BALANCING THE SCALES: REFORMING GEORGIA'S COMMON LAW IN EVALUATING RESTRICTIVE COVENANTS ANCILLARY TO EMPLOYMENT CONTRACTS

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I. INTRODUCTION

Crafting effective and enforceable restrictive covenants ancillary to employment contracts has befuddled and vexed attorneys, courts, and businesses in Georgia for decades. Likened to a dense thicket,[1] considered labyrinthine,[2] and viewed as lost "in a state of perpetual confusion,"[3] Georgia's governing common law lay at the heart of the discontent. A former Georgia Supreme Court justice once recognized, "Ten Philadelphia lawyers could not draft an employer–employee restrictive covenant agreement that would pass muster under the recent rulings of [the Georgia Supreme Court]."[4] As noted by Representative Wendell Willard, Georgia General Assembly House Judiciary Committee Chairman and author of the Restrictive Covenant Act,[5] these sentiments concerning Georgia's common law still hold today.[6] Indeed, as of this writing, attorneys seeking to understand this complex web of case law would have to sift through a staggering 148 Georgia Supreme Court cases and an additional 184 Georgia Court of Appeals cases.[7] The character of

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[1] Erika Birg et al., *Georgia Gets Competitive*, GA. B.J., Dec. 2009, at 12, 13.

[2] Peter C. Quittmeyer, *Survey of Current Georgia Law Regarding Restrictive Covenants*, 25 GA. ST. B.J. 188, 188 (1989).

[3] William F. Clark & Douglas H. Reynolds, *The Underbrush Grows Deeper: Restrictive Covenants in Employment Agreements in Georgia*, 21 GA. ST. B.J. 28, 28 (1984).

[4] Fuller v. Kolb, 234 S.E.2d 517, 518 (Ga. 1977) (Jordan, J., dissenting); *see also* Watson v. Waffle House, Inc., 324 S.E.2d 175, 177 (Ga. 1985) (recognizing that the Georgia Supreme Court's approach "has not been without criticism").

[5] Restrictive Covenant Act, 2011 Ga. Laws 399, 409 (codified at O.C.G.A. §§ 13-8-2.1, 13-8-50 to -59 (Supp. 2011)).

[6] *See* Interview with Wendell Willard, Chairman, House Judiciary Comm., Ga. Gen. Assembly, in Atlanta, Ga. (Oct. 7, 2011) [hereinafter Willard Interview] (on file with author) (excerpts transcribed in Part V, Appendix, *infra*) ("But the problem [with the common law] was every time a lawyer would attempt to draw up an agreement, he's telling his client, 'I'm drawing this based upon what I *think* the law is today.' But it doesn't mean tomorrow a decision won't come out and change that. So, it was a real haphazard position for the lawyers who practice in that area representing corporate-type clients and trying to draw up restrictive agreements that would protect these proprietary interests the corporation or business has and knowing that it will be something that they could enforce in the future." (emphasis in original)). Chairman Willard gave his express consent to use this interview in this Note.

[7] Search Results for Terms and Connectors, LEXISNEXIS, http://www.lexisnexis.com/lawschool/research/default.aspx (follow "States Legal – U.S." hyperlink; then follow "Georgia" hyperlink; then follow "GA State Cases, Combined" hyperlink; then search " 'restrict! covenant!' and 'employ!' ") (last visited Feb. 6, 2012); *see also* Birg et al., *supra* note 1, at 13

the law had grown so dissatisfactory that on three occasions the Georgia General Assembly attempted to enact sweeping reforms to the common law.[8]

Governor Nathan Deal signed the third of these efforts into law on May 11, 2011.[9] The Restrictive Covenant Act's aims are twofold: first, to create a more favorable environment in Georgia for businesses;[10] and second, to give courts guidelines to evaluate these covenants more consistently and predictably.[11] Specifically, the Act empowers courts to modify an unreasonable restrictive covenant by fashioning restrictions that a court deems to be reasonable under the circumstances of a case.[12] By codifying a reasonableness test that approximates Georgia's common law doctrine, the Act preserves its ties to the common law.[13]

The General Assembly's repeated efforts over the previous decades highlight an ongoing debate concerning how a state should balance employees' and employers' interests in enforcing the terms of an employment contract.[14] Advocates favoring the

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(referring to any attempt to make sense of the common law doctrine as "death by a thousand paper cuts").

[8] *See infra* Part II.A.*3*.

[9] *May 11, 2011: Bills Signed by Governor Deal*, GOVERNOR NATHAN DEAL, OFFICE OF THE GOVERNOR, http://gov.georgia.gov/00/article/0,2086,165937316_170511855_171223859,00.html (last visited June 18, 2012).

[10] *See* O.C.G.A. § 13-8-50 (Supp. 2011) (declaring the General Assembly's intent to "attract[ ] commercial enterprises to Georgia" and retain "existing businesses within the state").

[11] *See id.* (providing for statutory guidance for the courts).

[12] *See id.* § 13-8-54(b) ("[T]he court may modify the restraint provision and grant only the relief reasonably necessary to protect such interest or interests and to achieve the original intent of the contracting parties to the extent possible.").

[13] *Compare id.* §§ 13-8-56 to -57 (codifying a three-prong test of temporal, geographic, and scope-of-activity restrictions and establishing rebuttable presumptions on the temporal restriction depending on the type of employment relationship between the contracting parties), *with* Coleman v. Retina Consultants, P.C., 687 S.E.2d 457, 460–61 (Ga. 2009) ("Whether the restraint imposed by the employment contract is reasonable is a question of law for determination by the court, which considers the nature and extent of the trade or business, the situation of the parties, and all the other circumstances. A useful tool in examining the reasonableness of a particular factual situation consists of a three-element test of duration, territorial coverage, and scope of activity." (citations omitted) (internal quotation marks omitted)).

[14] *See generally* Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672 (2008) (urging jurisdictions to

General Assembly's statutory changes argue that the common law was irreparably convoluted, complex, and contradictory before the passage of the Act.[15] They claim that Georgia courts frequently voided restrictive covenants[16] and improperly sacrificed legitimate business interests for employee interests.[17] Willard further argues that the new Georgia Act offers significant economic benefits to both employers and employees in Georgia.[18]

Opponents to these statutory reforms have voiced a number of concerns about the policy shift in favor of businesses. They argue

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adopt a specificity standard—mandating the contract to identify the position to be restrained, the employer's legitimate business interests, and how the restriction will protect those interests—in evaluating restrictive covenants in order to better protect employees' interests); Shogun J. Khadye, Comment, *An Uncertain Future: Georgia's Policy on Restrictive Covenants in Employment Contracts*, 2 J. MARSHALL L.J. 208 (2009) (acknowledging the unsatisfactory state of Georgia's common law but arguing that a form of a blue-pencil doctrine will ultimately restrict employee mobility and harm Georgia's economy); Jay Bookman, *Amendment One: Making Georgia Less Competitive*, AJC BLOG (Oct. 1, 2010, 6:35 AM), http://blogs.ajc.com/jay-bookman-blog/2010/10/01/amendment-one-making-georgia-less-competitive/ (cautioning that Georgia's economy will be harmed if the courts read restrictive covenants in a way that favors employers).

[15] *See, e.g.*, Birg et al., *supra* note 1, at 18 ("At present, restrictive covenant cases rise and fall on common law rules that, upon closer examination, are often unusual and arbitrary."); Clark, *supra* note 3, at 28 ("The legal uncertainty that has arisen in dealing with restrictive covenants has resulted in part from a continuous stream of judicial decisions, which . . . have lacked clarity . . . or which have been tainted by certain facts contained in a case which favored a decision . . . in spite of legal precedents to the contrary."); Quittmeyer, *supra* note 2, at 194 (finding that, despite the Georgia Supreme Court's best attempts, "the law has become even more unsettled"); *see also supra* note 6 and accompanying text.

[16] *See generally* Gary P. Kohn, Comment, *A Fresh Look: Lowering the Mortality Rate of Covenants Not to Compete Ancillary to Employment Contracts and to Sale of Business Contracts in Georgia*, 31 EMORY L.J. 635 (1982) (reviewing the inconsistencies in the Georgia common law that lead to the high mortality rate in restrictive covenants and proposing that an "exchange calculus" and a partial enforcement of restrictive covenants would mend the deficiencies in the common law).

[17] *See generally* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 651–68 (1960) (outlining typical business interests that employers seek to protect by using restrictive covenants).

[18] *See* Willard Interview, *supra* note 6 ("[W]e were one of the few, and pretty much in the minority area, that did not have the ability to properly enforce contracts dealing with restrictive covenants in employment. We tried with what we had as far as case decisions—and this goes back to the point I was making earlier. The members of the [State Bar of Georgia] who practice in this area were very uncomfortable trying to advise clients and national companies . . . that you can come here and feel comfortable with doing business in Georgia as far as setting up an office. So we were the small minority.").

that businesses will draft impermissibly broad restrictive covenants in the hopes that the courts will apply the blue-pencil doctrine or the partial-enforcement doctrine[19] to the covenant to create a "reasonable" restriction.[20] This more permissive analysis of restrictive covenants will, they contend, lessen employees' mobility and ultimately lead to less technological advances and lower economic output.[21] Finally, critics argue that this Act will force Georgia to compete with other jurisdictions to attract businesses and thus will incentivize jurisdictions to progressively offer more favorable restrictive covenant regimes and to progressively abrogate employees' bargaining power relative to businesses.[22]

By holding on to over 113 years of common law,[23] Georgia courts may refuse to give credence to the General Assembly's legislative findings, reject the permissive tools enabled by the General Assembly, and maintain the current doctrine for evaluating restrictive covenants. According to Willard, substantial concern exists that the courts may choose to disregard the permissive tools enabled by the Restrictive Covenant Act.[24] This Note advocates

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[19] *See* Part II.A.*3*.

[20] *See, e.g.*, Blake, *supra* note 17, at 682–83 ("For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction. If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable."); Khadye, *supra* note 14, at 215 (citing the Georgia Supreme Court's refusal to apply the blue-pencil doctrine for fear of the chilling effect on employee mobility).

[21] *See* Blake, *supra* note 17, at 687 ("[T]he social cost of preventing an employee from going to a job at which he would be more productive is theoretically equal, given an efficient market, with the economic loss to the individual."); Pivateau, *supra* note 14, at 691–94 (arguing that using the blue pencil creates uncertainty and decreased employee mobility, thereby increasing opportunity costs for employees).

[22] *See* Gillian Lester & Elizabeth Ryan, *Choice of Law and Employee Restrictive Covenants: An American Perspective*, 31 COMP. LAB. L. & POL'Y J. 389, 420–23 (2010) (cautioning that "the law market might generate negative externalities").

[23] *Cf.* Wesley-Jessen, Inc. v. Armento, 519 F. Supp. 1352, 1357 (N.D. Ga. 1981) (identifying *Rakestraw v. Lanier*, 30 S.E. 735 (Ga. 1898), as "the seminal case" in Georgia jurisprudence concerning restrictive covenants in employment contracts).

[24] *See* Willard Interview, *supra* note 6 ("The question now is: Will the court do that? We won't know until some cases come through, and the judges say, 'Well, the legislature gave

against the temptation to marginalize the importance of the tools granted by the General Assembly in the Restrictive Covenant Act.

To support this position, this Note next proceeds by tracing the evolution of the public policies underlying Georgia's common law doctrine. Part II then concludes with an overview of the Restrictive Covenant Act and its impact on Georgia's treatment of restrictive covenants. Part III provides a defense of the Act and recommends how Georgia courts should interpret the provisions of the Act. Finally, in order to protect employees from restrictive covenants that serve no legitimate business interest, this Note proposes the adoption of a per se rule invalidating covenants sought to be enforced against employees that fall outside the scope of the Act.

II. BACKGROUND

The employer–employee relationship is one of the most complicated in society.[25] Employment law intricately blends status, contract, custom, and public policy into a single doctrine.[26] As a part of this entangled field influenced by more than five hundred years of common law, the law governing restrictive covenants has grown more complex.[27] Today, this body of law is largely viewed as a "confusing, seemingly incomprehensible puzzle whose underlying pattern is difficult, if not impossible, to discern."[28]

Generally, and for the purposes of this Note, a restrictive covenant is "[a] promise, usu[ally] in a sale-of-business, partnership, or employment contract, not to engage in the same type of business

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us this power.' Or will they say, 'The legislature has no right to dictate to us what we can do.' So we don't know. We are hoping they will recognize that as now an appropriate thing to do with the legislation that we now have in place and the constitutional amendment.").

[25] 1 KURT H. DECKER, COVENANTS NOT TO COMPETE 1 (2d ed. 1993).

[26] *Id.* at 2.

[27] Richard P. Rita Pers. Servs. Int'l v. Kot, 191 S.E.2d 79, 79 (Ga. 1972); 1 DECKER, *supra* note 25, at 21; *see also* Blake, *supra* note 17, at 626–27 ("[The treatment of restrictive covenants by] the courts has reflected the evolution of industrial technology and business methods, as well as the ebb and flow of such social values as freedom of contract, personal economic freedom, and business ethics.").

[28] 1 DECKER, *supra* note 25, at 22.

for a stated time in the same market as the buyer, partner, or employer."[29] These covenants are common in employment contracts.[30] They typically take shape in one or more of three basic forms: nondisclosure,[31] nonsolicitation,[32] and noncompetition.[33] This Part first examines the development of Georgia's common law governing restrictive covenants in employment contracts and the policies that guided its development. This Note then turns to the impetus of the current debate in Georgia employment law: the Restrictive Covenant Act, which supersedes the common law and declares new policies for courts to consider in evaluating the validity of restrictive covenants.

A. GEORGIA'S COMMON LAW APPROACH

1. The Foundation. The Georgia common law on restrictive covenants traces its roots to more than five hundred years of English and American jurisprudence.[34] Indeed, the Supreme Court of Georgia drew heavily from English courts establishing the common law doctrine in *Rakestraw v. Lanier*.[35] The *Rakestraw* court established a reasonableness standard in evaluating the validity of a restrictive covenant: In light of the surrounding circumstances, "the restraint imposed must be reasonable, and such as is reasonably necessary to protect the interest of the party

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[29] BLACK'S LAW DICTIONARY 420 (9th ed. 2009).

[30] Blake, *supra* note 17, at 625 n.1.

[31] *See, e.g.*, Coleman v. Retina Consultants, P.C., 687 S.E.2d 457, 459–60 (Ga. 2009) (evaluating a restrictive covenant that prohibited the employee from disclosing, licensing, or vending computer software or applications competitive with the employer's software).

[32] *See, e.g.*, Palmer & Cay of Ga., Inc. v. Lockton Cos., 629 S.E.2d 800, 801–02 (Ga. 2006) (evaluating a restrictive covenant that prohibited the employee from soliciting or taking away customers from the employer); Nasco, Inc. v. Gimbert, 238 S.E.2d 368, 370 (Ga. 1977) (evaluating a restrictive covenant that prohibited the employee from soliciting or taking away third-party employees from the employer).

[33] *See, e.g.*, Atlanta Bread Co. Int'l v. Lupton-Smith, 679 S.E.2d 722, 723 (Ga. 2009) (evaluating a restrictive covenant that prohibited the franchisee from engaging in, acquiring a financial interest in, or aiding a commercial entity similar to the franchisor).

[34] *See supra* note 27 and accompanying text.

[35] Rakestraw v. Lanier, 30 S.E. 735, 737 (Ga. 1898) (citing Mitchel v. Reynolds, (1711) 24 Eng. Rep. 347 (Q.B.)); *see also* Blake, *supra* note 17, at 629–46 (reviewing *Mitchel* and its influence on modern restrictive covenant doctrine).

in whose favor it is imposed, and at the same time not unduly prejudice the interest of the public."[36]

To confirm whether this test was consistent with Georgia public policy, the court looked to the Civil Code of Georgia and the constitution.[37] Although the court recognized the public's interest in protecting freedom of contract,[38] the court articulated strong policies in favor of limiting the heavy burdens restrictive covenants place on employees:

> [Restrictive covenants] tend to injure the parties making them; diminish their means of procuring livelihoods and a competency for their families; tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose them to imposition and oppression; tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as to themselves; discourage industry and enterprise, and diminish the products of ingenuity and skill; prevent competition, and enhance prices, and expose the public to all the evils of monopoly.[39]

Nevertheless, the court noted that it will enforce restrictive covenants only if the restraints pass a test of reasonableness.[40] Building on this foundation, the Georgia Supreme Court in *Shirk v. Loftis Bros. & Co.* adopted the first modern iteration of Georgia's

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[36] *Rakestraw*, 30 S.E. at 739.

[37] *Cf. id.* at 737–38 (noting that the Georgia Civil Code and the Georgia Constitution of 1877, like *Mitchel*, prohibit contracts that hinder competition).

[38] *Id.* at 739.

[39] *Id.* at 738.

[40] *See id.* at 739 ("[T]he restraint imposed must be reasonable, and such as is reasonably necessary to protect the interest of the party in whose favor it is imposed, and at the same time not unduly prejudice the interest of the public . . . ."). This test is commonly referred to as the rule of reason. *See* 1 DECKER, *supra* note 25, at 29–34 (tracing the development of the rule of reason as the modern restrictive covenant doctrine); Blake, *supra* note 17, at 638–46 (outlining the development of the rule of reason in English common law and its adoption in the United States).

common law rule and held that "the contract must be limited both as to time and territory, and not otherwise unreasonable."[41] Subsequent decisions further defined the boundaries of the *Shirk* test.[42] Despite the many forms in which the rule appeared in the one hundred years since the *Rakestraw* decision, Georgia courts continued to use the reasonableness test as enunciated in these cases prior to the enactment of the Restrictive Covenant Act.[43]

2. Becoming More Snarled: Moving Away from Certainty and Predictability.[44] Georgia courts generally categorized a restrictive covenant into one of four general classes: a contract for the (1) sale of a business, (2) personal services, (3) professional services, or (4) employment.[45] Courts evaluated each class using differing levels of scrutiny.[46] For example, Georgia afforded the loosest scrutiny

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[41] 97 S.E. 66, 68 (Ga. 1918).

[42] *See, e.g.*, Watson v. Waffle House, Inc., 324 S.E.2d 175, 178 (Ga. 1985) (recognizing the three-part inquiry of temporal, geographic, and scope-of-activity restraints not as a dispositive test but rather as a "helpful tool" in considering the particular factual setting); Coffee Sys. of Atlanta v. Fox, 176 S.E.2d 71, 73–74 (Ga. 1970) (summarizing the common law rule into three elements: "(1) the restraint in the activity of the employee, or former employee, imposed by the contract; (2) the territorial or geographic restraint; and (3) the length of time during which the covenant seeks to impose the restraint"); Mike Bajalia, Inc. v. Pike, 172 S.E.2d 676, 678 (Ga. 1970) (defining "not otherwise unreasonable" as "reasonably necessary for the protection of the employer's business" (citation omitted) (internal quotation marks omitted)).

[43] *See* Coleman v. Retina Consultants, P.C., 687 S.E.2d 457, 460 (Ga. 2009) ("[A] restrictive covenant . . . will be upheld if the restraint imposed . . . is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public." (citation omitted)).

[44] *See generally* Clark & Reynolds, *supra* note 3 (surveying the increasingly dense, contradictory, and complicated Georgia common law regarding restrictive covenants and urging Georgia courts to adopt a partial-enforcement doctrine to reduce the high mortality rate of restrictive covenants).

[45] Kinney v. Scarbrough Co., 74 S.E. 772, 774 (Ga. 1912).

[46] *See* White v. Fletcher/Mayo/Assocs., Inc., 303 S.E.2d 746, 749 (Ga. 1983) (recognizing restrictive covenants ancillary to the sale of a business are evaluated less strictly than those ancillary to an employment contract and may be "blue-penciled"); Martinez v. DaVita, Inc., 598 S.E.2d 334, 337 (Ga. Ct. App. 2004) ("[N]oncompete clause[s agreed upon] as part of an asset sale . . . [are] examined using the most lenient standard applicable to the sale of a business or, alternatively, at least subject to the mid-level standard of scrutiny applicable to a professional contract, instead of the strictest standard applicable to employment contracts."); *cf.* Rash v. Toccoa Clinic Med. Assocs., 320 S.E.2d 170, 173 (Ga. 1984) ("[I]nequality of bargaining power [between an employer and employee] is a determining factor in judging the reasonableness of a restrictive covenant . . . .").

for restrictive covenants contained in contracts for the sale of a business, finding that the parties' incentives and bargaining positions are fundamentally different than those in an employment contract.[47]

Conversely, Georgia considered that restrictive covenants in an employer–employee relationship exposed the public to the greatest potential for harm from employers' predatory business practices,[48] and courts afforded the strictest level of scrutiny for these covenants in order to prevent "the chilling effect that may be had upon post-employment competitive activity."[49] Georgia courts commonly used the test articulated in *Coffee System of Atlanta v. Fox* to evaluate the reasonableness of a restrictive covenant in an employment contract by inquiring into the reasonableness of the scope-of-activity, geographic, and temporal restrictions.[50]

Although Georgia courts evaluated the reasonableness of the temporal restriction on its face, they analyzed the territorial-scope and scope-of-activity restrictions in light of the surrounding facts and circumstances of the case.[51] In more recent decisions, the Georgia Supreme Court has focused more on the scope-of-activity restriction than the geographic restriction.[52]

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[47] *See* Durham v. Stand-By Labor of Ga., Inc., 198 S.E.2d 145, 149 (Ga. 1973) ("[P]ublic policy is swung in favor of protecting these commercial intangibles and of preventing unfair methods of exploiting them in breach of duty."); *cf.* Orkin Exterminating Co. v. Dewberry, 51 S.E.2d 669, 676 (Ga. 1949) (observing that the many reasons "for upholding a covenant in a contract of sale do not obtain in a contract of employment"), *rev'd on other grounds*, Barry v. Stanco Comms. Prods., Inc., 252 S.E.2d 491, 494 (Ga. 1979).

[48] Rakestraw v. Lanier, 30 S.E. 735, 738 (Ga. 1898).

[49] *Durham*, 198 S.E.2d at 149.

[50] 176 S.E.2d 71, 73–74 (Ga. 1970).

[51] *See Barry*, 252 S.E.2d at 493 ("The reasonableness of territory depends, not so much on the geographical size of the territory, as on the reasonableness of the territorial restriction in view of the facts and circumstances surrounding the case."); *see also* Wesley-Jessen, Inc. v. Armento, 519 F. Supp. 1352, 1357 (N.D. Ga. 1981) ("The relationship between activities during employment and activities prohibited is interpreted with reference to the individual situation.").

[52] *Cf.* W.R. Grace & Co. v. Mouyal, 422 S.E.2d 529, 532–33 (Ga. 1992) (noting the declining value of an express geographic limitation because modern technology now allows an employee to access clients throughout the world). *But see* Atlanta Bread Co. Int'l v. Lupton-Smith, 679 S.E.2d 722, 725 (Ga. 2009) (following the traditional three-element test of reasonableness and not placing less importance on the geographic restriction).

In terms of the temporal restriction, Georgia courts generally upheld a two-year restriction for employment contracts.[53] Regarding the other two factors of the *Fox* reasonableness test—the geographic and scope-of-activity restrictions—Georgia courts invalidated covenants that prohibited the employee from competing with the employer "in any capacity."[54] Additionally, courts required that the scope of such restrictions be strictly limited to, although not necessarily identical to, the employer's legitimate business interests.[55] This limitation provided notice to employees so that they would not have to guess "whether [they were] in violation of the covenant."[56]

Nevertheless, the court's factually intensive evaluation created a landscape full of inconsistencies and doubt. For example, the U.S. District Court for the Northern District of Georgia—interpreting state law—held in *Wesley-Jessen, Inc. v. Armento* that a territorial limitation spanning "the city of Atlanta and the area within [twenty-five] miles from its limits" was "precise and strictly limited."[57] But the Supreme Court of Georgia invalidated a covenant prohibiting competition within a seventy-five-mile radius of the "Metro Atlanta, Georgia area" because the covenant's scope was "impossible to define."[58] A vehement dissent argued that the

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[53] *See, e.g.*, Palmer & Cay of Ga., Inc. v. Lockton Cos., 629 S.E.2d 800, 804 (Ga. 2006) (holding a two-year restriction reasonable); Puritan/Churchill Chem. Co. v. McDaniel, 286 S.E.2d 297, 298–99 (Ga. 1982) (same); Marcoin, Inc. v. Waldron, 259 S.E.2d 433, 434–35 (Ga. 1979) (same); Turner v. Robinson, 107 S.E.2d 648, 650 (Ga. 1959) (same).

[54] *Armento*, 519 F. Supp. at 1357 ("Georgia courts have consistently invalidated covenants using the broad 'in any capacity' language.").

[55] *See id.* at 1357–58 (finding the geographic restriction of a twenty-five mile radius around Atlanta was precise, strictly limited, and had "a rational relationship [with the activities restricted] and the activities the employee conducted for his former employer"); Howard Schultz & Assocs. of the Se. v. Broniec, 236 S.E.2d 265, 268 (Ga. 1977) (concluding that the covenant entered into was unreasonable due to its excessive restrictions on territory—"any area or areas from time to time constituting the principal's or associate's area of activity in the conduct of their respective businesses, as of the date of said termination"—and activity—competition with the employer "*in any capacity* whatsoever" (emphasis added)).

[56] Fuller v. Kolb, 234 S.E.2d 517, 518 (Ga. 1977).

[57] *Armento*, 519 F. Supp. at 1357.

[58] Hamrick v. Kelly, 392 S.E.2d 518, 519 (Ga. 1990); *see also* Waste Mgmt. of Metro Atlanta v. Appalachian Waste Sys., 649 S.E.2d 578, 581–82 (Ga. Ct. App. 2007) (ignoring the parties' unambiguous intent and invalidating a noncompete agreement that had unlimited territorial restrictions on its face but where a concurrently executed document provided a strictly limited

court "destroy[ed] an agreement made between the parties" and forged a new agreement that neither party had originally agreed to.[59] Instead of adopting a construction of the agreement that would have rendered it reasonable, the dissent argued that the majority impermissibly ignored the intent of the parties by invalidating the entire agreement.[60]

3. The Alternatives to Reforming Unreasonable Restrictive Covenants: Blue Pencil, Partial Enforcement, or Nothing at All. Judicial and academic authorities have hotly debated whether courts should modify unreasonable restrictive covenants to craft and enforce reasonable restrictions on employees.[61] Those in favor of reforming covenants prefer either the blue-pencil doctrine or the partial-enforcement doctrine.

Generally, the blue-pencil doctrine is "[a] judicial standard for deciding whether to invalidate the whole contract or only the offending words."[62] A court applying the blue-pencil doctrine will enforce an otherwise unreasonable covenant after striking only the unreasonable portions of the covenant.[63] Nevertheless, the remaining pieces of the covenant will be enforced only if the altered covenant remains grammatically sound.[64]

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territorial restriction). Although *Hamrick* and *Appalachian* address restrictive covenants ancillary to the purchase of a business, which are allowed the loosest degree of scrutiny, the courts' varied responses to the parties' obvious intent highlights the uncertainty businesses must struggle with in crafting valid restrictive covenants.

[59] *Hamrick*, 392 S.E.2d at 519 (Benham, J., dissenting).

[60] *Id.* at 520; *see also Fuller*, 234 S.E.2d at 519 (Jordan, J., dissenting) (lambasting the majority's invalidation of a restrictive covenant when the covenant, "[v]iewed in the light of the clear intention of the parties and looking to the four corners of the contract, [ ] was reasonable in every respect" and arguing that the majority's decision would enable a party to "thumb his nose at his solemn contract and continue to pirate the clients of his former employer, at whose table he once supped").

[61] *See generally* Blake, *supra* note 17, at 681–84 (outlining the arguments in favor of and against using the blue pencil in employment contracts); Pivateau, *supra* note 14, at 681–88 (surveying the approaches to modifying unreasonable restrictive covenants: the no-modification doctrine, the strict blue-pencil doctrine, and the liberal blue-pencil doctrine, which is also known as the partial-enforcement doctrine).

[62] BLACK'S LAW DICTIONARY 196 (9th ed. 2009).

[63] *See Hamrick*, 392 S.E.2d at 519 ("The 'blue pencil' marks, but it does not write.").

[64] *See* Pivateau, *supra* note 14, at 683 ("The strict blue pencil doctrine permits only the removal of unreasonable contractual provisions. The court is not permitted to revise or add language to the agreement.").

Similarly, a court applying the partial-enforcement doctrine will enforce an unreasonable restrictive covenant only after making alterations to its restrictions.[65] However, instead of striking language with the hope that the remaining clause is grammatically sound, the court will craft temporal, geographic, and scope-of-activity restrictions that the court considers reasonable.[66] The court will then enforce the covenant subject to these judicially determined restrictions.[67]

Finally, six states[68] refuse to modify an unreasonable restrictive covenant and will strike it down in its entirety.[69] Georgia was in this extreme minority until the passage of the Restrictive Covenant Act because a divided Georgia Supreme Court in 1972, finding the arguments against employing the blue pencil persuasive, rejected the doctrine:

> For every covenant that finds its way to court, there are thousands which exercise an in terrorem effect on employees . . . . Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction. If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will

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[65] *See id.* at 687 ("Courts may use the [partial-enforcement] doctrine to modify an unreasonable noncompete agreement and enforce the agreement only to the extent that it is reasonable.").

[66] *See id.* ("The [partial-enforcement] doctrine permits a court greater leeway to change an agreement substantively. Courts may use [it] to modify an unreasonable noncompete agreement and enforce the agreement only to the extent that it is reasonable. A court may thus use the [partial-enforcement] approach to modify the covenant so that it is no broader than what is reasonably necessary to protect the employer." (footnote omitted)). The "partial-enforcement doctrine" and the "liberal blue-pencil doctrine" are used interchangeably. *See generally id.* at 681–82.

[67] *Id.*

[68] *See generally* 2 KURT H. DECKER, COVENANTS NOT TO COMPETE (2d ed. 1993) (overviewing every jurisdiction's approach to restrictive covenants and selecting cases from each jurisdiction to illustrate their unique approaches and policies).

[69] Pivateau, *supra* note 14, at 682–83.

> be pared down and enforced when the facts of a particular case are not unreasonable.[70]

Subsequent cases in Georgia continued to not apply the blue-pencil doctrine.[71] However, dissension within the court and the bar arose on this issue,[72] and Georgia began creating exceptions to this blanket rule.[73]

B. THE RESTRICTIVE COVENANT ACT AND ITS FORERUNNERS

1. Unsuccessful Legislative Efforts to Reform Georgia Law. According to Willard, the Georgia General Assembly labored for more than two decades to reform the common law doctrine.[74] In 1990, the legislature amended the Georgia Code to create a more favorable environment for restrictive covenants.[75] Specifically, the General Assembly explicitly recognized that restrictive covenants only partially restrained trade[76] and empowered courts to partially enforce unreasonable covenants.[77] It appeared from the outset,

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[70] Richard P. Rita Pers. Servs. Int'l v. Kot, 191 S.E.2d 79, 81 (Ga. 1972) (4-to-3 decision) (quoting Blake, *supra* note 17, at 682–83) (internal quotation marks omitted).

[71] *See, e.g.*, Durham v. Stand-By Labor of Ga., Inc., 198 S.E.2d 145, 149 (Ga. 1973) (noting "the chilling effect that may be had upon post-employment competitive activity" if the blue pencil were applied); Ceramic & Metal Coatings Corp. v. Hizer, 529 S.E.2d 160, 163 (Ga. Ct. App. 2000) ("[T]he severability clause in the contract does not save it. This Court has rejected the 'blue pencil theory of severability' with regard to employment contracts, and we will not sever a broader more restrictive provision so as to leave the narrower valid one." (citing Browning v. Orr, 249 S.E.2d 65 (Ga. 1978))).

[72] *See Durham*, 198 S.E.2d at 150–51 (Jordan, J., dissenting in part) (cautioning that the court should not rewrite a contract that is contrary to the unequivocal intent of the parties and contending that the court should have honored the severability clause in the covenant by severing the unreasonable terms from the contract).

[73] *See* Horne v. Drachman, 280 S.E.2d 338, 342 (Ga. 1981) (affirming the severance of a restrictive covenant from the remainder of a contract because the restrictive covenant was not "an 'integral part' of the contract."); *Rita*, 191 S.E.2d at 82 (Jordan, J., dissenting) (asserting that "[j]ustice and fair play" demanded the application of the blue pencil).

[74] *See* Willard Interview, *supra* note 6 ("[In 1990] the General Assembly first attempted to put structure, you might say, to these types of agreements by passing legislation that became enacted by the forerunner of the bill that we passed.").

[75] O.C.G.A. § 13-8-2.1 (1981 & Supp. 2009), *invalidated by* Jackson & Coker, Inc. v. Hart, 405 S.E.2d 253, 254 (Ga. 1991).

[76] *Id.* § 13-8-2.1(a).

[77] *See id.* § 13-8-2.1(g)(1) ("If any portion . . . is not so clearly unreasonable and overreaching in its terms as to be unconscionable, the court shall enforce so much of such

however, that the Georgia Supreme Court would invalidate the statute due to its direct conflict with the Georgia Constitution.[78] Indeed, the Georgia Supreme Court did just this.[79]

The Georgia House of Representatives renewed its efforts by passing House Bill 173 in 2009.[80] To avoid any constitutional conflict, the legislature made the passage of the bill contingent upon the ratification of an amendment to the Georgia constitution[81] that recognized the validity of its actions.[82] Although the amendment was successfully ratified,[83] the Act was later repealed due to a technicality.[84]

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restraint as it determines . . . necessary to protect the interests of the parties that benefit from such restraint.").

[78] *See* Theodore M. Forbes, Jr., *Georgia Constitution May Restrict the 1990 Restrictive Covenant Law*, 27 GA. ST. B.J. 82, 84–85 (1990) (observing that the newly enacted statute stands on "shaky ground" and recommending that employers "should try to stay within the rules, such as they are, set out in the courts' earlier opinions, lest the whole agreement be declared unenforceable").

[79] GA. CONST. art. III, § 6, para. 5(c) (amended 2010) ("The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void."); *Jackson & Coker*, 405 S.E.2d at 255 ("We hold that [O.C.G.A. § 13-8-2.1] is beyond the power of the General Assembly inasmuch as it is one that authorizes contracts and agreements which may have the effect of or which are intended to have the effect of defeating or lessening competition or encouraging monopoly.").

[80] Act of Apr. 29, 2009, 2009 Ga. Laws 231 (repealed 2011). The General Assembly overwhelmingly supported the bill, passing it by a margin of 137-to-22 in the House and 45-to-2 in the Senate. *HB 173*, GEORGIA GENERAL ASSEMBLY, http://www1.legis.ga.gov/legis/2009_10/sum/hb173.htm (last updated Oct. 13, 2010, 1:45 AM).

[81] *See* H.R. Res. 178, 2010 Gen. Assemb., Reg. Sess., 2010 Ga. Laws 1260, 1261 (proposing that an amendment be submitted to Georgia voters for ratification that reads, "Shall the Constitution of Georgia be amended so as to make Georgia more economically competitive by authorizing legislation to uphold reasonable competitive agreements?"). The General Assembly approved the amendment by a vote of 152-to-3 in the House and 49-to-0 in the Senate. *HR 178*, GEORGIA GENERAL ASSEMBLY, http://www1.legis.ga.gov/legis/2009_10/sum/hr178.htm (last updated Oct. 13, 2010, 1:45 AM).

[82] 2009 Ga. Laws at 246.

[83] *See AJC Election Central*, ATLANTA J.-CONST., Nov. 4, 2010, at A16 (reporting that 67% of Georgia voters voted in favor of the amendment). The amendment granted the General Assembly the power to "grant to courts by general law the power to limit the duration, geographic area, and scope of prohibited activities provided in a contract or agreement restricting or regulating competitive activities to render such contract or agreement reasonable under the circumstances for which it was made." GA. CONST. art. III, § 6, para. 5(c)(3) (Supp. 2011).

[84] Ratified amendments to Georgia's constitution take effect on the first day of January

2. The Restrictive Covenant Act and Reform. The General Assembly finally achieved reform in passing the Restrictive Covenant Act.[85] The Act both codifies portions of and marks significant departures from the former common law doctrine.[86] In relevant part, the Act establishes new public policies in guiding courts' decisions,[87] identifies the parties covered under the Act,[88]

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following ratification. GA. CONST. art. X, § 1, para. 6. However, House Bill 173 became effective upon ratification of the constitutional amendment and not when the amendment took effect. *See* Willard Interview, *supra* note 6 ("Well, . . . the law in '09 . . . says that this new statute will become effective upon the passing of a constitutional amendment in the November 2010 election . . . But then we passed a constitutional amendment overlooking the language we had as far as the enactment clause of the statute, and it did not have an effective date provided for the constitutional amendment. It was silent, in other words. So when you have a constitutional amendment, and it is silent as to when it becomes effective, it will then become effective the following January 1. . . . [W]e have case law that says that when a statute becomes effective, and there is not constitutional provisions supporting that as a principle of law, then the statute itself is void, and it is void *ab initio*, and it cannot be revived even by amendment." (internal quotation marks omitted)). In other words, the statute technically violated the Georgia constitution for the period of time between the date of ratification and the date the amendment took effect and thus was void.

[85] Restrictive Covenant Act, 2011 Ga. Laws 399 (codified at O.C.G.A. §§ 13-8-2.1, 13-8-50 to -59 (Supp. 2011)). The Restrictive Covenant Act was passed to avoid the thorny constitutionality question and is nearly the equivalent to House Bill 173. *See id.* at 400 ("It is the intention of this Act to remove any such uncertainty by substantially reenacting the substantive provisions of HB 173 . . . .").

[86] *Compare* Coffee Sys. of Atlanta v. Fox, 176 S.E.2d 71, 73–74 (Ga. 1970) (identifying the three-prong test of the common law doctrine as the scope of activity, the geographic scope, and the temporal scope of the restriction), *and* Richard P. Rita Pers. Servs. Int'l v. Kot, 191 S.E.2d 79, 81 (Ga. 1972) (expressly rejecting the blue-pencil doctrine), *with* O.C.G.A. §§ 13-8-56 to -57 (Supp. 2011) (creating a threshold rebuttable presumption based upon the temporal restriction of the covenant and adopting the *Fox* test's factors of geographic and scope-of-activity restrictions to determine reasonableness of the covenant), *and id.* § 13-8-54(b) ("[T]he court may modify the restraint provision and grant only the relief reasonably necessary to protect [the employer's legitimate business interests] . . . .").

[87] *See* § 13-8-50 (declaring the General Assembly's intent to "serve the legitimate purpose of . . . attracting commercial enterprises . . . and keeping existing businesses within [Georgia]" and to "provide statutory guidance" to evaluating restrictive covenants so that parties entering into such agreements will not be plagued by uncertainty surrounding the agreements' rights, obligations, and enforceability).

[88] *See id.* § 13-8-52(a) (limiting the Act's scope to restrictive covenants arising from seven enumerated categories: "(1) Employers and employees; (2) Distributors and manufacturers; (3) Lessors and lessees; (4) Partnerships and partners; (5) Franchisors and franchisees; (6) Sellers and purchasers of a business or commercial enterprise; and (7) Two or more employers"); *id.* § 13-8-51(5) to (8) (defining an employee, as contemplated by § 13-8-52(a)(1), as the following: a director of the board, an officer, manager, or supervisor of the business; an employee who, through the efforts and the investments of the business, has

empowers the courts to apply the partial-enforcement doctrine,[89] and codifies a reasonableness test inspired by the former common law doctrine.[90] Pursuant to Georgia law, the Act only applies to contracts entered into after the Act was signed into law.[91]

III. ANALYSIS

The policies underlying the Restrictive Covenant Act are apparent: (1) to inject greater certainty and predictability into the creation, evaluation, and enforcement of restrictive covenants and (2) to attract, retain, and create businesses in Georgia.[92] These pro-firm policies mark a distinct shift away from over 113 years of Georgia jurisprudence.[93] Although this legislation only slightly alters courts' methodology regarding restrictive covenants, how courts will respond to the Legislative Findings[94] and whether they will use the permissive partial-enforcement provision[95] remain in much greater doubt. Because the Georgia constitution gives courts considerable discretion regarding the extent to which they may

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gained a high level of rapport or reputation with the business's commercial relationships; an employee who is "intimately involved" in the direction of the business; or an employee who, through the investments of the business, has developed a specialized skill set). Significantly, the Act excludes employees who lack managerial responsibilities, specialized training, or knowledge of the company's business, relationships, or customers. *Id.*; *see also infra* Parts III.C.*1*, III.E.

[89] *See* § 13-8-54(b) ("[T]he court may modify the restraint provision and grant only the relief reasonably necessary to protect [the employer's legitimate business interests] . . . .").

[90] *See supra* note 86.

[91] *See* O.C.G.A. § 1-3-5 (2010) ("Laws prescribe only for the future; they cannot impair the obligation of contracts nor, ordinarily, have a retrospective operation."); Restrictive Covenant Act, 2011 Ga. Laws 399, 409 (codified at O.C.G.A. §§ 13-8-2.1, 13-8-50 to -59 (Supp. 2011)) ("This Act shall become effective upon its approval by the Governor . . . and shall apply to contracts entered into on and after such date and shall not apply in actions determining the enforceability of restrictive covenants entered into before such date.").

[92] *See* § 13-8-50 (acknowledging the "legitimate purpose of . . . attracting commercial enterprises . . . and keeping existing businesses within the state" in creating a more favorable environment in Georgia for restrictive covenants).

[93] *See supra* notes 70–71 and accompanying text.

[94] *See* § 13-8-50 (declaring the General Assembly's findings that denote the need for the Restrictive Covenant Act).

[95] *See* § 13-8-54(b) ("[T]he court may modify the restraint provision and grant only the relief reasonably necessary to protect [an employer's legitimate business interests] . . . .").

replace the common law with an enacted statute,[96] courts may decline to apply the partial-enforcement doctrine to restrictive covenants, holding instead that the common law policies in favor of employees outweigh the policies espoused in O.C.G.A. § 13-8-50.[97] In addition, parties entering into employment contracts cannot avoid Georgia's restrictive covenant doctrine by simply incorporating choice of law provisions in their contracts,[98] a fact that increases the importance of how Georgia courts interpret the Restrictive Covenant Act and whether they embrace the Act's permissive powers. Georgia courts would commit a dire mistake in interpreting the Act narrowly and declining to utilize the tools the Act grants to them.

A. THE PARTIES TO AN EMPLOYMENT CONTRACT AND THEIR INCENTIVES

The Restrictive Covenant Act is grounded in sound economic policy and will ultimately improve the standard of living in Georgia by increasing employment and raising wages paid to employees. Indeed, labor economics theory lies at the foundation of many of the Act's goals.[99] As a threshold matter, the incentives

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[96] *See* GA. CONST. art. XI, § 1, para. 2 ("All laws in force and effect on June 30, 1983, not inconsistent with this Constitution shall remain in force and effect; but such laws may be amended or repealed and shall be subject to judicial decision as to their validity when passed and to any limitations imposed by their own terms.").

[97] *See supra* note 24 and accompanying text.

[98] *See* Convergys Corp. v. Keener, 582 S.E.2d 84, 85–86 (Ga. 2003) ("The law of the jurisdiction chosen by parties to a contract to govern their contractual rights will not be applied by Georgia courts where application of the chosen law would contravene the policy of, or would be prejudicial to the interests of, this state. Covenants against disclosure, like covenants against competition, affect the interests of this state, namely the flow of information needed for competition among businesses, and hence their validity is determined by the public policy of this state." (citation omitted)). *But see* Amerireach.com, LLC v. Walker, 719 S.E.2d 489, 492 (Ga. 2011) (asserting that "there is no public policy exception to the Full Faith and Credit Clause" when enforcing a default judgment rendered in another state pursuant to a forum-selection clause but not ruling on whether the court would uphold a challenge to the forum-selection clause itself for violating Georgia's public policy).

[99] The discipline of labor economics attempts to describe and analyze the complex interactions between demanders of labor—firms—and suppliers of labor—individuals—functioning in an environment with scarce resources in order to better predict the interactions between these two parties. *See generally* BRUCE E. KAUFMAN, THE ECONOMICS

for firms and workers are clear: firms want to generate profits in the present and workers want to earn wages and consume goods, services, and leisure in the present.[100] When these parties consider the future, however, the incentives alter.[101]

Firms, burdened with hiring and capital-investment decisions, must decide whether to hire and whether to invest in their employees' human capital. Firms may benefit by increasing their productivity and by generating greater profits in the future through these human capital investments, but they also risk that the newly hired employee may leave the firm.[102] Employee turnover not only harms the firm through lost productivity and a wasted investment in human capital but also in that the employee may go work for a competitor, using the training and experiences from his previous job to compete with the firm.[103] Workers, on the other hand, tend to be "risk averse with respect to . . . their income."[104] They look to firms not only as wage suppliers but also as financial insurers.[105] Workers and firms thus use contracts to

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OF LABOR MARKETS AND LABOR RELATIONS 2–17 (Jane Perkins et al. eds., 1986) (providing an overview of the fundamental tenets of labor economics).

[100] *See id.* at 2 ("[F]or households to purchase the goods and services they desire requires that individual household members seek work in order to earn an income.").

[101] *See id.* at 4–5 (explaining that the search and hiring costs, large capital investments in training and experience, and lowered productivity associated with high turnover incentivize firms to maintain a steady workforce); *see also id.* at 175–205 (examining the market forces that influence "demand for labor in the long run").

[102] *Id.* at 5.

[103] *See* Blake, *supra* note 17, at 651–52 (observing that, due to the wide array of risks surrounding employers' hiring decisions—especially the risk that employees may go into employment that directly competes with past employers—employers are disincentivized from making an efficient investment in their employees).

[104] Russell W. Cooper, *Wage and Employment Patterns in Labor Contracts: Microfoundations and Macroeconomic Implications*, *in* 19 FUNDAMENTALS OF PURE AND APPLIED ECONOMICS 1, 4–5 (Jean-Michel Grandmont et al. ed., 1987); *see also* KAUFMAN, *supra* note 99, at 337 (observing that "most people are likely to be risk averse" and defining risk aversion as having an "increasing aversion to additional increments of risk").

[105] *See* Martin Neil Baily, *Wages and Employment Under Uncertain Demand*, 41 REV. ECON. STUD. 37, 37 (1974) ("Stockholders, through their greater wealth and expertise, are much better able to bear risks than are workers. The difference in ability to bear risk between the two groups immediately suggests an opportunity to trade. In deciding what wage-employment strategy to set, the firm will be willing to reduce workers risk. By doing so, the firm is offering a joint product, employment plus an insurance or financial intermediation service." (footnote omitted)).

navigate this complex web and allocate their respective risks and incentives.[106]

B. THE DEMAND SIDE: FIRMS

Firms regularly encounter risk and uncertainty in making employment decisions, and contract negotiations with prospective employees reflect this uncertainty.[107] Employees often look to firms to fulfill dual roles—wage-payers and insurers—in providing compensation and the promise of continued employment.[108] As consideration for assuming these risks, firms reduce employees' wages and draft restrictive covenants into employment contracts.[109]

Before the passage of the Restrictive Covenant Act, Georgia's relatively hostile approach to restrictive covenants left Georgia firms at a significant disadvantage compared to firms in states more favorable to restrictive covenants.[110] Prior to the Act, Georgia firms were incentivized to reduce the wage offered to employees since they could not efficiently allocate risks with restrictive covenants.[111] Conversely, firms in jurisdictions that looked more favorably upon restrictive covenants could bear the same quantum of risk more effectively with valid restrictive covenants and offer comparatively higher wages.[112] All other things being equal, jurisdictions relatively more favorable toward restrictive covenants than Georgia thus presumably appeared more attractive to employees. Additionally, the elevated uncertainty concerning the viability of restrictive covenants likely

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[106] *See* Cooper, *supra* note 104, at 1 ("[L]abor contracts are complex instruments influencing the allocation of labor time and consumption across states of the world . . . .").

[107] *See supra* note 101 and accompanying text.

[108] *See supra* note 105 and accompanying text.

[109] *See* Cooper, *supra* note 104, at 17 ("[W]ages do not serve as signals to elicit supplies of, and demands for, labor. . . . [W]ages (or better, compensation) serve to allocate risk.").

[110] Forty jurisdictions, not including Georgia, affirmatively use either the blue-pencil doctrine (ten states) or the partial-enforcement doctrine (thirty states), while only six states refuse to alter restrictive covenants. *See generally* 2 DECKER, *supra* note 68, at 4–349 (summarizing each state's approach to evaluating restrictive covenants).

[111] *See* Barnes Grp., Inc. v. Harper, 653 F.2d 175, 178 (5th Cir. Unit B Aug. 1981) (acknowledging the "high precedential mortality rate" of restrictive covenants in Georgia).

[112] *See supra* note 109 and accompanying text.

motivated firms to move from Georgia to jurisdictions that were more favorable to restrictive covenants, reducing the demand for labor and raising the level of unemployment.

The Restrictive Covenant Act now empowers firms to better bear this risk by establishing a more permissive restrictive covenant doctrine. In drafting the partial-enforcement doctrine,[113] Willard sought to place Georgia with the majority of jurisdictions regarding restrictive covenants.[114] Further, the Act creates a more favorable judicial environment for firms attempting to protect their legitimate business interests via restrictive covenants.[115] By using viable restrictive covenants to bear the risks facing firms when making employment decisions, firms can now offer employees competitive wages. Thus, taking all other things as equal, Georgia is now a more attractive forum for firms to conduct business.

C. THE SUPPLY SIDE: LABORERS

Although the Restrictive Covenant Act raises employees' costs of working and negotiating with firms, these increased costs do not outweigh the substantial benefits created by the Act. Admittedly, the Act declares new, pro-firm policies that courts must consider in evaluating a restrictive covenant, and these policies are a significant shift away from the predominantly pro-employee common law doctrine.[116] This shift will inevitably lead to a higher

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[113] *See* O.C.G.A. § 13-8-54(b) (Supp. 2011) ("[T]he court may modify the restraint provision and grant only the relief reasonably necessary to protect such interest or interests . . . .").

[114] *See* Willard Interview, *supra* note 6 ("[W]e were one of the few, and pretty much in the minority area, that did not have the ability to properly enforce contracts dealing with restrictive covenants in employment. We tried with what we had as far as case decisions—and this goes back to the point I was making earlier. The members of the bar who practice in this area were very uncomfortable trying to advise clients, and national companies and advise them that you can come here and feel comfortable with doing business in Georgia as far as setting up an office. So we were the small minority.").

[115] *See* § 13-8-50 (declaring the General Assembly's intent to serve the "legitimate purpose[s] of . . . attracting commercial enterprises to Georgia and keeping existing businesses within the state" and to "provide statutory guidance" to evaluating restrictive covenants so that parties to such agreements will not be plagued by uncertainty).

[116] *Compare id.* (declaring the General Assembly's intent to serve the "purpose of . . . attracting commercial enterprises . . . and keeping existing businesses within the

percentage of viable restrictive covenants and some higher costs for Georgia employees. These costs arise after an employee terminates employment with a firm, triggering a restrictive covenant, and include the search, time, and move expenses associated with finding alternate employment. However, due to safeguards in the Act as well as socio-economic trends, such as the country's continuing transformation toward a service economy and the rise of a progressively more sophisticated workforce, these costs will be modest when compared to the benefits created by the Act.

1. Statutory Safeguards. The General Assembly inserted two principal safeguards that will reduce the costs imposed on employees. First, the Act is limited in scope to employees who have certain managerial responsibilities, technological expertise, or business-specific acumen.[117] Thus, the Act only applies to employees who possess a certain level of bargaining power relative to the firm, as evidenced by their education, training, or expertise. Employees with greater bargaining power can negotiate the terms of an employment contract, and they are less likely to have unfavorable terms—much less legally unenforceable terms—forced upon them.[118] Therefore, the employees subject to the Act's lessened antagonism toward business interests are still in a position to negotiate the terms of their contracts. Second, the Act grants courts a permissive power to partially enforce restrictive covenants.[119] Georgia courts may use this power to police

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state"), *with* Atlanta Bread Co. Int'l v. Lupton-Smith, 679 S.E.2d 722, 724 (Ga. 2009) (quoting Rakestraw v. Lanier, 30 S.E. 735 (Ga. 1898)) (stating that restrictive covenants "tend to injure the parties making them, diminish their means of procuring livelihoods and a competency for their families; tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose them to imposition and oppression; tend to deprive the public of services of [people] in the employments and capacities in which they may be most useful to the community as well as themselves . . . ." (alteration in original)).

[117] *See supra* note 88 and accompanying text.

[118] *See generally* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005) (addressing "the surprising inconsistency between the rich understanding gained in the practical study of power and the legal system's far more limited and simplistic efforts to police perceived power disparities between bargaining parties").

[119] *See* O.C.G.A. § 13-8-54(b) (Supp. 2011) (recognizing that Georgia courts may—as opposed to shall—modify an unreasonable restrictive covenant to "grant only the relief

restrictive covenants and strike down unreasonable covenants or those not entered into in good faith.[120] In addition, if a restrictive covenant is entered into in good faith but is deemed unreasonable, Georgia courts have the option to modify the covenant and enforce reasonable restrictions. This discretion is intended to better align the covenant's restrictions with the firm's legitimate interests[121] and will incentivize firms to conduct negotiations with employees in good faith and draft restrictive covenants that better balance employees' needs with the respective firm's needs.

2. The Trend Towards a Service Economy and Increasing Worker Sophistication. Both the nation's trend towards a service economy and increased worker sophistication minimize the costs borne by employees. This trend to a predominantly service-oriented economy[122] highlights a growing demand for a more educated workforce.[123] Technological advances have also heightened this demand.[124] In turn, the American workforce substantially increased its level of education over the second half of the twentieth century.[125]

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reasonably necessary to protect" the firm's legitimate business interests).

[120] *Cf.* O.C.G.A. § 13-8-53(c)(1) (Supp. 2011) (construing "good faith estimates" of a restrictive covenant's geographic and scope-of-activity restrictions to ultimately "cover only so much of such estimate as relates to activities actually conducted," provided such restrictions are reasonable).

[121] § 13-8-54(b).

[122] *See generally Gross-Domestic-Product-(GDP)-by-Industry-Data*, U.S. DEP'T COMMERCE: BUREAU ECON. ANALYSIS, http://www.bea.gov/industry/gdpbyind_data.htm (last updated Dec. 13, 2011) (showing that the percent of real GDP of "[p]rivate goods-producing industries" fell from 39.7% in 1947 to 21.9% in 1997 but that the percent of real GDP of "[p]rivate service-producing industries" rose from 47.8% to 65.3% during the same period).

[123] *See* ANTHONY P. CARNEVALE, NICOLE SMITH & JEFF STROHL, GEORGETOWN UNIV. CTR. ON EDUC. & THE WORKFORCE, HELP WANTED: PROJECTIONS OF JOBS AND EDUCATION REQUIREMENTS THROUGH 2018, at 109 (2010), http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/FullReport.pdf (finding that of the projected 46.8 million job openings by 2018, "[e]mployers filling these jobs, overwhelmingly, will require college degrees or other postsecondary preparation of 63[%] of their new hires").

[124] *See* Kaufman, *supra* note 99, at 195 ("[T]echnological change is a positive force leading to higher real incomes and growing employment opportunities. . . . An additional aspect of technological change is that it . . . increase[es] the demand for skilled, highly educated workers . . . .").

[125] *See Percent of the Population 25 Years and Over with a Bachelor's Degree or Higher by Sex and Age, for the United States: 1940 to 2000*, U.S. DEP'T COMMERCE: U.S. CENSUS BUREAU, http://www.census.gov/hhes/socdemo/education/data/census/half-century/tables.html (last

Combined, these two trends help reduce the costs imposed by the Restrictive Covenant Act in two respects. First, a more educated workforce helps level the bargaining power between firms and employees.[126] Second, restrictive covenants do not have as significant an impact on a more educated workforce because this class of people is not as constrained to a geographic area.[127] For example, when employees gain more education and experience, they are likely to increase the geographic scope of their job search.[128] This extended scope empowers them to look beyond the enforceable scope of restrictive covenants, lessening an individual covenant's impact on that employee's ability to find new work.

D. REBUTTING THE "RACE TO THE BOTTOM" MYTH

In deciding where to grow, create, or move a business, firms will invariably consider the costs and benefits of operating in a particular jurisdiction.[129] A firm will likely consider how effectively a forum state protects legitimate business interests. Georgia's former hostility towards restrictive covenants and its absolute refusal to reform covenants[130] placed Georgia in the

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updated Apr. 6, 2006) (showing that the percent of the population at least twenty-five years of age with at least an undergraduate degree has grown from 4.6% in 1940 to 24.4% in 2000).

[126] *See supra* Part III.C.*1*.

[127] *See generally* Ofer Malamud & Abigail K. Wozniak, *The Impact of College Education on Geographic Mobility: Identifying Education Using Multiple Components of Vietnam Draft Risk* (Nat'l Bureau of Econ. Research, Working Paper No. 16463, 2010), *available at* http://www.nber.org/papers/w16463 (examining the impact of the attainment of college level education on geographic mobility by analyzing draft-avoidant behavior during the Vietnam War and concluding that attaining a college education creates a large, causal impact on geographic mobility).

[128] *Id.*

[129] *See generally* Lester & Ryan, *supra* note 22, at 420–21 (surveying scholarship regarding risks involved with adopting more permissive legal doctrines for evaluating noncompete agreements in an effort to lure businesses away from other jurisdictions). *But see* Erin Ann O'Hara & Larry E. Ribstein, *Rules and Institutions in Developing a Law Market: Views from the United States and Europe*, 82 TUL. L. REV. 2147, 2149 (2008) (arguing that permitting states to compete with one another in terms of the legal doctrines they implement will improve efficiency).

[130] *See* Richard P. Rita Pers. Servs. Int'l, Inc. v. Kot, 191 S.E.2d 79, 81 (Ga. 1972) ("[W]e have weighed the blue-pencil doctrine in the balance, and found it wanting." (internal quotation marks omitted)).

extreme minority—twelve percent—of jurisdictions holding a similarly hostile view.[131] In passing the Restrictive Covenant Act, the General Assembly sought to make Georgia a more attractive forum for businesses.[132]

Opponents to this reform mistakenly argue that this jurisdictional competition to attract business will lead jurisdictions to erode away employees' interests.[133] They argue that jurisdictions increasingly will create more favorable environments for firms in an attempt to lure them to their state. According to these critics, this trend will eventually grant firms such wide latitude in crafting restrictive covenants that businesses will transform into an assortment of miniature employment monopolies, capturing an employee for the entirety of an employee's life.

In this particular context, these fears are unfounded. The General Assembly enacted the Restrictive Covenant Act to position Georgia with the overwhelming majority of states and not to position Georgia as the leading pro-firm state.[134] Furthermore, there are sufficient safeguards, such as the permissive partial-enforcement provision[135] and the threshold applicability requirement,[136] to ensure employees' interests are not unduly injured. Further, this Note's proposed per se rule will add an

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[131] *See supra* note 110 and accompanying text.

[132] *See* H. STUDY COMM. ON RESTRICTIVE COVENANTS IN THE COMMERCIAL ARENA, Final Report, H. 149, Reg. Sess., at 3 (Ga. 2008) ("Therefore, the time has come for a change in the law . . . to bring Georgia in line with the overwhelming majority of other states . . . ."); *supra* note 114 and accompanying text.

[133] *See* Blake, *supra* note 17, at 691 ("From an objective point of view, the employee covenant not to compete is an inefficient and often unfair device for allocating the burden of certain business risks."); Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381, 1443–44 (2008) (arguing that it is improper for jurisdictions to compete in this legal market because it will ultimately harm the parties who are affected by this jurisdictional competition); Lester & Ryan, *supra* note 22, at 421 (surveying the negative effects of a legal market); Khadye, *supra* note 14, at 243 (arguing that House Bill 173, the functional equivalent to the Restrictive Covenant Act, "will have the unintended effect of restricting employee mobility and possibly decreasing overall economic growth in Georgia").

[134] *See supra* notes 114, 132 and accompanying text.

[135] *See supra* Parts II.A.*3*, III.C.*1*.

[136] *See supra* note 88 and accompanying text.

additional layer of protection for employees' interests.[137] Most importantly, the still-existent common law policies offer a check to the threat of eroding employees' rights. Georgia requires that in construing a statute, courts must look to the law prior to the enactment;[138] the common law policies that so strongly protect employees have not been abrogated by the Act. Rather, the common law policies merely coexist with the policies espoused in the Act. Thus, any fears that employers will create doctrines progressively favoring firms at the expense of employees are unfounded.

E. INTERPRETING THE RESTRICTIVE COVENANT ACT

Although the Restrictive Covenant Act is based on sound economic theory designed to ultimately increase employment and raise wages in Georgia, courts can further improve the efficacy and fairness of the Act by further minimizing the costs borne by employees.[139] Courts should adopt a per se rule of invalidity for restrictive covenants sought to be enforced against lower level employees that fall outside the Act's defined parameters.

The Restrictive Covenant Act protects businesses' legitimate interests by creating a more favorable environment for restrictive covenants.[140] Courts and academics agree that restrictive covenants are an effective means to protecting these interests.[141] However, at times a business will seek to enforce a restrictive covenant that reaches far beyond the legitimate business interest at stake.[142] Since few cases pass through the court system, a

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[137] *See infra* Part III.E.

[138] *See* O.C.G.A. § 1-3-1(a) (2000) ("In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy.").

[139] *See supra* Part III.C.

[140] O.C.G.A. § 13-8-50 (Supp. 2011).

[141] *See* 1 DECKER, *supra* note 25, at 76 (identifying the following as legitimate business interests that restrictive covenants permissibly protect: "(1) Long-term customer relationships; (2) Goodwill; (3) Confidential information in general; (4) Trade secrets; (5) Customer lists and other confidential customer information; (6) Special, unique, and extraordinary skills").

[142] *See* Blake, *supra* note 17, at 682–83 (noting that the potentially small chance of a court inquiring into the validity of a given restrictive covenant may incentivize firms to construct unreasonable broad covenants).

number of unreasonable covenants that do not seek to protect legitimate business interests could remain unchallenged.[143] While drafting the Act, Willard sought to remedy this potential *in terrorem* effect by limiting its applicability to employees who possess a certain level of managerial responsibility, technological expertise, or business-specific acumen.[144] The common law doctrine presumably still applies to the class of employees that have not developed these skills or knowledge.

Enforcing restrictive covenants against this latter class of employees, though, serves no legitimate business interest and only imposes *in terrorem* restrictions on employee mobility. In this context, the arguments for upholding the pro-firm policies espoused in the Restrictive Covenant Act do not carry the same weight as with the class of employees contemplated by the Act. Not only does this class have significantly less bargaining power than firms, the threat exists that firms would use this leverage to craft form employment contracts with unreasonable restrictive covenants and that these contracts of adhesion would inhibit employees both from changing employment and challenging the unreasonable restrictions.[145] Ultimately, these unduly burdensome covenants would confirm the concerns held by the *Rakestraw* court in 1898:

> [Restrictive covenants] tend to injure the parties making them; diminish their means of procuring livelihoods and a competency for their families; tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose them to imposition and oppression; tend to deprive the public of the services of men in the employments and capacities in which they

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[143] *See id.*; *supra* note 20 and accompanying text.

[144] *See* Willard Interview, *supra* note 6 ("[W]e were not trying to inhibit someone who had that type of business interest from being protected. We were really looking to protect more so what we think are valuable assets of a business, which is to say things they want to keep as trade secrets and proprietary information. So we tried to outline the bill using that as our guiding rod."); *supra* note 88 and accompanying text.

[145] *See supra* note 20 and accompanying text.

> may be most useful to the community as well as to themselves . . . .[146]

A per se rule of invalidity would defeat this injustice. In flatly invalidating restrictive covenants sought to be enforced against this class of employees, a per se rule would provide an effective disincentive to drafting restrictive covenants into these employment contracts. Additionally, this per se rule is consistent with the Georgia constitution and Georgia public policy, which invalidate covenants that serve no legitimate business interest and impose general restraints on trade.[147] As the courts further delineate who falls outside the parameters of the Act, a per se rule would provide firms clear direction and predictability in considering whether to draft a restrictive covenant into an employment contract. Therefore, in adopting a per se rule, the courts could better protect the class of employees falling outside of the Restrictive Covenant Act's boundaries.

IV. CONCLUSION

Georgia's former restrictive covenant doctrine was founded upon concerns of protecting employees from anti-competitive practices by firms, and courts thus strongly favored employees' interests over those of employers. The policies behind this favoritism are well founded. In protecting the employees' interests, Georgia courts ensured that employees were not victims of significant imbalances in bargaining power, captives of an unreasonably broad covenant, or casualties of the evils of unfair competition.

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[146] Rakestraw v. Lanier, 30 S.E. 735, 738 (Ga. 1898).

[147] *See* GA. CONST. art. III, § 6, para. 5(c)(1) ("[T]he General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessoning competition, which is hereby declared to be unlawful and void."); Riddle v. Geo-Hydro Eng'rs, Inc., 561 S.E.2d 456, 458 (Ga. Ct. App. 2002) ("A contract in general restraint of trade or which tends to lessen competition is against public policy and is void. A restrictive covenant in an employment contract . . . is considered in partial restraint of trade and will be enforced if reasonable . . . .").

Despite holding to these values, courts struggled to maintain a coherent doctrine as Georgia progressed through the twentieth century. Technology, education, and social norms changed, and the environment upon which the original common law doctrine was founded no longer existed. Courts struggled to find the appropriate loom with which to weave the current technological, social, and globalizing business environments into a rigid, aged common law. Unpredictability and uncertainty resulted. But one common thread remained: these covenants would likely not be upheld.

Due to the inefficacy of restrictive covenants in Georgia, firms were unable to distribute effectively the risks attendant to employment decisions between a restrictive covenant and the wage. Firms would likely compensate this risk by depressing wages. Consequently, Georgia appeared less attractive to both firms and employees relative to jurisdictions that are more favorable to restrictive covenants. These forces ultimately would create higher unemployment, diminished wages for employees, and a lower standard of living.

The Restrictive Covenant Act marks a turning point in Georgia employment law. The Act is designed to attract businesses to Georgia, boost employment, raise wages, and increase the standard of living. The Act significantly shifts public policy by adding pro-firm policies to balance its predominantly pro-employee common law. Further, a careful study of these provisions shows that Georgia will not unduly harm employees' interests. The reasonableness test codified in the Act is substantially similar to the common law, and the pro-employee policies espoused in the common law remain strong considerations for courts. The partial-enforcement provision protects employees from an *in terrorem* effect, giving courts the liberty to strike down impermissibly broad provisions. Additionally, the Act specifically establishes a minimum threshold for its applicability, protecting employees that do not have the same bargaining power, influence, or mobility as employees that possess managerial positions, technological expertise, or business-specific acumen.

Although many portions of the Act shift away from the common law doctrine, the Act has not stripped the Georgia judiciary of its authority in interpreting these covenants. The common law's reasonableness test has remained relatively intact. Additionally, courts can further improve the Act's fairness and efficacy by adopting a per se rule that would protect employees who fall outside the defined parameters of the Act. This per se rule would act as an additional policing agent for employers who try to enforce restrictive covenants against this class of employees who may have strong regional or community ties but lack bargaining power or company influence.

The Restrictive Covenant Act satiates Georgia's need to create a modernized approach to evaluating these covenants in a modern society. By fully embracing the provisions of the Act and taking the further actions this Note advocates, Georgia can create a dynamic approach that will promote jobs, economic growth, and a higher the quality of life in Georgia.

Alan Frank Pryor

V. APPENDIX

The following transcript contains excerpts of an interview of Representative Wendell Willard (WW), Georgia General Assembly House Judiciary Committee Chairman and author of the Restrictive Covenant Act. The interview was conducted by the author, Alan Pryor (AP), in Atlanta, Georgia, on October 7, 2011.

AP: What did you notice about in common law, what did you notice in society or in this state's economy that needed to change?

WW: Alright, let me just take off for a moment and do some talking for you to give you sort of the overview or the 30,000-feet view of it. I have practiced law in Georgia since 1968, and one of the things I do, and I tell other lawyers to do, is to read your advance sheets all the time. We used to have them come out in a booklet form, and I used to read those on, like, a Friday afternoon quite often and—the reason I am telling you about this is that it goes back historically looking at the cases. Dealing with the restrictive covenants in Georgia, we have never had a statute that would define what are the parameters for these types of agreements. Historically, looking at the cases, you'd have the courts from time to time changing positions, modifying depending on the makeup of the appellate courts panel. Depending on who you got, there might have a differing view and opinion, even among the panels about restrictive covenant agreements. And, of course, our constitution had limitations. The "Right-to-Work Clause," which is a very strong clause in our state constitution, has been applied with these types of agreement, even to the point that in I think 1989 or '90, the General Assembly first attempted to put structure, you might say, to these types of agreements by passing legislation that became enacted by the forerunner of the bill that we passed. And that bill, of course, was trying to say, "Here's the way things would work out as to the limitations or boundaries in which

parties could enter into a restrictive employment agreement." There was an appeal of a case that went up to the state Supreme Court, and the state Supreme Court, as you may have read the history of it, declared that entire enactment of the legislature unconstitutional . . . . It was an infringement upon the "Right-to-Work Clause in the constitution, saying "Thou shalt not be able to legislate or permit these types of agreements because of that constitutional provision." So, again we go from that period of time, like '91, '92, coming forward again. And we see more and more of the same thing again as people try to enter into agreements. And you had two types of agreements. You'd have a type of agreement where someone who is involved in the ownership of a business, and maybe the business is being sold, where the court's recognized the ability to have restrictive covenants and future employment as a part of what is being sold and consideration given for that. Then you'd have the other section, which is where a company is trying to protect its proprietary interests, whether it be employer customer lists, certain trade secrets, or how they conduct business, etc. So they tried to enter into agreements from time to time with that, and the court kept trying to make, through decisions, some types of guidelines. But the problem was every time a lawyer would attempt to draw up an agreement, he's telling his client, "I'm drawing this based upon what I *think* the law is today." But it doesn't mean tomorrow a decision won't come out and change that. So, it was a real haphazard position for the lawyers who practice in that area representing corporate-type clients and trying to draw up restrictive agreements that would protect these proprietary interests the corporation or business has, and knowing that it will be something that they could enforce in the future. With all that background, we had a legislator, Kevin Levitas, from DeKalb County, several years back look at trying to see if we could do something legislatively to improve this field of law. And we all agreed the only way

> to do it was, first of all, to get a constitutional amendment passed. So Kevin introduced a bill back in, I think it is '07 or '08, on this point. And the intent was to have the bill passed first and then come through with . . . a resolution to amend the constitution. And the reason we did sort of in reverse order was so that we could put out to the bar and the public the specifics of what we were trying to do legislatively so they could understand we are not trying to do away with completely the protections we have under the constitutional provision of the "right to work" that we have in this state. So the thought was to put out the constitutional—I mean the legislation first—and then the next year we would come out and do the constitutional amendment. So we had the constitutional amendment passed in 2010 to go on the 2010 ballot. And we already had a bill passed from 2009, which was to be the restrictive covenant legislation. So now we come forward with our constitutional amendment in 2010. That passes. It's on the ballot, and it passes pretty overwhelmingly. I think we had two-thirds approval of it, which was kind of surprising. So it was all good. We've got all this handled, and everything is in place now. But lo and behold, we had a couple of lawyers bring to my attention, "Hey, we've got a little glitch here." "Well, what's that?" "Well, you passed the law in '09, and the law says that this new statute will become effective upon the passing of a constitutional amendment in the November 2010 election." . . . But then we passed a constitutional amendment overlooking the language we had as far as the enactment clause of the statute, and it did not have an effective date provided for the constitutional amendment. It was silent, in other words. So when you have a constitutional amendment, and it is silent as to when it becomes effective, it will then become effective the following January 1. So it was to become effective then January 1, 2011. Ok, well then it doesn't become effective immediately. We'll wait til January 1. No, we couldn't do that. Why not? Well, we have case law that says that

when a statute becomes effective, and there is not constitutional provisions supporting that as a principle of law, then the statute itself is void, and it is void *ab initio*, and it cannot be revived even by amendment. So rather than being able to say we're going to pass an amendment saying, "Ok, the effective date of the amendment that we passed back in 2009 will not have an effective date sometime in 2011." You can't do it because what the case law says, that whole thing has been destroyed because it became effective without constitutional support. So there's your background, so now we are up to 2011. And I am dealing with the Chamber of Commerce and other groups of the bar about trying to find a way to resolve this. And the only way to resolve it was to go through the reenactment of the bill with some very, very minor changes. Very minor. . . . The strange thing is now it passes in 2011 with less support than we had for it back in 2010. If you looked at the debates we had on the floor, which you can find on the Internet, the debate of the bill had a couple of people in the House, Carl Rogers for one, and I forgot who the other was, they were vocal in their opposition to it. Carl, I think, dealt with insurance as like an insurance agent, and he had had unpleasant experiences in the past with companies he had represented in having restrictive covenants in place. So we had a lively debate on the floor, but it finally did go through. That's the background of the enactment of it.

AP: Now these people who were against the bill, what were their arguments?

WW: I think there's an area of lawyers and certainly individuals who do not like having the employer given this leverage of entering into—or let's say forcing employees to enter into—contracts that may restrict their ability to get work and employment post-employment with that particular company or person. And we in drawing up the legislation, we read the statutes, we try to make it very clear that this type of legislation and the type of contracts that it authorizes is only to be used when you have a company or

business that has real proprietary interests that need to be protected. And we are not looking to have the bill applied to what I call the "route salesman," the Orkin man, the snap-on tool, where they have sort of like a franchise or a route they work and then one day they say, "Hey, I'm leaving to do my own business." And that's happened a lot with the people in the termite, exterminating business.

AP: I've read a number of cases on that topic.

WW: It goes on all the time. Probably in the beginning, there was one exterminating company, and then the tree is all the ones who broke off from either that company or companies that formed and broke off from those companies. It's been that type of spread. Point being, we were not trying to inhibit someone who had that type of business interest from being protected. We were really looking to protect more so what we think are valuable assets of a business, which is to say things they want to keep as trade secrets and proprietary information. So we tried to outline the bill using that as our guiding rod.

AP: In the legislative findings of the statute that's now enacted, it said to provide a better ground for businesses. In my mind, there has to be stronger protection for businesses to attract, and to retain, and for business creation.

WW: Very good. And that's what we were hearing from the business community that there were corporations, national corporations, that were fearful of using Georgia as a regional-type office, basing persons here that were of a higher level of management for reason that if that person had a contract and then came into Georgia and left the company, there's a question whether that contract could or could not be enforced in all instances. So there was a movement in the business community saying, "We need to have something that will show the rest of the country and the world that if you come to Georgia you do have a business-friendly environment that will help protect those types of interests."

AP: I guess a secondary effect of that would be when you bring those businesses in, that will increase demand for labor, wages go up, unemployment drops.

WW: We hope that is the result of it.

AP: Ok, one concern that I thought of and talked to a few others [about] is a fear of a race to the bottom. If Georgia becomes more competitive for businesses, would other states respond and then keep moving in that direction?

WW: Good question, and the word that I have comes to me with regards to other states: we were one of the few, and pretty much in the minority area, that did not have the ability to properly enforce contracts dealing with restrictive covenants in employment. We tried with what we had as far as case decisions—and this goes back to the point I was making earlier. The members of the bar who practice in this area were very uncomfortable trying to advise clients, and national companies and advise them that you can come here and feel comfortable with doing business in Georgia as far as setting up an office. So we were the small minority. Most states do have legislation that is for that purpose of protecting proprietary interests. And they don't have a stronger clause dealing with the right to work as Georgia did.

AP: So becoming more mainstream with the majority.

WW: I think so.

AP: And the other appeals to this state will provide further incentive to bring them in.

WW: That is correct.

AP: There are sections that I have read that give courts leeway.

WW: Well, we did. Background-wise, as you read the cases, the court did not allow judges to do something we call "blue-lining," "blue-penciling," whatever you want to call it. And that is to say, "Ok, you made this restrictive covenant to cover all of Georgia when in fact all you do is business in Fulton and DeKalb Counties." Well, the court could not modify the agreement. It either all stood, or it all failed.

AP: The *Rita* case.

WW: And that goes to a long string of cases dealing with the same thing. So the courts—the appellate courts—were very restrictive in allowing the lower courts to do anything about trying to resolve this problem that may be with how broad a contract should be. And that's again one of the things that the practicing bar in that area was concerned about. With that said, we built in with the language, saying the thing a court can do is look at the territory and the length of time of the contract and the if it is overreaching, it can modify it to make it appropriate under the circumstances and the facts presented. The question now is: Will the court do that? We won't know until some cases come through, and the judges say, "Well, the legislature gave us this power." Or will they say, "The legislature has no right to dictate to us what we can do." So we don't know. We are hoping they will recognize that as now an appropriate thing to do with the legislation that we now have in place and the constitutional amendment.

AP: Will that "may" power to do that—that almost works as a policing power factor for business if—

WW: If they are overreaching. If they are overreaching, the court can take one of at least two avenues. That is, they can try to modify it, or they can say, "You overreached, and therefore you are out." That's the kind of thing I am saying: we are going to have to see how these cases are reviewed on the appellate level as they come up in the future.

. . . .

AP: This is a how many year project for you?

WW: Oh me, it goes back I guess, and it's not unusual to have a major piece of legislation take several years. This is a four-year project. I guess overall it started back in '07. Our first discussions of working with the bill.

. . . .

AP: Now moving back to the bill, were there any ambiguities that you noticed, and were those purposeful?

WW: They would not be for purpose that we did it, but there was some language that we cleared up between the bill that was passed in '09 and the bill that we passed this last session, 2011. It really was trying to clarify some wording that was, I consider it an ambiguity. I can't remember the clause. It's like section 54 or 55. You've got the bill there?

AP: I have the sections with me.

WW: Lo and behold. Let's see here. Do you have a comparison?

AP: I don't have the old bill. Here's [section] 54. And [section] 55.

WW: Yeah, I think it's the opening paragraph on [section] 54. "The court shall construe a restrictive covenant to comport with the reasonable intent and expectations of the parties to the covenant and in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement." I think that's the part that we had some ambiguities you determine you want to make a little clearer in terms of what they could do. And it may have been paragraph (b), too. Yep, I believe that is the one. I think it's good legislation. It's an open issue today how the courts look upon it and especially at the appellate level when cases get up there. And I'm sure there will be over the next few years.

AP: Like you said before, you want the courts to utilize the tools you put in there to exercise the reasonable intent of the parties and prevent overreaching and policing of the corporations.

WW: That's correct.

AP: Just as a final matter, do you think you were successful with the bill?

WW: Well, we think the language does that in the bill. The unknown is how the courts now look upon that power that we set out. So always you have to recognize in doing legislation, you have to be careful that you don't go into what may be the judicial discretionary authority or what may be things that are controlled by the courts. We think that what we said [in] this bill, as far as the authority of

> the court, is defining as a matter of public policy. We want the courts to look at those things and say the safeguards that we have tried to build into it and be the one to police this issue of the reasonableness of the territory and time primarily and the broadness of what can be covered under restrictive covenants.