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This writer feels that the court should have construed and applied Rule 1.3 in such a manner as to enable orderly procedure according to the "Rules"<sup>25</sup> and not to frustrate this procedure when by "happenstance" a motion of petition is made to the trial court by a litigant subsequent to the timely filing of an appeal. The court stressed the importance of the right to a rehearing pursuant to the "Rules," but seemed to relegate to a position of minimal importance the party's in-violate right of appeal.

WILLIAM F. SULLIVAN

### EQUITY—PARTIAL ENFORCEMENT OF CONTRACT NOT TO COMPETE

The defendant was employed as a district manager in the plaintiff's building maintenance business. After nine years of employment, the defendant signed a contract wherein he agreed not to engage in competition with the plaintiff for a three year period subsequent to the termination of his employment. Five months later, the defendant was discharged and subsequently engaged in business which was competitive with the plaintiff. The plaintiff obtained a decree which enjoined the defendant from competing with the plaintiff for the contract term of *three* years. The chancellor, on rehearing, modified the decree so as to preclude competition for a *one* year period. On appeal, the third district court of appeal *held* affirmed: the chancellor must look not only to the reasonableness of such an agreement on its face, but also to whether the agreement, as to the particular defendant, yields harsh, oppressive, or unjust results, and he may modify the restrictions in accordance with what would be a reasonable term in each case. *American Bldg. Maintenance Co. v. Fogelman*, 167 So.2d 791 (Fla. 3d Dist. 1964).

Covenants restricting employment were early objects of judicial disfavor;<sup>1</sup> however, the more modern view tends towards the accept-

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*Note:* When recording required, see section 28.29 F.S.A.

Tolling of Time. The running of the time for appeal or to petition for certiorari is terminated by a timely motion permitted under any court rule or applicable statute and the full time for appeal commences to run and is to be computed from the entry of any of the following orders made upon a timely motion:

- (1) granting or denying a motion for judgment in accordance with a motion for a directed verdict;
- (2) denying a motion for a new trial;
- (3) denying a motion or petition for rehearing in a non-jury matter;
- (4) denying or granting a motion to alter or amend judgment as to substance.

25. "Right to appeal." FED. R. CIV. P. 73; FLA. APP. R. 3.2. "Relief from judgment." FED. R. CIV. P. 60; FLA. R. CIV. P. 1.38.

1. The first recorded case of an attempt to gain enforcement of such a covenant was greeted with the chancellor's threat to incarcerate the plaintiff. "In my opinion you might have demurred upon him, that the obligation is against the common law, and, by God, if the plaintiff was here he should go to prison till he paid a fine to the king!" Dyer's Case,

ance of certain classes of restrictive covenants.<sup>2</sup> Most courts of equity will now enforce a covenant wherein an employee promises not to compete with his employer after the termination of his employment. The general test of the enforceability of such agreements is referred to as the test of "reasonableness," but the simplicity of this term is misleading. The question of whether a particular restriction is "reasonable" turns upon which of several tests a jurisdiction chooses to apply.<sup>3</sup> Similarly, the test adopted by a jurisdiction and applied as a rule of law depends on which of several factors its courts choose to include and emphasize in the rule. The rule, once formulated, speaks to the reasonableness of restricting the employee to the particular time, territory, or activity limitations set forth in the covenant. The several factors most often emphasized in the rule include: (1) the scope necessary to protect the legitimate business interests of the employer;<sup>4</sup> (2) public policy considerations against monopoly;<sup>5</sup> (3) the public interest in leaving certain occupations free from such restrictions;<sup>6</sup> and (4) the effect that the restriction would have upon the ability of the employee to support himself and his family.<sup>7</sup> The judgment may also turn upon the nature of the contract of which the covenant was a part.<sup>8</sup>

Most courts of equity refuse to grant specific performance of restrictive covenants which are unreasonable on their face.<sup>9</sup> When, however,

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Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414). This case was cited and analyzed as part of an extensive historical analysis of post-employment restraints in Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960).

2. This judicial relenting has been attributed to a variety of historical developments. Among them have been the disintegration of the apprentice system, *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961); growing appreciation of a need to protect the businessman from unfair competition, *Mitchel v. Reynolds*, 1 P.Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711); and the changing nature of the employer-employee relationship, *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A.C. 688; *Mason v. Provident Clothing & Supply Co.*, [1913] A.C. 724.

3. An excellent discussion of the policy considerations on all sides of this question can be found by reading the majority, concurring, and dissenting opinions in the Florida case of *Love v. Miami Laundry Co.*, 118 Fla. 137, 160 So. 32 (1935).

4. *E.g.*, *Arthur Murray Dance Studios, Inc. v. Whitter*, 62 Ohio L. Abs. 17, 105 N.E.2d 685 (1952); *Oxman v. Proffitt*, 241 S.C. 28, 126 S.E.2d 852 (1962); *Ofsowitz v. Askin Stores, Inc.*, 306 S.W.2d 923 (Tex. Civ. App. 1957).

5. *E.g.*, *Solar Textiles Co. v. Fortino*, 46 Ill. App. 2d 436, 196 N.E.2d 719 (1964); *Vaughan v. General Outdoor Advertising Co.*, 352 S.W.2d 562 (Ky. 1962); *Sonotone Corp. v. Ellis*, 2 N.J. Super. 419, 64 A.2d 255, *aff'd*, 4 N.J. Super. 331, 67 A.2d 186 (1949).

6. *E.g.*, *Marshall v. Covington*, 81 Idaho 199, 339 P.2d 504 (1959); *Bauer v. Sawyer*, 8 Ill. 2d 351, 134 N.E.2d 329 (1956); *Tench v. Weaver*, 374 P.2d 27 (Wyo. 1962).

7. *E.g.*, *Hill v. Rice*, 259 Ala. 587, 67 So.2d 789 (1953); *Donahue v. Permacel Tape Corp.*, 234 Ind. 398, 127 N.E.2d 235 (1955); *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961); *Richardson v. Paxton Co.*, 203 Va. 790, 127 S.E.2d 113 (1962).

8. These covenants generally arise either ancillary to a sale of the business, or as part of a contract of employment. The courts are less inclined to strike down or modify a restriction ancillary to a business sale, than one ancillary to an employment contract. The rationale for this distinction is rooted in the discrepancy in bargaining power and mutuality involved in the two types of contracts. This discussion deals primarily with employment contracts. For a closer analysis of the effect of lack of mutuality, see note 15 *infra*.

9. The most readily recognizable example of a restriction unreasonable on its face is

the restrictive covenant is reasonable on its face, but unreasonable or harsh in result when applied, courts then look to the divisibility of the restrictions.<sup>10</sup> This is to say that when restrictions unreasonable in this second sense<sup>11</sup> are divisible in their wording, a majority of jurisdictions apply the "blue pencil rule"<sup>12</sup> and enforce the covenants to the extent that the chancellor can make them reasonable. This is achieved by refusing specific performance to the unreasonable restrictions and granting it only to the reasonable ones.<sup>13</sup> When this divisibility of a restrictive covenant is absent, however, only a minority of courts exercise a discretionary partial enforcement of an unreasonable restraint *to the extent* that the chancellor deems reasonable upon the facts.<sup>14</sup>

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one which is unlimited as to time and territory. *E.g.*, *Nesko Corp. v. Fontaine*, 19 Conn. Supp. 160, 110 A.2d 631 (1954); *Vendo Co. v. Long*, 213 Ga. 774, 102 S.E.2d 173 (1958); *Snyder v. Hamilton*, 39 Ill. App. 352, 189 N.E.2d 97 (1963); *Larx Co. v. Nicol*, 224 Minn. 1, 28 N.W.2d 705 (1947); *Hudson Foam Latex Products, Inc. v. Aiken*, 82 N.J. Super. 508, 198 A.2d 136 (1964); *Segal v. Fleischer*, 93 Ohio App. 315, 113 N.E.2d 608 (1952).

10. The question of divisibility of restrictive covenants speaks to the intention of the parties to make the restrictions severable, thereby preserving the enforceability of the covenants. (*E.g.*, the restriction "State of Florida" would generally be held indivisible, while a complete listing of each of the state's counties could be held divisible.) Generally, the question of divisibility is based upon a consideration of the contract's language and subject matter. *E.g.*, *John T. Stanley Co. v. Lagomarsino*, 53 F.2d 112 (S.D.N.Y. 1931); *Eldridge v. Johnston*, 195 Ore. 379, 245 P.2d 239 (1952); *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958). The practice seems to be that those courts whose determinations are influenced by divisibility generally construe a restriction so as to find it divisible, *e.g.*, *Foltz v. Struxness*, 168 Kan. 714, 215 P.2d 133 (1950), while courts, not so influenced, generally do not, *e.g.*, *WAKE Broadcasters Inc. v. Crawford*, 215 Ga. 862, 114 S.E.2d 26 (1960) (where the court held the restrictions unseverable despite a provision of the covenant expressing a contrary intention).

11. It is with this class of restrictions that this discussion is primarily concerned. Thus, unless otherwise explained, the reader may assume that the term "unreasonable" will refer to a restraint unreasonable not on its face (*supra* note 9), but unreasonable as applied to the factual situation.

12. This rule, formulated by English courts, historically was applied only to those cases where the restrictions were clearly intended to be divisible and thus "where the severance [could] be performed by a blue pencil." *Attwood v. Lamont*, 2 K.B. 146, 155, *rev'd on other grounds*, 3 K.B. 571 (C.A. 1920). American courts, however, have used the term "blue pencil" when the restrictions were not worded in this manner. *E.g.*, *Edgecomb v. Edmonston*, 257 Mass. 12, 153 N.E. 99 (1926). Under the traditional view, if the promises are unreasonable and not divisible, the rule does not apply and the entire restriction fails. *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958).

13. *E.g.*, *Welcome Wagon, Inc. v. Morris*, 224 F.2d 693 (4th Cir. 1955) (applying North Carolina law); *Losquadro Coal Corp. v. Rubel Corp.*, 86 F. Supp. 774 (D. N.J. 1949) (applying New Jersey law); *McLeod v. Meyer*, 237 Ark. 173, 372 S.W.2d 220 (1963); *WAKE Broadcasters, Inc. v. Crawford*, 215 Ga. 862, 114 S.E.2d 26 (1960); *Friarson v. Shepard Bldg. Supply Co.*, 247 Miss. 157, 154 So.2d 151 (1963); *Union Central Life Ins. Co. v. Balistrieri*, 19 Wis.2d 265, 120 N.W.2d 126 (1963) (The court was there bound by a Wisconsin statute expressly prohibiting partial enforceability, even where divisible. *WIS. STAT. ANN.* § 103.46 (1957).).

14. *John Roane, Inc. v. Tweed*, 33 Del. Ch. 4, 89 A.2d 548 (1952); *Foltz v. Struxness*, 168 Kan. 714, 215 P.2d 133 (1950); *Tobin v. Cody*, 343 Mass. 747, 180 N.E.2d 652 (1962); *Extine v. Williamson Midwest, Inc.*, 176 Ohio St. 403, 200 N.E.2d 297 (1964); *Clare v. Palmer*, 201 Okla. 186, 203 P.2d 426 (1949) (The court here based its decision upon an Oklahoma statute providing that such covenants must be reasonable and where unreasonable were "to that extent void." 15 OKLA. STAT. ANN. § 217 (1964).); *Lewis v. Krueger, Hutchinson, & Overton Clinic*, 153 Tex. 363, 269 S.W.2d 798 (1954).

Florida law has paralleled the general American development on the enforceability of covenants restricting future employment. The earliest cases regarded such contracts as legally valid, but unenforceable in equity.<sup>15</sup> The rationale of this approach was founded upon what the courts termed a "lack of mutuality" between the parties to such a contract.<sup>16</sup> Even the most reasonable restrictive employment covenants were unenforceable in equity<sup>17</sup> until the enactment of a statute which authorized the use of such a remedy.<sup>18</sup> That statute provides *inter alia*:

[O]ne who is employed as an agent or employee may agree with his employer, to refrain from carrying on or engaging in similar business and from soliciting old customers of such an employer within a reasonably limited time and area . . . so long as such employer continues to carry on a like business therein. *Said agreements may, in the discretion of a court of competent jurisdiction be enforced by injunction.*<sup>19</sup>

In 1960 in *Tasty Box Lunch Co. v. Kennedy*<sup>20</sup> this statute was interpreted to dispense with the mutuality requirement. "To hold that the agreement is unenforceable because the bargaining parties were not on equal terms would void all such agreements and this would defeat the purpose of the statute."<sup>21</sup> Now that a remedy is available in equity there remained the question: to what extent if any can a chancellor exercise a discretionary partial enforcement of an unreasonable restraint on future employment? That question appears to have been answered by the instant case, *American Bldg. Maintenance Co. v. Fogelman*.<sup>22</sup> This case, when

15. This rationale was rooted in the conviction that absent some special equity, damages at law were an adequate remedy. *Simms v. Burnette*, 55 Fla. 702, 46 So. 90 (1908), is the leading case.

16. The lack of mutuality argument first appeared in *Simms v. Burnette*, *supra* note 14. It was repeatedly utilized as the controlling rationale in subsequent cases. *J. Schaeffer, Inc. v. Hoppen*, 127 Fla. 703, 173 So. 900 (1937); *Lewis v. Kirkland*, 118 Fla. 350, 160 So. 44 (1935); *Wheeler v. Mickles*, 118 Fla. 348, 160 So. 45 (1935); *Love v. Miami Laundry Co.*, 118 Fla. 137, 160 So. 32 (1935); *Simms v. Patterson*, 55 Fla. 707, 46 So. 91 (1908). The rule was verbalized most clearly by the Supreme Court of Florida in *Love v. Miami Laundry Co.*, *supra* note 3, at 139, 160 So. at 34:

A court of equity should not lend its power to enforce the provisions of an executory contract against one of the parties unless the terms and conditions . . . are such that a court of equity might enforce at least a part of the terms thereof against the other party.

17. The Florida Supreme Court reached the same conclusion in *Arnold v. Grossman*, 75 So.2d 593, 595 (Fla. 1954):

We have found no case nor have we been cited to one where a contract of employment with a provision not to compete . . . has been upheld in this jurisdiction. Such contracts will not be enforced, absent some special equity, and have generally been stricken down for 'lack of mutuality.' The same rule has been applied to support the refusal of injunctive relief in cases involving enforcement of restrictive covenants in contracts of employment.

18. FLA. STAT. § 542.12 (1953); this statute was held constitutional in *Standard Newspapers, Inc. v. Woods*, 110 So.2d 397 (Fla. 1959).

19. FLA. STAT. § 542.12(2) (1963). (Emphasis added.)

20. *Tasty Box Lunch Co. v. Kennedy*, 121 So.2d 52 (Fla. 3d Dist. 1960) (reversing a decree which had invalidated a six month restriction on the grounds of lack of mutuality).

21. *Id.* at 54.

22. 167 So.2d 791 (Fla. 3d Dist. 1964).

read with other recent Florida cases,<sup>23</sup> indicates that Florida now stands with that minority which enforces seemingly indivisible, unreasonable restraints *to the extent* that they appear reasonable to the chancellor.<sup>24</sup> This result was reached in the instant case by rather confusing language:

The first step is . . . for the chancellor to determine whether the *agreement* is reasonable. Should this inquiry result in the affirmative, the chancellor will proceed to the second discretionary consideration, to-wit, whether this reasonable agreement will result in harsh, oppressive or unjust results when *applied to this* defendant. In other words, there are two determinations; (1) the reasonableness of the agreement per se; (2) the reasonableness of the agreement as applied in the instant case, taking into consideration all of the facts, including those which have occurred subsequent to the execution of the agreement.<sup>25</sup>

Florida's newly established adherence to the rule of limited enforcement of indivisible post-employment restraints is in accordance with the trend in this area of the law. Both the rule and the trend, however, have been subjected to criticism in both legal comment<sup>26</sup> and case decision.<sup>27</sup> This criticism directs itself to possible judicial compounding of the inequities inherent in such contracts.<sup>28</sup> Further, the flexibility of the rule, which appears to be its best feature, is so flexible as to provide little in the way of guidelines for the practitioner or the layman. This dis-

23. *McQuown v. Lakeland Window Cleaning Co.*, 136 So.2d 370 (Fla. 2d Dist. 1962) (limiting enforcement of a five year restriction to one year). *Cf. Rinker Materials Corp. v. Holloway Materials Corp.*, 167 So.2d 875 (Fla. 2d Dist. 1964) (where the court refused to enforce by injunction a ten year employment restriction, holding that the employee had already followed the covenant for four and one-half years, and that any more would be an unreasonable restriction); *Davis v. Ebsco Indus., Inc.*, 150 So.2d 460 (Fla. 3d Dist. 1963) (where the court refused to grant full faith and credit to a valid New York restrictive covenant thereby limiting the territorial scope of the covenant's term).

24. See cases cited in note 13 *supra*.

25. *American Bldg. Maintenance Co. v. Fogelman*, 167 So.2d 791, 792 (Fla. 3d Dist. 1964). In the writer's opinion; this language wants for clarity. The first step listed by the court appears to direct itself to the question of whether the restriction is so wholly unreasonable (note 9 *supra*) as to render the agreement unenforceable at equity. The second step appears to speak to the standards of reasonableness (see notes 4-8 *supra* and accompanying text) generally applied to the factual situations in these cases. The language suggests that the emphasis in the Florida standard of reasonableness is upon the effect of the restriction on the employee.

26. 5 WILLISTON, CONTRACTS § 1660 (Rev. ed. 1937).

27. *E.g.*, *Hudson Foam Latex Products, Inc. v. Aiken*, 82 N.J. Super. 508, 514, 198 A.2d 136, 141 (1964):

Employers should not be permitted to include the broadest possible restrictions in an employment contract, thus achieving the greatest possible amount of protection for themselves, to the unreasonable restriction of an employee's right to use his skills to the best advantage, and then be enabled to enforce so much and so many of the restrictions as can be found by a court to be reasonable under the circumstances. If such were the rule, it would afford employers an unconscionable advantage over their employees . . . The restraints extend so far beyond what the employer can legitimately expect to be protected so as to be patently unreasonable. Attempts by this court to distill from the broad generalities contained therein narrower and more meaningful restrictions would constitute no less than a re-writing of the provision.

28. See note 15 *supra*.

turbing vagueness of the rule was certainly not alleviated by the language used in the instant case. At the best, a reconsideration is looked for; at the least, clarification.

MICHAEL R. KLEIN

## PROTECTION OF A TRADENAME IN THE ABSENCE OF ACTUAL COMPETITION

"Kash N' Karry Wholesale Super Markets" was the tradename<sup>1</sup> for the thirteen stores which the plaintiff operated in the Tampa area. When the defendant sought permission to use the same name for a similar business in Fort Lauderdale, because the name was "catchy," the prior user objected on the ground that he intended to expand to that area. However, the defendant, a South Florida business, subsequently appropriated the name, and the plaintiff brought suit to enjoin the alleged unfair competition.<sup>2</sup> The Chancellor dismissed the suit with prejudice.<sup>3</sup> On appeal, *held*, affirmed: in the absence of actual competition between the litigants, a court of equity will not enjoin the use of a tradename unless there exists a reasonable probability, rather than a mere possibility, that the prior user's business would expand to the area of the subsequent user at the time of the alleged misappropriation. *Tampa Wholesale Co. v. Foodtown, U.S.A., Inc.*, 166 So.2d 711 (Fla. 2d Dist. 1964).

### FLORIDA LAW IN NONCOMPETITIVE SITUATIONS

In noncompetitive situations, the Florida courts have extended injunctive relief when customer confusion is proved<sup>4</sup> or when it may be

1. "Tradename," as used in this article, has the definition given it by the Lanham Trademark Act. § 45, 60 Stat. 443 (1946), 15 U.S.C. § 1127 (1963). Thus, it is that name used by any entity "to identify their businesses, vocations or occupations." This is the most common usage of a tradename—applying it to a business and its good will—distinguishing it from trademark, which as a term is applied to vendible goods for identity purposes. *American Steel Foundries v. Robertson*, 269 U.S. 372 (1926); *Standard Oil Co. of N.M. v. Standard Oil Co. of Calif.*, 56 F.2d 973 (10th Cir. 1932); *Acme Chem. Co. v. Dobkin*, 68 F. Supp. 601 (W.D. Pa. 1946). As the principles governing the protection of marks and names are almost the same, cases involving marks are cited as authority for issues involving names. Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1297 (1940); Handler & Pickett, *Trademarks & Tradenames—An Analysis & Synthesis*, 30 COLUM. L. REV. 168, 759 (1930).

2. Tradenames may be protected in an action to restrain unfair competition. *Brown & Bigelow v. B.B. Pen Co.*, 191 F.2d 939 (8th Cir. 1951); *Cook Chem. Co. v. Cook Paint & Varnish Co.*, 185 F.2d 365 (8th Cir. 1950); *Safeway Stores, Inc. v. Sklar*, 75 F. Supp. 98 (E.D. Pa. 1947); 3 CALLMAN, *UNFAIR COMPETITION & TRADEMARKS* § 66.1 (2d ed. 1950).

3. FLA. R. CIV. P. 1.35(b). "Involuntary dismissal . . . . After the plaintiff has completed the presentation of his evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. . . . Unless the court . . . otherwise specifies, a dismissal . . . operates as an adjudication on the merits."

4. *Chemical Corp. of America v. Anheuser-Busch, Inc.*, 306 F.2d 433 (5th Cir.), *cert. denied*, 372 U.S. 965 (1963) (use of slogan); *Pure Foods, Inc. v. Minute Maid Corp.*, 214 F.2d 792 (5th Cir. 1954) (infringement of name).