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NONCOMPETE AGREEMENTS UNDER FLORIDA LAW: A RETROSPECTIVE AND A REQUIEM?

KENDALL B. COFFEY* & THOMAS F. NEALON, III**

I. INTRODUCTION

THE subject of the enforceability of an employee's covenant not to compete against a former employer has undergone a substantial evolution.¹ Reversing the momentum of a decade of increasingly rigid appellate enforcement, in 1990 the Florida Legislature amended section 542.33, Florida Statutes,² arguably restoring a level playing field to what, in many respects, had become a matter of "no contest." For some observers, this legislative enactment has taken the heart out of the express statutory authorization for the enforcement of covenants not to compete found in section 542.33. Others may proclaim that Florida has merely adopted a reasonable approach to the issue of enforcement of noncompete covenants, which places it more in line with other jurisdictions. Whatever the perspective, it is undeniable that the 1990 amendment has wrought dramatic change to an area of the law once dominated by the robotics of simplistic enforcement.

In addressing the evolution and current state of noncompete agreements, this Article initially analyzes the key developments in the case law concerning section 542.33 since its enactment in 1953, with particular emphasis on the past decade. This is done to fully develop the backdrop against which the true impact of the 1990 amendment can be best perceived and assessed. In many respects, this case law provided the impetus for the 1990 legislative revision. The Article next explores the various statutory revisions to section 542.33 before 1990. After developing this background analysis, the focus turns to the current status of section 542.33 and likely developments and potential areas of conflict in the aftermath of the 1990 amendment. Finally, this Article concludes with a summary and recommendation for dealing

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¹ This Article updates an Article covering the same subject published in 1980. Kendall B. Coffey, Noncompete Agreements by the Former Employee: A Florida Law Survey and Analysis, 8 FLA. ST. U. L. REV. 727 (1980).
² Ch. 90-216, 1990 Fla. Laws 1607 (amending FLA. STAT. § 542.33(2)(a) (1989)).
with future questions concerning the use and enforcement of covenants by employees not to compete against their former employers.

II. A Historical Perspective

For many years, Florida exhibited extreme distaste, if not outright opposition, toward covenants not to compete in the employment context. While affording occasional vindication to such restrictions when agreed to by sellers of businesses, Florida courts routinely voided such noncompetition agreements in employment cases, generally on the ground that they contravened public policy. Underlying this judicial antipathy was a range of social and equitable concerns that the courts typically resolved in favor of the employee. This judicial antagonism toward noncompetition agreements against former employees reached a high point in the mid-1950s when the Florida Supreme Court observed that "[w]e have found no case nor have we been cited to one where a contract of employment with provision not to compete or work for a competitor has been upheld in this jurisdiction." Somewhat paradoxically, the court further noted that "[s]uch contracts will not be enforced, absent some special equity, and have generally been stricken down for 'lack of mutuality.'" This sentiment had its roots in the long-standing common law principle that contracts in restraint of trade that deprived the public of one's skill or industry and that

3. Love v. Miami Laundry Co., 160 So. 32 (Fla. 1934). This case was in accord with the general sentiment of the time concerning such covenants, expressed in Super Maid Cook-Ware Corp. v. Hamil, 50 F.2d 830, 831 (5th Cir.), cert. denied, 284 U.S. 677 (1931). In Hamil, the court affirmed the denial of an injunction to enforce two restrictive covenants, noting: "For, fundamentally, in and of themselves these covenants are in restraint of trade, and unenforceable. It is a settled principle of law that no man may, per se, contract with another that that other will not follow a calling by which he may make his livelihood." Id.

4. In Love, the Florida Supreme Court best summarized this judicial aversion as follows: "[T]he enforcement of this provision of the contract may, and in all probability will, mean that the contracting employee cannot procure other employment, and that he, together with his family, will become a charge on the public." 160 So. at 34. The court also stated "[t]hat courts are reluctant to uphold contracts whereby an individual restricts his right to earn a living at his chosen calling is well established." Id. In many respects, with the 1990 amendment to § 542.33, we have come full circle regarding such concerns, as will be discussed infra in the text accompanying notes 194-212.

5. Arond v. Grossman, 75 So. 2d 593, 595 (Fla. 1954) (This case arose before the effective date of Florida's noncompetition statute.).

6. Id. In contrast, it is relevant to note Justice Drew's dissenting opinion in the case of United Loan Corp. v. Weddle, 77 So. 2d 629 (Fla. 1955), where the Florida Supreme Court affirmed the denial of injunctive relief based upon Love. Justice Drew, in his dissent, sought to distinguish Weddle from Love based upon a mutuality/arms-length contractual argument because the employee in Weddle had "considerable experience and business ability" and had voluntarily agreed to restrictions "without any coercion and for his own benefit." Id. at 631.
prevented one from supporting oneself and one’s family were invalid as against public policy.\textsuperscript{7}

In 1953, the dynamics of confrontations between employee and employer were radically altered by the Florida Legislature’s passage of a statute authorizing the enforcement of noncompetition agreements against former employers under certain circumstances.\textsuperscript{8} For employers confronting the traditional common law enmity toward such agreements, this statute provided a mechanism to protect their legitimate business interests. Thus, the first section of the statute defined its starting point with homage to the longstanding hostility to noncompetition agreements: “(1) Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind, otherwise than is provided by subsections (2) and (3) hereof, is to that extent void.”\textsuperscript{9} The Legislature next proceeded to carve out a specific exemption from this general prohibition in subsection (2):\textsuperscript{10}

[O]ne who is employed as an agent or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a

\begin{quote}
\textsuperscript{7} Oregon Steam Navigation Co. v. Winsor, 87 U.S. (20 Wall.) 64, 68 (1874). The Florida Supreme Court in Standard Newspapers, Inc. v. Woods, 110 So. 2d 397, 399 (Fla. 1959), summarized this doctrine as follows:

Originally, under the common law of England, contracts restricting a man’s right to follow his calling were considered void as against public policy. This view developed from the requirement that a man could not pursue a trade to which he had not become apprenticed, and that one so committed was subject to penalty if he did not exercise that trade. Consequently an agreement to restrain him from following his trade would result either in his violation of the law or the deprivation of his right to earn a livelihood.

\textit{Id.}

\textsuperscript{8} FLA. STAT. § 542.12 (1953). Subsequently, effective October 1, 1980, § 542.12 was renumbered § 542.33. Ch. 80-28, 1980 Fla. Laws 95. For purposes of consistency and in order to avoid confusion, all references in the text of this Article will be to § 542.33, unless otherwise indicated, and all references to § 542.12 cited in the various cases shall be deemed to be references to § 542.33.

\textsuperscript{9} FLA. STAT. § 542.12(1) (1953). Effective October 1, 1988, the Florida Legislature enacted certain revisions to § 542.33. In particular, subsection (1) was rewritten as follows:

(1) Notwithstanding other provisions of this chapter to the contrary, each contract by which any person is restrained from exercising a lawful profession, trade, or business of any kind, as provided by subsections (2) and (3) hereof, is to that extent valid, and all other contracts in restraint of trade are void.

\textit{FLA. STAT.} § 542.33(1) (1988). This amendment is discussed \textit{infra} in the text accompanying notes 175-77.

\textsuperscript{10} FLA. STAT. § 542.12(2) (1953). This section was amended to add the term “independent contractor.” Ch. 87-40, 1987 Fla. Laws 176. The importance of this revision is discussed \textit{infra} in part VB of this Article.
reasonably limited time and area, . . . so long as such employer continues to carry on a like business therein.11

This statute was upheld as applied to noncompetition agreements between employers and employees in Capelouto v. Orkin Exterminating Co.12 Noting the absence of "any overriding public interest in having the restricted employee's services available to it,"13 the court upheld a two-year restrictive covenant covering the multi-county area managed by the former employee. Capelouto was to become a watershed opinion spawning jurisprudence establishing that section 542.33(2) "clearly supersedes the common-law rule" and has become "the controlling law within its proper sphere of operation."14

Beginning with the Atlas Travel Service decision, the Florida courts began to weave distinct threads of legal reasoning around attempts to define the scope and limitations of section 542.33. The decision in Atlas noted that the trial court's exercise of its discretion regarding injunctive relief "shall be reasonably exercised to the end that the object of the statute may not be nullified," so long as the court avoids a result that is "harsh, oppressive or unjust."15 This demonstrated the early dichotomy that existed between judicial duty to enforce these agreements in the aftermath of a legislative mandate and the antipathy the courts had long expressed toward restrictions on the individual's ability to earn a livelihood. Through subsequent judicial action, though, this early divergence yielded to a pendulum swing favoring noncompetition agreements. Throughout this atmosphere of endorsement, the scope of judicial review narrowed for issues customarily raised by enforcement actions involving noncompetition agreements. That evolution culminated in the enactment of the 1990 amendment to section 542.33.

11. Fla. Stat. § 542.12(2) (1953). In Standard Newspapers, the court specifically rejected arguments that the statute was unconstitutional and violated due process by depriving a person of his or her livelihood. It should be noted that this case arose in the context of the sale of a business and, therefore, was governed by the first sentence of § 542.12(2) dealing with "one who sells the goodwill of a business." 110 So. 2d at 400.

12. 183 So. 2d 532 (Fla.), appeal dismissed, 385 U.S. 11 (1966). The court ruled that "there can be no doubt that the legislature of our state has the power to enact legislation superseding the common law as it did by enactment of Section 542.12, and more specifically by the enactment of subsections (2) and (3) thereof." Id. at 534.

13. Id. at 534.


15. Id. See also Capelouto, 183 So. 2d at 532, where similar concerns regarding the balancing of the various interests involved were expressed.

16. In part III of this Article we discuss this narrowing process and the role it may have played in prompting the 1990 amendment to section 542.33.
III. Statutory Framework

The legal framework for noncompetition agreements in Florida does not provide a specific affirmative statutory authorization but, in contrast, validates the agreements through an exception to a general prohibition against trade restraints. This is reflective of the public policy suspicions Florida had, at least at the outset, for such agreements. The Florida Supreme Court perhaps best summarized this public policy consideration in 1971:

The pertinent question is whether the contract in effect impedes or restrains a former employee from exercising his lawful profession, trade or business. If a contract has this effect, it violates public policy as announced through the statute, unless it conforms to the statutory requirements of reasonable limitation as to time and area.

In this context, at least initially, the courts frequently construed noncompetition agreements narrowly in order to avoid enforcement. Generally, courts took the position that unless the restrictive covenants were encompassed within the "savings" provision of section 542.33, they would be void.

A. Carrying On Business

The early case law concerning section 542.33 served to clarify any confusion regarding terminology contained in that section. Relatively easily, the courts resolved any question regarding the interpretation of the phrase "carrying on or engaging in a similar business" found in section 542.33(2). In Storz Broadcasting Co. v. Courtney, the Third District Court of Appeal stated: "[I]t is now established that accepting employment in a similar business falls within the term 'engaging in a similar business' as used in the statute, and therefore is within the

18. Id. at 858.
19. E.g., Storz Broadcasting Co. v. Courtney, 178 So. 2d 40 (Fla. 3d DCA 1965). In Storz, the court held the restriction was unenforceable "because the covenant not to compete related to termination of employment during the term and was not applicable after the employment contract was fully performed." Id. at 42.
20. E.g., Cerniglia v. C. & D. Farms, Inc., 203 So. 2d 1 (Fla. 1967) (contract unenforceable because it is repugnant to our public policy); Bergh v. Stephens, 175 So. 2d 787 (Fla. 1st DCA 1965) (The inclusion of the term "business" and the omission of the term "profession" from subsection (2) of § 542.33 indicated that it was not applicable to professions, and since the profession of medicine is not encompassed by the term "business," a covenant by a doctor, therefore, fell outside the statute and was unenforceable.).
21. 178 So. 2d 40 (Fla. 3d DCA 1965).
exceptions stated in § 542.12(2).”22 The Fourth District Court of Appeal likewise had little difficulty concluding that accepting a different position with a competitor than that held with the former employer did not preclude enforcement of the noncompetition agreement.23 Similarly, the Second District Court of Appeal rejected the argument that section 542.33(2) “applies only to one who leaves his employment and subsequently becomes an owner or proprietor of his own business.”24

B. “One Who Is Employed” and Independent Contractors

Another area of potential controversy surrounded interpretation of the term “one who is employed.” The initial version of section 542.33(2)(a) referred to “one who is employed as an agent or employee.” This gave rise to some question as to the applicability of 542.33 to independent contractors. In order to resolve this confusion, the courts resorted to principles of agency to analyze whether the former employer exerted sufficient control over the individual to bring him or her within the parameters of section 542.33. In Economic Research Analysts, Inc. v. Brennan,25 the Fourth District Court of Appeal rejected arguments by the defendant that he was not “employed” as required by section 542.33(2), but was merely an independent broker and, therefore, was outside the ambit of section 542.33. Reversing the trial court’s dismissal of the complaint, the court found that the plaintiff had asserted sufficient control over the defendant to establish an agency relationship that made the defendant “an agent of appellant within the meaning of subsection (2) of Section 542.12.”26

The Fifth District Court of Appeal reached a similar conclusion in Insurance Field Services, Inc. v. White & White Inspection,27 overruling the trial court’s determination that the defendant was an independent contractor.28 The facts of this case presented egregious conduct constituting tortious interference with a business relationship,

22. Id. at 42.
25. 232 So. 2d 219 (Fla. 4th DCA 1970). The court was not influenced by the fact that the agreement expressly provided that the relationship of employer and employee did not exist.
26. Id. at 221. The court, in explaining this finding, noted: “Appellant was required by law to supervise the conduct of appellee [defendant],” and “the appellee [defendant] was registered with the Florida Securities Commission as a registered agent or salesman for appellant.” Id.
27. 384 So. 2d 303 (Fla. 5th DCA 1980).
28. This Article revisits the topic of “independent contractor” during its examination and review of legislative developments since 1980. See infra in part VB.
which may have influenced the court’s analysis and decision. Less problematic was the question of whether a company’s officer was an “employee” for purposes of section 542.33 and therefore was bound by the terms of a noncompetition agreement.

Conversely, two decisions by the Second District Court of Appeal in 1985 departed from the foregoing analysis, breaking new ground with respect to the issue of “independent contractor” versus “agent/employee.” In Ware v. Money-Plan International, Inc., the court reversed the trial court’s decision granting injunctive relief solely on its finding that the defendants/appellants were independent contractors and not agents or employees. The court specifically distinguished Ware from Brennan. Similarly, in Lenox v. Sound Entertainment, Inc., the court, relying on its decision in Ware, reversed the trial court’s order granting an injunction exclusively on the finding “that Lenox was an independent contractor,” and therefore the covenant not to compete violated section 542.33.

This line of cases culminated with the decision Amedas, Inc. v. Brown. In Amedas, the Second District Court of Appeal narrowly construed the term “agent” and held that those who were characterized as “independent contractors” could not be deemed to be “agents” for purposes of section 542.33. The court found that the agreement between Brown and Amedas referred to Brown as an independent contractor, and the work arrangement supported this characterization in holding the noncompetition clause unenforceable.

C. Businesses and Professions

A related issue concerned the distinction, if any, for purposes of section 542.33 between a “business” and a “profession.” For a brief period there was some judicial sentiment endorsing a distinction between the two terms. In Bergh v. Stephens, the First District Court of Appeal noted: “[L]ike the legal profession, the medical profession

29. 384 So. 2d at 306.
31. 467 So. 2d 1072 (Fla. 2d DCA 1985).
32. Id. at 1075.
33. Id. at 1074.
34. 470 So. 2d 77 (Fla. 2d DCA 1985).
35. Id. at 79.
36. 505 So. 2d 1091 (Fla. 2d DCA 1987).
37. Id. at 1092. It should be noted, however, that the Second District Court of Appeal did remand the case to the trial court to consider whether Brown had breached his contract with Amedas or had tortiously interfered with Amedas’ contractual relations. Id. at 1093.
38. Id.
39. 175 So. 2d 787 (Fla. 1st DCA 1965).
has for centuries been regarded and adjudicated to be a great and no-
ble profession, as distinguished from a business, and it is so today."^40
This distinction was not recognized by all courts who considered the
issue. Any lingering doubt on this issue was conclusively resolved by
the Florida Supreme Court in 1970 in Akey v. Murphy. The supreme
court, in reversing the Second District Court of Appeal's decision
based upon Bergh v. Stephens, interred any such argument saying:

No real distinction between business partners associated together for
the practicing of a trade or profession and those engaged in a
'business' such as the sale of groceries . . . is immediately apparent,
insofar as the public policy in question is concerned.^43

IV. JUDICIAL EVOLUTION

A. Whether "Unreasonable" Agreements Are Within the Scope of
Section 542.33

The reasonableness of the nature, scope, and duration of the non-
competition agreement has been one of the most litigated issues raised
by section 542.33. As discussed previously, because such agreements
are in derogation of the common law, they must be strictly construed
and enforced. Applying this principle, several early decisions held that
the provisions of the noncompetition agreement were unreasonably
broad and, therefore, outside the savings provision of section 542.33,
and thus wholly void. The most significant holding to support the
premise that unreasonable arguments are to be discarded in their en-
tirety was the decision rendered by the Florida Supreme Court in 1967

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40. Id. at 791.
41. See White v. Allen, 232 So. 2d 766 (Fla. 4th DCA 1970) (holding that the term "business" as used in § 542.33 includes a profession or trade).
42. 238 So. 2d 94 (Fla. 1970) (restriction covered an area within 30 miles of Lakeland for a period of two years).
43. Id. at 96.
44. The concept of unreasonableness has played a pivotal role in the development of the law concerning the enforcement of noncompetition agreements. In addition to arising under the heading of the general unreasonableness of the restriction, these covenants have been hotly liti-
gated with respect to questions of reasonableness as to the time and the geographic area of the covenant. More recently, with the 1990 amendment to § 542.33, it has again assumed center stage as one of the key issues that a court must consider and resolve before enforcement. This Article investigates and analyzes each of these areas.
45. See, e.g., Forrest v. Kornblatt, 328 So. 2d 528, 529 (Fla. 3d DCA 1976) (The court noted that under Florida law the trial judge must exercise sound judicial judgment and that "[t]his record does not show an abuse of discretion under the circumstances of this case."); Sanford Indus. v. Jaghory, 223 So. 2d 77 (Fla. 3d DCA 1969); C & D Farms, Inc. v. Cerniglia, 189 So. 2d 384 (Fla. 3d DCA 1966), aff'd in part and remanded in part, 203 So. 2d 1 (Fla. 1967).
in *Cerniglia v. C. & D. Farms, Inc.*46 In a case involving a restrictive covenant signed by a former owner in favor of the purchaser of a business, the court, without comment or explanation, upheld the trial court's finding that the contract was unenforceable as against public policy because it was "too extensive, both as to time and area."47 It should be noted, however, that the time restriction in *Cerniglia* covered a twenty-year period, and the area restricted encompassed the entire United States.

For whatever reason, the *Cerniglia* doctrine of wholesale invalidation attracted little following in subsequent years. Shortly after its decision in *Cerniglia*, the Florida Supreme Court, in *Flammer v. Patton*,48 clarified the analysis governing the question of reasonableness for noncompetition agreements by mandating judicial modification, rather than nullification, of unreasonable agreements.

On its face, *Flammer* appeared to set forth the perfect factual background for the extension of the proposition established by the court in *Cerniglia*. Flammer had retired after thirty-three years of service with Beneficial Finance Company.49 At the time of his retirement, he was eligible for monthly pension benefits of $256.38 under the company's employees' pension and death benefit plan.50 The plan included a provision that gave plan trustees authority to terminate, discontinue, or suspend any payment under the plan if an employee or retired employee engaged in a business or occupation in competition with the company.51 When Flammer joined the National Bank of Tampa as a loan officer several months after his retirement, the trustees notified him that his benefits would be suspended.52 The circuit court upheld the noncompetition provision and the district court of appeal affirmed, notwithstanding the apparent harshness of the result.53

The supreme court began its analysis by discussing the historical hostility of courts to restraints upon former employees. After briefly

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46. 203 So. 2d 1 (Fla. 1967). The supreme court deferred to the discretion of the trial court.
47. *Id.* at 2.
48. 245 So. 2d 854 (Fla. 1971).
49. *Id.* at 855.
50. *Id.*
51. *Id.* at 856. The plan provision in question contained no limitation as to either time or geographic area for the alleged competition, but rather left that issue entirely to the discretion of the plan trustees.
52. *Id.* Flammer's benefits were suspended from December 1, 1965, until September 1, 1969, when they were reinstated following his resignation from the bank. No back payments were allowed by the trustees of the plan. *Id.*
53. *Id.*
reviewing the Florida Legislature's response in enacting section 542.33, the court reasoned:

The pertinent question is whether the contract in effect impedes or restrains a former employee from exercising his lawful profession, trade or business. If a contract has this effect, it violates public policy as announced through the statute, unless it conforms to the statutory requirements of reasonable limitation as to time and area.\textsuperscript{54}

Applying this rationale, the court swept aside the contention that the elimination of retirement benefits as a penalty for competing does not restrain trade:

We find it indefensible for respondents to contend that petitioner was free to accept any employment he chose, so long as he was willing to surrender the benefits earned as a result of more than thirty years' service to Beneficial. What greater restraint can there be on a retiree than the spector of withheld pension benefits?\textsuperscript{55}

Notwithstanding the court's conclusion that cutting off Flammer's retirement benefits could be a restraint on trade, the court agreed that it was nevertheless within the scope of section 542.33. To fashion a resolution to the controversy, the court adopted a middle-ground position, interpreting the statute to mean that "in the instant case, restrictions on the receipt of pension benefits would be permissible, so long as the restrictions were reasonably limited as to time and area."\textsuperscript{56}

Thus, rather than consigning facially unreasonable agreements to the nearest paper shredder, the court issued a broad judicial mandate to trial courts to exercise their discretionary authority. The court held that "[w]here no limitations are contained in the restrictions it is within the discretion of the trial court to determine what limitations as

\textsuperscript{54} Id. at 858. In response to the question of whether § 542.33 embraced noncompetition provisions in pension plans, the court, while noting that the statute provided no definition for a "contract by which anyone is restrained," concluded that "the breadth of the statutory language clearly implies a wide range of applicability." Id. at 857. See Herndon v. Eli Witt Co., 420 So. 2d 920 (Fla. 1st DCA 1982), where the court upheld the provisions of a covenant not to compete included in a settlement agreement entered into by the parties after their employer/employee relationship had terminated. While noting that the language of 542.33(2)(a) was intended to apply to agreements entered into during the course of the employment relationship, the court concluded that "under the circumstances [described], considerations of public policy, equity and fair dealing favor enforcement of the covenant if it is otherwise reasonable." Id. at 923. See also Pensacola Assoc. v. Briggs Sporting Goods Co., 353 So. 2d 944 (Fla. 1st DCA 1978) (The court held that a covenant not to compete included in provisions of lease did not violate § 542.33(1.).)

\textsuperscript{55} 245 So. 2d at 858.

\textsuperscript{56} Id. at 859.
to time and area would be reasonable under the circumstances.\textsuperscript{57} Flammer's progeny have consistently held that agreements that are unreasonable in matters of time and area are curable through the exercise of judicial discretion.\textsuperscript{58}

**B. Resolving the Questions of "Reasonableness" as to Time and Area**

In 1974, the Florida Supreme Court continued to endorse a proactive role for trial judges when, in \textit{Miller Mechanical, Inc. v. Ruth},\textsuperscript{59} the court reversed a denial of injunctive relief and ruled that the trial court should have determined a reasonable length of time for the restriction and granted an injunction for that period.\textsuperscript{60} In so doing, the court ruled that the trial court may have to assume the role of draftsman to modify and, in effect, rewrite unreasonable covenants. The court stated: "[I]n the event a trial court finds the provisions of the agreement to be unreasonable, the correct procedure would be for the Court to modify the agreement and award an appropriate remedy."\textsuperscript{61} As later decisions demonstrated, though, this holding did not give trial court judges blanket authority to totally rewrite otherwise reasonable agreements. In \textit{Twenty Four Collection, Inc. v. Keller},\textsuperscript{62} the trial court rejected a two-year, three-county noncompetition agreement and fashioned its own restriction, which restrained Ms. Keller from dealing with several named suppliers of Twenty Four Collection, Inc., with whom she had developed personal relationships, or with any of its former customers.\textsuperscript{63} The Third District Court of Appeal reversed

\textsuperscript{57} Id.

\textsuperscript{58} See \textit{Miller Mechanical, Inc. v. Ruth}, 300 So. 2d 11 (Fla. 1974).

\textsuperscript{59} In \textit{Miller}, the trial court found that the contract was valid, but the three-year covenant not to compete was unreasonable as to length of time. The trial court, therefore, refused to enforce the contract by way of an injunction and instead awarded nominal damages. 300 So. 2d at 12.

\textsuperscript{60} \textit{Id.} at 13. \textit{Compare with} \textit{Auto Club Affiliates, Inc. v. Donahey}, 281 So. 2d 239 (Fla. 2d DCA 1973) (reversing the denial of injunctive relief). In \textit{Auto Club Affiliates}, the court, commenting on the lack of an area restriction in the covenant, ruled: "A covenant which lacks a territorial limitation is not void ipso facto as long as the absence of the territorial limitation can be shown to be reasonable under the circumstances." \textit{Id.} at 243 (citations omitted). The court remanded the case to the trial court for such a determination. In Joseph U. Moore, Inc. v. Neu, 500 So. 2d 561 (Fla. 2d DCA 1986), where the noncompetition clause of a contract did not contain a geographic limitation, the court ruled that after remand "the trial court must determine a reasonable geographic limitation." \textit{Id.} at 563.

\textsuperscript{61} \textit{Miller}, 300 So. 2d at 12 (citations omitted).

\textsuperscript{62} 389 So. 2d 1062 (Fla. 3d DCA 1980), \textit{review dismissed}, 419 So. 2d 1048 (Fla. 1982).

\textsuperscript{63} \textit{Id.} at 1063. \textit{See also} \textit{Xerographics, Inc. v. Thomas}, 537 So. 2d 140, 143 (Fla. 2d DCA 1988) (The court reversed the trial court reduction in area of restriction on grounds that the "noncompetition agreement was clear and unambiguous" and "reasonable on its face."). Simi-
and, while sympathetic to the trial court’s discomfort, directed entry of an injunction. The court stated: “[W]e therefore find no basis in the law for the ruling below which, while obviously well-motivated, amounted simply to rewriting a duly-executed and valid contract so as to relieve one of the parties of its burdens.”

As is demonstrated by that decision and others that followed Flam-mer and Miller, Florida’s judiciary had ushered in an era of minimal deference to public policy and, instead, was focusing narrowly on the time and geographic area aspects of the restrictive covenants. While occasionally the trial judges objected to the seemingly harsh application of these provisions, Florida appellate courts moved steadily toward stricter enforcement of noncompetition agreements.

Relying on Miller, appellate courts routinely overturned trial court denials of injunctive relief based upon the unreasonableness of the covenant, with instructions to determine a reasonable length of time and area and so modify the covenant. Accordingly, trial court discretion in modifying the time and area restrictions became the battle-

larly, in Florida Pest Control & Chem. Co. v. Thomas, 520 So. 2d 669 (Fla. 1st DCA 1988), the trial court refused to enforce a contract provision forbidding employment in any manner with any competitor of FPC because the provision was “too broad.” The First District Court of Appeal reversed, stating: “[W]hen a contract is clear and unambiguous, the court cannot give it the meaning other than that expressed in it, and cannot rewrite the contract for the parties.” Id. at 671.

64. Keller, 389 So. 2d at 1064.

65. The large number of appellate reversals of trial court denials of injunctive relief even throughout the 1980s attest to the ongoing difficulty trial courts had in following this directive. See, e.g., Sarasota Beverage Co. v. Johnson, 551 So. 2d 503 (Fla. 2d DCA 1989); Xerographics, Inc. v. Thomas, 537 So. 2d 140 (Fla. 2d DCA 1988); Joseph U. Moore, Inc. v. Neu, 500 So. 2d 561 (Fla. 2d DCA 1988); Rollins Protective Serv. Co. v. Lammons, 472 So. 2d 812 (Fla. 5th DCA 1983); Sentry Ins. v. Dunn, 411 So. 2d 336 (Fla. 5th DCA 1982).

66. This approach favoring modification to support enforcement found expression as early as 1964 in American Building Maintenance Co. v. Fogelman, 167 So. 2d 791 (Fla. 3d DCA 1964), where the court upheld the trial court’s reduction of the term of a noncompetition agreement from three years to one year on grounds “that it was unreasonable to enjoin this man from his livelihood for more than one year.” Id. at 792. Similarly, in Kenco Chem. Mfg. Co. v. Railey, 286 So. 2d 272 (Fla. 1st DCA 1973), the court upheld the trial court’s reduction of the time period in the noncompete agreement from five years to three and limitation of the geographical area to the state of Florida and certain areas of Georgia where there was no geographical area specified in the agreement. The court, upholding the trial court modifications, noted: “Determination of reasonable limitations of the covenant as to time and geographical area was within the province of the court.” Id. at 274.

67. While the vast majority of appellate decisions concerning time and area restrictions have involved appellate court reversals of trial court attempts to diminish or excuse violations, there have been notable exceptions. See, e.g., U Shop Rite, Inc. v. Richard’s Paint Mfg. Co., 369 So. 2d 1033 (Fla. 4th DCA 1979) (The court reversed the trial court’s expansion of a 10-year restriction into a perpetual injunction and its removal of a 350-mile geographic limit, in effect making the geographical area of the covenant unlimited.).
NONCOMPETE AGREEMENTS

ground for appellate court scrutiny. In Availability, Inc. v. Riley, the Second District Court of Appeal reversed the trial court’s finding that the geographic limitations of the covenant were “unconscionable and unenforceable,” and said:

Accordingly, where noncompetitive agreements have been shown to be reasonable, they have been consistently upheld by the Florida courts. In determining the reasonableness of such an agreement the courts first of all, as dictated by the statute, consider the expressed limitations as to time and geographical area. Additionally, the courts employ a balancing test to weigh the employer’s interest in preventing the competition against the oppressive effect on the employee.

The court, ostensibly employing this balancing test, found no imbalance, basing its decision, in part, on the trial court’s finding that the former employee was “otherwise well able to support himself and his family.”

The implication of a balancing test is that substantially equal weight will be accorded to the circumstances of the employee and to those of the employer. As is evident from a portion of the opinion, the Riley decision somewhat belies that implication: “The aforequoted statute and the cases, as we read them, give discretion to the courts to construe the reasonableness of a restrictive covenant on its own terms — not discretion to rewrite it so as to be reasonable in other respects.”

The subtle but clear suggestion from this language is that there exists an objective standard of reasonableness applicable to all such covenants without regard to any particular subjective considerations, a

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68. 336 So. 2d 668 (Fla. 2d DCA 1976) (trial court reduced area restriction from within a 100-mile radius of Tampa to Hillsborough County). Compare this case with Orkin Exterminating Co. v. Girardeau, 301 So. 2d 38 (Fla. 1st DCA 1974), where the court of appeal upheld the trial court’s reduction of the geographic area restriction from five counties to the San Jose portion of the city of Jacksonville. Basing its decision on the premise that “[w]hat is a reasonable area is a factual matter to be determined in each case,” the court found that Girardeau’s employment assignment had been exclusively to the San Jose area of Jacksonville. Id. at 40.

69. Riley, 336 So. 2d at 669-70 (footnotes omitted). See Sarasota Beverage Co. v. Johnson, 551 So. 2d 503 (Fla. 2d DCA 1989) (consideration of whether the threatened injury to the employer outweighed any possible harm to the employee was not relevant to the issue of whether to grant injunctive relief but only to a determination of the reasonableness of the covenant as to time and area).

70. Riley, 336 So. 2d at 670.

71. Id.

72. Contrast this approach with the two-step process advanced in American Bldg. Maintenance Co. v. Fogelman, 167 So. 2d 791 (Fla. 3d DCA 1964). “In other words, there are two determinations; (1) the reasonableness of the agreement per se; (2) the reasonableness of the agreement as applied in the instant case, taking into consideration all of the facts, including those which have occurred subsequent to the execution of the agreement.” Id. at 792.
theme consistent with Miller’s rigid focus on time and place analysis.\textsuperscript{73}

Absent unreasonable time and place restrictions, courts seemed stymied in any opposition to enforcement of noncompetition agreements.\textsuperscript{74} The First District Court of Appeal, in Florida Pest Control & Chemical Co. v. Thomas stated:\textsuperscript{75}

It has been repeatedly held that upon finding that the time and space restrictions of a covenant not to compete are appropriate, and that the employer has not itself breached the agreement, the trial court has no power to do anything but enforce the terms of the covenant \textit{as written} by injunction.\textsuperscript{76}

Other examples abounded.\textsuperscript{77}

Even in cases where the trial court has found that enforcement of a specific noncompetition agreement would be unduly harsh and oppressive, enforcement has been upheld.\textsuperscript{78} The rationale for this position was set forth by the Third District Court of Appeal in Keller:\textsuperscript{79}

Furthermore, it is established law that a court is not empowered to refuse to give effect to such a contract on the basis of a finding, as

\textsuperscript{73} Miller Mechanical, Inc. v. Ruth, 300 So. 2d 11, 12 (Fla. 1974).

\textsuperscript{74} In fact, the Third District Court of Appeal endorsed an extension to this proposition in Royal Serv. v. Williams, 334 So. 2d 154, 156 (Fla. 3d DCA 1976). The court held that in the absence of a finding by the trial court that the time and area were unreasonable, the trial court was not at liberty to elect not to enforce the noncompete contract. \textit{Id.} at 157. The court reversed the denial of injunctive relief even though the trial court found that the restrictive covenants were not reasonable, “went beyond the scope of protecting any interest of the employer,” and would be unduly harsh and oppressive. \textit{Id.} at 156. The trial court further held that the “agreement amounts to an undue and an unreasonable restraint of trade and would be detrimental to the public welfare and obnoxious to public policy.” \textit{Id.} It should be noted that Williams was an unskilled employee, providing janitorial and cleaning services. \textit{Id.}

\textsuperscript{75} 520 So. 2d 669 (Fla. 1st DCA 1988) (court reversed trial court’s refusal to enforce provision forbidding employment in any manner by a competitor of the former employer).

\textsuperscript{76} \textit{Id.} at 671.

\textsuperscript{77} See Air Ambulance Network, Inc. v. Floribus, 511 So. 2d 702, 703 (Fla. 3d DCA 1987) (The court reversed denial of injunctive relief, stating: “[U]pon findings, such as those reached below, that the time and space restrictions are appropriate, . . . the trial court has no power to do anything but enforce the terms of the covenant as written by injunction.”). \textit{See also} Xerographics, Inc. v. Thomas, 537 So. 2d 140 (Fla. 2d DCA 1989) (court reversed trial court’s reduction of geographic area covered by restriction from five counties to three counties on grounds that it would be “unreasonable and oppressive”); Kverne v. Rollins Protective Serv. Co., 515 So. 2d 1320 (Fla. 3d DCA 1987) (appellate court directed trial court to extend injunction for the full two-year period set forth in the agreement).

\textsuperscript{78} Rollins Protective Serv. Co. v. Lammons, 472 So. 2d 812, 813 (Fla. 5th DCA 1985) (reversed trial court’s denial of injunctive relief on grounds “that the enforcement of the provision would not accomplish its intended purpose and would be unduly harsh and oppressive on the employees.”).

\textsuperscript{79} 389 So. 2d 1062 (Fla. 3d DCA 1980), \textit{review dismissed}, 419 So. 2d 1048 (Fla. 1982) (The court specifically rejected the trial court’s “balancing the equities” approach to enforcement, which resulted in modification of the terms of the noncompetition agreement.).
was the case below, that enforcement of its terms would produce an 'unjust result' in the form of an overly burdensome effect upon the employee.\(^{80}\)

Thus, as with unreasonable time and geographic area restrictions, a finding by the trial court that enforcement of the provision would be unduly harsh and oppressive was not a basis to invalidate an agreement. Rather, the power of trial courts is limited to modifying agreements to ameliorate the harsh results. Because, in substance, this is done by modifying the time and place restrictions, the so-called harshness or oppression issues devolve into the same analysis. As stated by the Third District Court of Appeal in *Orkin Exterminating Co. v. Martin:*\(^{81}\)

If a covenant not to compete is facially reasonable, the burden shifts to the employee to show why the covenant is unreasonable as applied to him . . . . Where the territorial restriction is unreasonable, the trial court may determine what constitutes a reasonable area and enforce the covenant in the limited area.\(^{82}\)

This concept of "facially reasonable" further erodes any balance in the enforcement equation. It implies an objective standard for evaluation of the time and area provisions of the covenant rather than an analysis that considers the individual concerns and hardships of the employee. The burden on the former employee is further compounded by the obligation in contesting the noncompetition agreement to plead and prove unreasonableness as a defense to an injunctive claim\(^{83}\) unless the noncompetition agreement is "facially violative" of the reasonably limited time and area requirements of section 542.33.\(^{84}\) An inherently imprecise standard, the "facially reasonable" or "facially

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80. *Id.* at 1063.
81. 516 So. 2d 970 (Fla. 3d DCA 1987) (The court rejected the trial court's reduction of the geographic area stipulated in the covenant from all of Dade County to the territory where the employee had worked.).
82. *Id.* at 971-72. Compare *Orkin Exterminating Co. v. Girardeau*, 301 So. 2d 38 (Fla. 1st DCA 1974), *cert. denied*, 317 So. 2d 75 (Fla. 1975) (geographical area covered by noncompetition agreement reduced from five counties to specific area within the City of Jacksonville); *Graphic Business Sys. v. Rogge*, 418 So. 2d 1084 (Fla. 2d DCA 1982) (agreement not to compete for two years after termination of employment within 75-mile radius of the city of Tampa was facially reasonable).
83. *Tomasello, Inc. v. Los Santos*, 394 So. 2d 1069 (Fla. 4th DCA 1981) (rejecting trial court's unilateral reduction of a countywide geographical area restriction to the area of former employee's prior employment where the former employee had not raised the issue of reasonableness).
84. *Id.* at 1072.
violative' criteria is not made easier for the former employee by the fact that the agreements are invariably drafted by lawyers for employers.

Essentially reducing most analysis to objective criteria governing the time component of noncompetition agreements, Florida courts understandably hold that the facts and circumstances of each case are critical to a determination of what is reasonable. In Dorminy v. Frank B. Hall & Co., the Fifth District Court of Appeal found no basis in the record to show either that the three-year time limit was unreasonable or that it would work any exceptional hardship on Dorminy to justify the time reduction. Because the agreement was neither facially unreasonable nor proven by the employee to be oppressive as applied, it was enforced in accordance with its terms.

According to Dorminy, a one- to two-year time limit has been widely accepted. The court stated: "[T]here is no set time limit for enforcement of covenants not to compete, although one to two years are the time limits which have been upheld in Florida against former employees competing with former employers." Also, the court in Dorminy found that the position held by the former employee is a relevant consideration, stating: "[T]he higher in management and the more key or important the function performed by the employee the longer the time which could be justified for a no-competition covenant. In such a case, a longer time may be needed to protect the former employer's business."

A related but less frequently discussed issue is the nature of the competition restricted by the noncompete clause. In at least one case, an appellate court has rewritten the noncompete agreement to restrict a narrower range of competitive activity, while upholding the imposition of an injunction. In Marshall v. Gore, the Second District Court of Appeal invalidated a noncompete agreement to the extent that it prohibited the former employee from engaging in the development

85. Dorminy v. Frank B. Hall & Co., 464 So. 2d 154 (Fla. 5th DCA 1985) (court reversed the trial court's reduction of noncompete time period from three years to one and one-half years). It is worthwhile noting that Florida courts have upheld the enforceability of covenants not to compete extraterritorially. See Carnahan v. Alexander Proudfoot Co. World Headquarters, 581 So. 2d 184, 186 (Fla. 4th DCA 1991) (court instructed trial court to modify its order so as to encompass only the country of Australia).
86. 464 So. 2d at 158. Compare Suave Shoe Corp. v. Fernandez, 390 So. 2d 799, 801 (Fla. 3d DCA 1980) (The court noted that "the failure of the plaintiff to seek an injunction for more than a year after the defendant terminated his employment is not a basis for the denial of the injunction, rather it is the basis for the trial court's fashioning of the reasonableness of the period of time an injunction will be in force.").
87. 464 So. 2d at 158.
88. Id. The court also noted that Dorminy received extremely valuable stock in consideration for entering into the contract containing the covenant not to compete.
and marketing of computer software and, accordingly, reduced the
scope of the trial court’s order to restrict competition only "in the
development and marketing of computer software for management
and programming of dairy feeding programs."90 In Marshall, the geo-
graphic restriction was nationwide, and the court’s decision to limit
rather than prohibit Marshall’s employment in the field of computer
software may have reflected concerns that he would be otherwise un-
employable.

C. Applicability of Section 542.33 to Parties Other Than Original
Parties to Noncompetition Agreements

The terms of section 542.33 are expressly made applicable to “one
who is employed as an agent, independent contractor, or employee”
and to the “employer.” Notwithstanding this language, there have
been various attempts to broaden the categories of parties who can
enforce noncompetition agreements and who must abide by them.

With respect to the enforcement of noncompetition agreements, the
Second District Court of Appeal in Manpower, Inc. v. Olsten Perma-
nent Agency,91 ruled that section 542.33 “cannot be extended to per-
mit a third party beneficiary to enforce a covenant not to compete.”92
The unmistakable conclusion from this case is that there must be some
form of an explicitly defined contractual nexus binding the enforcing
party and the party agreeing not to compete for such an agreement to
be enforceable. A review of the current case law fails to disclose any
dissenting or contrary opinion on this issue. Subsequently, in Gory
Associated Industries v. Griffin,93 the Fourth District Court of Appeal
ruled that a covenant not to compete contained in an employment
contract was enforceable by an affiliate of the original contracting
employer.94 This result was premised upon the plain language of the

90. Id. at 92.
91. 309 So. 2d 57 (Fla. 2d DCA 1975). The court specifically rejected the claim of two
franchises, not parties to the original employment agreement, for injunctive relief as third-party
beneficiaries of the underlying contract. Id. at 58-59.
92. Id. at 59. Compare Auto Club Affiliates, Inc. v. Donahey, 281 So. 2d 239 (Fla. 2d
DCA 1973). Donahey had originally executed an employment contract with K & K Insurance
Agency, Inc., all of the stock of which was owned by Nord W. Krauskopf and his wife. Subse-
quently, Krauskopf assigned this contract to Auto Club Affiliates, Inc., another company he
owned. The court briefly noted that “Donahey accepted the change in titular employer.” Id. at
241. There was no further discussion of this issue.
93. 397 So. 2d 1054 (Fla. 4th DCA 1981).
94. Id. at 1055.
agreement. By its terms, the contract clearly stated that it applied not only to the original contracting employer but also to its affiliates.  

In addition to affiliates of the employer, assignees can enforce covenants not to compete. In *Pino v. Spanish Broadcasting Systems, Inc.*, Pino originally signed a five-year employment contract with Radio WCMQ, Inc. and Great Joy, Inc., which contained a twelve-month covenant not to compete. This contract provided that it was "transferable or assignable." Subsequently, the assets of these two entities were sold to Spanish Broadcasting System. As part of the sale, Pino’s employment contract was assigned to Spanish Broadcasting System. Approximately three years later, while the employment contract was still operative, "Pino contracted with Viva America Media Group for the position of program director and ‘on the air personality’" at Viva’s FM radio station. Spanish Broadcasting System brought an action seeking a temporary injunction to enforce the non-competition agreement. The trial court granted the injunction. On appeal, the Third District Court of Appeal rejected Pino’s claim that section 542.33 prohibited the enforcement of a covenant not to compete by an employer who was not a party to the original agreement and upheld the trial court’s order granting injunctive relief.

The other side of the question of who may enforce noncompetition agreements is the issue of whom they may be enforced against. In a leading decision on this issue, *Temporarily Yours-Temporary Help Services v. Manpower, Inc.*, the First District Court of Appeal ruled that a noncompetition agreement was binding not only on the former employee but also on the rival corporation the employee established. Finding that the newly formed corporation’s primary pur-

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95. *Id.* at 1056 Griffin initially signed an employment contract with Elcor Corporation that contained a one-year covenant not to compete applicable to both Elcor Corporation and its affiliates. Immediately thereafter, Griffin was transferred to Gory Associated Industries, Inc., an affiliate of Elcor.

96. 564 So. 2d 186 (Fla. 3d DCA 1990).

97. *Id.* at 187.

98. *Id.*

99. *Id.* at 186. It was also alleged by Spanish Broadcasting System that Pino had orally assented to the assignment of her employment contract following the sale. However, the court relied on the fact that Pino had specifically agreed in writing that her employment contract, including the noncompetition provision, was assignable. *Id.* at 189.

100. *Id.* at 187.

101. *Id.*

102. *Id.* at 189.

103. 377 So. 2d 825 (Fla. 1st DCA 1979).

104. *Id.* Jones, the former employee, was instrumental in establishing Temporarily Yours and became its president and only operating officer. He was not a stockholder but had an oral understanding with the sole stockholder that he could purchase stock in the corporation at a later date.
pose was to assist the former employee in violating his covenant not to compete, the court held that such agreements are enforceable against the parties and "also those identified with them in interest, in privity with them, represented by them or subject to their control."

This same rationale was followed by the Second District Court of Appeal in *Tampa Bay Business Publishing Co. v. Zink* to support the entry of an injunction against Zink, the former employee, and Zincom, Inc., the corporation he formed, prohibiting competition with Tampa Bay Business Publishing. Similarly, in *Dad's Properties, Inc. v. Lucas*, the Second District Court of Appeal, relying on *Temporarily Yours*, reversed the denial of entry of an injunction against the wife of the contracting party and the corporation formed by her. In so doing, the court stated: "[L]ooking beyond the corporate fictions utilized by Mr. and Mrs. Lucas, it is clear that they intentionally violated the covenant by setting up a competing business."

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105. *Id.* at 827. Compare *U Shop Rite, Inc. v. Richard's Paint Mfg. Co.*, 369 So. 2d 1033 (Fla. 4th DCA 1979). The trial court issued an injunction against not only O.A. Griffis and U Shop Rite, Inc., parties to noncompete agreements, but also to Paint Right Manufacturing, Inc., Ronald V. Rowsey, and their agents, servants, and/or employees, and those acting in concert with them. The appellate court reversed, noting, without comment or case law citation: "The injunction is also excessive where it enjoins persons other than those party to the contract." *Id.* at 1034. See also *Channel v. Applied Research, Inc.*, 472 So. 2d 1260 (Fla. 4th DCA 1985). The court upheld the imposition of a fine on the subsequent employer, along with the former employees, for violation of an injunction issued to enforce a noncompetition covenant. Relying on *Temporarily Yours* and the subsequent employer's apparent knowledge of the injunctive proceedings, the court found the subsequent employer as one in privity with the parties defendant, the former employees. *Id.* at 1263.

106. 439 So. 2d 271 (Fla. 2d DCA), rev. denied, 447 So. 2d 889 (1983).

107. *Id.* at 274. It should be noted that the court did reverse the trial court's failure to issue an injunction against the newly formed corporation even following its sale to this third party. *Id.* at 275. The court instructed the trial court "to determine a reasonable period of time for operation of the injunction." *Id.* However, the court refused to find that the injunction issued against the former employee was binding on the subsequent purchaser of the corporation, formed by the employee, because the purchaser "was not acting in concert with Zink to evade the trial court's injunction through the purchase of Zincom." *Id.* at 274. While the purchaser had knowledge of the injunctive proceedings, the injunction was not perfected before the purchase. *Id.*

108. 545 So. 2d 926 (Fla. 2d DCA 1989).

109. *Id.* at 929. Albert C. Lucas and Al Lucas Enterprises, Inc., sold their adult nightclub to Dad's Properties, Inc. *Id.* at 927. The covenant not to compete entered into as part of this sale was for a period of five years, within a 50-mile radius, "either directly or indirectly, as an individual, partner, employee, stockholder, or consultant." *Id.* About one year later, Susan Lucas, Albert Lucas' wife, formed Martus, Inc., which began operating a similar nightclub within the 50-mile radius. *Id.* Mrs. Lucas was the sole shareholder, director, and officer of Martus. Mr. Lucas worked for Martus as manager of the nightclub. *Id.*

110. *Id.* at 928. See also *Kusner v. American Minerals, Inc.*, 460 So. 2d 464 (Fla. 3d DCA 1984) (The Third District ruled that the term "salesman" in the contract provision relating to the noncompetition covenant was not applicable to the corporation's former president.).
D. Availability of Noncompete Injunctive Relief

Once a noncompetition agreement has satisfied the threshold requirements of section 542.33, the statute empowers the trial court to determine, in the exercise of its judicial discretion, whether such an agreement should be enforced by injunctive relief. Notwithstanding the permissive language of section 542.33(2)(a) that "[s]aid agreements may, in the discretion of a court of competent jurisdiction, be enforced by injunction," in practice, this discretion has been narrowly confined. From the earliest days of the statute, appellate courts have admonished trial courts that the ostensibly permissive language "does not imply that the court is vested with an absolute or arbitrary discretion, and is construed as requiring that the discretion shall be reasonably exercised to the end that the object of the statute may not be nullified."112

In 1974, the Florida Supreme Court firmly established the preference for injunctive relief in Miller Mechanical, Inc. v. Ruth.113 In Miller, the court overturned the trial court's denial of an injunction and an award of only nominal damages stating: "[W]here the trial court finds that there is a valid contract it would be error for the court not to grant an appropriate remedy."114 The court went on to add that "[t]he Court may award damages for breach of contract but the normal remedy is to grant an injunction."115 This unambiguous declaration may, as much as any other factor, explain the prevalence of Florida appellate decisions reversing lower court denials of injunctive relief.116

Conversely, trial court decisions enforcing noncompetition agreements through injunctive relief have rarely been disturbed.117 Underscoring this judicial affinity for enforcement has been the erosion of standard equitable principles in actions involving noncompetition agreements. The most glaring example of this erosion has been the

112. Atlas Travel Serv. v. Morelly, 98 So. 2d 816, 818 (Fla. 1st DCA 1957).
113. 300 So. 2d 11 (Fla. 1974).
114. Id. at 12.
115. Id.
116. See Florida Pest Control & Chem. Co. v. Thomas, 520 So. 2d 669 (Fla. 1st DCA 1988); Rollins Protective Serv. Co. v. Lammons, 472 So. 2d 812 (Fla. 5th DCA 1985); Twenty Four Collection, Inc. v. Keller, 389 So. 2d 1062 (Fla. 3d DCA 1980), review dismissed, 419 So. 2d 1048 (Fla. 1982); Empiregas, Inc. v. Thomas, 359 So. 2d 15 (Fla. 1st DCA 1978); Foster and Co. v. Snodgrass, 333 So. 2d 521 (Fla. 2d DCA 1976).
117. See Maimone v. Wackenhut Corp., 329 So. 2d 332, 333 (Fla. 3d DCA 1976) (The court upheld the trial court's entry of injunctive relief in favor of a former employer based on a finding that the former employee "voluntarily signed this employment contract which contained the noncompetition provision."). This case evidences the level of predisposition toward enforcement.
failure to require a showing of irreparable injury in noncompetition cases even though this element has long been an essential component of other actions for injunctive relief in Florida.\textsuperscript{118}

In one discussion of injunctive relief, the Fourth District omitted any mention of irreparable harm,\textsuperscript{119} although it did mention its first cousin, lack of an adequate legal remedy.\textsuperscript{120}

In summarizing the allegations that are sufficient to state a cause of action under that statute, the court listed the following: "(a) The contract (b) The appellant's intentional direct and material breach thereof. (c) No adequate remedy except by injunctive relief."\textsuperscript{121}

Going a critical step further, the Third District Court of Appeal in \textit{Puga v. Suave Shoe Corp.}\textsuperscript{122} jettisoned any need to make a particular showing of irreparable harm or inadequate legal remedy. The court stated:

\begin{quote}
[T]he showing in the record that the covenant in question was being directly violated and that 'from the nature of the act or the circumstances [the breach] cannot be readily, adequately, and completely compensated for with money,' . . . is itself sufficient to support the finding of irreparable injury which was made by the trial judge and which is necessary to justify such an order.\textsuperscript{123}
\end{quote}

This dispensation with the longstanding injunctive prerequisites found growing support among other Florida courts addressing this issue.\textsuperscript{124}

Not all decisions were in complete accord.\textsuperscript{125} For example in

\begin{itemize}
\item \textsuperscript{118} See Fl. R. Civ. P. 1.610(a)(1); 29 Fl.A. JUR. 2d Injunctions §§ 21-22 (1981) ("Jurisdiction to grant injunctive relief should be exercised only when intervention is essential to protect property, or other rights of which chancery will take cognizance, against irreparable injury. The complainant must allege and establish facts from which irreparable injury can reasonably be inferred."); Wilson v. Sandstrom, 317 So. 2d 732 (Fla. 1975); Russell v. Florida Ranch Lands, Inc., 414 So. 2d 1178 (Fla. 5th DCA 1982).
\item \textsuperscript{119} Hunter v. North Am. Biologicals, Inc., 287 So. 2d 726 (Fla. 4th DCA 1974).
\item \textsuperscript{120} \textit{Id.} at 728.
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} 374 So. 2d 552 (Fla. 3d DCA 1979).
\item \textsuperscript{123} \textit{Id.} (citations omitted).
\item \textsuperscript{124} See, \textit{e.g.}, Foster & Co. v. Snodgrass, 333 So. 2d 521, 522 (Fla. 2d DCA 1976) (The court reversed the refusal to grant injunctive relief, noting that "where the agreement is neither harsh nor oppressive, then under Fla. Stat. § 542.12(2) the employee's violation thereof is a sufficient basis for enforcement."). \textit{See also} Chessick Clinic v. Jones, 367 So. 2d 1028 (Fla. 2d DCA 1979).
\item \textsuperscript{125} See, \textit{e.g.}, Damsey v. Mankowitz, 339 So. 2d 282, 283 (Fla. 3d DCA 1976) (upholding the denial of injunctive relief against a former employee doctor stating that "[t]he granting or denying of injunctive relief rests largely in the discretion of the chancellor and is governed by the facts and circumstances of the particular case."). \textit{See also} Un-Chem Corp. v. Maret, 338 So. 2d 885, 887 (Fla. 3d DCA 1976) (affirming the denial of an injunction recognizing "the necessity of showing irreparable harm as a prerequisite to the granting of a temporary injunction" and "the discretionary right of a chancellor to decline to enter a temporary injunction.").
\end{itemize}
Forrest v. Kornblatt, 126 the Third District Court of Appeal upheld the trial court’s denial of injunctive relief, noting that under section 542.33, “the trial judge is called upon to exercise sound judicial discretion in determining whether such a covenant is conscionable and is reasonably limited in time and area.” 127 This concept of sound judicial discretion as applied to actions arising under section 542.33 found little support outside the Third District. Accordingly, decisions requiring a showing of irreparable harm before the issuance of injunctive relief by the trial court in the exercise of its judicial discretion became a rarity. 128

Thus, although a general movement away from irreparable injury in noncompetition cases was underway during the late 1970s and early 1980s, some courts continued to grapple with the issue. 129 Nevertheless, increasingly throughout the early 1980s, courts downgraded the requirement of irreparable harm to the point of applying a quasi-judicial notice approach that essentially presumed irreparable harm. 130 Perhaps one of the clearest explanations of this rationale is found in Satellite Industries v. Stutz. 131 In reversing the trial court’s denial of injunctive relief, the Fourth District Court of Appeal said: “Satellite has alleged the existence of a contract, the intentional, direct, and material breach of that agreement, and the lack of an adequate remedy except by injunctive relief. These skeletal allegations, supported by evidence at the hearing below, are sufficient to obtain a preliminary injunction.” 132 Thus, during the 1980s, appellate courts enforced

126. 328 So. 2d 528 (Fla. 3d DCA 1976). There was no discussion of the facts and circumstances surrounding the covenant not to compete and the alleged breach. These were subsumed under the court’s general observation that “[t]his record does not show an abuse of discretion under the circumstances of this case.” Id. at 529.
127. Id.
128. See, e.g., Uni-Chem Corp. v. Maret, 338 So. 2d 885, 887 (Fla. 3d DCA 1976) (in upholding the trial court’s refusal to grant a temporary injunction, the district court noted that “[n]otwithstanding statutory right to injunctive relief [see: § 542.12 Fla. Stat.], upon proof of a valid covenant not to compete said statutory provision does not negate the necessity of showing irreparable harm as a prerequisite to the granting of a temporary injunction.”).
129. See Contemporary Interiors, Inc. v. Four Marks, Inc., 384 So. 2d 734 (Fla. 4th DCA 1980) (party seeking an injunction must prove irreparable harm).
130. See Summerlin v. LaMar Advertising, 419 So. 2d 781, 782 (Fla. 1st DCA 1982) (allegation in the complaint that “the damages that Plaintiff will sustain cannot be determined and compensated for in an action at law...” was sufficient to satisfy the requirement of irreparable harm); Graphic Business Sys., Inc. v. Rogge, 418 So. 2d 1084, 1086 (Fla. 2d DCA 1982) (not practical to require proof of irreparable harm because this “would tend to diminish the efficacy of covenants not to compete”).
131. 437 So. 2d 222 (Fla. 4th DCA 1983).
132. Id. at 223. In addition, while noting the trial court’s broad discretion in granting or denying preliminary injunctions, the court ruled that this “discretion is not unlimited particularly in the face of a binding written contract between the parties.” Id.
noncompetition agreements, reversing numerous trial judges who failed to grant injunctive relief.\textsuperscript{133}

Another decision confirming the erosion of any irreparable harm requirement was \textit{Silvers v. Dis-Com Securities, Inc.}\textsuperscript{134} In a decision that contrasted the elements generally necessary in an injunctive claim with the more limited requirements in actions arising under section 542.33,\textsuperscript{135} the Fourth District Court of Appeal capsulized prevailing analysis of irreparable harm, stating: "Implicit in our holding is a recognition that irreparable injury may be presumed in cases involving violation of a covenant not to compete or not to divulge trade secrets. It need not be \textit{alleged} nor \textit{proved."}\textsuperscript{136} Alternatively, courts found sufficient evidence of irreparable harm in either the inability to establish money damages or the lack of an adequate remedy at law.\textsuperscript{137}

Any lingering doubt regarding the issue of "irreparable injury" was conclusively resolved by the Florida Supreme Court in 1985. In \textit{Capraro v. Lanier Business Products, Inc.},\textsuperscript{138} the court held that when a valid covenant not to compete is breached, irreparable injury should be presumed and does not have to be proved as a prerequisite to injunctive relief.\textsuperscript{139} This decision marked the culmination of years of ever-narrowing judicial review of noncompetition agreements and the zenith in terms of the pro-enforcement attitude toward such agreements. This approach to irreparable harm became more firmly established and entrenched following the \textit{Capraro} decision so that covenants not to compete were almost automatically enforced, and on appeal denial was routinely reversed.\textsuperscript{140} In fact, the presumption of

\begin{footnotes}
\item[133] See U.S. Floral Corp. v. Salazar, 475 So. 2d 1305 (Fla. 3d DCA 1985); Sentry Ins. v. Dunn, 411 So. 2d 336 (Fla. 5th DCA 1982); Twenty Four Collection, Inc. v. Keller, 389 So. 2d 1062 (Fla. 3d DCA 1980), \textit{review denied}, 419 So. 2d 1048 (Fla. 1982).
\item[134] 403 So. 2d 1133 (Fla. 4th DCA 1981).
\item[135] \textit{Id.} at 1136. The court specifically noted the rule set out in Hunter v. North Am. Biologicals, Inc., 287 So. 2d 726 (Fla. 4th DCA 1974).
\item[136] 403 So. 2d at 1136 (emphasis added). \textit{See also} Sentry Ins. v. Dunn, 411 So. 2d 336 (Fla. 5th DCA 1982).
\item[137] Tiffany Sands, Inc. v. Mezhibovsky, 463 So. 2d 349 (Fla. 3d DCA 1985). \textit{See also} Cash v. Surf Club, 436 So. 2d 970 (Fla. 3d DCA 1983).
\item[138] 466 So. 2d 212 (Fla. 1985). This decision was over the vigorous dissent of Justice Ben Overton, who called upon the Florida Legislature to amend or modify § 542.33 to require proof of irreparable harm. \textit{Id.} at 214.
\item[139] \textit{Id.} at 213.
\item[140] \textit{See Cordis Corp. v. Prooslin, 482 So. 2d 486, 490 (Fla. 3d DCA 1986)} (After reviewing the general requirements for a temporary injunction, the court stated: "In the context of covenants not to compete or not to divulge trade secrets, this general rule has been relaxed so that irreparable injury may be presumed."). \textit{See also} Xerographics, Inc. v. Thomas, 537 So. 2d 140, 143 (Fla. 2d DCA 1988) ("For purposes of a temporary injunction, irreparable injury is presumed where there is a violation of a noncompetition agreement."); T.K. Communications v. Herman, 505 So. 2d 484, 486 (Fla. 4th DCA 1987) (Relying on \textit{Capraro}, the court ruled
irreparable injury upon the breach of a valid covenant not to compete was subsequently held to be conclusive as a matter of law. Accordingly, in order to establish entitlement to injunctive relief in a covenant not to compete case, a party need only prove the existence of a valid agreement, the intentional and material breach, and no adequate remedy other than injunctive relief.

E. Defenses to Enforcement

1. General Discussion

Notwithstanding the maxim that statutes in derogation of common law are to be strictly construed, the historical development of the case law under section 542.33 has provided scant nourishment for defenses. Few defenses can completely bar enforcement of noncompetition agreements, and even those have not always been hospitably received by the courts.

The most promising line of defense lies in the dynamic of exclusion. That is, either the covenant fails to encompass the complained-of activity or it does not fall within the criteria specifically authorized by section 542.33. This has included establishing that the alleged competitive activities did not fall within the parameters of the noncompetition agreement. Similarly, a former employee was successful in asserting that a restrictive covenant expired with the termination of an employment agreement, thereby validating the covenant's expiration under the circumstances. For further discussion, see the notes accompanying the text.

"[w]here a covenant not to compete is violated, irreparable injury is presumed and does not have to be proven to obtain an injunction.”).

141. Air Ambulance Network, Inc. v. Floribus, 511 So. 2d 702, 703 (Fla. 3d DCA 1987), rev. denied, 520 So. 2d 584 (Fla. 1988) (This conclusive presumption of irreparable injury “clearly precludes inquiry into the existence of ‘irreparable injury,’ which is now deemed established as a matter of law in a case like this.”). For a discussion of whether the presumption should be conclusive or rebuttable, see Sarasota Beverage Co. v. Johnson, 551 So. 2d 503 (Fla. 2d DCA 1989).

142. Pinch-A-Penny, Inc. v. Chango, 557 So. 2d 940 (Fla. 2d DCA 1990). See also Sarasota Beverage Co., 551 So. 2d at 509 (“Consequently, the trial judge’s discretion is rightfully limited in this type of case to a determination of whether there is a valid (i.e., reasonable as to time and area) noncompetition agreement, whether the former employee breached the agreement, and whether no adequate remedy at law exists.”). It may, in fact, be that this judicial softening of the traditional high standards necessary to impose the extraordinary and drastic remedy of injunctive relief spawned the legislative initiative to amend section 542.33 in the 1990 session of the Florida Legislature. This matter is discussed in more detail in the text accompanying notes 173-212, infra.

143. Frumkes v. Beasley-Reed Broadcasting, Inc., 533 So. 2d 942 (Fla. 3d DCA 1988). Under the terms of the employment agreement, the covenant not to compete was only operative if the employment agreement was terminated by Reed for cause. Frumkes voluntarily tendered a letter of resignation.
employment contract. Also, arguments that a restrictive covenant is not encompassed within section 542.33 have been successful. Some agreements have also been successfully challenged on grounds that the activities of the former employee do not constitute competition.

Another defense raised by former employees is lack of consideration for the covenant not to compete, an argument that is rarely successful. Routinely rejecting this defense, some courts have exercised creativity to find consideration present in the employment relationship. Another long shot is laches, or the failure of the former employer to promptly seek an injunction. In one case in which the employer waited for more than a year after the former employee was terminated, the court rejected laches as the basis for the denial of injunctive relief, finding the delay as merely a factor to be considered in determining the reasonableness of the injunctive period.

2. Harshness, Oppression, or Offense to Public Policy

For the most part, "unreasonableness" has not been deemed an adequate justification for invalidating an entire noncompetition agreement. As already noted, unreasonableness has generally been viewed purely in the context of the time and area of the restriction, both of which can be modified and thereby cured within the discretion of the court. Dicta in a few cases, each of which upheld the validity of the

144. See, e.g., Flatley v. Forbes, 483 So. 2d 483 (Fla. 2d DCA 1986) ("[T]he exception [under section 542.33] does not encompass an agreement in which the buyer of a business agrees not to compete with the seller of the same business."); Orthopedic Equip. Co. v. Streetman and Assoc., Inc., 390 So. 2d 134, 136 (Fla. 5th DCA 1980) ("Section 542.12 has no application to in-term restraints, restraints existing for the duration of the term of employment.").
146. Compare Dunkin, D.O. v. Barkus & Kronstadt, D.O.’s, 533 So. 2d 877 (Fla. 3d DCA 1988) with Answer All Tel. Secretarial Serv., Inc. v. Call 24 Inc., 381 So. 2d 281 (Fla. 5th DCA 1980).
147. See Tasty Box Lunch Co. v. Kennedy, 121 So. 2d 52, 54 (Fla. 3d DCA 1960) ("Inasmuch as the employment was a continuing contract terminable at the will of the employer or the employee, the continued employment and agreement to pay commissions was consideration for the employee’s agreement not to compete.").
148. See, e.g., Criss v. Davis, Presser & La Faye, P.A., 494 So. 2d 525, 527 (Fla. 1st DCA 1986) ("The contract between DP & L and Criss was also terminable at will. Criss also received a continuation of his employment for two years, in addition to a salary increase. Accordingly, we hold that there was adequate consideration for the employment contract."); Wright & Seaton, Inc. v. Prescott, 420 So. 2d 623, 626 (Fla. 4th DCA 1982) ("The obligation on appellant’s part to give written notice of termination can be held to be the consideration eliminating the need for mutual obligation.").
149. Suave Shoe Corp. v. Fernandez, 390 So. 2d 799, 801 (Fla. 2d DCA 1980) (Delay in seeking an injunction "is not a basis for the denial of the injunction, rather it is the basis for the trial court’s fashioning of the reasonableness of the period of time an injunction will be in force.").
noncompetition agreement, have given some recognition to this defense. In one case, the Florida Supreme Court hinted at the characteristics that might sustain this defense when it pointed out the lack of "any overriding public interest in having the restricted employee's services available to it."\(^{150}\) In spite of this overture, defenses based on oppressive results, like unreasonableness, have achieved only nominal success.\(^{151}\) For the most part, the applicable appellate decisions have merely given lip service to the harshness, oppressiveness, or unreasonableness of the restrictive covenant, while, at the same time, enforcing the provisions of the noncompetition agreement.\(^{152}\) During the proenforcement era of the 1980s, this approach was crystallized in the following holding by the Second District Court of Appeal in *Pinch-A-Penny, Inc. v. Chango:*\(^{153}\) "The court may not refuse to give effect to a valid noncompete agreement on the ground that it would have an overly burdensome effect on the employee."\(^{154}\) A rare deviation from this philosophy occurred in a case in which the monetary sanction imposed as a penalty for competing was deemed so oppressive as to render the covenant wholly unenforceable.\(^{155}\)

Similarly, attempts to modify the terms of the noncompetition agreement on grounds that enforcement of the covenant would be unduly harsh or oppressive have met with minimal success.\(^{156}\) In *Orkin Exterminating Co. v. Girardeau,*\(^{157}\) in an isolated dispensation of mercy, the court reduced the noncompete area to a portion of the city.

\(^{150}\) Capelouto v. Orkin Exterminating Co., 183 So. 2d 532, 534 (Fla. 1966); see also Atlas Travel Serv. v. Morelly, 98 So. 2d 816 (Fla. 1st DCA 1957).

\(^{151}\) It should be noted, however, that the recent amendment to § 542.33 demands consideration of "unreasonableness" as a threshold question to enforcement of the noncompetition agreement. This is discussed in more detail in the text accompanying notes 173-212, infra.

\(^{152}\) See, e.g., Twenty Four Collection, Inc. v. Keller, 389 So. 2d 1062, 1063 (Fla. 3d DCA 1980) ("[T]he establishment of law that a court is not empowered to refuse to give effect to such a contract on the basis of a finding, as was the case below, that enforcement of its terms would produce a 'unjust result' in the form of an overly burdensome effect upon the employee."); Barco Chem. Div., Inc. v. Colton, 296 So. 2d 649, 650 (Fla. 3d DCA 1974) ("The trial judge may not refuse to enforce a valid contract upon a general finding that enforcement will produce unjust results.").

\(^{153}\) 557 So. 2d 940 (Fla. 2d DCA 1990); see also Rollins Protective Serv. Co. v. Lammons, 472 So. 2d 812 (Fla. 5th DCA 1985).

\(^{154}\) Id. at 940.

\(^{155}\) Cherry, Bekaert & Holland v. La Salle, 413 So. 2d 436 (Fla. 3d DCA 1982). This case does stand for the proposition that the facts of a particular enforcement action concerning a covenant not to compete can be so egregious as to constitute the covenant as an unreasonable restraint of trade.

\(^{156}\) See Florida Pest Control & Chem. Co. v. Thomas, 520 So. 2d 669 (Fla. 1st DCA 1988) (Even if enforcement of the provision would be unduly harsh and oppressive, this was not an adequate reason to justify refusal.); Xerographics, Inc. v. Thomas, 537 So. 2d 140 (Fla. 2d DCA 1988).

\(^{157}\) 301 So. 2d 38 (Fla. 1st DCA 1974), cert. denied, 317 So. 2d 75 (1975).
of Jacksonville. One factor perhaps motivating the result was Orkin's presenting an employment contract to Girardeau four months after he was employed with the ultimatum that he either sign or be "out on the streets."

Where a community's need for health care is implicated, slightly greater hope may lie in defenses predicated upon public policy. And even in that relatively confined area, the results have not been uniform. In one case, the First District Court of Appeal, upholding a two-year noncompetition agreement, acknowledged the need for pediatricians in the area but concluded that enforcement would not jeopardize the public health. Conversely, in Damsey v. Mankowitz, the Third District Court of Appeal reached a contrary result through a seemingly compatible analysis when it refused to enforce a three-year noncompetition agreement signed by a surgeon practicing in the Florida Keys. The court observed that enforcement of the geographic restriction would require the surgeon to move seventy miles to escape the restraining covenant. In that event, the court found that an important public interest would be undermined: "The testimony also revealed a compelling need for defendant's services as a surgeon in the area and enforcement of the covenant would jeopardize the public health of the community." Since this decision was rendered, no subsequent cases have adopted jeopardy to the public welfare as the basis for invalidating a noncompetition agreement.

3. Breach of Contract or Discharge by the Employer

As was recognized in the leading decision of Troup v. Heacock, an employer who breaches the contract of employment or similar agreement with an employee may be precluded from enforcing a noncompetition agreement against the employee. The breach, however, must be material. Thus, the employer's mere failure to provide the employee with knowledge and training does not rise to this level.

158. Id. at 40.
159. Id. at 39.
161. 339 So. 2d 282 (Fla. 3d DCA 1976), cert. denied, 345 So. 2d 421 (1977). The fact that the employer terminated the employment relationship by failing to renew the employment contract was noted, without comment, and may have influenced the court's decision.
162. Id. at 283.
163. Id.
164. Id.
165. 367 So. 2d 691 (Fla. 1st DCA 1979) (employer unilaterally reduced employee's salary by over 50% and ultimately fired him for unknown reasons).
166. Id. at 692.
167. Suave Shoe Corp. v. Fernandez, 390 So. 2d 799 (Fla. 3d DCA 1980).
Additionally, the employer’s breach has been recognized as the basis for denial of a preliminary injunction, pending a full trial on the merits. The rationale for this conclusion is based upon the equitable maxim of “unclean hands.” If the conduct of the employer is nothing short of unconscionable, the courts will not intervene on behalf of the employer to perpetuate the unconscionable conduct by issuing an injunction order.

When an employer discharges an employee, several different scenarios exist for the enforceability of noncompetition agreements. *Troup* stands for the proposition that if termination is wrongful, Florida courts will not allow the former employer to restrain the wrongfully discharged employee from competition. Florida law is less clear in cases where no evidence of wrongful discharge or unconscionability on the part of the employer is present. Unfortunately, the relevant reported decisions generally do not indicate whether the former employee was discharged or not and whether such discharge was with or without cause. Those few cases that mention this fact, for the most part, fail to regard it as a significant element in their analysis of the employer's entitlement to injunctive relief. While it is difficult to trace a clear pattern in all such cases, the better view is that, in the absence of employer wrongdoing, the noncompetition agreement is enforceable even in the hands of the employer who fired the former employee. The only possible variation on this observation is in cases where there may have been a written or oral modification of the terms of the noncompetition agreement.

168. Cordis Corp. v. Prooslin, 482 So. 2d 486 (Fla. 3d DCA 1986). *Compare* Tiffany Sands, Inc. v. Mezhibovsky, 463 So. 2d 349 (Fla. 3d DCA 1985) (employee claim of material breach of employment agreement by employer must await full hearing on the merits); Channell v. Applied Research, Inc., 472 So. 2d 1260, 1262 (Fla. 4th DCA 1985) (“Our study of the record and briefs convinces us that the trial court could find there was inadequate evidence of alleged breaches by Applied which would nullify Applied’s right to a temporary injunction.”).

169. See Kverne v. Rollins Protective Serv. Co., 515 So. 2d 1320 (Fla. 3d DCA 1987) (employee discharged); Wright & Seaton, Inc. v. Prescott, 420 So. 2d 623 (Fla. 4th DCA 1982) (employee resigned); Twenty Four Collection, Inc. v. Keller, 389 So. 2d 1062 (Fla. 3d DCA 1980) (employee discharged); Temporarily Yours-Temporary Help Serv., Inc. v. Manpower, Inc., 377 So. 2d 825 (Fla. 1st DCA 1979) (employee fired).

170. See Florida Pest Control & Chem. Co. v. Thomas, 520 So. 2d 669 (Fla. 1st DCA 1988) (former employee attempted, unsuccessfully, to raise his termination by his former employer as invalidating the covenant not to compete).

171. It is worth noting that in light of the recent amendment to § 542.33, the nature and the circumstances surrounding the termination of the employment relationship may become relevant in enforcement actions.

172. Braun v. Ryder Sys., Inc., 430 So. 2d 567, 568 (Fla. 3d DCA 1983) (“[T]here is a genuine issue of a material fact as to whether or not Ryder Systems, Inc. agreed to a modification of the noncompetition agreement if Braun kept a ‘low profile.’” *Id.*).
V. STATUTORY DEVELOPMENTS

A. Overview

Before 1990, the amendments made to section 542.33 rarely entailed significant change. The first of these was enacted in 1980 and merely renumbered section 542.12 as 542.33 without textual amendment, as part of a substantial overhaul of Florida's antitrust law embodied in chapter 542.173

In 1987, section 542.33 was amended to expand the statutory criteria to include "independent contractors" among those who may enforceably agree with their employer to refrain from engaging in a similar business or soliciting old customers of the employer.174 In 1988 the Florida Legislature further amended section 542.33.175 This time, lawmakers rewrote subsection (1) to clarify that by validating certain kinds of contracts in restraint of trade, section 542.33 operated as an exception to the rest of Florida's antitrust law.176 Lawmakers also amended subsection (2)(b) to include the term "service mark" and provide licensors of service marks with the same protection accorded licensors of trademarks.177

Finally, in 1990 truly dramatic change came when the Legislature enacted the most significant revision of section 542.33 since its enactment in 1953.178 By the addition of the following three sentences to subsection (2)(a) profound change was achieved:

However, the court shall not enter an injunction contrary to the public health, safety, or welfare or in any case where the injunction enforces an unreasonable covenant not to compete or where there is no showing of irreparable injury. However, use of specific trade secrets, customer lists, or direct solicitation of existing customers shall be presumed to be an irreparable injury and may be specifically

173. Ch. 80-28, 1980 Fla. Laws 95. (In 1979, subsection (2) was redesignated (2)(a) and a subsection (2)(b) was added that expanded the exceptions to the prohibition against contracts in restraint of trade to allow restrictions on one who licenses the use of a particular trademark or an identifiable business format or system. Ch. 79-43, 1979 Fla. Laws 312. This provision brought Florida law into conformity with the laws of other states.).
174. Ch. 87-40, 1987 Fla. Laws 176. (This provision is discussed in more detail in part VB of this Article.).
175. Ch. 88-400, 1988 Fla. Laws 2363.
177. Ch. 88-400, 1988 Fla. Laws 2363. The language "trademark or service mark, and business format or system identified by that trademark or service mark" was substituted for "trade-mark and identifiable business format or system" in subsection (2)(b).
enjoined. In the event the seller of the goodwill of a business, or a shareholder selling or otherwise disposing of all his shares in a corporation breaches an agreement to refrain from carrying on or engaging in a similar business, irreparable injury shall be presumed.\textsuperscript{179}

\section{Independent Contractor}

This provision was intended to resolve confusion regarding the applicability of section 542.33 to independent contractors. Previously, decisions in this area were frequently more "sui generis" than based upon an identifiable legal rationale. In fact, according to one court, the designation of an individual as an independent contractor in an agreement containing a noncompetition covenant was deemed a sufficient basis for finding the contract, as written, void as against public policy as an illegal restraint of trade.\textsuperscript{180} At times, this resulted in creative attempts to invoke this characterization of a working relationship in order to avoid the applicability of this section.

A combination of factors led to the 1987 amendment. One of these was the increasing use of independent contractors by businesses in roles previously filled by employees or agents.\textsuperscript{181} Another important factor was a recent Florida appellate court decision\textsuperscript{182} that prompted a swift and dramatic response. Lest there be any ambiguity regarding the intended effect of the changes in section 542.33, the legislative history specifically noted that "[i]t is the sponsors' intent to legislatively reverse the result in the Amedas case to the extent that the court held that no independent contractor could be an agent for the purposes of section 542.33."\textsuperscript{183} Consequently, the mere characterization of someone as an "independent contractor" no longer bars enforcement of a covenant not to compete. More importantly, noncompetition agreements with independent contractors are now specifically authorized and validated under Florida law.

\textsuperscript{179} Id. The impact of this additional language is discussed in part VC of this Article.
\textsuperscript{180} Schweitzer v. Seaman, 383 So. 2d 1175 (Fla. 4th DCA 1980).
\textsuperscript{181} Staff of Fla. S. Comm. on Com., SB 166 (1987) Staff Analysis and Economic Impact Statement (April 17, 1987) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).
\textsuperscript{182} Amedas, Inc. v. Brown, 505 So. 2d 1091 (Fla. 2d DCA 1987); Staff of Fla. H.R. Comm. on Com., H.B. 206 (1987) Staff Analysis (final June 16, 1987) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.). This decision is discussed \textit{supra} in the text accompanying notes 36-38.
\textsuperscript{183} Staff of Fla. H.R. Comm. on Com., HB 206 (1987) Staff Analysis (final June 16, 1987) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).
C. The 1990 Amendment

As discussed earlier, the momentum behind firm, almost rigid enforcement of noncompetition agreements had dominated the 1980s. Following its earlier decisions in Flammer and Miller, the Florida Supreme Court largely sealed the fate of breaching former employees in the 1985 Capraro case.\footnote{Capraro v. Lanier Business Prod., Inc., 466 So. 2d 212 (Fla. 1985).} The court obliterated the requirement of proof of irreparable injury, traditionally one of the greatest obstacles to securing injunctions in Florida, stating:

To require that a plaintiff prove irreparable injury as a prerequisite to injunctive relief, as petitioner urges, would, in most instances, defeat the purpose of the plaintiff's action. Immediate injunctive relief is the essence of such suits and oftentimes the only effectual relief. It truly can be said in this type of litigation that relief delayed is relief denied. For these reasons we agree with the district court that irreparable injury should be presumed.\footnote{Id. at 213.}

Following Capraro, courts in the latter 1980s routinely overturned trial court decisions\footnote{See, e.g., Xerographics, Inc. v. Thomas, 537 So. 2d 140 (Fla. 2d DCA 1988); T.K. Communications, Inc. v. Herman, 505 So. 2d 484 (Fla. 4th DCA), rev. denied, 513 So. 2d 1061 (Fla. 1987) (Relying upon the Capraro decision, the court reversed the denial of injunctive relief, noting that ``the requirements for the issuance of a temporary injunction have been met.'').} that denied relief based upon the failure to demonstrate irreparable injury.\footnote{FLA. R. CIV. P. 1.610.}

In reaction to these developments and the manifest imbalance created between employer and employee, the Florida Legislature enacted legislation to help even the odds in litigation concerning noncompetition agreements. Just as Justice Ben Overton had asked it to do when he dissented in Capraro, the Legislature added the three critical sentences to section 542.33(2)(a).\footnote{FLA. STAT. § 542.33(2)(a) (1990).} The sponsors of this legislation were direct in describing the desired impact of these changes:

The bill would prohibit a court from entering an injunction when the injunction would be contrary to the public health, safety or welfare, when the injunction enforces an unreasonable covenant to not compete or when there is no showing of an irreparable injury. This would overturn the decision in Capraro v. Lanier Business Products, Inc., . . . and require the party seeking injunctive relief to plead and prove irreparable injury.

The bill would continue to allow the presumption of irreparable
injury in connection with the use of trade secrets, customer lists, or
direct solicitation of existing customers. Such injury would also
continue to be presumed in connection with the sale of the goodwill
of a business or the sale of all of a shareholder’s stock in a
corporation.189

In addition to resurrecting the requirement of a showing of irrepa-
rable injury before the issuance of an injunction in noncompetition
agreement cases, the amendment breathes new life into the defense of
unreasonableness. As has been noted above, the clear mandate of the
case law up until this amendment was that allegations regarding un-
reasonableness were limited to consideration of the time and area re-
strictions of the covenant. This narrow review rarely resulted in the
denial of injunctive relief, regardless of the harshness or severity of
the result. A newly expanded review could have a significant effect on
enforcement actions in the future, a fact not overlooked by the Legis-
lature at the time of the adoption of these amendments: “In addition,
although courts currently examine covenants for the purpose of as-
sessing their reasonableness, the addition of language stating that the
court shall not enter an injunction which enforces an unreasonable
covenant could result in the court’s reexamination of whether the cov-
enant is burdensome . . . .”190

In assessing the impact of the 1990 amendment, the mandatory na-
ture of “the court shall not enter” language cannot be overlooked.
The clear import of this language undoubtedly means that in the fu-
ture, former employees will have at least two additional and powerful
avenues of defense in litigation concerning enforcement of noncompe-
tition agreements: unreasonableness of the covenant and failure to
show irreparable injury. For employers, the new change grants little.
While the statute addresses use by the former employee of specific
trade secrets, customer lists, and direct solicitation of existing custom-
ers, the amendment merely codifies existing law. Additionally, if an
employer cannot establish any of these elements, the task of proving
irreparable injury may be very difficult.

D. Aftermath

The 1990 amendment will have an enormous impact in noncompeti-
tion cases against former employees. Covenants not to compete are

189. Staff of Fla. S. Comm. on Judiciary Civil, CS for SB 2642 (1990), Staff Analysis and
Economic Impact Statement 2 (May 17, 1990) (available at Fla. Dep’t of State, Div. of Archives,
Tallahassee, Fla.).
190. Id.
already used in virtually every industry, through every employment level from management to clerical, and even in hourly positions. Pressures that weaken general prosperity and intensify the threat of competition will increase the use of such restrictions. Much of this conflict will center on irreparable injury. Certainly as the corporate hierarchy descends to positions of lesser authority, it becomes increasingly unlikely that knowledge of trade secrets, customer lists, or the ability to directly solicit existing customers can be attributable to employees. Thus, a natural outgrowth of the 1990 amendment may be that future covenants will not be as widely used and may instead be limited to key management, product development, and sales and marketing personnel. In the context of more selective use, employers may find greater support for the view that a breach of a noncompete agreement will result in irreparable harm.

Before the 1990 amendment to section 542.33, Florida had emerged as one of the most pro-employer states in the country regarding enforcement of covenants not to compete. As discussed earlier, this distinction was due in large part to the erosion of two major areas of inquiry and consideration in these types of cases, that is, proof of irreparable injury and the unreasonableness of the underlying covenant.

191. It is highly probable that such indiscriminate usage by an employer may be a critical issue in future enforcement proceedings as evidence of "unreasonableness." Apparently two cases involving hourly workers—a truck driver for a beer distributor and telemarketing clerks—who were denied jobs at competing firms motivated one of the sponsors of the 1990 amendment to introduce the legislation. Mark Dillon, Is Florida Less Friendly To Non-Compete Contracts?, THE MIAMI REVIEW, Sept. 6, 1991, at 8A. Also, it should not be overlooked that in these recessionary economic times many a prospective employee is willing to sign any document presented in order to secure employment. This is particularly true in the case of middle managers, where the current wave of corporate restructurings, reorganizations, and downsizings has taken a heavy toll. Collaterally, Florida residents have long exhibited and been noted for a natural and well-documented entrepreneurial spirit. This natural desire to start one's own business, combined with the growing necessity for unemployed individuals to start their own business in order to secure employment, undoubtedly will precipitate confrontation with former employers regarding noncompetition agreements.

192. Conversely, if employers continue to require hourly employees to sign covenants not to compete, such employers may be confronted with two rather unappealing alternatives: 1) decide to enforce the covenant against the hourly employee, lose and risk having all such covenants undermined, or 2) decide not to enforce and find themselves facing arguments of estoppel, laches, and retaliatory enforcement in future enforcement proceedings.

193. The customary difficulty in proving irreparable injury, rather than being an ally of the employee opposing enforcement of a covenant not to compete, became an asset of the employer seeking enforcement. See, e.g., Graphic Business Sys., Inc. v. Rogge, 418 So. 2d 1084, 1086-87 (Fla. 2d DCA 1982) (The court reversed the denial of an injunction noting, particularly, that irreparable injury may be presumed where there is a violation of a covenant not to compete and "the practical difficulties of proving irreparable harm would tend to diminish the efficacy of covenants not to compete, which bear the imprimatur of the legislature and the courts of Florida.").
The 1990 amendment has clearly created a new reality. Instead of enforcing such covenants with impunity, the amendment mandates that judges undertake a more rigorous factual analysis of each case. In many respects, the analysis predicated upon generally accepted equitable principles for which Justice Overton argued in his dissents in *Keller* and *Capraro*, has now been achieved. Rather than just enforce covenants, courts now must consider and weigh the protection of legitimate business interests of the employer, the potentially unduly oppressive effect on the former employee, and the public interest involved. These factors may or may not favor enforcement.

The single significant decision applying the 1990 amendment so far is *Hapney v. Central Garage, Inc.* This case involved a former employer engaged in the installation, repair, and maintenance of auto air conditioners who sought to enforce a covenant not to compete against a former employee and his new employer. The court's lengthy opinion began with a detailed discussion of the historical background of non-competition agreements. The court specifically highlighted "the distinction between contracts prohibiting competition per se, which were prima facia invalid, ... and contracts protecting an employer from unfair competition from a former employee who had obtained trade secrets, or other confidential information, or special relationships with customers during the course of his employment." Next, the court pointed out that the Florida statute is silent on the issue of whether, to be valid, contracts must relate to the protection of a proprietary interest of the employer. Additionally, the court examined whether such a requirement is implied in the statute or whether, instead, the Legislature intended to authorize contracts that prohibit competition per se.

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194. Justice Overton's sentiments are perhaps best summarized in the following from his dissent in *Keller v. Twenty Four Collection, Inc.*: "It is my belief that we should never, by our laws or court determination, totally restrict an individual from earning a living in his or her chosen calling, particularly when the individual is an employee not used in a management capacity, except when absolutely necessary to prevent irreparable damage." 419 So. 2d 1048, 1050 (1982).

195. This line of inquiry may also include, as Justice Overton suggested in *Capraro v. Lanier Business Products, Inc.*, an examination of "whether termination of employment was at the instance of the employer or employee." 466 So. 2d 212, 213 (Fla. 1985). This factor may prove significant when considering the entire topic of unreasonableness.

196. 579 So. 2d 127 (Fla. 2d DCA 1991). Hapney voluntarily terminated his employment on July 14, 1989, and began working with a direct competitor of Gulfcoast. Gulfcoast instituted an action to enforce the covenant not to compete on August 1, 1989. The trial court entered a temporary injunction, and Hapney appealed.

197. *Id.* at 129.

198. *Id.*

199. *Id.*
Initially, in answering this question, the court reviewed the laws and decisions of other states requiring proof of some legitimate protectible business interest—not merely elimination of competition—and concluded: "The rule is an expression of common sense which both protects the employer from unfair competition and recognizes the right of an individual, in a free and competitive society, to earn an honest living and better his status along the way." \(^{200}\)

The court also examined Florida decisions and determined that the same general rule was an integral part of Florida law. \(^{201}\) Accordingly, the court identified the legitimate interests of the employer that may be protected by a covenant not to compete. The court stated: "Generally, three such interests are recognized: (1) trade secrets and confidential business lists, records, and information, (2) customer goodwill, and (3) to a limited degree, extraordinary or specialized training provided by the employer." \(^{202}\) With regard to categories (1) and (2), the court specifically referred to the 1990 amendment to section 542.33 for endorsement. In order for specialized training to rise to the level of a protectible interest, it must be extraordinary, which the court defined as follows: "Extraordinary is that which goes beyond what is usual, regular, common, or customary in the industry in which the employee is employed." \(^{203}\) The court concluded that there was no evidence in the record that Hapney's training in the pending case rose to that level.

The court next discussed the *Capraro* decision and the impact of the 1990 amendment to section 542.33. \(^{204}\) The court also noted that the

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200. *Id.* at 130.
201. *Id.* The court relied heavily on two recent decisions by the Second District Court of Appeal: *Flatley v. Forbes*, 483 So. 2d 483, 485 (Fla. 2d DCA 1986) ("The obvious and sole purpose of the covenant was to exclude Forbes from competing with Flatley in Pinellas County.") and *Marshall v. Gore*, 506 So. 2d 91, 92 (Fla. 2d DCA 1987) (The court narrowed the scope of the injunction issued by the trial court because "the injunction protects more than appellee's legitimate business interests.").
202. 579 So. 2d at 131.
203. *Id.* at 132. The court also noted that the precise degree of training that constitutes a protectible interest "will vary from industry to industry and is a factual determination to be made by the trial court." *Id.*
204. Noting that in his dissents in *Keller* and *Capraro* Justice Overton had called upon the Florida Legislature to modify section 542.33, the court assessed the impact of the 1990 amendment:

We view the sweeping impact of this amendment to be threefold. First, the presumption of irreparable injury expressed in *Capraro* is strictly curtailed. Second, a test of reasonableness is injected into the enforcement process because the amendment prohibits the enforcement of an unreasonable covenant. . . . Third, the legislature has specifically identified and segregated for special treatment covenants which protect trade secrets and customer lists and prohibit solicitation of existing customers, all of which are universally identified as legitimate business interests which may be pro-
1990 amendment conferred specific statutory authority on the courts to deny injunctive relief in the case of an unreasonable covenant, thereby invoking traditional equitable principles in order to avoid unfair and unjust results. Based upon that analysis, the court concluded its decision with six specific holdings:

(1) a covenant not to compete which prohibits competition per se violates public policy and is void; (2) a condition precedent to the validity of a covenant not to compete entered into by an agent, independent contractor or employee is the existence of a legitimate business interest of the employer to be protected; (3) it is the employer's burden to plead and prove the underlying protectible interest; (4) trade secrets, customer lists, and the right to prevent direct solicitation of existing customers are, per se, legitimate business interests subject to protection; (5) other business interests, such as, but not limited to, extraordinary training or education, may constitute protectible interests depending upon the proof adduced; and (6) chapter 90-216, section 1, Laws of Florida, shall apply to and control all actions now pending or hereafter commenced.

This final holding was based upon the court's finding that section 542.33 is a remedial statute and accordingly should be applied retroactively. With its extensive examination of various issues, the Hapney case may well prove to be a benchmark for future litigation involving noncompetition agreements and section 542.33.

Future decisions applying the 1990 amendment will, as did the court in Hapney, evaluate enforcement of noncompetition agreements in light of all of the facts and circumstances of each case. One of the

Id. at 133-34.

205. Id. at 134.

206. See Stuart L. Stein v. Miller Indus., 564 So. 2d 539 (Fla. 4th DCA 1990).

207. Id. See also Ziccardi v. Strother, 570 So. 2d 1319 (Fla. 2d DCA 1990). It should be noted that the "Comments" section of the Senate Staff Analysis accompanying the 1990 amendment made the observation that "[it] is unclear whether the provisions of the bill would apply to covenants entered into prior to the effective date of the bill or whether the bill would apply to all covenants breached after the effective date of the bill." Staff of Fla. S. Comm. on Judiciary Civil, CS for SB 2642 (1990), Staff Analysis and Economic Impact Statement 2 (May 17, 1990) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.). In contrast, the House Staff Analysis to the 1988 amendment described § 542.33 as "remedial in nature, therefore, the bill would most likely be applied retroactively . . . ." Staff of Fla. H.R. Comm. on Com., HB 917 (1988) Staff Analysis and Economic Impact Statement 3 (final June 13, 1988) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.). This latter view is more persuasive.

208. In certain respects, this will constitute a revival of the approach outlined in American Building Maintenance Co. v. Fogelman, 167 So. 2d 791, 792 (Fla. 3d DCA 1964), which advo-
first steps in the process will be a determination of the reasonableness of the covenant, which will include "a balancing test to weigh the employer's interest in preventing the competition against the oppressive effect on the employee." 209

Implementing a balancing test, will, of necessity, encompass consideration of a myriad of issues. These include: the time and geographic area of the restriction; the nature of the business and whether it involves the public health, safety, or welfare; any evidence of duress, economic or otherwise, associated with the execution of the covenant; any additional consideration for the covenant such as a bond, stock, equity, a multi-year contract; whether the employee holds a management position or not; the nature and scope of the employee's duties and responsibilities; the length of the employee's service; the employee's knowledge of confidential trade secrets or customer lists; any investment by the employer in specialized and extraordinary training and education of the employee; any unique skills possessed by the employee, particularly any that relate to the public health, safety or welfare; any special circumstances relating to the employee's employment with the employer such as recent relocation, the foregoing of other employment opportunities or reliance on promises by the employer; any breach of promise or agreement by the employee or employer; whether the termination of employment was voluntary or involuntary and with or without cause; an oppressive and harsh impact on the employee; the ability of the employee to secure other employment; and, finally, any unusual facts or circumstances relating to the employment relationship or its termination. 210 No listing can be exhausted a two-step process: first, a determination regarding the reasonableness of the agreement per se, and second, a determination concerning the reasonableness of the agreement as applied in the instant case. In a broader sense, it harkens to the exercise of judicial discretion outlined in Cordis Corp. v. Prooslin, 482 So. 2d 486 (Fla. 3d DCA 1986):

In exercising its discretion, the court is guided by established rules and principles of equity jurisprudence, in view of the particular facts presented in the case . . . . The trial court must use a balancing-type approach, balancing the possible beneficial results on the one hand with the possible detrimental results on the other, . . . and the threatened hardships associated with the issuance or denial of the injunction with the degree of likelihood of success on the merits.

Id. at 491 (citations omitted).

209. Miller Mechanical, Inc. v. Ruth, 300 So. 2d 11, 12 (Fla. 1974). This will be a vindication of the position expressed by Judge Wentworth in her dissent in Fla. Pest Control & Chemical Co. v. Thomas, 520 So. 2d 669 (Fla. 1st DCA 1988), where she railed at the employer's attempt, in that case successfully, to obtain a broader injunctive order which, in effect, "forbid[s] such employment in any capacity, without regard to the employee's performance of any functions having competitive impact on employer's business." Id. at 672.

210. This might include sexual or racial harassment of the employee by the employer or similar claims that the employer created a hostile work environment that caused the employee to
tive. Ultimately, the range of circumstances can be limited only by the range of human endeavor and the creativity of counsel representing the former employer or employee in an enforcement action.

Beyond a mere listing of the factors to be considered in enforcement actions involving covenants not to compete, it is possible to construct a methodology for resolving such issues. This methodology will of necessity involve, among other considerations, attention to the category of the position held by the former employee and the industry involved. Generally, in order for a former employer to prevail in enforcing a covenant not to compete, the former employer must prove that the threatened injury it faces outweighs any possible harm to the former employee. Otherwise, the covenant not to compete is unreasonable and therefore unenforceable.

Beyond the conclusive statutory presumption of irreparable harm set forth in the 1990 amendment, there should be a rebuttable presumption of irreparable harm in cases involving a former employee at the management level and above. This category of employees is typically privy to company trade secrets, business strategies, and customer information.

Conversely, there should be a presumption, again rebuttable, against irreparable harm in the case of former employees below the management level. The vast majority of these employees lack any knowledge of company trade or business secrets, and the awareness of customer information is usually only in the most general sense. Absent a showing by the former employer of a significant investment in training or developing the employee, which must be significant and extraordinary—not merely what is standard and customary in the industry—the presumption against irreparable harm would prevail. The former employer may experience greater success in overcoming this presumption in highly specialized and technical industries.

The facts and circumstances surrounding the termination of the employment relationship should also be examined. As a matter of pure equity, an employer who has wrongfully terminated the employee should not be able to enforce a covenant not to compete against the employee. Similarly, in cases where the former employee—regardless of level—is terminated without cause, there should be a rebuttable presumption against irreparable harm on the part of the former em-

resign. In such a manner, the employee would, in effect, be invoking the classic equitable defense of "unclean hands" to an enforcement action by the former employer, or, as Justice Overton observed: "[H]e who seeks equity must do equity." Keller v. Twenty Four Hour Collection, Inc., 419 So. 2d 1048, 1050 (1982).
ployer. This can be established in much the same way that claims for unemployment compensation are validated. This presumption should only be overcome with compelling evidence of specific tangible consideration tendered for such purpose and received as part of the termination. Otherwise, the former employer should be precluded from enforcing such a covenant. It seems patently unreasonable for an employer to terminate an employee without cause and, at the same time, prevent the employee from securing gainful employment.

In cases where the former employee leaves voluntarily, the courts should exercise appropriate judicial review of the facts and circumstances of each case, weighing the interests of the employer and employee, and considering the public interest. The result often may be judicial construction of an appropriate limitation on the activities of the former employee with the new employer, which protects the legitimate business interests of the former employer. This only seems just and reasonable in light of the current economic forces.

VI. CONCLUSION

With the 1990 amendment to section 542.33, a requiem of sorts for noncompete agreements may be heard. These agreements will continue to be part of business and commerce, but their use and enforcement probably will be more selective and limited. A rigid pattern of enforcement by courts in the mid-1980s obviously has been altered by the 1990 amendment. In this new era, the courts’ challenge will be to address the three vital interests at stake in this area—the personal interest in practicing one’s trade or profession and earning a living, the employer’s interest in protecting the integrity and vitality of its

211. The former employer would, of course, still be able to avail itself of the copyright and trademark protections. In addition, if appropriate and the facts warranted, the former employer could pursue an action for tortious interference with business opportunity.

212. This approach has broad support generally by the courts of other jurisdictions that have applied either the “blue pencil rule” or complete modification to unreasonable covenants not to compete. This has been done based on the general concept that flexibility promotes equity. DONALD J. APPELUND & CLARENCE E. ERIKSEN, EMPLOYEE NONCOMPETITION LAW § 8.01 (1991).

213. How much of this momentum to stem such rigid enforcement and interject a degree of judicial discretion is due to economic forces, as opposed to the evolution of public policy opinion regarding such widespread use of covenants not to compete, is a matter of conjecture, but the impact of the current recessionary atmosphere cannot be discounted. In certain respects, the passage of the 1990 amendment represents the convergence of three factors: a growing recognition that Florida law regarding noncompetition agreements was too rigid, the effects of the current recession and the inequality of bargaining power for employers and employees, and the desire to have Florida law on the subject be more in the mainstream of other jurisdictions.
business franchise, and the public interest in seeing that the two are properly balanced. In adopting the 1990 amendment to section 542.33, the Florida Legislature sought to restore some semblance of fairness to an area of law that had become decidedly one-sided. Because section 542.33 is in derogation of the common law abhorrence of restraints on trade, the new criteria for enforcement will require employers to demonstrate the need to protect a legitimate business interest and not merely suppress competition. Courts that have become accustomed to rigidly enforcing noncompetition agreements will have to reorient their thinking regarding such agreements. These courts will have to reexamine covenants not to compete in the light in which they were originally viewed—as attempts to restrain trade, which should be read, interpreted, and enforced narrowly.\textsuperscript{214}

Accordingly, in many respects, the 1990 amendment marks a return of section 542.33 to its roots. With its enactment, the Legislature has radically changed the rules regarding noncompetition agreements in Florida and has turned back the clock. The more recent all-or-nothing approach to enforcement has been abrogated. Instead, the clear mandate from the Legislature is that the courts must now engage in the serious exercise of judicial development of sound criteria for enforcement.\textsuperscript{215} Whole areas that were formerly foreclosed from consideration and deemed irrelevant, such as proving irreparable injury; considerations of public health, safety, or welfare; and the general unreasonableness of the covenant are now viable.

It is hoped that, in fulfilling this mandate, the courts will be mindful of the sound advice provided by the Florida Supreme Court in \textit{Capelouto v. Orkin Exterminating Co.}: "The restrictive provisions of such contracts will generally be enforced in such a way as to protect the legitimate interests of the employer without doing harm to the public interest, and without inflicting an unduly harsh or oppressive result on the employee."\textsuperscript{216} The proof of this proposition will be found in the courts and how they administer the new order inaugurated by the 1990 amendment.

\textsuperscript{214} This should not be too difficult for most trial courts that have exhibited a historical reluctance to impose such sanctions, even in the face of repeated appellate reversals calling for more stringent enforcement.

\textsuperscript{215} As contrasted with the short-hand approach of the 1980s, some suggested guidelines for this development are set forth \textit{supra} in part \textit{VD} of this Article.

\textsuperscript{216} 183 So. 2d 532, 534 (1966).