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Arkansas Courts and Covenants Not to Compete

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I. INTRODUCTION

Courts determine the enforceability of covenants not to compete by applying the centuries-old common-law prohibition against unreasonable restraints of trade.¹ The Restatement (Second) of Contracts declares that a promise to refrain from competition is an unreasonable restraint of trade, and thus is unenforceable, if the promise "is not ancillary to an otherwise valid transaction or relationship."² This principle recognizes that thwarting competition is not a legitimate end in itself. To merit judicial approval, a restraint of competition merely must serve as the means of attaining some lawful aim, such as protecting the value of good will acquired in connection with the purchase of an ongoing business, or safeguarding trade secrets and confidential customer information entrusted to an employee.³

The Restatement lists three examples of ancillary covenants not to compete:

(a) a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of the business sold;
(b) a promise by an employee or other agent not to compete with his employer or other principal;
(c) a promise by a partner not to compete with the

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³ Restatement (Second) of Contracts § 188 comments b, f, & g.
partnership. Even an ancillary covenant is unenforceable, however, if it violates the rule of reason. Under the rule, a court will refuse to uphold a covenant if it proscribes more activities, covers more territory, or lasts longer than necessary to protect the promisee's legitimate interests, or if the promisee's need for protection is outweighed by the hardship to the promisor and the likely injury to the public.

These doctrines have produced a huge body of case law and scholarly commentary. The purpose of this article is to examine the way Arkansas courts have applied the doctrines to the two most common kinds of covenants not to compete: a seller's promise not to compete with the buyer following the sale of a business or professional practice; and an employee's promise not to compete with his employer after leaving the job.

Section II of the article discusses the ends/means analytical framework judges use when deciding whether to enforce a covenant not to compete. Section III describes the various ancillary purposes that Arkansas courts deem sufficiently legitimate to warrant enforcement of a reasonably circumscribed covenant. Section IV explores Arkansas courts' utilization of means scrutiny to uncover illegitimate anticompetitive objectives concealed behind ostensibly valid purposes. The Conclusion suggests a few guidelines for drafting covenants which will pass muster under Arkansas law.

II. ENDS/MEANS ANALYTICAL FRAMEWORK

The common-law methodology courts use to determine the enforceability of covenants not to compete resembles the ends/means analysis they employ in constitutional cases. Just as ends/means scrutiny helps courts "flush out" illicit purposes in equal protection cases, ends/means analysis assists courts in identifying those cove-

4. Id. § 188.
5. See id. comments a & d.
7. The third type of covenant mentioned by the Restatement—a promise by a partner not to compete with the partnership—will not be examined separately because such covenants are treated much the same as employee covenants. See A. Farnsworth, Contracts § 5.3, at 338 (1982).
nants that have as their principal aim the suppression of ordinary competition rather than protection of a legitimate interest.

To ascertain whether a particular covenant is enforceable because it reasonably restrains unfair competition, or unenforceable because it unreasonably restricts ordinary competition, a court must ask several questions:

1. Does the covenant ostensibly have a legitimate purpose, or is it a naked restraint of competition? If the covenant does not even purport to do something other than aid the promisee in his quest to monopolize the market, the court will not enforce it. If it appears to serve a legitimate function, however, the court will go to the next question.

2. Is the ostensible purpose the real purpose, or is it a smoke screen for an attempt to monopolize? The court will answer this query by examining how closely the means fit the purported ends. If the connection is close enough, the court will conclude that the covenant really is a reasonable restriction on unfair competition and deserves enforcement. If the nexus appears too attenuated, though, the court will decide that the covenant's real goal is to impose an unreasonable restraint on ordinary competition, which public policy forbids.

In the case of a covenant ancillary to the sale of a business, the court will not demand a very close fit, but if the provision limits employment opportunities, the court must precisely measure the gap between means and ends by paying careful attention to the answers to the next three subquestions:


One reason for the double standard is courts' desire to prevent overreaching by employers. "Because post-employment restraints are often the product of unequal bargaining power and may inflict unanticipated hardship on the employee," notes Professor Allan Farnsworth, "they are scrutinized with more care than are covenants in the sale of a business." A. FARNSWORTH, supra note 7, § 5.3, at 338. Cf. Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689 (1984) (arguing that heightened scrutiny in certain types of constitutional cases reflects judicial awareness that dominant groups sometimes give themselves "naked preferences," i.e., benefits obtained through the exercise of raw political power).

The Restatement suggests another reason for according differential treatment: buyers of business good will generally require protection from competition in order to enjoy the benefit of their bargain, whereas employers usually can derive full value from their contracts without such protection except in those instances where an employee might appropriate valuable trade
a. Is the covenant’s territorial scope broader than necessary to achieve the legitimate objective the promisee supposedly seeks? In other words, does the covenant forbid competition in an unnecessarily large number of cities, counties, or states?

b. Is the covenant’s temporal scope broader than necessary to accomplish the legitimate goal the promisee claims to pursue? Put another way, does the covenant bar competition for too many months or years?

c. Is the covenant’s substantive scope broader than necessary to serve the legitimate purpose it ostensibly serves? That is to say, does the covenant prohibit too many forms of competitive activity?

Every covenant is judged according to the facts and circumstances in that case. The party challenging the validity of a restraint of competition has the burden of proving its unreasonableness. In summary, the challenger must show the restraint lacks a legitimate purpose or “lasts longer than is necessary to protect the promisee’s interest, covers a geographic area larger than is necessary to protect those interests, or prohibits the promisor from engaging in activities which are unnecessary to protect the promisee.”

III. ENDS SCRUTINY: LEGITIMATE PURPOSES

A. Restraint of Competition Ancillary to Sale of a Business

The buyer of an established business or professional practice has a legitimate interest in securing from the seller a promise not to compete in a way that would devalue the good will and other assets the buyer purchased. The covenant actually works to both parties’ advantage because, in addition to protecting the buyer’s investment, the noncompetition clause enables the seller to exact a higher price for his business.

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information or customer relationships. Restatement (Second) of Contracts § 188 comment b (1981). See also Blake, supra note 6, at 647-48.


12. See Hyde v. CM Vending Co., 288 Ark. at 222, 703 S.W.2d at 864; Madison Bank & Trust v. First Nat'l Bank of Huntsville, 276 Ark. at 408-11, 635 S.W.2d at 270-72; McClure v. Young, 193 Ark. 188, 190-91, 98 S.W.2d 877, 878 (1936); Wright v. Marshall, 182 Ark. 890, 891-92, 33 S.W.2d 43, 44 (1930); Hultsman v. Carroll, 177 Ark. 432, 434-37, 6 S.W.2d 551, 552-53 (1928); Robbins v. Plant, 174 Ark. 639, 643, 646, 297 S.W. 1027, 1029, 1030 (1927); Culp Bros. Piano Co. v. Moore, 162 Ark. 292, 305-06, 258 S.W. 326, 330 (1924); Bledsoe v. Carpenter, 160 Ark. 349, 352, 254 S.W. 677, 678 (1923); Wakenight v. Spear & Rogers, 147
If the promisee already participates in the business or profession and the promisor does not, however, the promisee lacks a proper purpose for enforcing a prohibition against competition. Public policy will not allow someone to buy off potential rivals in order to control a market. Where the "avowed object of the contract was to stifle competition and to promote a monopoly," rather than to protect the promisee "in a legitimate use of something which it acquired by [the contract]," an Arkansas court will not enforce the bargain.\(^{13}\) Nor will a court enforce a covenant forbidding future competition between parties who currently participate in the same market unless the promise effects a transfer of property or good will.\(^{14}\)

B. Restraint of Competition Ancillary to an Employment Relationship

1. Common Law of Contracts

The Arkansas Court of Appeals summarized the types of employment-related interests that qualify as legitimate bases for enforcing covenants not to compete:

Where the covenant grows out of an employment or other associational relationship, the courts have found an interest sufficient to warrant enforcement of the covenant only in those cases where the covenantee provided special training, or made available trade secrets, confidential business information or customer lists, and then only if it is found that the associate was able to use information so obtained to gain an unfair competitive advantage.\(^{15}\)

Arkansas cases are full of ad hoc judgments and hair-splitting distinctions because the courts have tried to maintain a delicate state of equilibrium among three competing interests: an employer's right to protect his investment; an employee's right to work wherever and with whomever he pleases; and a customer's right to do business with the person of his choice. Nevertheless, from the numerous fact-dependent Arkansas cases on noncompetition covenants in employment contracts, we can distill a few basic principles.

First, an employer does not have a legitimate interest in prevent-
ing an ex-employee from using the general knowledge and experience he acquired during his period of employment. 16

Second, an employer does have a legitimate interest in preventing an ex-employee from making competitive use of secret formulas, techniques, and devices which were developed at the employer's expense. 17 Secrecy is the essential element here: if the formulas, methods, and so forth may be learned by consulting public sources, or if the employer does not take adequate measures to avoid dissemination, the trade secrets rule is inapplicable. 18

Third, an employer has a legitimate interest in preventing an ex-employee from unfairly exploiting confidential information. The Arkansas Supreme Court appears to define confidential information as something which does not qualify as a trade secret, but which no company engaged in business for profit would disclose voluntarily to its competitors. 19 Pricing data that reveal costs and profit margins, for example, fit this definition. 20 Information is not confidential if other ex-employees may use it in the same manner as the defendant without committing a breach of contract. 21 Nor is it confidential if it is readily ascertainable by anyone in the industry, 22 or is available from a public source such as a directory. 23 The mere fact that an ex-employee

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16. See McLeod v. Meyer, 237 Ark. at 177, 372 S.W.2d at 223; see also American Excel- sior Laundry Co. v. Derrisseaux, 204 Ark. 843, 845-46, 165 S.W.2d 598, 600 (1942) (absent overriding justification, interference with ex-employee's right to continue working in chosen field imposes undue hardship).


Besides relying on a covenant not to compete, an employer may protect his trade secrets by invoking Ark. Code Ann. §§ 4-75-601 to 607 (1987), the Arkansas version of the Uniform Trade Secrets Act, 14 U.L.A. 537 (1980). The Act basically codifies much of the common law of trade secrets. Id. at 538; Electro-Craft Corp. v. Controlled Motion, Inc., 332 N.W.2d 890, 898 (Minn. 1983). For information on the common law of trade secrets, see Restatement (First) of Torts § 757 (1939); R. Milgrim, Milgrim on Trade Secrets § 2.03 (Business Organizations Vol. 12 (1986)).


19. See Rector-Phillips-Morse, Inc. v. Vroman, 253 Ark. at 752, 489 S.W.2d 3.


21. See Rector-Phillips-Morse, Inc. v. Vroman, 253 Ark. at 752, 489 S.W.2d at 3.


23. See Rector-Phillips-Morse, Inc. v. Vroman, 253 Ark. at 752, 489 S.W.2d at 3; Miller
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knows confidential information about the employer's customers does not warrant enforcement of a noncompetition clause. The information must help the ex-employee take advantage of personal relationships with customers and thereby entice them away from the employer. 24

Fourth, an employer has a valid interest in thwarting unfair appropriation of its stock of customers by an ex-employee. An employer cannot prevent satisfied customers from seeking out the ex-employee and giving him their patronage based solely upon their appreciation of his skill. 25 An employer does have a right, however, to stop an ex-employee from soliciting business from customers on the strength of the personal relationships which his employment enabled him to develop. 26

2. Common Law of Agency

Even if the contract says nothing about post-employment activity, the common law of agency imposes significant limitations on what an ex-employee may do. 27 An employee is a fiduciary whose duties do not end upon termination of employment. He owes a fiduciary duty not to use, to the detriment of his former employer, any secret or confidential information which he acquired during his employment.


27. See generally Annotation, Former Employee's Duty, in Absence of Express Contract, Not To Solicit Former Employer's Customers or Otherwise Use His Knowledge of Customer Lists Acquired in Earlier Employment, 28 A.L.R.3d 7 (1969). The RESTATEMENT (SECOND) OF AGENCY (1958) summarizes the common-law rule:

Unless otherwise agreed, after the termination of the agency, the agent:

(a) has no duty not to compete with the principal;

(b) has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty. The agent is entitled to use general information concerning the method of business of
confidential information he learned in the course of his employment. The ex-employee may draw freely, however, upon knowledge obtained through ordinary experience. A third party, such as a new employer, who knowingly aids, encourages, or cooperates with the ex-employee in the breach of his fiduciary duty not to use secret or confidential information becomes liable, along with the ex-employee, for any resulting harm.

IV. MEANS SCRUTINY: REASONABLE RESTRICTIONS

As noted above in Section II, courts identify the real purpose of a covenant not to compete by examining the extent to which its territorial, temporal, and substantive restrictions are necessary to achieve the clause’s ostensible aim. If the restrictions seem reasonably calculated to serve one of the legitimate purposes described in Section III, the court enforces the prohibition, but if the restraints appear overly broad, the court denies enforcement.

Courts sometimes say that each of the three means factors—ge-

the principal and the names of the customers retained in his memory, if not acquired in violation of his duty as agent;
(c) has a duty to account for profits made by the sale or use of trade secrets and other confidential information, whether or not in competition with the principal;
(d) has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation.
Id. § 396.
28. The duty not to use confidential information applies “regardless of the fact that the information . . . might not technically be considered a trade secret.” Nucor Corp. v. Tennessee Forging Steel Service, Inc., 476 F.2d 386, 392 (8th Cir. 1973) (applying Arkansas law).
29. The Arkansas Supreme Court characterized this duty as being in the nature of an implied provision of the employment contract. El Dorado Laundry Co. v. Ford, 174 Ark. 104, 106, 294 S.W. 393, 394 (1927). The plaintiff in El Dorado Laundry sued to enjoin its former employee from soliciting business from customers whom the defendant had served while employed by the plaintiff. The court rejected the argument that the identities of the defendant’s own former customers constituted a trade secret. “[I]n the absence of an express contract,” the court concluded, “on taking a new employment in a competing business an employee may solicit for his new employer the business of his former customers, and will not be enjoined from so doing at the instance of his former employer.” Id. at 107, 294 S.W. at 394.
30. See Witmer v. Arkansas Dailies, Inc., 202 Ark. 470, 476, 151 S.W.2d 971, 974 (1941) (ex-employee allowed to solicit former employer’s customers because knowledge of customers stemmed from experience rather than from secret or confidential information). But see Restatement (Second) of Agency § 396 comment b (1958) (although ex-employee may solicit former employer’s customers if ex-employee retained customers’ names in his memory, ex-employee may not use written customer data made during employment); id. comment b (employee may not take job primarily for purpose of memorizing names for later use as competitor); id. comment c (employee may not use information acquired by eavesdropping or by unpermitted examination of employer’s records).
31. See Raines v. Toney, 228 Ark. 1170, 1180-82, 313 S.W.2d 802, 809-10 (1958); Restatement (Second) of Agency § 312 comment c (1958).
ography, time, and substance—must be analyzed individually to determine whether the covenant constitutes an unreasonable restraint of trade. An examination of all the reported cases plainly shows, however, that Arkansas judges have recognized the subtle interplay of the three variables. Each influences the others. For example, a five-county restriction may withstand scrutiny if it bars competition in one field of commercial activity for two years but will flunk the reasonableness test if it bars competition in all fields for two years or in one field for three years. In some cases, a particular factor may play the predominant role, but the other two always lurk in the background and provide a context for the dispositive issue.

The foregoing observations explain why it would be pointless to compile separate lists of the various kinds of territorial, temporal, and substantive restrictions which Arkansas courts either have enforced or declined to enforce. Instead, we will examine the cases chronologically and see how the three factors, in combination with each other, produced certain results.

A. Restraint of Competition Ancillary to Sale of a Business

1. Noncompetition Covenants Upheld by Courts

Courts have enforced the following types of anticompetition clauses in contracts for the sale of a business or professional practice:

- A permanent prohibition against practicing medicine in Texarkana and its immediate vicinity. (See, e.g., Stubblefield v. Siloam Springs Newspapers, Inc., 590 F. Supp. at 1035.)
- A ban on soliciting insurance business in Jefferson County for five years. (Webster v. Williams, 62 Ark. 101, 34 S.W. 537 (1896).
- A permanent proscription of participating in the plumbing business in Searcy (if such participation would compete with the promisees). (Kimbro v. Wells, 112 Ark. 126, 165 S.W. 645 (1914).
- A prohibition against engaging in the clothing business in Arkadelphia for five years. (Bledsoe v. Carpenter, 160 Ark. 349, 254 S.W. 677 (1923).)
A permanent ban on the sale of musical instruments in Fort Smith, Hartford, Russellville, an Oklahoma town, and the surrounding area.  
A prohibition against competing with the promisee in the ginning business in Kentucky Township, White County, for a period of twenty years.  
A permanent restriction on the sale of gasoline at a particular location in Pulaski County.  
A permanent ban on reentering the restaurant business in Blytheville.  
A prohibition against engaging in the retail hardware or furniture business in Walnut Ridge for three years.  
A ban on the establishment of banking facilities in Huntsville, Hindsville, Marble, or within a ten-mile radius of Huntsville for ten years.  
A prohibition against operating a truck stop or service station within a 100-mile radius of Alma (except for part of a certain highway) for five years.  
A ban on participating in the food and beverage vending business within a fifty-mile radius of Russellville for a period of up to fifteen years.

2. Noncompetition Covenants Invalidated by Courts

The present study failed to discover a single reported case in which an Arkansas appellate court declined to enforce a noncompetition clause in a contract for the sale of a business or professional practice on the ground that the covenant's territorial, temporal, or substantive scope reached farther than necessary to protect the promisee's legitimate interests. A United States district court decision, *Stubblefield v. Siloam Springs Newspapers, Inc.*, appears to be the only reported example of invalidation based on a finding of unreasonableness.

The contract at issue in *Stubblefield* barred the promisor from

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41. Hultsman v. Carroll, 177 Ark. 432, 6 S.W.2d 551 (1928).
42. Wright v. Marshall, 182 Ark. 890, 33 S.W.2d 43 (1930).
43. McClure v. Young, 193 Ark. 188, 98 S.W.2d 877 (1936).
44. Madison Bank & Trust v. First Nat'l Bank of Huntsville, 276 Ark. 405, 635 S.W.2d 268 (1982).
engaging in the newspaper business in Benton County for ten years. Judge Franklin Waters noted that the covenant restricted employment as well as commercial opportunities, so he applied both heightened and minimal scrutiny and declared the restraint invalid under each.\textsuperscript{48} The employment aspect of the case was not dispositive, however. "[E]ven if this contract was a pure business sale transaction, it would be void because of the combined effect of the duration and geographic scope and the unreasonable restraint on trade which results."\textsuperscript{49} Stubblefield, therefore, stands for the proposition that, although drafters of business noncompetition covenants enjoy great latitude, courts will deny enforcement to grossly excessive restrictions.

B. Restraint of Competition Ancillary to an Employment Relationship

1. Noncompetition Covenants Upheld by Courts

Courts have deemed reasonable the following types of post-employment limitations:

- A one-year prohibition against soliciting the promisee's customers, disclosing its trade secrets, or working for a competitor's pest control business within the territory where the promisee had an established clientele (Little Rock, Ft. Smith, Clarksville, Van Buren, Hot Springs, Dumas, Pine Bluff, Camp Robinson, and a seventy-five mile radius of each city). The court emphasized the brevity of the restriction and concluded that the covenant's territorial scope corresponded closely enough to the interests it supposedly served: protection of trade secrets, confidential customer information, and the investment in special training.\textsuperscript{50}

- A ban on engaging in the linen supply business in Ft. Smith or within twenty-five miles thereof for one year after termination of employment. The court stressed that the promisor still could engage in the home laundry business, his previous occupation, and thus was not being deprived of the ability to make a living. The court also emphasized the short duration of the restraint. The opinion said little about the nexus between the covenant's territorial coverage and its ostensible purpose, but evidently the court considered the scope commensurate with the danger of customer appropriation.\textsuperscript{51}

\textsuperscript{48} Id. at 1036-37. On two-tiered scrutiny, see supra note 9.

\textsuperscript{49} 590 F. Supp. at 1037.

\textsuperscript{50} Orkin Exterminating Co. v. Murrell, 212 Ark. 449, 206 S.W.2d 185 (1947).

• A prohibition against the sale of school equipment and supplies anywhere in Arkansas for two years after termination of employment. The purpose of the covenant was to safeguard confidential pricing information. The promisee operated statewide, so a statewide ban on competition was reasonably necessary to protect the promisee's legitimate interest. The two-year restriction also bore a sufficiently close relationship to the covenant's objective, the court held, because pricing information takes that long to become obsolete.\textsuperscript{52}

• A prohibition, lasting one year after termination of employment, against selling food in Conway, Morrilton, Clinton, and Perryville. The purpose of the covenant was to prevent the ex-employee, a traveling salesman, from using his personal relationships with the promisee's customers to lure them away from his former employer. The territorial scope of the covenant reflected that purpose by restricting competition only in the county seats of counties in which the promisor sold the promisee's products during the last two years of their employment relationship. The court found the territorial restriction reasonable and reached the same conclusion regarding the covenant's duration because the evidence showed the danger of customer appropriation remained high for at least a year after the promisor left.\textsuperscript{53}

• A covenant barring the sale of water treatment products, for a period of one year after termination of employment, to any of the promisee's established prospects or customers in the ex-employee's assigned sales territory. Here, too, the covenant aimed to prevent unfair exploitation of personal relationships. The territorial scope of the covenant passed the reasonableness test because the restriction did not prevent the ex-employee from doing business with everyone in Arkansas, but only with particular buyers and prospective buyers (those the promisor was most likely to appropriate unfairly). This approach, the court underscored, left the ex-employee free to solicit purchases from a huge pool of people throughout Arkansas. The court devoted scant attention to the temporal scope of the covenant, apparently considering a one-year period reasonable per se.\textsuperscript{54}

• A covenant preventing the ex-employee from soliciting or accepting insurance business from his own former customers for a two-year period following termination of his employment. The covenant provided a reasonable means of preventing unfair appro-

\textsuperscript{52} All-State Supply, Inc. v. Fisher, 252 Ark. 962, 483 S.W.2d 210 (1972).
\textsuperscript{53} Borden, Inc. v. Huey, 261 Ark. 313, 547 S.W.2d 760 (1977).
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propriation of customers, the court held, because its substantive scope was not too broad. The provision did not apply to all forms of business, but only to insurance business. The territorial scope presented no obstacle to enforcement because the covenant allowed the ex-employee to continue working in the same town. He could sell insurance to anyone he pleased so long as he had not served the buyer while employed by the promisee. The two-year period qualified as reasonable, the court concluded, because the task of training a replacement for the ex-employee would take that long.\textsuperscript{55}

- A covenant reducing an insurance agent's postemployment compensation if, within two years after termination, he managed a competing business located within 200 miles of the Little Rock office he managed for the promisee. The object of the covenant was to prevent the ex-agent from using confidential information to entice the promisee's customers. The court did not clearly articulate why it found the two-year and 200-mile provisions reasonable. The opinion suggests, however, that the reasonableness test will be applied less stringently if the covenant merely exacts a financial penalty instead of prohibiting competition outright.\textsuperscript{56}

2. *Noncompetition Covenants Invalidated by Courts*

The following noncompetition provisions in employment contracts were held unreasonable because their territorial, temporal, or substantive scope proved broader than necessary to achieve a legitimate objective:

- A covenant barring a laundry route man from engaging in the laundry or dry cleaning business in the Pine Bluff area for five years after termination of his employment with the promisee. The purpose of the covenant was to prevent unfair solicitation of the employer's stock of customers. The employer could have attained that objective by means of a restriction shorter than five years, so the court invalidated the covenant on the ground that it unduly restricted the ex-employee's right to earn a living in his calling.\textsuperscript{57}

- A prohibition against working for a brush clearing business in Missouri, Kansas, Oklahoma, or Arkansas for five years after ending employment with the promisee. The aim of the covenant appeared to be preservation of the employer's stock of customers rather than protection of trade secrets or confidential


\textsuperscript{56} Owens v. Penn Mutual Life Ins. Co., 851 F.2d 1053 (8th Cir. 1988).

\textsuperscript{57} American Excelsior Laundry Co. v. Derrisseaux, 204 Ark. 843, 165 S.W.2d 598 (1942); see also Orkin Exterminating Co. v. Murrell, 212 Ark. 449, 457, 206 S.W.2d 185, 189 (1947) (explaining and distinguishing *American Excelsior*).
information. The restriction did not need to embrace so much territory and last so long to serve that purpose, hence the court held the covenant unreasonable.58

- A covenant restraining a linen service company executive from working for another linen service or laundry company anywhere in the promisee's sales area (most of Arkansas) for five years after the end of his employment by the promisee. The court concluded that the covenant provided the employer with greater protection than the company required and imposed an undue hardship on the ex-employee. The substantive scope of the covenant was unreasonable, the court held, because it included a type of business—family laundry service—in which the promisee had never engaged. Moreover, the five-year restriction was too long. The linen service business did not involve trade secrets, so the employer's only legitimate interest seemed to be the preservation of its stock of customers. For that purpose, a shorter period would have sufficed.59

- A covenant preventing a commercial pilot from rendering crop dusting services within a fifty-mile radius of Eudora for five years after terminating his employment with the promisee. The court declared the restriction invalid because of its length (indicating that a five-year restraint is unreasonable per se), but suggested in dicta that a two-year period probably would have survived scrutiny.60

- A three-year postemployment prohibition against competing with the promisee in the sale or development of real estate within a fifty-mile radius of Greers Ferry Lake. The court considered the territorial scope overly broad but failed to explain the precise basis for that conclusion.61 The court's discussion of the three-year duration of the covenant made more sense. Evidently, the purpose of the covenant was to prevent ex-employees from making unfair use of customer information. A three-year restriction was longer than necessary, the court held, because customer information became useless after only a few months.62

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61. Miller v. Fairfield Bay, Inc., 247 Ark. 565, 570-71, 446 S.W.2d 660, 663 (1969). The court merely noted the absence of trade secrets and contrasted this case with McCumber v. Federated Mutual Implement & Hdw. Ins. Co., 230 Ark. 13, 320 S.W.2d 637 (1959), in which the court declined to enforce a covenant with a narrower territorial scope than the Greers Ferry area restriction. McCumber was inapposite, though, because the result there turned on the absence of a legitimate purpose for the covenant rather than on the breadth of the restriction. See id. at 17, 320 S.W.2d at 640, and text accompanying note 23 supra.
• A covenant restricting the ex-employee, for a period of one year, from competing with the promisee in the food-selling business within the promisee's trade area, which included almost four-fifths of Arkansas. The court did not examine the reasonableness of the covenant's temporal scope because it found the territorial coverage much broader than necessary to forestall the unfair exploitation of personal relationships with customers. The ex-employee had serviced customers in only four of the fifty-nine Arkansas counties covered by the covenant, so the fit between means and end was too attenuated to merit enforcement.63

• A ban on selling real estate in Pulaski County for three years after termination of employment with the promisee. The purpose of the covenant was to prevent the ex-employee from using confidential information unfairly, but since the useful life of the information was far less than three years, the court found the covenant’s duration unreasonable.64

• A prohibition against engaging in the insurance business within a seventy-five mile radius of El Dorado for five years after ending employment with the promisee. The Supreme Court affirmed the trial judge's conclusion that the five-year restriction was unreasonable, but the sketchy appellate opinion sheds little light on the court’s reasoning.65

• A covenant barring a chemist from working for another manufacturer of defoaming agents anywhere in the United States for two years after leaving the promisee. The court declined to enforce the contract as written because the restriction applied to parts of the nation where the covenantee had few, if any, customers.66

• A prohibition against engaging in the newspaper business in Benton County for ten years. The purpose of the covenant was to protect customer lists and other confidential information. The court surveyed the case law and concluded that a restriction in an employment contract exceeding two years is presumptively invalid; therefore, a ten-year restraint seemed plainly unreasonable. Furthermore, the geographic scope swept too broadly because the contract prevented the promisor from becoming associated with any publication—even an out-of-state journal—that did business in Benton County, thus giving the restriction virtually nationwide effect.67


See supra text accompanying notes 48-49.
V. Conclusion

A lawyer must use great care in drafting a covenant not to compete because an Arkansas court will not apply a blue pencil to overly broad provisions. The court either will enforce a covenant exactly as written or invalidate it altogether. Consequently, the drafter should be extremely conservative and include only those restrictions that the client actually needs to protect judicially recognized interests. Here are a few suggested guidelines for writing an enforceable covenant:

1. Spell out the exact purpose of the noncompetition clause. If the aim of the clause is to prevent an ex-employee from unfairly exploiting his knowledge of trade secrets or his relationships with customers, say so explicitly. By eschewing boilerplate and focusing upon the specific dangers facing your client, you will reduce the risk that a court will view the covenant as simply an attempt to monopolize.

2. Make sure the covenant's territorial scope corresponds closely to the danger the covenant aims to obviate. If the danger is customer pirating, for example, the logical ambit of the restricted zone is the area where the customers live or work. Better still, instead of putting an area off limits, put the customers themselves off limits. In other words, rather than prohibiting the employee of a Pulaski County-based company from competing in Pulaski County, where most of the company's customers reside, bar the employee from contacting any customer whom the employee personally served, regardless of where the customer lives. Framing the restriction in nonterritorial terms should refute a challenger's argument that the covenant tries to carve out an exclusive trading zone. The employee will remain free to work anywhere he wishes, and he may deal with anyone he pleases, except for that tiny fraction of the population consisting of former customers.

68. See Rector-Phillips-Morse, Inc. v. Vroman, 253 Ark. at 753, 489 S.W.2d at 4; Borden, Inc. v. Smith, 252 Ark. at 299-300, 478 S.W.2d at 747; Brown v. Devine, 240 Ark. at 842, 402 S.W.2d at 672; McLeod v. Meyer, 237 Ark. at 178, 372 S.W.2d at 223; Hampton Road, Inc. v. Miller, 18 Ark. App. at 11, 708 S.W.2d at 99-100.

69. In some situations, however, the drafter will have to use a territorial restriction. Take the sale of business good will, for instance. The buyer of a going concern pays for a reputation which the buyer hopes will attract new customers as well as retain the business's existing clientele. A covenant that merely prohibits the seller from contacting those who actually traded with him before the sale would deny the buyer the benefit of his bargain. Such a covenant would be unfair to the buyer because it would allow the seller to continue to exploit an asset for which the buyer had paid valuable consideration: the seller's reputation in the area among people who had heard of the seller but had not yet traded with him. The only way to secure the buyer's bargain would be to ban the seller from trading with anyone in the region for a reasonable period of time. The restricted area should be narrowly defined, however, to
3. Base the length of the noncompetition term on the nature of the promisee's business, and ensure that the restriction lasts no longer than absolutely necessary to protect the promisee's legitimate interests. If the purpose of the noncompetition clause is to protect a securities dealer's customer information, say, and if industry conditions give the material a useful life of only six months, limit the noncompetition clause's duration to six months. Arkansas courts have enforced sale-of-business covenants lasting fifteen years and longer, but they have taken a much tougher stance on employment covenants. As Judge Waters observed in *Stubblefield*, "[a]lthough the reasonableness of a covenant not to compete must be determined in light of the particular facts of each case, . . . [Arkansas decisions] strongly indicate that covenants contained in employment contracts which restrict competition for more than two years are highly suspect and are generally void as against public policy." The prudent drafter will not crowd the two-year limit, but will confine the covenant's temporal scope to a year or less.

4. Do not proscribe any forms of conduct except those that directly threaten your client's interests. If your client sells trucks, you may restrict employees from working for a competing truck dealer, but do not try to prevent them from earning their living selling cars. Similarly, if you represent the buyer of a dry-cleaning business, you may include in the contract of sale a provision preventing the seller from resuming the cleaning business in that area for a reasonable period of time, but you may not abridge his right to open a laundromat. A covenant that reaches farther than necessary invites the inference that the promisee inserted the restriction, not for the purpose of protecting legitimate interests, but in order to punish the promisor. Given courts' traditional distaste for contracts impeding free trade in labor and goods, salutary self-restraint should guide the drafter's pen.

include only the territory where the seller had done business and built a reputation prior to the sale.

Protection of trade secrets also necessitates the use of a territorial limitation. An employee who is entrusted with trade secrets or other confidential information should be prohibited from working for anyone who could exploit the material to the promisee's detriment. That would include all competitors doing business in the area where the promisee operates. The area should be defined as precisely as possible.
