several other firms that performed the same type of actuarial services as Howard Johnson.

d. No protectible interest in 10-year-old goodwill.

Hamer Holding Group, Inc. v. Elmore (Hamer II), 244 Ill. App. 3d 1069, 613 N.E.2d 1190 (1st Dist. 1993). On appeal after remand pursuant to *Hamer Holding Group, Inc. v. Elmore (Hamer I)*, 202 Ill. App. 3d 994, 560 N.E.2d 907 (1st Dist. 1990) (also discussed at page 55), the appellate court upheld the denial of the employer's request for a preliminary injunction. By the time of this appeal, ten years had passed since Hamer purchased Elmore's business and the three-year no-compete period had long since lapsed. The court found that to enjoin Elmore's activities well after the three-year term had expired would only be "vindictive," and Elmore would suffer harm if an injunction were issued because he had invested sums in a business in reliance upon the trial court's initial denial of an injunction.

5. Covenants ancillary to the formation of a new business or joint venture.

Central Water Works Supply, Inc. v. Fisher, 240 Ill. App. 3d 952, 608 N.E.2d 618 (4th Dist. 1993). Four partners formed Central Water Works, a wholesale distributor of water and sewer products, and agreed to mutual covenants not to compete. Less than a year after entering into the agreement, one of the shareholders, Fisher, ended his employment with Central Water Works and returned to work for a competitor, Water Products. Central Water Works sued Fisher to enforce the covenant not to compete. The trial court granted Central Water Works a preliminary injunction.

The appellate court affirmed the injunction. The appellate court first considered whether the covenant not to compete was more akin to a restrictive covenant in an employment contract or in a contract for the sale of a business. The court noted that courts apply a stricter standard of reasonableness to restrictive covenants in employment contracts than they do to restrictive covenants ancillary to the sale of a business. The court explained that "[t]he basis for distinction rests upon the fact that a purchaser in the sale of a business context holds more bargaining power than an ordinary employee in an employment context." The court then determined that the

restrictive covenant at issue was more like a covenant ancillary to the sale of a business. The court reasoned that Fisher essentially purchased a part of the business, as he was an initial shareholder and capital contributor to the formation of Central Water Works. Further, the three other shareholders entered into the same agreement with equal bargaining power.

The court then turned to the basis for Fisher's challenge to the trial court's entry of a preliminary injunction; namely, that the geographical scope of the restrictive covenant was overbroad. The restrictive covenant prohibited Fisher from conducting business in parts of Illinois and Indiana, including Bloomington, where Fisher's current employer had a branch office. The court noted that Water Products primarily serviced Cook and DuPage counties, and Fisher was not prevented from working in those counties under the trial court's injunction. Given that Fisher was able to work in two counties in which his employer conducted business, the appellate court held that the geographical limits were reasonable.

Hess Newmark Owens Wolf, Inc. v. Owens, 415 F.3d 630 (7th Cir. 2005) (also discussed at page 43). The Seventh Circuit explained why courts, under Illinois law, are more likely to enforce restrictive covenants ancillary to the formation of a business. The court explained that parties entering into such covenants are frequently entrepreneurs who stand to gain more than simply a salary of an ordinary employee. The court noted that entrepreneurs often enter into such agreements for the opportunity to reap the benefits of a newly created business and to secure the loyalty of co-entrepreneurs in the business.

In *Hess*, the entrepreneurs willingly entered into the agreements and bound themselves through the covenant. By doing so, the entrepreneurs represented that the covenant was reasonable. The court noted that it was in the public interest to accept such representations and allow entrepreneurs to enter into such *ex ante* agreements to promote the formation and success of new businesses. Finding no reason to refuse to acknowledge the representation that the covenant was reasonable, the court reversed the trial court's denial of plaintiff's request for a preliminary injunction to enforce the restrictive covenant.

III. CONSTRUCTION OF RESTRICTIVE COVENANTS.

Illinois courts will sometimes "blue-pencil" restrictive covenants if unenforceable provisions are not identified as "essential."

A. "Blue-penciling" Rejected.

Arcor, Inc. v. Haas, 363 Ill. App. 3d 396, 842 N.E.2d 265 (1st Dist. 2005) (also discussed at page 32, 68). Arcor manufactured customized metal tubes. Haas worked for Arcor from 1983 until he resigned in November 2004. During his employment, Haas entered into two non-compete agreements, one contained in his 1987 employment contract and one contained in a 1998 shareholder's agreement. After leaving Arcor, Haas, along with one of Arcor's former customers and one of Arcor's former suppliers, formed Jadtis, a company in direct competition with Arcor. Jadtis sold metal tubes to eleven of Arcor's former customers. Arcor moved for a preliminary injunction, claiming Haas misappropriated trade secrets and breached the two

noncompetition covenants. The trial court ruled that the two noncompetition covenants to be overbroad and unenforceable because there was no geographic restriction and the provisions constituted a “blanket prohibition on competition.” The trial court separately held that certain of Arcor’s customer information was a protectible trade secret and issued a preliminary injunction prohibiting Haas from using or disclosing customer information he gained while employed at Arcor.

The appellate court reversed the lower court’s grant of a preliminary injunction because Arcor failed to present sufficient evidence to establish that its customer information could be protected as a trade secret. In addition, the appellate court refused to blue-pencil the overly broad restrictive covenants because Arcor did not ask the trial court to modify the provisions, thus waiving its right to raise the issue on appeal. The court noted that even if Arcor had raised the blue-penciling issue with the lower court, it would be improper for a court to modify the agreement because it would require the court to write a new agreement.

Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc., 292 Ill. App. 3d 131, 685 N.E.2d 434 (2d Dist. 1997) (also discussed at page 14). Lawrence & Allen operated an employee outplacement agency with at-will employees. One of those employees left to join Cambridge, a competitor. Lawrence & Allen sued Cambridge for tortious interference. The trial court entered summary judgment for Cambridge, finding that there was no enforceable contract.

The appellate court affirmed. Among other things, the court then held that the scope of the covenant, which prohibited the employee from soliciting any client of the plaintiff firm anywhere in the United States, was unreasonable. The court noted that although a covenant not to solicit need not have a geographic limit, this covenant was not limited to clients with whom the employee had contact, did not distinguish among past, current, or prospective clients of the firm, and there was no evidence that the employee’s clients were located throughout the United States. The court also held that the non-competition clause in the covenant was unreasonably overbroad because it covered the entire United States. The court declined to blue-pencil the covenant to limit the scope of the non-solicitation or non-competition clauses.

Hill v. Names & Addresses, Inc., 212 Ill. App. 3d 1065, 571 N.E.2d 1085 (1st Dist. 1991). Names & Addresses was in the business of renting mailing lists and providing them to direct mail marketing businesses. Hill brought an action to declare a restrictive covenant in her employment agreement with her former employer unenforceable. Names & Addresses counterclaimed and sought an injunction preventing Hill from servicing clients that she had improperly obtained from Names & Addresses. The trial court held the restrictive covenant unenforceable, but held that Hill had breached her duty of loyalty to Names & Addresses, entitling Names & Addresses to recover damages. Both sides appealed.

On appeal, Names & Addresses sought to enforce only a provision of Hill’s restrictive covenant which prohibited Hill from competing with Names & Addresses or soliciting business from any of Names & Addresses’ customers for a two-year period following termination of her employment. Names & Addresses argued that because the covenant contained a severability clause, the fact that other portions of the covenant were held unenforceable should not affect this provision. The appellate court rejected this argument because each of the clauses of the restrictive covenant recited that it was “essential” to the agreement. The court gave full effect to

that language over the more general severability clause, and affirmed the trial court's ruling that the restrictive covenant was unenforceable.

Pactiv Corp., et al. v. Menasha Corp., 261 F. Supp. 2d 1009, 1014-15 (N.D. Ill. 2003) (also discussed at page 37). Menasha considered buying Pactiv, and during its due diligence review it agreed not to solicit Pactiv's management-level employees for three years. Because the no-solicit provision in the contract covered employees who did not possess confidential information, the court found the provision, as written, to be overbroad and unenforceable. Pactiv asked the court to modify the no-solicit provision to ban the hiring of management-level employees from Glacier-Cor, the subsidiary of Pactiv that Menasha considered purchasing, and Hexacomb, a subsidiary of Pactiv from which a management-level employee was hired by Menasha. Pactiv argued that Glacier-Cor and Hexacomb were so intertwined that it was reasonably foreseeable that information about Glacier-Cor would contain information about Hexacomb. The court declined to blue-pencil the provision because the requested modification would have required the court to make a factual determination about the relationship between Glacier-Cor and Hexacomb, and the court believed it had insufficient information on which to make the determination.

See also *Eichmann v. National Hospital & Health Care Services, Inc.*, 308 Ill. App. 3d 337, 719 N.E.2d 1141 (1st Dist. 1999) (also discussed at pages 22, 38, and 54); *Stunfence, Inc. v. Gallagher Security (USA), Inc.*, 01 C 9627, 2002 WL 1838128 (N.D. Ill. Aug. 12, 2002); *Roberge v. Qualitek International, Inc.*, 01 C 5509, 2002 WL 109360 (N.D. Ill. Jan. 28, 2002); *Nobel Biocare USA, Inc. v. Lynch*, No. 99 C 5774, 1999 WL 958501 (N.D. Ill. Sept. 15, 1999) (also discussed at pages 39, 72); *Systemax, Inc. v. Schoff*, No. 97 C 5014, 1997 WL 467545 (N.D. Ill. Aug. 13, 1997) (also discussed at page 90); *Telxon Corp. v. Hoffman*, 720 F. Supp. 657 (N.D. Ill. 1989) (also discussed at pages 40, 72).

B. "Blue-penciling" Upheld.

Abbott-Interfast Corp. v. Harkabus, 250 Ill. App. 3d 13, 619 N.E.2d 1337 (2d Dist. 1993) (also discussed at pages 41, 88). Abbott manufactured fasteners, and Harkabus was a former Abbott salesman. In 1977, the parties entered into an employment agreement with an agreement by Harkabus that for a year after his termination, he would not solicit for one year or canvas, divert, take away, accept orders or interfere with any of Abbott's business customers' trade or patronage, wherever the customers were located. The agreement also contained a standard non-disclosure provision. The contract further provided that invalid, illegal or unenforceable provisions of the contract were severable. The trial court entered judgment on the pleadings, holding the restrictive covenant unenforceable because it had no geographic limitation.

The appellate court reversed, holding that only in extreme cases should a court find a restrictive covenant invalid on its face. The absence of a geographic limitation was not necessarily fatal where the purpose of the restrictive covenant was to protect the employer from losing customers to a former employee who, by virtue of his prior relationship, gained special knowledge and familiarity with the customer's requirements. The court ruled that a trial court may modify a contract so that it comports with the law or sever unenforceable provisions, particularly when the contract contains a severability clause, unless the enforcement of one

provision would render the entire contract void. The court recognized that this can occur where the agreement contains otherwise unenforceable provisions labeled as “essential.”

YCA, LLC v. Berry, No. 03 C 3116, 2004 WL 1093385 (N.D. Ill. May 7, 2004) (also discussed at pages 25, 32, and 37). YCA provided computer training classes and software to corporations and employed Berry as one of its consultants. The court found the non-recruitment provision in Berry’s employment contract to be broader than necessary to serve YCA’s legitimate business interest of protecting its confidential information. The non-recruitment provision barred Berry from recruiting any other YCA associate for any business, regardless of whether the associate possessed confidential information or whether the business was a competitor of YCA. The contract also provided that “in the event a court should determine not to enforce a covenant as written due to overbreadth, you specifically agree that said covenant shall be enforced to the extent reasonable, whether said revisions be in time, territory, or scope of prohibited activities.” The court ruled that “this clause both empowers and requires the Court to attempt reform of Berry’s overly broad covenant of non-recruitment.” The court reformed the non-recruitment clause to limit its scope to prevent Berry from recruiting for YCA’s competitors those YCA associates who potentially possessed confidential information. As rewritten, the court determined that the non-recruitment clause served YCA’s interest of shielding confidential information from disclosure to competitors.

Joy v. Hay Group, Inc., No. 02 C 4989, 2003 WL 22118930 (N.D. Ill. Sept. 11, 2003). Joy was employed by Hay Group, Inc. Joy’s employment agreement required her to purchase shares of the Bermuda entity HGB. As part of the purchase of shares, Joy executed a shareholders agreement that contained a covenant not to compete that prohibited Joy from investing in, or working for, any company that competed with HGB for two years. Joy sought a preliminary injunction to prevent HGB from interfering with her employment in the insurance industry, as well as a declaratory judgment that such employment would not violate the non-competition agreement. The magistrate judge denied Joy’s motions without prejudice. The district court adopted the magistrate judge’s recommendation.

The court discussed non-competition covenants under both Bermuda and Illinois law. As a preliminary matter, the court found that the covenant not to compete in this case was more analogous to the employer-employee context rather than the sale of business context. The court then concluded that HGB, a holding company, had an interest in preventing its shareholders from competing against it. The court did not address whether this was a recognized protectible interest under Illinois or Bermuda law. Rather, the court found that the plaintiff employee had not met her burden of showing that there was no protectible interest. The court next concluded that the two-year time period for the covenant was reasonable but that the unlimited geographical area and scope of restricted activity was overly broad under Illinois law and probably under Bermuda law. Finally, the court discussed the availability of the “blue pencil doctrine” that allows a court to modify unreasonable terms. The court concluded that under Illinois law it could rewrite the terms without rewriting the entire agreement but was unsure whether Bermuda law permitted such modifications. The court lacked sufficient evidence to decide the choice of law issue, and therefore denied the plaintiff’s motion for preliminary injunction without prejudice.

See also *Health Professionals, Ltd. v. Johnson*, 339 Ill. App. 3d 1021, 791 N.E.2d 1179 (3d Dist. 2003) (also discussed at pages 56, 84); *Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 589 N.E.2d 640 (1st Dist. 1992) (also discussed at pages 9, 36, 47, and 64).

C. Restrictive Covenants Construed Against the Drafter.

Bishop v. Lakeland Animal Hospital, P.C., 268 Ill. App. 3d 114, 644 N.E.2d 33 (2d Dist. 1994) (also discussed at pages 84 and 86). Bishop was a veterinarian who was employed by Lakeland Animal Hospital. Lakeland terminated Bishop's employment, and Bishop brought suit, asking the court to declare that the non-competition clause in her employment contract was unenforceable because her employment contract required that she be terminated only for cause, and Lakeland had no cause to terminate her. The court dismissed the complaint, holding that the employment contract did not require cause and that the restrictive covenant was enforceable.

The appellate court affirmed the trial court's ruling that the employment contract was not for a definite period, but reversed the trial court's ruling that the restrictive covenant was enforceable. The court determined the contract was ambiguous because it permitted termination "for any cause." This phrase could be interpreted, as Bishop argued, as requiring "cause" for termination. Because Illinois law disfavors restraints on trade, non-competition clauses must be closely scrutinized and this ambiguous language in Bishop's contract must be construed against the drafter, Lakeland. The court also accepted Bishop's argument that Lakeland could not enforce the restrictive covenant because "the implied promise of good faith inherent in every contract precludes the enforcement of a non-competition clause when the employee is dismissed without cause."

IV. INJUNCTIONS

Most of the cases discussed in this outline involve requests for injunctive relief. Below, Section A collects cases where injunctions have been granted or where the denial was reversed; Section B collects cases where the request for an injunction was denied; Section C addresses injunctions in cases involving arbitration clauses; and Section D addresses bringing a contempt action to enforce an injunction.

A. Injunction Granted or Affirmed (or Denial Reversed).

1. Illinois State Cases.

Stenstrom Petroleum Services Group, Inc. v. Mesch, 375 Ill. App. 3d 1077, 874 N.E.2d 959 (2d Dist. 2007). Mesch was an estimator and project manager for Stenstrom, a company that installs and repairs equipment in the petroleum industry. Mesch signed a training agreement containing a confidentiality and non-compete restriction that prohibited Mesch from working in any capacity in the excavation or equipment repair field in the counties of Winnebago and Boone for a period of six months from his date of termination. Mesch resigned and immediately started working as a project manager and estimator for New PPI, a Stenstrom competitor. Mesch

conceded that he used data from Stenstrom to prepare bids at New PPI. The trial court entered a preliminary injunction against Mesch, enforcing the covenant not to compete for six months after Mesch's termination.

On appeal, Stenstrom argued that the six month no-compete period should commence on the date Mesch stopped breaching the restrictive covenant rather than from the date he left Stenstrom. Stenstrom relied on *Prairie Eye Center*, 329 Ill. App. 3d 293, 768 N.E.2d 414 (4th Dist. 2002) (also discussed at pages 11, 64), where the court extended the defendant's covenant not to compete for two years after finding that the defendant repeatedly violated the covenant. The court disagreed with Stenstrom because, unlike the circumstances in *Prairie Eye Center*, the covenant not to compete at issue did not specifically provide that the noncompetition period would extend upon breach.

Mesch cross-appealed, arguing that the trial court erred in entering the preliminary injunction. Stenstrom moved to dismiss Mesch's cross-appeal as moot. The court held that the issue of the restrictive covenant's enforceability was moot because the noncompetition period had expired. Mesch's cross-appeal was dismissed.

Lifetec, Inc. v. Edwards, 377 Ill. App. 3d 260, 880 N.E.2d 188 (4th Dist. 2007) (also discussed at page 22). The appellate court affirmed the preliminary injunction, holding that Edwards' knowledge of the information relied upon for calculating quotes given to customers constituted confidential information, and Edwards' awareness of open quotes when he left Lifetec made it possible for him to know whether Lifetec could adjust its bid downward to undercut his new employer's bid.

Mohanty v. St. John Heart Clinic, 225 Ill. 2d 52, 866 N.E.2d 85 (2006) (also discussed at pages 45, 78). The appellate court reversed the denial of a preliminary injunction, reasoning that the activity provision prohibiting the doctors from the entire practice of medicine was reasonable even though St. John's only specialized in cardiology, because all specialties are "inextricably intertwined" with the practice of medicine. The court found the restricted territories (a five-mile and two-mile radius of St. John's offices, respectively) reasonable because they only cover a "narrowly circumscribed area of [the] large metropolitan area" of Chicago.

Appelbaum v. Appelbaum, 355 Ill. App. 3d 926, 823 N.E.2d 1074 (1st Dist. 2005) (also discussed at pages 18, 34). The appellate court upheld the part of the preliminary injunction that prohibited both J.W. (company Penguin's former employee) and William (partner still at Penguin) from contacting those customers for whom J.W. had been the primary or secondary contact while employed by Penguin. The appellate court vacated all other provisions of the preliminary injunction because Penguin failed to show it had a protectible interest in its customer information because customer preferences and credit information were not confidential information.

Hanchett Paper Co. v. Melchiorre, 341 Ill. App. 3d 345, 792 N.E.2d 395 (2d Dist. 2003) (also discussed at page 4). The appellate court affirmed the preliminary injunction because Hanchett had near-permanent relationships with its packaging products customers where two-thirds of Hanchett's top 300 customers had been with the company for more than five years.

Prairie Eye Center, Ltd. v. Butler, 329 Ill. App. 3d 293, 768 N.E.2d 414 (4th Dist. 2002) (also discussed at pages 11 and 63). The appellate court affirmed the part of the preliminary injunction that was granted by the trial court, but reversed the trial court's denial of an injunction as to patients who had a prior relationship with medical professional Butler. The appellate court held that Prairie had a protectible interest in Butler's preexisting patients and the covenant not to compete was enforceable as to them.

Dam, Snell & Taveirne, Ltd. v. Verchota, 324 Ill. App. 3d 146, 754 N.E.2d 464 (2d Dist. 2001) (also discussed at page 5). The appellate court affirmed a preliminary injunction enforcing the restrictive covenant as to all of DST's customers, including those Verchota brought with her to DST.

Midwest Television, Inc. v. Oloffson, 298 Ill. App. 3d 548, 699 N.E.2d 230 (3d Dist. 1998) (also discussed at page 5). The appellate court affirmed a preliminary injunction against Oloffson enforcing the covenant not to compete, finding that plaintiff radio station had a near-permanent relationship with its listeners and advertisers.

Howard Johnson & Co. v. Feinstein, 241 Ill. App. 3d 828, 609 N.E.2d 930 (1st Dist. 1993) (also discussed at page 56). The appellate court affirmed a preliminary injunction enforcing the non-competition agreements, noting that the terms of the agreements were not unreasonable where the activity restraints did not purport to prohibit all competition.

Lyle R. Jager Agency, Inc. v. Steward, 253 Ill. App. 3d 631, 625 N.E.2d 397 (3d Dist. 1993) (also discussed at page 5). The appellate court affirmed an injunction barring Steward from soliciting all of plaintiff insurance company's customers because the company had developed a near permanent relationship with its customers where 75% of plaintiff's customers had obtained their insurance from Jager for nine years.

Central Water Works Supply, Inc. v. Fisher, 240 Ill. App. 3d 952, 608 N.E.2d 618 (4th Dist. 1993) (also discussed at page 57). The appellate court affirmed the preliminary injunction, finding the covenant at issue more like a covenant ancillary to the sale of a business. The court also found the geographical limits covering parts of Illinois and Indiana reasonable because Fisher was able to work in two counties in Illinois where his new employer conducted business that were not within the covenant's geographic scope.

Arpac Corp. v. Murray, 226 Ill. App. 3d 65, 589 N.E.2d 640 (1st Dist. 1992) (also discussed at page 9, including how this decision has been criticized). The appellate court upheld the part of the preliminary injunction that prevented Murray from soliciting Arpac's employees to leave the company because it found that Arpac had an interest in protecting the stability of its workforce, but reversed the parts of the injunction that included end-user customers and that prohibited Murray from working in any capacity in the shrink-wrap business nationwide. The appellate court also rejected Murray's argument that Arpac had not shown the possibility of irreparable harm because Murray had left Arpac to set up a company that competed directly with Arpac.

Sarah Bush Lincoln Health Center v. Perket, 238 Ill. App. 3d 958, 605 N.E.2d 613 (4th Dist. 1992) (also discussed at page 12). The appellate court affirmed the preliminary

injunction, holding that a proper protectible interest was inherent in the relationship alleged where Perket was employed as director of physical medicine and rehabilitation at Sarah Bush.

PCx Corp. v. Ross, 209 Ill. App. 3d 530, 568 N.E.2d 311 (1st Dist. 1991) (also discussed at page 7). The appellate court affirmed the preliminary injunction prohibiting Ross and her new employer from doing business with six of PCx's customers because they were limited to her old territory and were the only customers Ross would not have contacted "but for" her previous employment with PCx.

Tyler Enterprises of Elwood, Inc. v. Shafer, 214 Ill. App. 3d 145, 573 N.E.2d 863 (3d Dist. 1991) (also discussed at page 6). The appellate court affirmed the preliminary injunction where the court presumed that Shafer's diversion of Tyler's clientele constituted irreparable harm.

Millard Maintenance Service Co. v. Bernero, 207 Ill. App. 3d 736, 566 N.E.2d 379 (1st Dist. 1990) (also discussed at page 22). The appellate court affirmed the preliminary injunction, finding that Millard's pricing formula was a protectible business interest because the formula was based in large part upon Millard's confidential worker's compensation and liability insurance claims, and Millard kept the customer information under lock and key. Also, the appellate court agreed that Millard had established near-permanent relationships because most of its customers had done business with Millard for more than 15 years.

Agrimerica, Inc. v. Mathes, 199 Ill. App. 3d 435, 557 N.E.2d 357 (1st Dist. 1990), *abrogated on other grounds by Roy v. Coyne*, 259 Ill. App. 3d 269, 630 N.E.2d 1024 (1st Dist. 1994) (also discussed at page 3). The appellate court reversed the trial court's order denying injunctive relief after it analyzed the seven factors for determining whether a company has near-permanent customer relationships, which have become known as the *Agrimerica* factors.

Preferred Meal Systems, Inc. v. Guse, 199 Ill. App. 3d 710, 557 N.E.2d 506 (1st Dist. 1990) (also discussed at page 6). The appellate court reversed the lower court's denial of an injunction as to customers that contract pursuant to public bid and held that those customers were near-permanent because once Preferred succeeded in winning a contract in the public school system, the school had the option to renew the contract without public bid each year.

Hamer Holding Group, Inc. v. Elmore (Hamer I), 202 Ill. App.3d 994, 560 N.E.2d 907 (1st Dist. 1990) (also discussed at pages 46 and 55). The appellate court reversed the denial of a preliminary injunction, finding that the trial court had applied a "preponderance of the evidence" standard which, in effect, was a decision on the merits.

Retina Services, Ltd. v. Garoon, 182 Ill. App. 3d 851, 538 N.E.2d 651 (1st Dist. 1989) (also discussed at page 12). The appellate court reversed the trial court's denial of the injunction, holding that a professional's medical practice is a protectible business interest where the duration and geographic scope are reasonable.

2. Federal Cases Within the Seventh Circuit

Lakeview Technology, Inc. v. Robinson, 446 F.3d 655 (7th Cir. 2006). Lakeview is a vendor of software that allows users to access data during system outages. Robinson was vice-president of sales at Lakeview, where he promised that for a year following his departure, he would not compete with Lakeview by soliciting any of the customers or prospective customers with which he had contact in the preceding 24 months. He also promised to hold in confidence all of Lakeview's trade secrets, including its customer lists, pricing and plans. While still working at Lakeview, Robinson negotiated a new position at Vision Solutions, one of Lakeview's competitors, but denied having any plan to leave Lakeview when asked point-blank about rumors of employment negotiations with Vision. By lying to Lakeview, he extended the duration of his salary and gained valuable information regarding Lakeview's selling plans for the 2005-2006 sales year, which he took with him to Vision in mid-May 2005.

The federal district court denied plaintiff Lakeview's request for an injunction, giving three reasons for this denial: (1) lack of proof Robinson had solicited Lakeview's customers or disclosed any of its secrets; (2) Robinson's promise not to do so in the future; and (3) the possibility of hefty damages if Robinson should act otherwise. The Seventh Circuit reversed and granted Lakeview a preliminary injunction. As to the first reason (lack of proof of solicitation), the Seventh Circuit said that, under Illinois law, injunctions "issue to curtail palpable risks of future injury; it is not essential to establish that the worst has come to pass." The court rejected the second reason (defendant's promise not to solicit plaintiff's customers in the future) as "weak," especially given Robinson's history of deceit. The court also rejected the third reason (possibility of hefty damages) because of concern that Robinson might not be able to satisfy any judgment. In balancing the equities, the court found them lopsided in favor of granting Lakeview injunctive relief, unless Robinson could demonstrate he could satisfy any judgment against him.

The Seventh Circuit also considered whether a bond or other surety could be a sufficient reason to withhold injunctive relief, and concluded that that issue was better left to the district court. The court ruled that the balance of equities was very lopsided in favor of granting plaintiff Lakeview a preliminary injunction unless Robinson could demonstrate that he could satisfy any judgment against him. The court further noted that, when "the evaluation of relative error costs depends in large measure on the fact that the defendant may be unable to pay damages, this balance changes if a bond or letter of credit ensures that the prevailing side can be compensated adequately." However, until Robinson could prove, by way of a bond or other surety, that he could satisfy any judgment, the court granted Lakeview a preliminary injunction so that Lakeview would be protected from the risks it faced from uncertainty about Robinson's conduct.

Hess Newmark Owens Wolf, Inc. v. Owens, 415 F.3d 630 (7th Cir. 2005) (also discussed at page 43). The Seventh Circuit reversed the district court's denial of injunctive relief, holding that, under Illinois law, Hess did not have to demonstrate that it had lost any particular account to show that Owens had caused irreparable injury. Owens' ongoing competition with Hess was itself a sufficient basis for relief.

Outsource International, Inc. v. Barton, 192 F.3d 662 (7th Cir. 1999) (also discussed at page 10). The court of appeals affirmed the preliminary injunction, finding that Outsource had a

near permanent relationship with its clients based on long-term customer loyalty and name recognition attributed to an elaborate employee screening and customer service system.

PepsiCo, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995) (also discussed at page 24). The court of appeals affirmed the preliminary injunction based on inevitable disclosure and stressed that it was affirming because it extended “no further than necessary” and was not a permanent injunction.

Business Records Corp. v. Lueth, 981 F.2d 957 (7th Cir. 1992) (also discussed at page 46). The court of appeals affirmed the injunction, finding the covenant ancillary to the sale of a business and reasonable in its terms.

Mintel International Group, Ltd. v. Neergheen, No. 08-CV-3939, 2008 WL 2782818 (N.D. Ill. July 16, 2008). Mintel provides consumer, product, and market research to clients around the world; Neergheen was a former employee who signed a non-compete agreement in which he agreed not to compete with the business of Mintel or its subsidiaries for one year. His employment contract required him to refrain from using or disclosing any of the company’s trade secrets or other proprietary or confidential information. During his last week at Mintel, Neergheen emailed himself confidential files, including client and vendor lists and strategic documents. Plaintiff Mintel sought a TRO after Neergheen went to work for one of Mintel’s competitors.

In granting the ten-day TRO as to the non-solicitation provision, the court noted that an injury is irreparable “when it is of such a nature that the injured party cannot be adequately compensated in damages or when damages cannot be measured by any pecuniary standard.” The court found that the loss of clients and sales and the continued possibility of further loss due to the prospect that Neergheen would distribute Mintel’s client lists and marketing data were sufficient to constitute irreparable injury. The court also concluded that money damages would not be an adequate remedy because Mintel could face the threat of lost sales and clients if Neergheen used the information he copied before leaving; also, it was difficult at the time of the TRO to determine with any degree of certainty the amount of financial loss Mintel might suffer. Thus, Mintel met the irreparable harm and inadequate remedy at law standard.

As for the balance of harms analysis, the court noted that injunctive relief was warranted as to the non-solicitation provision but not as to the non-compete provision. The court found that the balance of harms weighed in favor of granting the injunction pertaining to the non-solicitation provision. As to the non-compete, however, the court could not conclude that Neergheen should be prevented from working in his new position because Mintel failed to show clear entitlement to the extraordinary remedy for the non-compete, and because it would be a short time period between entry of the TRO and the preliminary injunction hearing date.

Diamond Blade Warehouse, Inc. v. Paramount Diamond Tools, Inc., 420 F. Supp. 2d 866 (N.D. Ill. 2006) (also discussed at pages 49 and 53). Defendant Marino entered into a twelve-year employment agreement as a sales representative with plaintiff Diamond Blade (“Diamond Blade”). Included in the agreement were two restrictive covenants: (1) a covenant not to compete prohibiting Marino from competing with Diamond Blade, and hiring or doing business with Diamond Blade’s employees for two years following termination of his employment; and

(2) a non-solicitation agreement prohibiting Marino from soliciting Diamond Blade's customers for two years. Marino also agreed not to disclose Diamond Blade's confidential information, including customer lists. In return for signing, Marino received \$250,000 and continued employment. Two and a half years later, Marino left plaintiff Diamond Blade and began working for Diamond Blade's competitor, defendant Paramount. Both Diamond Blade and Paramount compete in the diamond-tipped saw blade industry. At Paramount, Marino began selling and distributing diamond-tipped saw blades, soliciting orders directly from Diamond Blade, and seeking employees who were working at Diamond Blade when Marino left.

The district court entered judgment on the pleadings in favor of plaintiff Diamond Blade on four of the five claims and granted Diamond Blade's request for a preliminary injunction. The court found adequate consideration for the covenants in the \$250,000 and twelve years of promised employment. Additionally, the court granted Diamond Blade's request for a preliminary injunction, stating it had met all the requirements. Particularly, Diamond Blade would suffer irreparable harm because Diamond Blade "will lose goodwill, competitive position, and continuity of business relationships with its customers and employees" if Paramount and Marino were allowed to continue to pilfer Diamond Blade's customers and employees. Additionally, the possible harm to Diamond Blade without this injunction outweighed the harm to defendants should the injunction be imposed. Finally, there was no indication that the injunction would harm the public interest.

Henry v. O'Keefe, No. 01 C 8698, 2002 WL 31324049 (N.D. Ill. Oct. 18, 2002) (also discussed at page 8). The district court granted Henry an injunction and found that O'Keefe's letters to former customers were solicitations and thus forbidden by the restrictive covenant, even though O'Keefe informed them she could not work for them until the restrictive covenant had run its course. The district court extended the restrictive covenant for another twelve months with regard to the four previous customers that O'Keefe had improperly solicited.

CUNA Mutual Life Insurance Co. v. Kuperman, No. 97 C 6228, 1998 WL 409880 (N.D. Ill. July 7, 1998) (also discussed at page 8). The district court adopted the magistrate's recommendation and granted CUNA a preliminary injunction, finding that it did have a near-permanent relationship with its customers to whom it provided financial advice and products.

B. Injunction Denied or Reversed.

1. Illinois State Cases.

Bisla v. Parvaiz, 379 Ill. App. 3d 567, 884 N.E.2d 790 (1st Dist. 2008) (also discussed at page 81). The appellate court affirmed the denial of a preliminary injunction on the two grounds given by the trial court (the agreement was invalidated because (1) the dissolution of the corporation was a material breach of the agreement, and (2) Bisla's failure to offer Parvaiz an equity share was a material breach). The appellate court also added a third ground for affirming the denial, stating that since the agreement had expired on January 31, 2002, the agreement was not in force at the time Parvaiz practiced medicine outside of the Bisla Corporation.

Arcor, Inc. v. Haas, 363 Ill. App. 3d 396, 842 N.E.2d 265 (1st Dist. 2005) (also discussed at pages 32, 58). The appellate court reversed the lower court's grant of a preliminary injunction

because Arcor's requirement that its employees sign confidentiality agreements, without more, was insufficient to show that Arcor took adequate steps to protect its customer lists.

Carus Chemical Co. v. Calciquist, Inc., 341 Ill. App. 3d 897, 793 N.E.2d 931 (3d Dist. 2003) (also discussed at page 35). The appellate court dissolved the preliminary injunction because the information was no longer confidential after Carus republished the information to a prospective customer, thereby removing the threat of irreparable harm.

Delta Medical Systems v. Mid-America Medical Systems, Inc., 331 Ill. App. 3d 777, 772 N.E.2d 768 (1st Dist. 2002) (also discussed at page 29). The appellate court reversed the preliminary injunction, finding that Delta's Lorad customer list was not a protectible trade secret as it could be duplicated with little effort because Lorad could provide Mid-America with a list of its customers' identities, and because such a list could be generated from looking at the yellow pages or from a FOIA request.

Center for Sight of Central Illinois I, S.C. v. Deranian, 305 Ill. App. 3d 909, 712 N.E.2d 417 (4th Dist. 1999) (also discussed below at page 82). The appellate court affirmed the denial of a preliminary injunction, finding that the corporation materially breached the employment agreement and thus was not likely to succeed on the merits.

Sheehy v. Sheehy, 299 Ill. App. 3d 996, 702 N.E.2d 200 (1st Dist. 1998) (also discussed at page 47). The appellate court affirmed the denial of a permanent injunction, finding the restrictive covenant unreasonable since it prohibited James Sheehy from being employed outside the restricted zone merely because the funeral home he went to work at had a branch within the restricted zone.

Audio Properties, Inc. v. Kovach, 275 Ill. App. 3d 145, 655 N.E.2d 1034 (1st Dist. 1995) (also discussed at page 16). The appellate court affirmed the trial court's denial of a preliminary injunction to enforce the restrictive covenant, holding that Audio Properties had failed to prove it had near-permanent customers because it did not show that the repeat customers who use its studios were its customers rather than customers of the sound engineers, especially because the customers specifically requested sound engineers.

Graber v. Badegian, 242 Ill. App. 3d 1049, 611 N.E.2d 1291 (1st Dist. 1993). Badegian was newly licensed when she contracted with Graber in 1988. In 1991 Badegian advised Graber that she intended to move her practice to a location less than four miles away. Graber twice sought and was denied temporary restraining orders and preliminary injunctions. Badegian then entered into a five-year lease for properties she personally measured to be over four miles from Graber's practice. Badegian confirmed her distance calculations with municipal planners. Land surveys later established that the new office was only approximately 3.9 miles from Graber's office.

The trial court denied Graber's request for a preliminary injunction enjoining Badegian, a former associate of Graber's in a dental practice from competing within a four-mile radius of Graber's practice for two years. The appellate court affirmed the denial of injunctive relief, reasoning that the injury that Badegian would suffer as a result of an injunction — the loss of a five-year lease and expenditures Badegian made with respect to the property — outweighed any

injury to Graber. The court emphasized that Badegian had made a good faith effort to determine that her leased property was more than four miles from Graber's practice, and that Graber had not demonstrated any injury as a result of Badegian's minor deviation from the terms of the restrictive covenant. The court also noted that the trial court had made no finding as to whether Graber had a protectible interest in her patients, and that, even if she had, the court still had an obligation to balance the hardships of the parties.

George S. May International Co. v. International Profit Associates, 256 Ill. App. 3d 779, 628 N.E.2d 647 (1st Dist. 1993) (also discussed at pages 31, 47). The appellate court upheld the denial of a preliminary injunction because the company had not shown a protectible interest because May routinely distributed its manuals to thousands of trainees, May failed to identify what specifically it considered confidential in its manuals, and May admitted that its manuals contained commonly known information.

Mid-Town Petroleum, Inc. v. Gowen, 243 Ill. App. 3d 63, 611 N.E.2d 1221 (1st Dist. 1993) (also discussed at page 50). The appellate court affirmed the denial of the preliminary injunction, finding the employment contract lacked consideration because Gowan only continued to work for Mid-Town for seven months after signing the contract.

Office Mates 5, North Shore, Inc. v. Hazen, 234 Ill. App. 3d 557, 599 N.E.2d 1072 (1st Dist. 1992) (also discussed at page 13). The appellate court affirmed the denial of a preliminary injunction because the company did not have near-permanent relationships (two-thirds of Office Mates' customers remained customers for less than two years) and former employees Hazen and Greenberg acquired no confidential information (basic customer information that could be obtained from a cold call is not confidential information).

Office Electronics, Inc. v. Adell, 228 Ill. App. 3d 814, 593 N.E.2d 732 (1st Dist. 1992) (also discussed at page 43). The appellate court affirmed the denial of a preliminary injunction, finding that OEI's allegations of irreparable injury and absence of adequate legal remedy were merely conclusory and not supported by sufficient factual allegations to support a preliminary injunction.

LSBZ, Inc. v. Brokis, 237 Ill. App. 3d 415, 603 N.E.2d 1240 (2d Dist. 1992) (also discussed at page 16). The appellate court reversed the preliminary injunction, holding that the plaintiff hair salon had failed to prove the customers were its customers rather than customers of the individual hairstylist who serviced them.

Rapp Insurance Agency, Inc. v. Baldree, 231 Ill. App. 3d 1038, 597 N.E.2d 936 (5th Dist. 1992) (also discussed at page 17). The appellate court affirmed the denial of the preliminary injunction, holding that the mere potential that an insurance customer could become a long-standing customer was not sufficient to show near-permanent customers.

Peterson-Jorwic Group, Inc. v. Pecora, 224 Ill. App. 3d 460, 586 N.E.2d 676 (1st Dist. 1991). Pecora had entered into a written employment contract including a non-competition clause which prohibited Pecora from soliciting Peterson-Jorwic's customers for a period of 24 months following his termination. Peterson-Jorwic served as the exclusive manufacturing representative for an appliance manufacturer. The manufacturer terminated Peterson-Jorwic's

contract, and Peterson-Jorwic fired Pecora. Pecora then went to work directly for the manufacturer as a manufacturer's representative. Peterson-Jorwic sought an injunction preventing Pecora from working as a manufacturer's representative for the manufacturer.

The trial court denied Peterson-Jorwic's request for a preliminary injunction enforcing a restrictive covenant in Pecora's employment contract, finding that the covenant was unenforceable for lack of consideration and that Peterson-Jorwic did not have a protectible business interest. The appellate court affirmed the denial of the injunction, holding that Peterson-Jorwic had not shown it would suffer any injury because Peterson-Jorwic no longer had a business relationship with the manufacturer. Accordingly, the appellate court did not address whether Peterson-Jorwic had a protectible business interest or whether there was sufficient consideration to support the covenant not to compete.

Label Printers v. Pflug, 206 Ill. App. 3d 483, 564 N.E.2d 1382 (2d Dist. 1991) (also discussed at page 18). The appellate court reversed the preliminary injunction, finding that Label Printers had not established near-permanent customer relationships because most printing customers do business with several printers.

Frazier & Dallas v. Dettman, 212 Ill. App. 3d 139, 569 N.E.2d 1382 (2d Dist. 1991) (also discussed at page 21). The appellate court affirmed the denial of a preliminary injunction, holding that it made no sense to protect the dissolved dental partnership's relationship with its patients because those patients would no longer be serviced by the partnership, and that individual partners of the dissolved partnership could not enforce the restrictive covenant because they were not parties to the agreement.

Williams & Montgomery, Ltd. v. Stellato, 195 Ill. App. 3d 544, 552 N.E.2d 1100 (1st Dist. 1990) (also discussed at page 19). The appellate court affirmed the denial of the preliminary injunction, finding that Williams & Montgomery, a law firm, did not have a protectible interest in its client relationships because the firm did not keep the identity of its clients confidential, nor did the firm have near-permanent relationships with the clients because the clients regularly retained other firms in the Chicago area.

Service Centers of Chicago, Inc. v. Minogue, 180 Ill. App. 3d 447, 535 N.E.2d 1132 (1st Dist. 1989) (also discussed at page 27). The appellate court reversed the preliminary injunction, holding that Service Centers had failed to show there was information in its pricing mechanism that was not generally known in the medical records storage industry, and noting that Service Centers had not introduced any evidence concerning the amount of time, money and effort involved in compiling the pricing mechanism.

Shapiro v. Regent Printing Co., 192 Ill. App. 3d 1005, 549 N.E.2d 793 (1st Dist. 1989) (also discussed at page 30). The appellate court reversed the two-month preliminary injunction, holding that the trial court had actually entered a permanent injunction because the order determined the rights of the parties with respect to the merits. While the appellate court found the "substantial likelihood of success" prong for a preliminary injunction was met because the trial court had decided the issue on the merits, the court found that Regent had not established a protectible business interest.

Capsonic Group v. Swick, 181 Ill. App. 3d 988, 537 N.E.2d 1378 (2d Dist. 1989) (also discussed at page 30). The appellate court affirmed the denial of a preliminary injunction, holding that Swick's knowledge of how to design an automated insert molding system was general knowledge that he had the right to take with him from his employment.

Southern Illinois Medical Business Associates v. Camillo, 190 Ill. App. 3d 664, 546 N.E.2d 1059 (5th Dist. 1989) (also discussed at page 20). The appellate court reversed entry of the preliminary injunction, finding that SIMBA did not have a legitimate protectible interest in any of its nursing home clients. The appellate court also found that SIMBA had requested the covenant not to protect its legitimate business interests, but to ensure that Camillo would not become a competitor.

2. Federal Cases Within the Seventh Circuit.

Advent Electronics, Inc. v. Buckman, 112 F.3d 267 (7th Cir. 1997) (also discussed at pages 2 and 54). The court of appeals vacated the injunction and remanded, directing the district court to determine whether Advent had a legitimate business interest that would be protected by the injunction.

Fisher Investments, Inc. v. Carlson, No. 04 C 6619, 2004 WL 2496474 (N.D. Ill. Nov. 2, 2004) (also discussed at pages 33 and 40). The district court denied Fisher's motion for a TRO, finding Fisher unlikely to succeed in enforcing the restrictive covenant because it lacked time and geography restrictions, and Fisher failed to show that the lists were confidential information or that it took reasonable measures to safeguard the information.

Nobel Biocare USA, Inc. v. Lynch, No. 99 C 5774, 1999 WL 958501 (N.D. Ill. Sept. 15, 1999) (also discussed at page 39). The district court denied Nobel a TRO for breach of the restrictive covenant, finding that the covenant was void *per se* under California law and unenforceable under Illinois law because it prohibited Lynch from working for any competitor anywhere in the U.S. for two years.

Henri Studio, Inc. v. Outdoor Marketing, Inc., No. 96 C 8198, 1997 WL 652351 (N.D. Ill. Oct. 14, 1997), *vacated pursuant to settlement*, 1998 WL 569303 (N.D. Ill. Aug. 3, 1998) (also discussed at pages 4, 15 and 42). The district court denied Henri Studio's motion for a TRO and preliminary injunction because Henri Studio had failed to show it had either near-permanent customers (customers routinely bought lawn and garden statuary from multiple manufacturers) or confidential information (customer names were available in various public directories). The court ruled that, while there is a presumption of irreparable harm where a terminated employee solicits former clients, that presumption was rebutted in this case by Henri Studio's eight-month delay in seeking an injunction.

Telxon Corp. v. Hoffman, 720 F. Supp. 657 (N.D. Ill. 1989) (also discussed at pages 40 and 51). The district court refused to enter an injunction enforcing the restrictive covenant because it found Telxon unlikely to succeed on the merits.

C. Injunction May Be Awarded in Arbitration.

Coady v. Harpo, Inc., 308 Ill. App. 3d 153, 719 N.E.2d 244 (1st Dist. 1999) (also discussed at pages 2 and 41). Enforceability of restrictive covenant was for court, not arbitrator, to decide because the issue of whether a confidentiality agreement is valid and enforceable is a matter of law for the courts.

Vascular & General Surgical Associates, Ltd. v. Loiterman, 234 Ill. App. 3d 1, 599 N.E.2d 1246 (1st Dist. 1992). The trial court confirmed an arbitrator's award of an injunction enforcing a restrictive covenant which prohibited Loiterman from practicing vascular surgery at certain specified hospitals, and from conducting a medical practice that competed with plaintiff's practice within a five-mile radius of the hospital where the plaintiff medical group was located. The medical group later brought a motion for rule to show cause, and the trial court found that Loiterman had violated the injunction, and ordered Loiterman to cease performing any vascular surgery for a period of two years from the date of the contempt order. Loiterman appealed both the preliminary injunction and the contempt order. On appeal, Loiterman argued that the trial court should have vacated the arbitrator's award because the arbitrator had exceeded his authority. Loiterman also argued that the award was contrary to public policy, that the arbitrator was biased, and that the trial court improperly found that he had violated the injunction.

On appeal, the court interpreted the employment contract in the context of the Uniform Arbitration Act, and held that the award of injunctive relief was within the scope of the arbitrator's powers under the employment agreement. The court next held that the injunction enforcing the restrictive covenant did not violate public policy, acknowledging that Illinois courts have often upheld restrictive covenants in medical practice cases without inquiring specifically whether the plaintiff had a protectible business interest. The court also held that Loiterman had not shown by clear and convincing evidence that the arbitrator was biased in favor of the medical group. Finally, the appellate court upheld the contempt order, finding that evidence that Loiterman had performed nine vascular surgical procedures at one of the prohibited hospitals was sufficient to establish that he was engaged in the "practice" of vascular surgery.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d 211 (7th Cir. 1993). The Seventh Circuit held that the arbitration panel can enter whatever temporary injunctive relief it deems necessary to maintain the status quo. Additionally, the court noted that "district courts are not precluded as a general matter from issuing preliminary injunctive relief pending arbitration" where the plaintiff satisfies the requisites for obtaining injunctive relief, but any preliminary injunctive relief granted will expire when an arbitration panel is available to review the issue.

D. Contempt Action to Enforce a TRO or Injunction.

Bloomington Urological Associates, SC v. Scaglia, 292 Ill. App. 3d 793, 686 N.E.2d 389 (4th Dist. 1997). Scaglia had been employed by the plaintiff as a physician in a medical practice in Bloomington, under an employment agreement with a restrictive covenant. Scaglia left the practice, and the plaintiff sued to enforce the covenant. The parties settled that suit by entering

into an agreed order providing that Scaglia would not be involved in the business of providing urological medicine services within a 50-mile radius of Bloomington, Illinois for a specified period of time. The medical practice brought this second action to enforce that order.

The trial court held Scaglia in contempt for violating the agreed order by operating an office in his home in Bloomington in which he and his nurses did some of the administrative work associated with his medical practice that Scaglia had relocated to Ottawa, Illinois. The trial court found that Scaglia also had violated the order by receiving telephone calls from patients at his home in Bloomington, by telephoning in prescriptions from his home, and by maintaining a Bloomington telephone number listed in his name as a physician.

The appellate court reversed. The court determined that the language in the order prohibiting Scaglia from being “involved in the business of providing urological medicine” in Bloomington was ambiguous and, applying the rules of contract interpretation, found that the parties had intended only to prohibit Scaglia from practicing medicine in Bloomington, and not from performing other activities associated with the “business of practicing medicine” there. The court then determined that Scaglia’s obligations as a physician required him to be available to answer calls from patients, and that the activities in which he engaged in Bloomington did not violate the agreed order.

V. MISCELLANEOUS ISSUES INVOLVING RESTRICTIVE COVENANTS.

A. Existence of Restrictive Covenant May Give Rise to Post-Employment Fiduciary Duty.

Jostens, Inc. v. Kauffman, 842 F. Supp. 352 (C.D. Ill. 1994). Jostens is in the business of preparing and selling school yearbooks. Kauffman had been a sales representative for Jostens, and had a written employment agreement containing a one-year covenant not to compete. Jostens brought a claim for breach of fiduciary duty, arguing that Kauffman owed a fiduciary duty not to solicit Jostens’ customers because of the one-year restrictive covenant in his employment contract. Kauffman moved for summary judgment on Jostens’ claim of breach of fiduciary duty. The court denied the motion for summary judgment, holding that a restrictive covenant in an employment agreement may give rise to a fiduciary duty after employment is terminated. Thus, Jostens’ claim for breach of fiduciary duty was dependent upon the enforceability of the restrictive covenant in Kauffman’s employment agreement. That issue could not be decided in the context of the motion for summary judgment.

B. Attorneys’ Fees.

1. Attorneys’ fees not recoverable where new employer pays employee’s legal bills.

Label Printers v. Pflug, 246 Ill. App. 3d 435, 616 N.E.2d 706 (2d Dist. 1993). After the appellate court reversed a preliminary injunction entered in favor of Label Printers, the former employee petitioned to recover legal fees as damages for a wrongfully-entered injunction. The

former employee's legal fees had been paid by his new employer. The trial court granted the employee's petition for fees.

The appellate court reversed. The court held that 735 ILCS 5/11-110 does not constitute an exception to the ordinary rule that each party to a lawsuit pays its own fees. It is not a fee-shifting statute, but one which authorizes the recovery of damages, including attorneys' fees, incurred in prosecuting an appeal to reverse or dissolve a wrongfully entered preliminary injunction. The court construed Section 11-110 strictly to apply only to "fees arising from actions seeking reversal or dissolution of the preliminary injunction," and only to fees actually expended by the party seeking reimbursement. Here, the employee could not recover fees because the fees had been paid, gratuitously, by his new employer.

C. Successor Employer May Enforce Restrictive Covenant.

AutoMed Technologies, Inc. v. Eller, 160 F. Supp. 2d 915 (N.D. Ill. 2001). Defendants were former employees who oversaw the research and development of medical equipment for a predecessor company purchased by AutoMed. After Defendants left the company, AutoMed sued for breach of contract. Defendants moved to dismiss, arguing that their restrictive covenants were unreasonable in duration and geographic limitation, Eller's contract was not assignable because it was an executory contract, and Eller had not signed the covenants.

The court denied the motion to dismiss, holding that the reasonableness of the restrictive covenant is a fact-based question which cannot be resolved on a motion to dismiss. The court also held that a successor employer can enforce a restrictive covenant in an employment agreement between its predecessor and the predecessor's employee, and rejected Eller's argument that his contract could not be assigned absent his consent. The court explained that restrictive covenants are not executory because they take effect after the employer has completed its promised performance. The court also noted that employees are not prejudiced by allowing the assignment of restrictive covenants because courts already closely scrutinize those agreements and that a rule prohibiting assignment of restrictive covenants would frustrate many acquisitions. Finally, the court rejected Eller's argument that he did not sign the covenant because he demonstrated his assent by working for AutoMed for nearly two years after receiving the covenant.

D. Enforceability of Restrictive Covenants in the Legal Profession.

While non-competition provisions in attorneys' employment or partnership agreements are generally unenforceable, Illinois courts have split as to whether such provisions are enforceable when they are part of attorneys' retirement benefits agreements. In *Cummins v. Bickel*, the federal district court found that non-competition provisions in retirement benefit agreements are unenforceable, but the Illinois appellate court in *Hoff v. Mayer* found a similar provision to be enforceable.

Rule 5.6 of the Rules of Professional Conduct prohibits both express restrictive covenants and forfeiture provisions that punish an attorney for competing.

Rule 5.6 states:

A lawyer shall not participate in offering or making: (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement. . . .

Hoff v. Mayer, Brown and Platt, 331 Ill. App. 3d 732, 772 N.E.2d 263 (1st Dist. 2002). Hoff retired from Mayer, Brown and Platt (“MBP”) after 36 years of service. As part of his retirement plan, he was to receive in excess of \$94,000 in income on the condition he substantially cease the active practice of law or if his post-retirement activities were consistent with his status as retiree. Hoff left MBP to become founding partner at another firm. MBP consequently denied him retirement benefits.

Hoff argued that the retirement provision was an impermissible restrictive covenant and that the provision was unreasonably broad. The Circuit court dismissed the lawsuit. On appeal, the appellate court held that the restrictions of the retirement plan were enforceable and not overly broad. The court rejected Hoff’s argument that the retirement provision violated Illinois Rule of Professional Conduct 5.6(a). The court noted that while Rule 5.6(a) finds non-competition provisions generally unenforceable, an agreement concerning benefits upon retirement is exempt from the general rule. The court acknowledged that law firms might try to take advantage of Rule 5.6(a) by attempting to characterize a lawyer’s departure as a “retirement” in order to prevent him from subsequently practicing law. But the court did not find that to be the case in the immediate instance because MBP was merely denying employment benefits, and not actually restricting Hoff from practicing law. Under the rationale that the provision was an enforceable limitation on retirement benefits and not a strict non-competition agreement, the court denied Hoff’s argument that the retirement provision was too broad. **Note that *Cummins* and *Hoff* were decided around the same time by different courts and come to different conclusions regarding Rule 5.6.**

Stevens v. Rooks Pitts & Poust, 289 Ill. App. 3d 991, 682 N.E.2d 1125 (1st Dist. 1997). Stevens was a partner who withdrew from the Rooks, Pitts firm. The partnership agreement provided that upon withdrawal from the firm, a partner would be paid 4/5 of his share of collections, and, if the partner did not compete with the firm for one year following withdrawal from the firm, the partner would be paid the remaining 1/5 at the end of that year. Stevens joined another firm within a year of his withdrawal, and Rooks, Pitts refused to pay him the remaining 1/5 of his share of collections. Stevens sued for a declaratory judgment that the partnership agreement violated Rule 5.6 of the Rules of Professional Conduct. The trial court entered summary judgment in favor of the firm, finding that the partnership agreement did not violate Rule 5.6.

The appellate court reversed, holding that the forfeiture provision in the partnership agreement violated Rule 5.6. Because that provision violates public policy, the court held it should be severed from the agreement so that the firm would not receive a windfall if the court were merely to leave the parties *in pari delicto*.

See also *Williams & Montgomery, Ltd. v. Stellato*, 195 Ill. App. 3d 544, 552 N.E.2d 1100 (1st Dist. 1990) (also discussed at pages 19 and 71 above) (affirming denial of preliminary injunction on grounds that insurance defense firm did not have a protectible interest in its client relationships).

Dowd & Dowd, Ltd. v. Gleason, 284 Ill. App. 3d 915, 672 N.E.2d 854 (1st Dist. 1996), *aff'd in part, rev'd in part*, 181 Ill. 2d 460, 693 N.E.2d 358 (1998) (also discussed at 11 and 79). The appellate court held that Rule 5.6 bars agreements that would prohibit lawyers from soliciting clients of a former firm. The court held that Rule 5.6, which went into effect in 1990, applies retroactively to contracts entered into before 1990, and affirmed summary judgment in favor of the defendants on the law firm's claim to enforce a non-solicitation covenant in the defendants' employment contracts. However, the court held that the law firm stated a claim for breach of fiduciary duty against defendants who were former shareholders and officers of the firm, who allegedly had taken steps to form a new firm without disclosing their intentions before they resigned their positions with the plaintiff firm.

Upon appeal to the Illinois Supreme Court, the court concluded that Rule 5.6 does apply retroactively to bar enforcement of the noncompetition covenant. The court remanded the fiduciary duty count to resolve various factual issues. In doing so, however, the court noted that lawyers are not "necessarily bound by the same fiduciary constraints that apply to nonlawyer officers and directors who are seeking to leave positions in commercial entities. . . . Lawyers who are preparing to leave a law firm face a dilemma, caught between the fiduciary obligations they owe the other members of their firm, on one hand, and the duty of being able to adequately represent clients who choose to follow them to their new place of employment, on the other hand."

Cummins v. Bickel & Brewer, No. 00 C 3703, 2002 WL 187492 (N.D. Ill. Feb. 6, 2002). Plaintiff sued his former law partnership and former partners seeking a declaratory judgment that the forfeiture provision in the firm's partnership agreement was void and unenforceable based on Rule 5.6 of the Professional Rules of Conduct. Defendants argued that the agreement in this case was an agreement concerning benefits upon retirement and therefore the forfeiture provision, which unquestionably restricted the plaintiffs' right to practice after termination of the relationship, was valid.

The court distinguished this case from *Dowd & Dowd v. Gleason*, which did not address benefits for retiring partners. However, the court concluded that the retirement issues do not make *Dowd & Dowd* inapplicable. The provision clearly undermined the policy behind Rule 5.6 because it hinders a withdrawing partner's ability to take on clients and a client's ability to retain counsel of his or her own choice. Thus the restrictive covenant was unenforceable.

E. Enforceability of Restrictive Covenants in the Medical Profession.

Illinois law is unsettled as to whether restrictive covenants in physician employment agreements are enforceable. The Fifth District appellate court held that such provisions were against public policy and, thus, unenforceable. But the First District appellate court enforced a restrictive covenant that prohibited a doctor from the entire practice of medicine where the time and geographic restrictions were reasonable.

Defendants have tried to defend these lawsuits by questioning the validity of the underlying medical employment contract. Defendants have unsuccessfully asserted that hospitals and unlicensed health centers' employment contracts were invalid because they violated the corporate practice of medicine doctrine. But in *TLC v. Midwest Eye*, the defendant successfully argued that the contract containing the restrictive covenant was invalid because it contained a fee-splitting provision that violated the Illinois Medical Practice Act.

1. Restrictive covenants involving physicians may be unenforceable on public policy grounds.

Mohanty v. St. John Heart Clinic, 225 Ill. 2d 52, 866 N.E.2d 85 (2006) (also discussed at 11, 45, 63 and 81). Dr. Mohanty and Dr. Ramadurai were cardiologists at St. John Heart Clinic. Both doctors entered into employment contracts with St. John that contained restrictive covenants. The restrictive covenant in Dr. Mohanty's contract prohibited him for five years after the end of his employment from practicing medicine within a five-mile radius from any St. John's offices. The restrictive covenant in Dr. Ramadurai's contract prohibited him for three years after the end of his employment from practicing medicine within a two-mile radius from any St. John's offices.

The doctors argued that all non-compete provisions in physician employment contracts were against Illinois public policy and therefore, unenforceable. They also contended that the activity and time restrictions in their non-compete covenants were unreasonable and that St. John breached their employment agreements by improperly billing patients for certain diagnostic exams.

The appellate court affirmed the trial court's ruling that the geographic and time restrictions were reasonable, and reversed the trial court's finding that activity provisions were overly broad and unreasonable. The court also rejected Drs. Mohanty's and Ramadurai's argument that restrictive covenants in physician employment contracts were against Illinois public policy.

The Supreme Court affirmed. The court declined to accept Dr. Mohanty's and Dr. Ramadurai's broad contention that all restrictive covenants in physician employment contracts are unenforceable as against Illinois public policy promoting accessibility of health care. In the absence of any Illinois constitutional provision, statute or judicial decision that clearly conflicts with restrictive covenants in the medical profession, the court found that physician restrictive covenants are not contrary to Illinois public policy, despite Drs. Mohanty's and Ramadurai's "laundry list" of potential adverse effects (e.g., interfering with doctor-patient relationships, denying patients the freedom to choose their own doctor, and creating barriers to quality medical care). Faced with the argument that multiple states have totally prohibited restrictive covenants in medical employment contracts based on public policy concerns, the court noted that these states, the clear minority, all acted pursuant to some legislative enactment. The Illinois legislature has not acted and until it does, Illinois courts must enforce physician restrictive covenants meeting the usual "reasonableness" standard and the accompanying contractual requirements (e.g., adequate consideration).

The court also found that the particular activity, geographic and time restrictions within Drs. Mohanty's and Ramadurai's non-compete provisions were reasonable. The physicians argued that prohibiting "the practice of medicine" was an unreasonably broad activity restriction, because the clinic specialized only in cardiology. The court disagreed, finding that all specialties are "inextricably intertwined" with the practice of medicine. Further, these physicians could easily find employment elsewhere, because the restricted territories (a five-mile and two-mile radius of St. John's offices) covered only a "narrowly circumscribed area of a large metropolitan area," Chicago. As for the three- and five-year time restrictions, the court found them reasonable based on other Illinois decisions upholding similar time restrictions and evidence that it took the clinic over ten years to successfully establish itself in the competitive area of cardiology.

Finally, the court also ruled that the clinic's billing practices did not constitute a material breach of Drs. Mohanty's and Ramadurai's employment contracts. The doctors argued that the clinic failed to compensate them the full amounts due them under their contracts. The court reiterated the general rule that an employer's material breach of contract may bar enforcement of a covenant not to compete. Nevertheless, the court concluded that this rule did not apply to Drs. Mohanty and Ramadurai because the disputed amounts were for technical not physician work. Thus, not crediting Drs. Mohanty and Ramadurai with these billed amounts did not deny them any compensation due under their employment contracts.

The Illinois Supreme Court did not expressly address the issue of whether the restrictive covenants were necessary to protect St. John's "protectible interests." However, by affirming the appellate court's decision, the court agreed with the appellate court that St. John had a wide protectible interest in the "practice of medicine," which was not limited to "the practice of cardiology and possibly internal medicine" as viewed by the circuit court. The appellate court reached this conclusion because Drs. Mohanty and Ramadurai not only practiced cardiology but also saw patients with other problems and made referrals. The *Mohanty* courts did not discuss protectible interests in the traditional sense and addressed neither near permanent customer relationships nor confidential information issues.

Carter-Shields, M.D. v. Alton Health Institute, 317 Ill. App. 3d 260, 739 N.E.2d 569 (5th Dist. 2000), *aff'd on other grounds, vacated as advisory*, 201 Ill. 2d 441, 777 N.E.2d 948 (2002) (also discussed at pages 13 and 80). Relying on section 9.2 of the Opinions of the Council on Ethical & Judicial Affairs of the American Medical Association and *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 693 N.E.2d 358 (1998), which held restrictive covenants in the legal profession are *per se* illegal, the Fifth District held that the use of restrictive covenants in physician employment agreements is unenforceable on public policy grounds. The court concluded that a patient's freedom to choose a doctor outweighs the parties' right to contract.

2. Prohibition against corporations practicing medicine may bar enforcement of covenant not to compete in physician's employment contract.

Joliet Medical Group, Inc. v. Ensminger, 337 Ill. App. 3d 1076, 787 N.E.2d 879 (3d Dist. 2003). Defendant doctor maintained staff privileges at a hospital within the radius restricted by a non-competition agreement. Refusing to interpret *Berlin v. Sarah Bush Lincoln Health Center* as holding that a hospital constituted a medical practice, the appellate court held that a medical

practice is where a physician's business is located. Since the non-competition agreement only prohibited the defendant from establishing a medical practice in the restricted radius, not from practicing medicine, the trial court properly found that there was no violation of the agreement.

Carter-Shields, M.D. v. Alton Health Institute, 201 Ill. 2d 441, 777 N.E.2d 948 (2002) (also discussed at pages 13 and 79). A physician sought a declaration that her employment agreement with a not-for-profit health care institute was invalid because the Institute was owned in part by a nonphysician. The trial court held that the agreement was valid and enforceable, and that the Institute had a protectible interest in enforcing the agreement's non-compete provision. The appellate court reversed, finding the contract violated the corporate practice of medicine doctrine and refused to extend the holding in *Berlin* which had exempted hospitals from application of the doctrine, noting that Carter-Shields had complained repeatedly of nonphysicians directing her practice and interfering with the treatment of her patients. *Berlin* stands for the proposition that the proscription against the corporate practice of medicine is, at its root, animated by the public policy purpose of safeguarding the public health and welfare by protecting the physician-patient relationship from lay interference with the physician's professional judgment. *Berlin* did not create an exception to the corporate practice doctrine for nonprofit entities.

The Illinois Supreme Court reversed, holding that the *Berlin* exception should apply to unlicensed health centers. Public policy concerns that support the prohibition against the corporate practice of medicine do not arise where a licensed hospital enters into an employment agreement with physicians. Therefore, the employment agreement at issue here violated the prohibition against the corporate practice of medicine.

Berlin v. Sarah Bush Lincoln Health Center, 179 Ill. 2d 1, 688 N.E.2d 106 (1997). The Supreme Court reversed the appellate court's decision that a restrictive covenant was not enforceable because the hospital's contract employing the physician violated the "corporate practice doctrine," which prohibits corporations from practicing medicine. The court first held that the case was not moot, despite the fact that the two-year non-competition period in the contract had expired, because the question whether the "corporate practice doctrine" applied had consequences for both the hospital and the physician and because if the court held the restrictive covenant was enforceable, the hospital may have a breach of contract action against the physician. The court then held that the "corporate practice doctrine" does not apply to hospitals because hospitals are licensed to provide care under statutes other than the Medical Practice Act, which is the statute under which the corporate practice doctrine evolved. The court reversed the summary judgment that the trial court had entered in the physician's favor and remanded for a determination whether the restrictive covenant is enforceable.

See also Center for Sight of Central Illinois I, S.C., v. Deranian, 305 Ill. App. 3d 909, 712 N.E.2d 417 (4th Dist. 1999) (also discussed at pages 69 and 82) (employment contract was in violation of Medical Corporation Act because Center for Sight was controlled by non-physicians through a figurehead president physician).

3. Covenants void under Illinois Medical Practice Act prohibitions against fee-splitting.

TLC The Laser Center, Inc. v. Midwest Eye Institute II, Ltd., 306 Ill. App. 3d 411, 714 N.E.2d 45 (1st Dist. 1999). TLC purchased substantially all of the assets of an ophthalmology practice from defendants. As part of the asset purchase agreement, TLC agreed to manage the practice, advance funds to pay expenses, and train defendants in laser eye surgery. Defendants signed confidentiality and non-compete agreements under which they retained exclusive control over the delivery of medical care. Defendants opened a competing clinic, and TLC sought to enjoin them from practicing laser surgery within the restricted geographic area and time limits. The trial court entered summary judgment for defendants, holding that TLC had no legitimate business interest.

The appellate court affirmed, holding that the service agreement was unenforceable because it was an impermissible fees splitting arrangement. Defendants raise its invalidity as a defense, even though they were at fault in entering the contract.

F. Other Defenses to Enforcement of Restrictive Covenants.

1. Employer's breach of employment contract precludes enforcement of restrictive covenant.

Mohanty v. St. John Heart Clinic, 225 Ill. 2d 52, 866 N.E.2d 85 (2006) (also discussed at pages 11, 45, 63 and 78). Drs. Mohanty and Ramadurai argued that St. John Heart Clinic, their former employer, breached their employment contract by failing to compensate them the full amounts due them under their employment contracts. The Illinois Supreme Court disagreed. The court acknowledged the general rule that an employer's material breach of contract may bar enforcement of a covenant not to compete, but ruled that in this case, the clinic's billing practices did not constitute a material breach of the employment contracts because the disputed amounts were for technical, not physician, work. The court reasoned that the failure to credit the doctors with those billed amounts did not deny them any compensation due under their employment contracts.

Bisla v. Parvaiz, 379 Ill. App. 3d 567, 884 N.E.2d 790 (1st Dist. 2008) (also discussed at page 68). Parvaiz was employed as a cardiologist by a medical corporation, Bisla Corporation. In January 1998, Parvaiz signed an employment agreement, that contained a restrictive covenant. The terms of the employment agreement provided a base salary and, after three years of employment, Parvaiz would be offered a 50% equity interest in Bisla Corporation. The terms of the employment agreement also provided for an automatic termination of the employment agreement in the event of the dissolution of the Bisla Corporation.

On January 31, 2001, Parvaiz completed three years of employment with Bisla Corporation. Bisla failed to offer him 50% equity in the corporation as required under the employment agreement. Instead, Bisla offered Parvaiz 45% equity interest. Parvaiz refused to sign the new agreement. In December 2002, the Illinois Secretary of State involuntarily dissolved the Bisla Corporation for nonpayment of a filing fee, but Bisla applied for reinstatement. In 2005, Parvaiz began performing professional services for a competitor of Bisla

Corporation, without its knowledge or consent. He continued to work for Bisla Corporation until his termination on July 14, 2006. After terminating Parvaiz, Bisla brought an action seeking injunctive relief against his former employee.

The trial court denied the injunction on two grounds: (1) the dissolution of the corporation constituted a material breach of the Employment Agreement invalidating the covenant of employment; and (2) Bisla's failure to offer Parvaiz a 50% equity interest in the corporation constituted a material breach of the employment agreement, invalidating the restrictive covenant. The appellate court affirmed on both grounds and added a third ground, that the employment agreement had expired on January 31, 2002. Thus, the agreement was not in force at the time Parvaiz practiced medicine outside of the Bisla Corporation.

Galesburg Clinic Association v. West, 302 Ill. App. 3d 1016, 706 N.E.2d 1035 (3d Dist. 1999). A medical partnership sought a declaration of its right to enforce covenants not to compete against several departing partners. The trial court found that the partners were discharged from their obligations under their agreements when the partnership's executive committee materially breached the partnership agreement by conducting secret meetings, voting to pay unsubstantiated bills, and changing accounting methods without first amending the agreement.

The appellate court affirmed, noting that the former partners testified that they had relied on the partnership agreement before joining the partnership, and expected the partnership to comply with the terms of the agreement. The court also held that the partners' delay in exiting the firm after learning of the breaches was not a clear and unequivocal waiver of their right to declare a breach of contract. The partners were not required to act immediately on suspicion of a breach, and their actions were reasonable considering the complexity of the partnership, the nature of the medical practice and the personal and professional ramifications of their leaving.

Center for Sight of Central Illinois I, S.C., v. Deranian, 305 Ill. App. 3d 909, 712 N.E.2d 417 (4th Dist. 1999) (also discussed at pages 69 and 80). Medical corporation brought action against former employee ophthalmologist. Trial court denied medical corporation preliminary injunctive relief, finding that corporation materially breached the employment agreement and, thus was not likely to prevail on the merits. The appellate court affirmed, finding that the undisputed testimony showed that material breaches had occurred, and that employment contract was executed in violation of Medical Corporation Act because the medical corporation was controlled by non-physicians through a figurehead president physician.

Bergstein v. Technology Solutions Co., Inc., 274 Ill. App. 3d 689, 654 N.E.2d 479 (1st Dist. 1995). Bergstein had been employed by TSC as an executive under an employment agreement for a specified term that permitted termination only for cause, and was also a director of the company. Bergstein left TSC when the company's Board asked him to resign, and started a competing company. Bergstein remained a director of TSC. He sued for a declaratory judgment that the restrictive covenant in his employment agreement was unenforceable because TSC breached the agreement by terminating him without cause. TSC counterclaimed to enforce the restrictive covenant and for breach of fiduciary duty. TSC also sued another former employee who joined Bergstein's new business, seeking to enforce the restrictive covenant in his employment contract. The trial court held that the covenant was not enforceable because TSC

had breached the contract by terminating him, and that Bergstein owed TSC no fiduciary duty as a director because he had been “*de facto*” removed as a member of TSC’s Board when the Board asked him to resign. The trial court entered summary judgment in favor of the other employee, holding that TSC could not enforce his restrictive covenant because TSC had “canceled” his employment contract.

The appellate court affirmed the trial court’s decision that TSC had breached the employment contract, and that TSC’s breach precluded it from enforcing the restrictive covenant against Bergstein. However, the court reversed the trial court’s ruling that Bergstein owed no fiduciary duty, holding that a director cannot be “*de facto*” removed. The court also reversed the summary judgment in favor of the other employee who joined Bergstein’s business, finding a disputed issue of fact concerning whether his contract had been “canceled,” or whether it merely had been “terminated,” in which case the restrictive covenant would be triggered.

Innovative Clinical Solutions, Ltd. v. Clinical Research Center, P.C., 173 F. Supp. 2d 826 (C.D. Ill. 2001). Innovative is in the business of performing clinical drug testing. Defendants Anjuli and Nicholas Nayak own defendant Central Research, which also conducts clinical drug testing. Innovative and Central entered into a transaction whereby Central agreed to conduct clinical drug testing while Innovative agreed to perform business and accounting functions for Central. Under a separate agreement, the Nayaks were to oversee Central’s drug testing operations in exchange for three large installment payments and a monthly fee for services. This agreement contained covenants prohibiting the Nayaks for three years from competing with Innovative and hiring any Innovative employees. The agreement also provided that each party could terminate the contract if a breach by the other party was not cured within thirty days or if the other party voluntarily filed a petition in bankruptcy.

Innovative filed for bankruptcy and, shortly thereafter, stopped paying some of Central’s expenses and the monthly fee to the Nayaks. The Nayaks terminated the agreement on account of the bankruptcy. The Nayaks next hired several Innovative employees and informed contractors to send payment to them rather than to Innovative. Several days later, the Nayaks sent a second notice of default to Innovative, and when the default was not cured within thirty days, the Nayaks terminated the agreement a second time. Innovative filed an action alleging breach of contract, breach of the restrictive covenants, and tortious interference with Innovative’s business relationships, and sought to restrain defendants from, among other things, violating the restrictive covenants in the agreement.

The court denied the motion, finding that Innovative was not entitled to enforce the restrictive covenants because defendants had rightfully terminated the agreement on account of Innovative’s failure to cure material breaches.

Francorp, Inc. v. Siebert, 126 F. Supp. 2d 543 (N.D. Ill. 2000). Employer sued former officers and employees for breach of employment agreements. The former officers and employees worked for Francorp under employment agreements that prohibited them from competing with Francorp for one year after leaving the company, from using Francorp’s confidential information, and from luring away Francorp employees for a period of six months after ending their employment. After Francorp failed to pay defendants for several weeks, the

former officers left to form a competing company. Shortly thereafter, several employees left Francorp to join the new company.

Francorp sued defendants, claiming they had breached their restrictive covenants. Defendants moved for summary judgment, arguing they were excused from their obligations under the restrictive covenants by Francorp's failure to pay them. The court agreed, holding that it was "axiomatic that an employer's failure to compensate its employees violates the employment relationship," notwithstanding defendants' prior toleration of late paychecks.

2. Breach of the implied covenant of good faith and fair dealing by employer precludes enforcement of restrictive covenant.

Bishop v. Lakeland Animal Hospital, P.C., 268 Ill. App. 3d 114, 644 N.E.2d 33 (2d Dist. 1994) (also discussed at pages 62 and 86). Bishop was a veterinarian who was employed by Lakeland Animal Hospital. Lakeland terminated Bishop's employment, and Bishop brought suit, asking the court to declare that the non-competition clause in her employment contract was unenforceable because her employment contract required that she be terminated only for cause, and Lakeland had no cause to terminate her. The court dismissed the complaint, holding that the employment contract did not require cause, and that the plain language of the contract required enforcement of the restrictive covenant.

The appellate court affirmed the trial court's ruling that the employment contract was not for a definite period, but reversed the trial court's ruling that the restrictive covenant was enforceable. The court determined the contract was ambiguous because it permitted termination "for any cause." This phrase could be interpreted, as Bishop argued, as requiring "cause" for termination. Because Illinois law disfavors restraints on trade, non-competition clauses must be closely scrutinized and this ambiguous language in Bishop's contract must be construed against the drafter, Lakeland. The court also accepted Bishop's argument that Lakeland could not enforce the restrictive covenant because "the implied promise of good faith inherent in every contract precludes the enforcement of a non-competition clause when the employee is dismissed without cause."

See also Danville Polyclinic, Ltd. v. Dethmers, 260 Ill. App. 3d 108, 631 N.E.2d 842 (4th Dist. 1994) (also discussed at pages 13 and 20), and noting rule that employer's bad faith would preclude it from enforcing an employee restrictive covenant).

3. Covenant void because it violates a state law.

Health Professionals, Ltd. v. Johnson, 339 Ill. App. 3d 1021, 791 N.E.2d 1179 (3d Dist. 2003) (also discussed at pages 40 and 56). Plaintiffs and defendants provided health care services to jails and correctional facilities through a jointly owned business until the plaintiffs agreed to purchase all of defendants' outstanding shares. As part of the purchase agreement, contracts to provide services to certain exempted facilities were assigned to a new business started by the defendants. The parties also executed a noncompetition, nondisclosure, and nonsolicitation agreement effective for three years and to include correctional facilities in Illinois, Wisconsin, Missouri, and Indiana, and all facilities operated by Cornell Companies, Incorporated. In July

2002, a representative of defendants' new business contacted facilities in violation of the restrictive covenant. The trial court granted a preliminary injunction.

The appellate court held that to the extent the non-competition agreement prohibited the defendants from bidding on contracts with the Illinois Department of Corrections, it violated the plain language of section 50-25 of the Illinois Procurement Codes which prohibits the payment of money to induce any person not to bid for a State contract. The court rejected plaintiffs' argument that section 50-25 should not apply to restrictive covenants because it would impair the ability of business owners who have state contracts from selling their businesses. The appellate court did not void the entire noncompetition agreement as many of the clients were county jails, thus not covered by section 50-25.

4. Employer may not enforce restrictive covenant against employee for subsequent employment under a different agreement.

Marwaha v. Woodridge Clinic, S.C., 339 Ill. App. 3d 291, 790 N.E.2d 974 (2d Dist. 2003). Plaintiff was a doctor who had entered into an agreement with defendant which included a covenant not to compete covering 10 miles and 2 years. After the expiration of the agreement, plaintiff continued to work for defendant until he eventually received a termination notice. Plaintiff sued, seeking a declaratory judgment that the covenant not to compete was unenforceable.

The appellate court upheld the lower court's determination that the covenant not to compete was triggered only by the termination of employment under the agreement, not by subsequent employment under a different agreement, particularly in light of the rule that courts are to strictly construe restrictive covenants. Thus, the noncompete clause was not triggered.

G. A Contract Provision Restricting One Employer's Ability to Hire Employees of Another Employer Is Not a Restrictive Covenant

H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc., 209 Ill. 2d 52, 805 N.E.2d 1177 (Ill. 2004). The plaintiff, a company in the business of leasing truck drivers entered into an agreement with the defendant, its customer. The agreement included a provision prohibiting the customer from hiring drivers assigned to it for a period of one year after the termination of the agreement. The plaintiff sued for breach of contract after the defendant hired one of plaintiff's drivers during the course of the agreement.

On an issue of first impression in Illinois, the Supreme Court ruled that a contract provision between businesses limiting the ability of one business to hire employees of the other business was neither a covenant not to compete nor a restrictive covenant between employer and employee. Agreeing with the Virginia Supreme Court, the Court held that this type of contract provision acts as a restraint on trade; thus, the proper analysis is whether it is a reasonable restraint. Consequently, the Supreme Court upheld the lower court's finding of breach of contract in favor of the plaintiff.

H. Viability of a Motion to Dismiss.

Because the enforceability of a restrictive covenant frequently turns on a number of factual inquiries — including the existence of a protectible interest in either near-permanent customer relationships or confidential information, as well as the circumstances surrounding the reasonableness of the restriction — the issue is often resolved after some factual development either through a summary judgment motion or a preliminary injunction hearing. Nevertheless, a motion to dismiss is not necessarily precluded. Because Illinois is a fact-pleading jurisdiction, a complaint that fails to plead the facts necessary to establish the existence of an enforceable restrictive covenant may be dismissed. Although federal courts require only notice pleading, a complaint that fails to state a “plausible” claim under the standards articulated in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), may be susceptible to a motion to dismiss. The lack of decisions affirming dismissal should not be surprising because in most cases a successful motion to dismiss is followed by an amended complaint or a settlement.

1. Motion to dismiss granted.

Bishop v. Lakeland Animal Hospital, P.C., 268 Ill. App. 3d 114, 644 N.E.2d 33 (2d Dist. 1994) (also discussed at pages 62 and 84). Bishop was a veterinarian who was employed by Lakeland Animal Hospital. Lakeland terminated Bishop’s employment, and Bishop brought suit, asking the court to declare that the non-competition clause in her employment contract was unenforceable because her employment contract required that she be terminated only for cause, and Lakeland had no cause to terminate her. The court dismissed the complaint, holding that the employment contract did not require cause, and that the plain language of the contract required enforcement of the restrictive covenant.

The appellate court affirmed the trial court’s ruling that the employment contract was not for a definite period, but reversed the trial court’s ruling that the restrictive covenant was enforceable. The court determined the contract was ambiguous because it permitted termination “for any cause.” This phrase could be interpreted, as Bishop argued, as requiring “cause” for termination. Because Illinois law disfavors restraints on trade, non-competition clauses must be closely scrutinized and this ambiguous language in Bishop’s contract must be construed against the drafter, Lakeland. The court also accepted Bishop’s argument that Lakeland could not enforce the restrictive covenant because “the implied promise of good faith inherent in every contract precludes the enforcement of a non-competition clause when the employee is dismissed without cause.”

Dryvit Systems, Inc. v. Rushing, 132 Ill. App. 3d 9, 477 N.E.2d 35 (1st Dist. 1985) (also discussed at page 39). Rushing worked as a regional sales manager for Dryvit, a company that did business both nationally and internationally. A year into his employment, Rushing signed a two paragraph agreement that contained a restrictive covenant prohibiting him from working for a competitor in the continental United States for a period of two years. Four years later, he quit and began working for a competitor. Dryvit filed an action for preliminary injunction 15 months later seeking to enforce the restrictive covenant. Rushing moved for judgment on the pleadings, arguing that the geographic scope was *per se* void as a restraint of trade and unreasonable. Dryvit filed for leave to amend the scope of its sought relief to prohibit Rushing from soliciting

customers he contacted during his employment. The court denied leave and granted motion for judgment on the pleadings.

The appellate court affirmed. The court noted that an enforceable restrictive covenant must be reasonable as to time, geographic scope and activity. The court found that the restrictive covenant was extremely broad in that it sought to prohibit Rushing from engaging in competitive business anywhere in the United States, including with customers that Rushing did not know about until after he had left Dryvit. The court concluded that the unlimited geographic scope on competitive activities and the additional restriction from association with a corporation whose activities are competitive in the United States was “patently beyond the needs of the employer to protect his interests and [was] unduly harsh on the employee.”

2. Motion to dismiss denied or reversed.

Baird & Warner Residential Sales, Inc. v. Mazzone, No. 1-07-2179, 2008 WL 3837782 (1st Dist. Aug. 15, 2008) (also discussed at page 46). Baird & Warner was an independent real estate broker with more than 30 offices in the Chicagoland area. Mazzone was the manager of Baird & Warner’s Lincoln Park office. As a condition of her employment, Mazzone entered into a Compensation Agreement containing a non-solicitation clause prohibiting her from soliciting or hiring any of Baird & Warner’s employees for one year after her employment. After Mazzone resigned from her position with Baird & Warner, she joined Prudential as the manager of Prudential’s Michigan Avenue office. Baird & Warner sued, alleging violation of the restrictive covenant. The trial court dismissed the complaint, ruling that the non-solicitation clause was unreasonable and overbroad because it was not limited to the Lincoln Park office.

The appellate court reversed and reiterated the rule that “a restrictive covenant may be valid and enforceable if its terms are reasonable and necessary to protect a legitimate business interest of the employer.” The court noted that to determine if a restrictive covenant was reasonable other courts looked at the hardship caused to the employee, the effect upon the general public, the geographic and temporal scope of the restrictions, as well as the activities restricted. The court stated that the trial court erred in granting the motion to dismiss because the reasonableness of the restrictive covenant was a fact based question that could not have been resolved on a motion to dismiss. The court ruled that, even if the non-solicitation clause encompassed all Baird & Warner’s Chicagoland offices, it was not unreasonable as a matter of law. The court pointed out that Mazzone was free to solicit thousands of other employees from other companies, and the agreement extended only one year after her employment with Baird & Warner.

Woodfield Group, Inc. v. DeLisle, 295 Ill. App. 3d 935, 693 N.E.2d 464 (1st Dist. 1998) (also discussed at page 52). Woodfield Group was in the business of computer hardware and software sales. DeLisle, a sales manager who had worked for the company for several years, executed a restrictive covenant that prohibited her from soliciting or accepting sales of any hardware or software from customers or active prospects of Woodfield for a period of 18 months following termination of her employment. The covenant also prohibited her for the same period from soliciting or influencing any person who had a business relationship with Woodfield to discontinue or reduce that relationship, and from disclosing any confidential information for the same period.

After DeLisle went to work for a company engaged in the same business and market area, Woodfield filed suit claiming that DeLisle had breached the restrictive covenant by soliciting and accepting sales from Woodfield customers, and by disclosing confidential information to her new employer. The trial court dismissed Woodfield's complaint, relying upon *Creative Entertainment*, and holding that there was no employment contract to which the restrictive covenant could be ancillary. The appellate court reversed, rejecting the holding in *Creative Entertainment*, and adopting the reasoning of the Fourth District in *Abel v. Fox*, and the Second District in *Lawrence & Allen, Inc. v. Cambridge* (also discussed at pages 1, 14, 40 and 59). The court held that a restrictive covenant may be ancillary to an employment relationship even though there is no written employment agreement and the employment is at will.

Abel v. Fox, 274 Ill. App. 3d 811, 654 N.E.2d 591 (4th Dist. 1995) (also discussed at page 52). Fox worked for a house cleaning service for several years under an oral at-will employment agreement. She signed a covenant not to compete some time after her employment began. The trial court dismissed Abel's complaint seeking to enforce the covenant, relying upon *Creative Entertainment* and holding that the covenant was *per se* unenforceable because it was not ancillary to an enforceable employment contract.

The appellate court reversed, disagreeing with the holding in *Creative Entertainment*. The court reviewed the historical origin of the rule cited in *Creative Entertainment*, and determined that to be enforceable, a covenant not to compete need only be ancillary to a transaction or a valid relationship. Because an oral at-will employment relationship is a valid relationship, a covenant not to compete in the context of such a relationship is not *per se* unenforceable.

Abbott-Interfast Corp. v. Harkabus, 250 Ill. App. 3d 13, 619 N.E.2d 1337 (2d Dist. 1993) (also discussed at pages 4, 41 and 60). Abbott manufactured fasteners, and Harkabus was a former Abbott salesman. In 1977, the parties entered into an employment agreement containing a provision in which Harkabus agreed that, in the event of the termination of his employment, he would not solicit for one year or canvas, divert, take away, accept orders or interfere with any of Abbott's business customers' trade or patronage, wherever the customers were located. The agreement also contained a provision that the employee could not make use of his knowledge of the identity of Abbott's customers, customer lists, methods of operation and obtaining business, pricing, processes, techniques, systems, formulas and any information contained in an Abbott customer history book or other trade secrets. The trial court entered judgment on the pleadings, holding the restrictive covenant unenforceable because it had no geographic limitation. The appellate court reversed, holding that only in extreme cases should a court find a restrictive covenant invalid on its face. The court ruled that the absence of a geographic limitation was not necessarily fatal where the purpose of the restrictive covenant was to protect the employer from losing customers to a former employee who, by virtue of his prior relationship, gained special knowledge and familiarity with the customer's requirements.

Restaurant.com, Inc. v. Savad, No. 08 C 2978, 2008 WL 3992695 (N.D. Ill. Aug. 21, 2008). Savad was a founder of Restaurant.com and served as CFO, COO and vice-chairman during his employment with the company. Savad left and began working for a direct competitor. Restaurant.com filed a complaint against Savad alleging that Savad had violated the non-solicitation and confidentiality agreements found in his employment contract by going to work

for a direct competitor and attempting to lure away other Restaurant.com employees to work for this competitor. Restaurant.com requested preliminary and permanent injunctions and Savad moved to dismiss, arguing that the non-recruitment covenant was unenforceable under Illinois law. After finding that the covenant was unambiguous and applied to Savad's actions, the court turned to address its enforceability. The court noted that to be enforceable, a restrictive covenant must be reasonable and necessary to protect the employer's legitimate interest. Although the court described the covenant, which prohibited recruiting "any person who was an employee, consultant, representative, or agent of the Corporation or any of its affiliates," as broad, it nevertheless held that fact issues as to the size and nature of Restaurant.com's business precluded the court from granting a motion to dismiss.

Integrated Genomics, Inc. v. Krypides, No. 06 C 6706, 2008 WL 630605 (N.D. Ill. Mar. 4, 2008). Integrated Genomics develops software for analyzing genomes. The co-defendants, Krypides and Ivanova, developed software for use in analyzing genomes at Integrated Genomics. Krypides and Ivanova left the company to work for Joint Genome Institute to develop software that directly competes with Integrated Genomics' software. Integrated Genomics filed suit against Krypides and Ivanova alleging breach of covenant not to compete as well as breach of a duty of loyalty, tortious interference, and common law unfair competition. Krypides and Ivanova moved to dismiss.

Although the court noted that there is an apparent split under Illinois law as to whether the reasonableness of a restrictive covenant can be determined on a motion to dismiss, the court denied the motion to dismiss on the grounds that whether a restrictive covenant is reasonable depends on the unique facts and circumstances of each case. The court did not discuss whether a protectible interest or near-permanent customer relationships existed. The restrictive covenant at issue was without limitation as to duration or geography. Krypides covenanted that he would not "engage in the business of developing, producing, marketing or selling products or services which would compete with products or services of the kind of type developed or being developed produced marketed or sold by the Company." The complaint failed to allege facts regarding the number and size of companies that compete with Integrate Genomics, the general size of the genome industry, the existence of other jobs in the defendants' field of expertise, or the nature of the relationships between Integrated Genomics and its clients. Thus, although the court denied the motion to dismiss, it noted that Integrated Genomics "will face an uphill battle on the merits because of how heavily the law weighs against covenants that are not limited in their geographical reach or their scope of prohibited activities."

AutoMed Technologies, Inc. v. Eller, 160 F. Supp. 2d 915 (N.D. Ill. 2001) (also discussed at page 75). Eller was a former employee who oversaw the research and development of medical equipment for a predecessor company purchased by AutoMed. After Eller left AutoMed, AutoMed sued for breach of contract. Eller moved to dismiss, arguing that his restrictive covenants were unreasonable in duration and geographic limitation, that Eller's contract was not assignable because it was an executory contract, and that Eller had not signed the covenants.

The court denied the motion to dismiss, holding that the reasonableness of the restrictive covenant is a fact-based question which cannot be resolved on a motion to dismiss. The court also held that a successor employer can enforce a restrictive covenant in an employment agreement between its predecessor and the predecessor's employee, and rejected Eller's

argument that his contract could not be assigned absent his consent. The court explained that restrictive covenants are not executory because they take effect after the employer has completed its promised performance. The court also noted that employees are not prejudiced by allowing the assignment of restrictive covenants because courts already closely scrutinize those agreements and that a rule prohibiting assignment of restrictive covenants would frustrate many acquisitions. Finally, the court rejected Eller's argument that he did not sign the covenant because he demonstrated his assent by working for AutoMed for nearly two years after receiving the covenant.

Systemax, Inc. v. Schoff, 972 F. Supp. 439 (N.D. Ill. 1997) Systemax sued for breach of non-solicitation covenants contained in an "Employee Agreement Regarding Proprietary and Confidential Information, Patents and Trade Secrets." Schoff had been an at-will employee of Systemax, and signed the Agreement at Systemax's insistence more than six months after he was hired. Schoff moved to dismiss Systemax's claims to enforce the Agreement on the basis that there was no enforceable employment contract between Systemax and Schoff, relying on the First District's decision in *Creative Entertainment*. The court denied the motion to dismiss, following the Seventh Circuit's decision in *Curtis 1000, Inc. v. Suess*, 24 F.3d 941 (7th Cir. 1994) (also discussed at pages 11, 49 and 53), and holding that the Illinois Supreme Court likely would reject the First District's decision in *Creative Entertainment* and adopt the Fourth District's analysis in *Abel v. Fox*, where the Illinois appellate court held that a post-hiring restrictive covenant is enforceable at least where the employee worked for a substantial period after signing. In *dicta*, the court noted that, in a case that arose within Cook County, a federal district court would be required to follow the First Circuit's decision in *Creative Entertainment*. (See discussion on pp. 40-41.)

Following additional briefing on the restrictive covenant's validity and enforceability, the issue was revisited in *Systemax, Inc. v. Schoff*, No. 97 C 5014, 1997 WL 467545 (N.D. Ill. Aug. 13, 1997) (also discussed at page 40). The court granted the motion to dismiss Systemax's claim to enforce the covenant against soliciting employees, finding the covenant unenforceable because it contained no time limitation. The court denied the motion to dismiss the other counts, holding that the covenants pertaining to customers were not inherently invalid on public policy grounds, but expressed strong concerns about their breadth.

Applied Micro, Inc. v. SJI Fulfillment, Inc., 941 F. Supp. 750 (N.D. Ill. 1996) (also discussed at page 53. Predicting that the Illinois Supreme Court would not follow *Creative Entertainment*, the federal district court denied a motion to dismiss a complaint to enforce a non-solicitation agreement that was ancillary to an oral at-will employment relationship.

TABLE OF CASES

<i>Abbott-Interfast Corp. v. Harkabus</i> , 250 Ill. App. 3d 13, 619 N.E.2d 1337 (2d Dist. 1993)	4, 41, 60, 88
<i>Abel v. Fox</i> , 274 Ill. App. 3d 811, 654 N.E.2d 591 (4th Dist. 1995)	52, 88
<i>Advent Electronics, Inc. v. Buckman</i> , 112 F.3d 267 (7th Cir. 1997)	2, 54, 72
<i>Agrimerica, Inc. v. Mathes</i> , 199 Ill. App. 3d 435, 557 N.E.2d 357 (1st Dist. 1990).....	3, 65
<i>Appelbaum v. Appelbaum</i> , 355 Ill. App. 3d 926, 823 N.E.2d 1074 (1st Dist. 2005).....	7, 18, 34, 63
<i>Applied Micro, Inc. v. SJI Fulfillment, Inc.</i> , 941 F. Supp. 750 (N.D. Ill. 1996)	53, 90
<i>Arcor, Inc. v. Haas</i> , 363 Ill. App. 3d 396, 842 N.E.2d 265 (1st Dist. 2005)	32, 58, 68
<i>Arpac Corp. v. Murray</i> , 226 Ill. App. 3d 65, 589 N.E.2d 640 (1st Dist. 1992)	1, 9, 36, 47, 62, 64
<i>Audio Properties, Inc. v. Kovach</i> , 275 Ill. App. 3d 145, 655 N.E.2d 1034 (1st Dist. 1995).....	2, 4, 16, 69
<i>AutoMed Technologies, Inc. v. Eller</i> , 160 F. Supp. 2d 915 (N.D. Ill. 2001)	75, 89
<i>Baird & Warner Residential Sales, Inc. v. Mazzone</i> , No. 1-07-2179, 2008 WL 3837782 (1st Dist. Aug. 15, 2008)	46, 87
<i>Bankcard America, Inc. v. American Timeshare Associates, Inc.</i> , No. 93 C 6362, 1994 U.S. Dist. LEXIS 12205 (N.D. Ill. Aug. 29, 1994).....	15
<i>Bell Atlantic v. Twombly</i> , 550 U.S. 544 (2007)	86
<i>Bergstein v. Technology Solutions Co., Inc.</i> , 274 Ill. App. 3d 689, 654 N.E.2d 479 (1st Dist. 1995)	82
<i>Berlin v. Sarah Bush Lincoln Health Center</i> , 179 Ill. 2d 1, 688 N.E.2d 106 (1997).....	80
<i>Bishop v. Lakeland Animal Hospital, P.C.</i> , 268 Ill. App. 3d 114, 644 N.E.2d 33 (2d Dist. 1994).....	62, 84, 86
<i>Bisla v. Parvaiz</i> , 379 Ill. App. 3d 567, 884 N.E.2d 790 (1st Dist. 2008)	68, 81
<i>Bloomington Urological Associates, SC v. Scaglia</i> , 292 Ill. App. 3d 793, 686 N.E.2d 389 (4th Dist. 1997).....	73

<i>Brown and Brown, Inc. v. Mudron</i> , 379 Ill. App. 3d 724, 887 N.E.2d 437 (3d Dist. 2008)	49
<i>Business Records Corp. v. Lueth</i> , 981 F.2d 957 (7th Cir. 1992)	46, 67
<i>C.H. Robinson Worldwide, Inc. v. Command Transp., LLC</i> , No. 05 C 3401, 2005 WL 3077998 (N.D. Ill. Nov. 16, 2005)	1
<i>Callahan v. L.G. Balfour</i> , 179 Ill. App. 3d 372, 534 N.E.2d 565 (1st Dist. 1989)	34, 40
<i>Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.</i> , 378 Ill. App. 3d 437, 879 N.E.2d 512 (1st Dist. 2007)	42, 47
<i>Capsonic Group v. Swick</i> , 181 Ill. App. 3d 988, 537 N.E.2d 1378 (2d Dist. 1989)	30, 72
<i>Carter-Shields, M.D. v. Alton Health Institute</i> , 317 Ill. App. 3d 260, 739 N.E.2d 569 (5th Dist. 2000), <i>aff'd on other grounds, vacated as advisory</i> , 201 Ill. 2d 441, 777 N.E.2d 948 (2002)	13, 79, 80
<i>Carus Chemical Co. v. Calciquest, Inc.</i> , 341 Ill. App. 3d 897, 793 N.E.2d 931 (3d Dist. 2003)	35, 69
<i>Center for Sight of Central Illinois I, S.C. v. Deranian</i> , 305 Ill. App. 3d 909, 712 N.E.2d 417 (4th Dist. 1999)	69, 80, 82
<i>Central Water Works Supply, Inc. v. Fisher</i> , 240 Ill. App. 3d 952, 608 N.E.2d 618 (4th Dist. 1993)	38, 57, 64
<i>Coady v. Harpo, Inc.</i> , 308 Ill. App. 3d 153, 719 N.E.2d 244 (1st Dist. 1999)	2, 41, 73
<i>COM-CO Insurance Agency, Inc. v. Service Insurance Agency, Inc.</i> , 321 Ill. App. 3d 816, 748 N.E.2d 298 (1st Dist. 2001)	16
<i>Corroon & Black of Illinois, Inc. v. Magner</i> , 145 Ill. App. 3d 151, 494 N.E.2d 785 (1st Dist. 1986)	2
<i>Creative Entertainment, Inc. v. Lorenz</i> , 265 Ill. App. 3d 343, 638 N.E.2d 217 (1st Dist. 1994)	14, 52
<i>Credit Suisse First Boston, LLC v. Vender</i> , No. 04 C 7631, 2004 WL 2806191 (N.D. Ill. Dec. 3, 2004)	47
<i>Cummins v. Bickel & Brewer</i> , No. 00 C 3703, 2002 WL 187492 (N.D. Ill. Feb. 6, 2002)	77

<i>CUNA Mutual Life Insurance Co. v. Kuperman</i> , No. 97 C 6228, 1998 WL 409880 (N.D. Ill. July 7, 1998).....	8, 68
<i>Curtis 1000, Inc. v. Suess</i> , 24 F.3d 941 (7th Cir. 1994).....	11, 49, 53, 90
<i>Dam, Snell & Taveirne, Ltd. v. Verchota</i> , 324 Ill. App. 3d 146, 754 N.E.2d 464 (2d Dist. 2001).....	5, 64
<i>Danville Polyclinic, Ltd. v. Dethmers</i> , 260 Ill. App. 3d 108, 631 N.E.2d 842 (4th Dist. 1994).....	13, 20, 84
<i>Decker, Berta & Co., Ltd. v. Berta</i> , 225 Ill. App. 3d 24, 587 N.E.2d 72 (4th Dist. 1992).....	38, 56
<i>Delta Medical Systems v. Mid-America Medical Systems, Inc.</i> , 331 Ill. App. 3d 777, 772 N.E.2d 768 (1st Dist. 2002).....	29, 69
<i>Diamond Blade Warehouse, Inc. v. Paramount Diamond Tools, Inc.</i> , 420 F. Supp. 2d 866 (N.D. Ill. 2006).....	49, 53, 67
<i>Donald McElroy, Inc. v. Delaney</i> , 72 Ill. App. 3d 285, 389 N.E.2d 1300 (1st Dist. 1979).....	1
<i>Dowd & Dowd, Ltd. v. Gleason</i> , 284 Ill. App. 3d 915, 672 N.E.2d 854 (1st Dist. 1996), <i>aff'd in part, rev'd in part</i> , 181 Ill. 2d 460, 693 N.E.2d 358 (1998).....	11, 77, 79
<i>Dryvit Systems, Inc. v. Rushing</i> , 132 Ill. App. 3d 9, 477 N.E.2d 35 (1st Dist. 1985).....	39, 86
<i>Eichmann v. National Hospital & Health Care Services, Inc.</i> , 308 Ill. App. 3d 337, 719 N.E.2d 1141 (1st Dist. 1999).....	21, 22, 38, 54, 60
<i>Fisher Investments, Inc. v. Carlson</i> , No. 04 C 6619, 2004 WL 2496474 (N.D. Ill. Nov. 2, 2004).....	33, 40, 72
<i>Flexicorps, Inc. v. Trend Technologies, Inc.</i> , No. 01 C 1754, 2002 WL 31018353 (N.D. Ill. Sept. 10, 2002).....	35, 37
<i>Francorp, Inc. v. Siebert</i> , 126 F. Supp. 2d 543 (N.D. Ill. 2000).....	83
<i>Frazier v. Dettman</i> , 212 Ill. App. 3d 139, 569 N.E.2d 1382 (2d Dist. 1991).....	21, 71
<i>Freund v. E.D. & F. Man International, Inc.</i> , 199 F.3d 382 (7th Cir. 1999).....	51
<i>Galesburg Clinic Association v. West</i> , 302 Ill. App. 3d 1016, 706 N.E.2d 1035 (3d Dist. 1999).....	82

<i>George S. May International Co. v. International Profit Associates</i> , 256 Ill. App. 3d 779, 628 N.E.2d 647 (1st Dist. 1993).....	31, 47, 70
<i>Graber v. Badegian</i> , 242 Ill. App. 3d 1049, 611 N.E.2d 1291 (1st Dist. 1993).....	69
<i>Grand Vehicle Works Holdings Corp. v. Frey</i> , No. 03 C 7948, 2005 WL 1139312 (N.D. Ill. May 11, 2005)	29, 44
<i>H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.</i> , 209 Ill. 2d 52, 805 N.E.2d 1177 (Ill. 2004)	85
<i>Hamer Holding Group, Inc. v. Elmore (Hamer I)</i> , 202 Ill. App. 3d 994, 560 N.E.2d 907 (1st Dist. 1990).....	2, 38, 46, 55, 57, 65
<i>Hamer Holding Group, Inc. v. Elmore (Hamer II)</i> , 244 Ill. App. 3d 1069, 613 N.E.2d 1190 (1st Dist. 1993)	57
<i>Hanchett Paper Co. v. Melchiorre</i> , 341 Ill. App. 3d 345, 792 N.E.2d 395 (2d Dist. 2003)	4, 63
<i>Health Professionals, Ltd. v. Johnson</i> , 339 Ill. App. 3d 1021, 791 N.E.2d 1179 (3d Dist. 2003)	40, 56, 62, 84
<i>Hecny Transportation, Inc. v. Chu</i> , 430 F.3d 402 (7th Cir. 2005)	28
<i>Henri Studio, Inc. v. Outdoor Marketing, Inc.</i> , No. 96 C 8198, 1997 WL 652351 (N.D. Ill. Oct. 14, 1997).....	4, 15, 42, 72
<i>Henry v. O’Keefe</i> , No. 01 C 8698, 2002 WL 31324049 (N.D. Ill. Oct. 18, 2002).....	8, 68
<i>Hess Newmark Owens Wolf, Inc. v. Owens</i> , 415 F.3d 630 (7th Cir. 2005)	43, 58, 66
<i>Hill v. Names & Addresses, Inc.</i> , 212 Ill. App. 3d 1065, 571 N.E.2d 1085 (1st Dist. 1991).....	59
<i>Hoff v. Mayer, Brown and Platt</i> , 331 Ill. App. 3d 732, 772 N.E.2d 263 (1st Dist. 2002).....	76
<i>Howard Johnson & Co. v. Feinstein</i> , 241 Ill. App. 3d 828, 609 N.E.2d 930 (1st Dist. 1993).....	56, 64
<i>Innovative Clinical Solutions, Ltd. v. Clinical Research Center, P.C.</i> , 173 F. Supp. 2d 826 (C.D. Ill. 2001)	83
<i>Integrated Genomics, Inc. v. Krypides</i> , No. 06 C 6706, 2008 WL 630605 (N.D. Ill. Mar. 4, 2008).....	89

<i>Joliet Medical Group, Inc. v. Ensminger</i> , 337 Ill. App. 3d 1076, 787 N.E.2d 879 (3d Dist. 2003).....	79
<i>Jostens, Inc. v. Kauffman</i> , 842 F. Supp. 352 (C.D. Ill. 1994).....	74
<i>Joy v. Hay Group, Inc.</i> , No. 02 C 4989, 2003 WL 22118930 (N.D. Ill. Sept. 11, 2003).....	61
<i>Ken-Pin, Inc. v. Vantage Bowling Corp.</i> , No. 02 C 7991, 2004 WL 783092 (N.D. Ill. Jan. 20, 2004).....	40
<i>Label Printers v. Pflug</i> , 206 Ill. App. 3d 483, 564 N.E.2d 1382 (2d Dist. 1991).....	18, 71
<i>Label Printers v. Pflug</i> , 246 Ill. App. 3d 435, 616 N.E.2d 706 (2d Dist. 1993).....	74
<i>Lakeview Technology, Inc. v. Robinson</i> , 446 F.3d 655 (7th Cir. 2006).....	66
<i>Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.</i> , 292 Ill. App. 3d 131, 685 N.E.2d 434 (2d Dist. 1997).....	1, 14, 40, 59
<i>Learning Curve International, LLC v. Chansons Du Kakawi, Inc.</i> , No. 98 C 2360, 1998 WL 565149 (N.D. Ill. Aug. 31, 1998).....	19
<i>Liebert Corp. v. Mazur</i> , 357 Ill. App. 3d 265, 827 N.E.2d 909 (1st Dist. 2005).....	27
<i>Lifetec, Inc. v. Edwards</i> , 377 Ill. App. 3d 260, 880 N.E.2d 188 (4th Dist. 2007).....	22, 63
<i>Loewen Group International, Inc. v. Haberichter</i> , 912 F. Supp. 388 (N.D. Ill. 1996).....	2, 11, 45, 54
<i>LSBZ, Inc. v. Brokis</i> , 237 Ill. App. 3d 415, 603 N.E.2d 1240 (2d Dist. 1992).....	16, 70
<i>Lyle R. Jager Agency, Inc. v. Steward</i> , 253 Ill. App. 3d 631, 625 N.E.2d 397 (3d Dist. 1993).....	5, 64
<i>Malone v. CORT Furniture Corp.</i> , No. 02 C 1729, 2002 WL 1874819 (N.D. Ill. Aug. 13, 2005).....	36
<i>Marwaha v. Woodridge Clinic, S.C.</i> , 339 Ill. App. 3d 291, 790 N.E.2d 974 (2d Dist. 2003).....	85
<i>Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano</i> , 999 F.2d 211 (7th Cir. 1993).....	73

<i>Metropolitan Life Insurance Co. v. Kaufman</i> , 275 Ill. App. 3d 1126 (1st Dist. Oct. 13, 1995).....	52
<i>Mid-Town Petroleum, Inc. v. Gowen</i> , 243 Ill. App. 3d 63, 611 N.E.2d 1221 (1st Dist. 1993).....	50, 70
<i>Midwest Television, Inc. v. Oloffson</i> , 298 Ill. App. 3d 548, 699 N.E.2d 230 (3d Dist. 1998)	4, 5, 43, 50, 64
<i>Millard Maintenance Service Co. v. Bernero</i> , 207 Ill. App. 3d 736, 566 N.E.2d 379 (1st Dist. 1990)	3, 22, 49, 65
<i>Mintel International Group, Ltd. v. Neergheen</i> , No. 08-CV-3939, 2008 WL 2782818 (N.D. Ill. July 16, 2008).....	67
<i>Mohanty v. St. John Heart Clinic</i> , 225 Ill. 2d 52, 866 N.E.2d 85 (2006). 11, 45, 63, 78, 81	
<i>New Medico Associates, Inc. v. Kleinhenz</i> , No. 90 C 6782, 1991 WL 105600 (N.D. Ill. May 31, 1991)	50
<i>Nobel Biocare USA, Inc. v. Lynch</i> , No. 99 C 5774, 1999 WL 958501 (N.D. Ill. Sept. 15, 1999)	39, 60, 72
<i>North American Paper Co. v. Unterberger</i> , 172 Ill. App. 3d 410, 415-16, 526 N.E.2d 621, 624 (1st Dist. 1988).....	2
<i>Office Electronics, Inc. v. Adell</i> , 228 Ill. App. 3d 814, 593 N.E.2d 732 (1st Dist. 1992).....	43, 70
<i>Office Mates 5, North Shore, Inc. v. Hazen</i> , 234 Ill. App. 3d 557, 599 N.E.2d 1072 (1st Dist. 1992)	1, 3, 4, 13, 70
<i>Outsource International, Inc. v. Barton</i> , 192 F.3d 662 (7th Cir. 1999).....	10, 66
<i>Pactiv Corp. v. Menasha Corp.</i> , 261 F. Supp. 2d 1009 (N.D. Ill. 2002).....	37, 40, 60
<i>PCx Corp. v. Ross</i> , 209 Ill. App. 3d 530, 568 N.E.2d 311 (1st Dist. 1991)	7, 65
<i>PepsiCo, Inc. v. Redmond</i> , 54 F.3d 1262 (7th Cir. 1995).....	24, 25, 26, 27, 67
<i>Perman v. ArcVentures, Inc.</i> , 196 Ill. App. 3d 758, 554 N.E.2d 982 (1st Dist. 1990).....	38
<i>Peterson-Jorwic Group, Inc. v. Pecora</i> , 224 Ill. App. 3d 460, 586 N.E.2d 676 (1st Dist. 1991).....	70
<i>Prairie Eye Ctr, Ltd. v. Butler</i> , 329 Ill. App. 3d 293, 768 N.E.2d 414 (4th Dist. 2002).....	11, 63, 64

<i>Preferred Meal Systems, Inc. v. Guse</i> , 199 Ill. App. 3d 710, 557 N.E.2d 506 (1st Dist. 1990).....	6, 65
<i>PRG-Schultz International Inc. v. Kirix Corp.</i> , No. 03 C 1867, 2003 WL 22232771 (N.D. Ill. Sept. 22, 2003).....	25
<i>Quixote Transportation Safety, Inc. v. Cooper</i> , No. 03 C 1401, 2004 WL 528011 (N.D. Ill. Mar. 12, 2004).....	17, 40
<i>Rapp Insurance Agency, Inc. v. Baldree</i> , 231 Ill. App. 3d 1038, 597 N.E.2d 936 (5th Dist. 1992).....	17, 70
<i>Restaurant.com, Inc. v. Savad</i> , No. 08 C 2978, 2008 WL 3992695 (N.D. Ill. Aug. 21, 2008).....	88
<i>Retina Services, Ltd. v. Garoon</i> , 182 Ill. App. 3d 851, 538 N.E.2d 651 (1st Dist. 1989).....	12, 65
<i>RKI, Inc. v. Grimes</i> , 177 F. Supp. 2d 859 (N.D. Ill. 2001).....	10, 24
<i>Roberge v. Qualitek International, Inc.</i> , No. 01 C 5509, 2002 WL 109360 (N.D. Ill. Jan. 28, 2002).....	41, 60
<i>Roy v. Coyne</i> , 259 Ill. App. 3d 269, 630 N.E.2d 1024 (1st Dist. 1994).....	3
<i>RRK Holding Co. v. Sears, Roebuck and Co.</i> , 563 F. Supp. 2d 832 (N.D. Ill. 2008).....	24
<i>RTC Industries, Inc. v. Haddon</i> , No. 06 C 5734, 2007 WL 2743583 (N.D. Ill. Sept. 10, 2007).....	26
<i>Sarah Bush Lincoln Health Center v. Perket</i> , 238 Ill. App. 3d 958, 605 N.E.2d 613 (4th Dist. 1992).....	12, 64
<i>Scheffel & Co., P.C. v. Fessler</i> , 356 Ill. App. 3d 308, 827 N.E.2d 1 (5th Dist. 2005).....	48
<i>Scherer v. Rockwell International Corp.</i> , 766 F. Supp. 593 (N.D. Ill. 1991).....	51
<i>Service Centers of Chicago, Inc. v. Minogue</i> , 180 Ill. App. 3d 447, 535 N.E.2d 1132 (1st Dist. 1989).....	26, 27, 71
<i>Shapiro v. Regent Printing Co.</i> , 192 Ill. App. 3d 1005, 549 N.E.2d 793 (1st Dist. 1989).....	30, 71
<i>Sheehy v. Sheehy</i> , 299 Ill. App. 3d 996, 702 N.E.2d 200 (1st Dist. 1998).....	47, 69
<i>Smith v. Burkitt</i> , 342 Ill. App. 3d 365, 795 N.E.2d 385 (5th Dist. 2003).....	45

<i>Southern Illinois Medical Business Associates v. Camillo</i> , 190 Ill. App. 3d 664, 546 N.E.2d 1059 (5th Dist. 1989).....	20, 72
<i>Springfield Rare Coin Galleries, Inc. v. Mileham</i> , 250 Ill. App. 3d 922, 620 N.E.2d 479 (4th Dist. 1993).....	4, 14, 33
<i>Stenstrom Petroleum Services Group, Inc. v. Mesch</i> , 375 Ill. App. 3d 1077, 874 N.E.2d 959 (2d Dist. 2007).....	62
<i>Stevens v. Rooks Pitts & Poust</i> , 289 Ill. App. 3d 991, 682 N.E.2d 1125 (1st Dist. 1997).....	76
<i>Strata Marketing, Inc. v. Murphy</i> , 317 Ill. App. 3d 1054, 740 N.E.2d 1166 (1st Dist. 2000).....	26, 27
<i>Stunfence, Inc. v. Gallagher Security (USA), Inc.</i> , No. 01 C 9627, 2002 WL 1838128 (N.D. Ill. Aug. 12, 2002)	40, 60
<i>Systemax, Inc. v. Schoff</i> , 972 F. Supp. 439 (N.D. Ill. 1997)	53, 90
<i>Systemax, Inc. v. Schoff</i> , No. 97 C 5014, 1997 WL 467545 (N.D. Ill. Aug. 13, 1997)	40
<i>Taimoorazy v. Bloomington Anesthesiology Service, Ltd.</i> , 122 F. Supp. 2d 967 (C.D. Ill. 2000).....	21
<i>Tax Track Systems Corp. v. New Investor World, Inc.</i> , 478 F.3d 783 (7th Cir. 2007)	35
<i>Telxon Corp. v. Hoffman</i> , 720 F. Supp. 657 (N.D. Ill. 1989).....	40, 51, 60, 72
<i>The Agency, Inc. v. Grove</i> , 362 Ill. App. 3d 206, 839 N.E.2d 606 (2d Dist. 2005)	1, 23
<i>Thomas & Betts Corp. v. Panduit Corp.</i> , No. 93 C 4017, 1999 WL 261861 (N.D. Ill. Apr. 8, 1999)	32
<i>TLC The Laser Central, Inc. v. Midwest Eye Institute II, Ltd.</i> , 306 Ill. App. 3d 411, 714 N.E.2d 45 (1st Dist. 1999)	81
<i>Trailer Leasing Co. v. Associates Commercial Corp.</i> , No. 96 C 2305, 1996 WL 392135 (N.D. Ill July 10, 1996).....	1
<i>Tyler Enterprises of Elwood, Inc. v. Shafer</i> , 214 Ill. App. 3d 145, 573 N.E.2d 863 (3d Dist. 1991).....	6, 65
<i>Unisource Worldwide, Inc. v. Carrara</i> , 244 F. Supp. 2d 977 (C.D. Ill. 2003)	28, 37

<i>Vascular & General Surgical Associates, Ltd. v. Loiterman</i> , 234 Ill. App. 3d 1, 599 N.E.2d 1246 (1st Dist. 1992)	73
<i>Williams & Montgomery, Ltd. v. Stellato</i> , 195 Ill. App. 3d 544, 552 N.E.2d 1100 (1st Dist. 1990).....	19, 71, 77
<i>Woodfield Group, Inc. v. DeLisle</i> , 295 Ill. App. 3d 935, 693 N.E.2d 464 (1st Dist. 1998).....	52, 87
<i>YCA, LLC v. Berry</i> , No. 03 C 3116, 2004 WL 1093385 (N.D Ill. May 7, 2004)	25, 32, 36, 61

