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ANTITRUST COMMON LAW: RESTRICTIVE COVENANTS AND REASONABLENESS

by

THOMAS J. COLLIN

Restrictive covenants are integral to countless commercial transactions. As contracts in restraint of trade, they are not favored. A restrictive covenant may be enforceable, however, if reducing competition is necessary to achieve the main purpose of a transaction. The restraint is then considered ancillary to the main purpose, and the covenant will be enforced if the restraint is reasonable. The enforceability of contracts restraining trade has been a subject of centuries of case law, and it is governed, outside of statutory prohibitions, by what is referred to as the ancillary restraint doctrine.

This article will review the ancillary restraint doctrine in Ohio. It will do so by focusing on the three settings in which restrictive covenants are commonly, and most frequently, used and from which the vast majority of the case law has emerged: (1) the sale of a business; (2) leasing; and (3) employment. As the following discussion will show, analysis of ancillary restraints should be uniform even though the subjects of restrictive covenants may differ.

Under controlling decisions by the Ohio Supreme Court, the test of reasonableness of a restraint is pragmatic: Is the restraint no greater than that needed to protect the legitimate interests of the covenantee and at the same time consistent with the public interest? This article will show that conventional antitrust rule of reason analysis should be followed in evaluating restrictive covenants. Although there is no need to import federal antitrust statutory analysis into ancillary restraint analysis, the focus of inquiry should be the same -- the
competitive impact of the restraint. Do the competitive benefits of a restraint outweigh the actual or potential competition foreclosed?

Before reviewing the criteria for evaluating ancillary restraints, it will prove instructive to survey briefly the common law background from which Ohio law has developed, followed by a review of early decisions by the United States Supreme Court. Controlling decisions of the Ohio Supreme Court will then be addressed, followed by a consideration of the case law on various categories of restrictive covenants.

I. Common Law Background

By the time Mitchell v. Reynolds was decided by the Queen's Bench in 1711, it was already well-established that not all contracts in restraint of trade were unenforceable. We will look very briefly at the test of enforceability that had evolved in the English courts by the mid-nineteenth century, when the United States and Ohio Supreme Courts first addressed ancillary restraints.

The court considered in Mitchell v. Reynolds whether a promise was enforceable by the assignor of a lease of a bake shop that the assignor, a baker, would not engage in the baker's business in a London parish for the five-year term of the lease. Noting that there was a presumption that all restraints of trade were invalid and therefore unenforceable, the court nonetheless held that the promise was enforceable because it was reasonable. It protected the purchaser of

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3 Pursuant to Rule 2(E) of the Supreme Court Rules for the Reporting of Opinions, unpublished decisions by Ohio's intermediate courts of appeals have no controlling authority except as between the parties to the decisions. Because of the comparatively large body of unpublished appellate case law, however, these opinions necessarily need to be consulted if any accurate view of Ohio law, as applied by the courts, is to be gained: "What constitutes the law? . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." O. Holmes, Collected Legal Papers 172-73 (1920). Unpublished decisions will be cited and discussed in this article on the same footing as published decisions.


5 Contracts in restraint of trade were not indictable at common law. Even if a contract was "general" or otherwise unreasonable, the only consequence was that the parties could not call upon the courts for assistance in enforcing it. See generally W. Taft, The Anti-Trust Act and the Supreme Court 11-21 (1914); H. Thorelli, Federal Antitrust Policy 17-20 (1954); Dewey, The Common-Law Background of Antitrust Policy, 41 Va. L. Rev. 759, 771-83 (1955). See also State ex rel. Monnett v. Buckeye Pipe Line Co., 61 Ohio St. 520, 546, 56 N.E. 464, 467 (1900); Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666, 671-72 (1880). There was no criminal liability for any such contract, see, e.g., State ex rel. Monnett v. Buckeye Pipe Line Co., 61 Ohio St. at 546, 56 N.E. at 467; W. Taft, The Anti-Trust Act and the Supreme Court at 20-21, and no private cause of action for any third party injured as a result of performance of the contract, see, e.g., Mogul S.S. Co. v. McGregor, Gow & Co., 21 Q.B.D. 544, 554 (1888), aff'd, 23 Q.B.D. 598, 632 (C.A. 1889), aff'd[1992] A.C. 25 (1891); Runck v. Cloud, 8 Ohio N.P. 436, 444 (Super. Ct. 1901); H. Thorelli, Federal Antitrust Policy at 34; Hovenkamp, The Sherman Act and the Classical Theory of Competition, 74 Iowa L. Rev. 1019, 1030-44 (1989).
the business from unfair competition at the hands of the seller, competition that could destroy the value of the business to the buyer.⁶

In the course of reviewing the law governing the validity of such a promise, the court volunteered that a restraint of trade could be enforceable if it were "partial", as opposed to "general".⁷ A general restraint would prohibit an individual from engaging in his trade throughout all of England. A partial restraint, in contrast, would not entirely foreclose an individual from practicing his profession. In the case before the court, the restraint was partial, and therefore enforceable, because it restrained the seller only from engaging in the baking profession in a single parish.⁸

Even a partial restraint might not be enforceable if it were unreasonable, however. A practical test of reasonableness was later announced in Horner v. Graves.⁹ Reviewing the enforceability of a contract restraining a dentist from engaging in his practice within one hundred miles of the city of York, the court observed that Mitchel v. Reynolds had been the leading case on contracts in restraint of trade from the time of its decision "to the present".¹⁰ After noting that the contract under review did not amount to a general restraint of trade that would be clearly unenforceable under the authority of Mitchel v. Reynolds -- because the dentist was free to engage in his trade as long as he did so more than 100 miles from the city of York -- the court focused on whether the restraint was reasonable. Speaking through Chief Justice Tindal, the court proposed this test, subsequently nearly universally followed:

And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.¹¹

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⁶ 1 P. Wms. at 182, 197, 24 Eng. Rep. at 348, 352. This case is discussed at length in Blake, Employee Agreements Not to Compete, 73 HARV. L. REV. 625, 629-37 (1960).
⁷ 1 P. Wms. at 182, 185, 24 Eng. Rep. at 348, 349.
⁸ Id. at 182, 197, 24 Eng. Rep. at 348, 352.
The formulation of the ancillary restraint doctrine reflected in these two leading cases underwent refinement and revision in the English courts in the 19th and early 20th centuries, particularly as applied to post-employment restraints. Nonetheless, the earliest United States Supreme Court and Ohio decisions addressing the enforceability of ancillary restraints drew directly upon Mitchel v. Reynolds and Horner v. Graves.

II. Early United States Supreme Court Decisions

As the following discussion of early Ohio Supreme Court decisions will show, the Ohio court drew initially on English precedents in its analysis of restrictive covenants. It did not consult United States Supreme Court decisions, but a brief review of key decisions by that court will prove useful in understanding the jurisprudential context in which the Ohio case law developed. Both courts followed the same English precedents, and their analyses advanced along parallel paths.

The United States Supreme Court considered in Oregon Steam Navigation Company v. Winsor whether a restraint on competition by the purchaser of a steamship was enforceable. The Oregon Steam Navigation Company had purchased the steamer New World from the California Steam Navigation Company on condition that it would not use it in the waters of California for a period of ten years after purchase. Oregon Steam then sold the boat to Winsor subject to the same restriction on its use. Oregon Steam filed an action against Winsor for breach of the covenant and recovery of liquidated damages upon learning that Winsor was carrying freight and passengers into California.

In evaluating the enforceability of the covenant, the Court described the controlling principles as follows:

It is a well-settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in

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13 For a detailed review of the law of ancillary restraints as it had evolved in the English courts by the middle of the nineteenth century, see generally H. Thorelli, supra note 5, at 17-20; Blake, supra note 6, at 629-42; Carpenter, Validity of Contracts Not to Compete, 76 U. Pa. L. Rev. 244, 245-48 (1928); Eaton, supra note 12, at 129-34; Kerr, Contracts in Restraint of Trade, 22 Am. L. Rev. 873, 880-88 (1888); Letwin, supra note 12, at 373-79.
14 See infra notes 39-85 and accompanying text.
15 87 U.S.(20 Wall.) 64 (1873).
16 Id. at 65.
17 Id. at 66.
partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must be not larger than is required for the necessary protection of the party with whom the contract is made. A contract, even on good consideration, not to use a trade anywhere in England, is held void in that country, as being too general a restraint of trade; but a contract not to use a trade at a particular place, if it be founded on a good consideration, and be made for a proper and useful purpose, is valid. Of course, a contract not to exercise a trade generally would be obnoxious to the rule, and would be void.\(^\text{18}\)

After acknowledging the difficulty of applying these general principles in any particular case, the Court held that the covenant before it was enforceable because "its object and purpose was simply to protect the vendors".\(^\text{19}\) Although the Court did not cite \emph{Mitchel v. Reynolds} in its analysis, it cited and followed \emph{Horner v. Graves}\(^\text{20}\) for the proposition that the restraint imposed must not be larger than what is required for the protection of the party imposing the restraint.\(^\text{21}\)

The Court had occasion in \emph{Gibbs v. Consolidated Gas Company}\(^\text{22}\) to apply the teachings of both \emph{Oregon Steam Navigation Company} and \emph{Mitchel v. Reynolds}. It there reviewed an action to enforce a contract between two publicly regulated utilities in Baltimore, Consolidated Gas Company and Equitable Gas-Light Company, to fix the price of gas to consumers.\(^\text{23}\) Plaintiff, Gibbs, sought to recover compensation for services alleged to have been rendered by him to Consolidated Gas Company in securing the contract between it and Equitable Gas-Light Company.\(^\text{24}\)

Recognizing that the contract in question eliminated competition between the two utilities,\(^\text{25}\) the Court turned to consider whether, as a contract in restraint of trade, it could nonetheless be enforced as reasonable. Citing \emph{Mitchel v. Reynolds}, the Court observed that if "public welfare ... be not involved" and the restraint

\(^{18}\) \textit{Id.} at 66-67 (footnotes omitted). The Court's characterization of contracts in general restraint of trade as "illegal" simply signified that they were unenforceable. Prior to passage of the Sherman Act (15 U.S.C. §§ 1 et seq. (1982)) in 1890 and comparable state antitrust laws, including the Valentine Act (Ohio Rev. Code §§ 1331.01 et seq.), there was no criminal liability for restraints of trade. See generally supra note 5.

\(^{19}\) \textit{Id.} at 71-72.


\(^{21}\) \emph{Oregon Steam Navigation Co. v. Winsor}, 87 U.S. (20 Wall.) 64, 67 (1873).

\(^{22}\) 130 U.S. 396 (1889).

\(^{23}\) \textit{Id.} at 398-99.

\(^{24}\) \textit{Id.} at 403.

\(^{25}\) \textit{Id.} at 406, 408.
is no greater than needed for protection of the other party, the contract may be enforced as reasonable. The Court went on to quote from Justice Bradley's opinion in *Oregon Steam Navigation Company* on the circumstances under which a contract in restraint of trade will be enforced, but it concluded that there could be no possible justification for enforcement of a contract in restraint of trade between two public utilities which is "manifestly prejudicial to the public interest." The Court declined to permit Gibbs to collect any fee for his "efforts to accomplish what the law declared should not be done".

Later in the same term, the Court applied in *Fowle v. Park* the same analysis to a contract restricting the sale of medicine. It was there alleged that John D. Park had entered into an agreement with Seth and Lucy Fowle whereby he transferred the exclusive right to sell Wistar's Balsam of Wild Cherry west of the Rocky Mountains. The promise was subsequently breached, and the Supreme Court was called upon to consider whether the contract was enforceable. Relying upon Gibbs, Mitchel v. Reynolds and *Oregon Steam Navigation Company*, the Court had no difficulty concluding that the restriction was enforceable because reasonable:

Relating as these contracts did to a compound involving a secret in its preparation; based as they were upon a valuable consideration, and limited as to the space within which, though unlimited as to the time for which, the restraint was to operate, we are unable to perceive how they could be regarded as so unreasonable as to justify the court in declining to enforce them.

The vendors were entitled to sell to the best advantage, and in so doing to exercise the right to preclude themselves from entering into competition with those who purchased, and to prevent competition between purchasers; and the purchasers were entitled to such protection as was reasonably necessary for their benefit. . . . The policy of the law is to encourage useful discoveries by securing their fruits to those who make them. If the public found the balsam efficacious, they were interested in not being deprived of its use, but by whom it was sold was unimportant.

26 *Id.* at 409.
27 *Id.*
28 *Id.* at 410.
29 *Id.* at 412.
30 131 U.S. 88 (1889).
31 *Id.* at 90.
32 *Id.* at 97.
Even though it held that the restriction was reasonable, it remanded the case for further proceedings to determine whether in fact it had been breached.\textsuperscript{33}

The Court's analysis is instructive in its attention to the public benefits occasioned by securing to the discoverer of a useful product the rewards of its exploitation. This was, in the Court's view, a salutary objective, and it made the covenant reasonable. True, it restrained competition in the production of Wistar's Balsam of Wild Cherry, but it contributed to make the covenantees stronger, presumably, in the larger product market in which they competed for the dollars of consumers. The analysis implies the need to evaluate reasonableness by taking into account a restraint's competitive effects, not just its immediate impact on the covenantor.

By the time Judge Taft wrote his survey of the ancillary restraint doctrine in \textit{United States v. Addyston Pipe & Steel Co.},\textsuperscript{34} affirmed by the Supreme Court, he was able to identify authoritatively five circumstances when contracts in partial restraint of trade would be upheld as reasonable:

For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service.\textsuperscript{35}

Immediately before quoting Chief Justice Tindal's formulation of the test of reasonableness,\textsuperscript{36} Judge Taft emphasized that the restraints are enforceable because they are ancillary to the main purpose of a lawful contract:

It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid

\textsuperscript{33} Id. at 97-99.

\textsuperscript{34} 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899). The court reviewed in Addyston Pipe & Steel Co. whether a price-fixing agreement among six manufacturers of cast-iron pipe for the purpose of preventing the "evils of ruinous competition", id. at 279, was unenforceable at common law and, consequently, a violation of Section 1 of the Sherman Act (15 U.S.C. § 1), id. at 278-79.

\textsuperscript{35} Id. at 281.

\textsuperscript{36} See supra note 11 and accompanying text for Chief Justice Tindal's formulation.
down for determining the validity of such an agreement that no conve-
ntional restraint of trade can be enforced unless the covenant embody-
ing it is merely ancillary to the main purpose of a lawful contract, and
ecessary to protect the covenantee in the enjoyment of the legitimate
fruits of the contract, or to protect him from the dangers of an unjust use
of those fruits by the other party. 37

This general formulation of the ancillary restraint doctrine continues to be
followed to this day. 38

III. Ohio Supreme Court Decisions -- 1853 to 1898.

With this outline before us of the general state of the common law of
ancillary restraints at the end of the 19th century, it is appropriate to turn now to
a review of controlling Ohio decisions. As will be seen, the Ohio Supreme Court,
in common with the United States Supreme Court, evaluated contracts in restraint
of trade consistently with the tests earlier developed by the English courts.

The Ohio Supreme Court had its first occasion to consider the enforceability
of a restrictive covenant in Lange v. Werk. 39 Werk and Lange had been
members of a partnership engaged in the manufacture of stearin and candles. The
partnership was dissolved, and Lange sold his interest to Werk and promised that
he would not engage in the manufacture of candles or stearin in Hamilton County
or anywhere else in the United States prior to January 1, 1846, some two and
one-half years from the date of the sale. 40 The covenant was later breached, and
Werk filed an action to recover liquidated damages.

37 85 F. at 282. Judge Taft explained subsequently that while it is "conceivable" that there may be other
situations in which contracts in restraint of trade were enforceable at common law other than these five
categories, he conceded that he was unable to find any other instances. W. TAFT, supra note 5, at 10.
For another detailed judicial survey of the law of contracts in restraint of trade in the last decade of the
19th century, see United States v. Trans-Missouri Freight Ass'n, 58 F 58, 68-72 (8th Cir. 1893), rev'd
on other
38 Judge Bork, commenting upon Judge Taft's formulation of the ancillary restraint doctrine, recently
explained its continuing application as follows:
To be ancillary . . . an agreement eliminating competition must be subordinate and collateral
to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the
sense that it serves to make the main transaction more effective in accomplishing its purpose.
Of course, the restraint imposed must be related to the efficiency sought to be achieved. If it
is so broad that part of the restraint suppresses competition without creating efficiency, the
restraint is, to that extent, not ancillary.
Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224 (D.C. Cir. 1986), cert. denied,
1981)(ancillary restraint doctrine applied to evaluate reasonableness, under Section 1 of Sherman Act, of
restrictive covenant incident to sale of business), cert. denied, 455 U.S. 921 (1982). See generally 3 P.
AREEDA & D. TURNER, ANTITRUST LAW § 703b (1978); Bork, Ancillary Restraints and the Sherman Act,
15 ABA SECTION OF ANTITRUST LAW PROCEEDINGS 211 (1959).

39 2 Ohio St. 520 (1853)
40 Id. at 526
The court began its analysis with an extended discussion of *Mitchel v. Reynolds*. It excused the emphasis on the case by explaining that "it contains the substance of all the English cases" and that, as well, "it seems to us to place the whole matter upon the true ground". After citing other cases, the court offered the following test for the enforceability of contracts in restraint of trade:

These cases fully justify the conclusion, that a contract in restraint of trade can only be enforced, when it is made to appear from the pleadings and proofs: 1. That the restraint is partial; 2. That it is founded upon a valuable consideration; and 3. That it is reasonable and not oppressive.

In addressing how reasonableness should be evaluated, the court quoted the *Horner v. Graves* formulation that the reasonableness of a restraint will be evaluated by reference to whether it is larger than that necessary to protect the interests of the contracting party.

Applying these criteria, the court concluded that the covenant was enforceable only with respect to the promise to refrain from engaging in a competitive business in Hamilton County. To the extent it prohibited Lange from engaging in a competitive business anywhere in the United States, the court held that the covenant was "clearly illegal and void". Although the court did not expressly say so, the country-wide restraint was apparently unenforceable because it was a "general restraint", falling in the same category as the England-wide restraint condemned by Chief Justice Parker in *Mitchel v. Reynolds* in text quoted earlier in the opinion.

The court confronted a similar issue the next year in *Thomas v. Administrator of Miles*. Thomas and Miles had been partners in the business of dealing in "fancy goods, cabinet-maker's trimmings and furnishings, and patent medicines" in Cincinnati. They dissolved the partnership, and Miles sold his interest to Thomas subject to a covenant that he, Miles, would not enter into competition with Thomas for a period of five years in Cincinnati or anywhere else that

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41 Id. at 528.
42 Id.
43 See supra note 11 and accompanying text.
44 2 Ohio St. at 530.
45 Id. at 531.
46 Id. at 527.
47 3 Ohio St. 275 (1854).
48 Id.
Thomas might set up a branch or agency. Miles allegedly breached the covenant, and Thomas sued.

The court had little difficulty in holding that the covenant was reasonable and enforceable to the extent it restrained Miles from engaging in competition in Cincinnati:

Tested by the general principles applicable to contracts of this character, as settled by this court in *Lange v. Werk*, 2 Ohio St. 519, this agreement seems to have been reasonable and proper, and founded upon a sufficient consideration, so far as it restrained Miles from engaging, for a limited time, within the city of Cincinnati, in the business theretofore pursued by the firm, and which it may fairly be inferred was expected to be continued by Thomas.

So far it is only a partial restraint of trade, no more extensive than was necessary to afford a fair protection to the purchaser of the whole partnership interest; while the influence it might have upon the value of that interest, and the inducement it furnished to bid higher for it, would seem to furnish a sufficient pecuniary consideration to uphold the contract.

To the extent the covenant also restricted Miles from engaging in business in any locale outside of Cincinnati where Thomas might establish a branch or agency, the court held that the covenant was "in general restraint of trade, opposed to public policy, and therefore void". Because, however, the covenant was divisible, the court held that it could be enforced to the extent that it was limited to Cincinnati.

The court considered in *Grasselli v. Lowden* whether a covenant ancillary to the settlement of a nuisance action was enforceable. Lowden had filed a nuisance action against Grasselli in the superior court in Cincinnati to enjoin Grasselli’s operation of a laboratory on his property. The case was settled on July 10, 1851. In return for Lowden dismissing the action, Grasselli was not to conduct any business at the laboratory beginning five years from the date of the

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49 Id. at 276.
50 Id. at 276.
51 Id. at 277. Although the court had no evidence before it to suggest that Thomas, as the covenantee, may have had a legitimate interest in preventing Miles from engaging in business where Thomas might set up a branch or agency, it is not difficult to envision interest that would have made this feature of the restraint reasonable. If, for example, Miles had been aware of confidential information about Thomas' business, the restraint may have been necessary to protect Thomas against Miles' use of it in direct competition. See infra notes 241-48 and accompanying text for judicial recognition of trade secrets and other confidential information as protectable interests in the enforcement of restrictive employment covenants.

52 11 Ohio St. 349 (1860).
Grasselli urged that the contract could not be enforced because it was in restraint of trade. The court had no problem enforcing the covenant:

. . . [T]he contract, tested by the rules applicable to agreements in restraint of trade, is one which the law must still enforce. These rules are said to be -- 1. The restraint must be partial only. 2. It must be founded upon a valuable consideration; and 3. It must be reasonable, and not oppressive.  

The court applied these three criteria, holding, first, that the restraint was partial, limited to one lot in the City of Cincinnati. It held, second, that it was founded upon valuable consideration, the settlement of a lawsuit.  

Third, the court held that the restraint was reasonable. It noted that the reasonableness of the restraint is not to be tested by "reference to its effect upon the rights and interests of the covenantor" but rather by its effects on the rights of the covenantee and the rights and interests of the public. The court then quoted the definition of reasonableness offered in *Horner v. Graves*, already set out above.  

In evaluating whether the restraint affected the public interest, the court observed that Grasselli was free to continue his business in any other portion of the city or surrounding country. The restraint therefore could not be condemned "as contravening public policy". As to whether the restraint was no greater than the interests of Lowden required, the court likewise found it reasonable. Because the restraint agreed to by Grasselli was even less onerous than the remedy Lowden could have obtained by way of injunction if he had succeeded in the nuisance action, the court had no difficulty in concluding that the restraint was not greater than that consistent with Lowden's interests.
The Ohio Supreme Court next addressed the enforceability of a contract in restraint of trade in *Stines v. Dorman.* Dorman purchased in March 1873 from Blakley the Tremont House hotel in Conneaut. Dorman sold Blakley, in partial payment for the Tremont House, a building previously used as a hotel under the name Randolph House. Blakley promised that he would not use the former Randolph House for a hotel or inn as long as the Tremont House was used for that purpose. Blakley thereafter sold the building, and it was eventually transferred to Stines, who opened it as a hotel. Dorman thereupon brought an action to enforce the restrictive covenant.

After holding that Dorman could enforce the covenant against Stines as an assignee of the original party to the covenant, Blakley, the court considered whether the restriction was void because in restraint of trade. The contention did not long detain the court:

This claim can not avail. It is not a contract in general restraint of trade, but is limited in its application to a specific parcel of real property, and forbids its use to a particular business.

The consideration is sufficient, for the restriction formed a material part of the consideration by which the property was obtained, and, under the circumstances, must be regarded as reasonable and not oppressive.

The court considered in *Morgan v. Perhamus* whether a restrictive covenant incident to the sale of a millinery and dress-making business was enforceable. As part of the sale of the business and its goodwill, the seller agreed that she would not at any time in the future engage in the same business in the town of Felicity, Ohio, or at any other place near enough to Felicity to interfere with the conduct of the business by its purchasers. The court’s analysis focused on whether the goodwill of the business constituted part of the seller’s separate estate or instead could only have been transferred if her husband had joined in the sale, and it had no problem holding, without analysis, that the covenant was proper:

And it is not doubted that, had she been sole and unmarried when the contract was entered into, the stipulation not to re-engage in the business

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61 25 Ohio St. 580 (1874).
62 Id. at 581.
63 Id. at 583.
64 36 Ohio St. 517 (1881).
65 Id. at 518.
66 Id. at 514-15.
in the town of Felicity, or so near thereto as to interfere with the business, would have been perfectly valid. *Lange v. Werk*, 2 Ohio St. 519.67

The Ohio Supreme Court had occasion in 1898 in *Lufkin Rule Co. v. Fringeli*68 to recapitulate the law of contracts in restraint of trade and apply it to a comparatively new phenomenon, the monopoly.

The Fringeli brothers had been engaged in Cleveland in the business of manufacturing and selling rules and other instruments used primarily in measuring lumber.69 Lufkin Rule Company, with its principal office in Saginaw, Michigan, purchased the entire business and assets of the Fringeli's and secured a promise from the sellers that they would not engage in the same business in the State of Ohio or anywhere else in the United States for a period of 25 years.70 The Fringeli's thereafter breached the agreement by opening a new business, the Cleveland Rule Company. Lufkin Rule then sought liquidated damages for breach of the noncompetition covenant.71

After observing that agreements in general restraint of trade are void, the court noted that partial restraints may be enforceable:

> [A]greements that only impose a partial restraint, made in connection with the purchase of a business, that are reasonably necessary to make available the good will purchased with the business, and are reasonable, and not oppressive, may be enforced.72

It then considered whether the restraint before it was an enforceable partial restraint.

The court observed that the case of *Lange v. Werk* "is the leading one on the subject" of the enforceability of contracts in restraint of trade.73 The court discussed the facts of the earlier case and restated its test for enforceability. It noted, as well, that there is a presumption that any such contract is unenforceable and that the party seeking to enforce it must overcome the presumption:

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67 Id. at 521.
68 57 Ohio St. 596, 49 N.E. 1030 (1898).
69 Id. at 597, 49 N.E. at 1032.
70 Id. at 598, 49 N.E. at 1032.
71 Id. at 601, 49 N.E. at 1032.
72 Id.
73 Id.
The presumption of illegality [i.e., unenforceability] arises from the fact that any restraint of the kind tends to oppression, by depriving the individual of the right to engage in a pursuit or trade with which he is generally most familiar, and consequently the community of the services of a skillful laborer; and the general effect must be, more or less, to encourage idleness, and affect the price of such things as had been produced by his labor. These are the general reasons against any restraint of trade, and, being founded in the nature of things, cannot be materially varied by any change in the times and circumstances of a people.\(^{74}\)

Because the restraint before it covered, at a minimum, all of Ohio, the court had no difficulty concluding that it was a general restraint and therefore unenforceable. It distinguished *Thomas v. Administrator of Miles* and *Morgan v. Perhamus*, discussed above,\(^{75}\) as cases in which partial restraints were enforced.\(^{76}\) The court explained why the restriction in the latter case, preventing the seller of the business from engaging in the same business in Felicity, Ohio, was reasonable:

The good will being in general nothing more than the probability that the old customers will resort to the old place for the purpose of trade, it is apparent that in this case the restraint imposed was reasonable, being no more than was required to secure the good will of the business to the purchaser, and was not oppressive, as she was at liberty to carry on the same business outside of the limits to which the good will of her former business, carried on in Felicity, extended. Partial restraints on trade, of this character, have been generally sustained, and they are the only ones that have been, in this state or elsewhere, unless it be in a few modern instances, to which we will hereafter refer.\(^{77}\)

The court then discussed the comparatively recent decision by the New York Court of Appeals in *Diamond Match Co. v. Roeber*.\(^{78}\) There, Roeber had sold his business and goodwill and promised that he would not for a period of 99 years thereafter engage anywhere in the United States, except Nevada and

\(^{74}\) Id. The presumption of invalidity was well-established. See 1 E. KINTNER, supra note 12, at § 2.5; Kerr, supra note 13, at 884-85. It has been repeated from time to time in later decisions. See, e.g., Midwest Presort Mailing Servs., Inc. v. Clark, No. 13215, slip op. at 2 (Ohio Ct. App. Feb. 10, 1988) (1988 WL 17825 (Ohio App.)) ("[n]oncompetition clauses are to be strictly construed in favor of freedom of competition"); Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 105 N.E.2d 685, 693 (Ohio C.P. 1952). At most, the presumption has the effect of imposing on a plaintiff the burden of showing reasonableness.

\(^{75}\) See supra notes 47-51 and 64-67 and accompanying text.

\(^{76}\) 57 Ohio St. at 604-05, 49 N.E. at 1032-33.

\(^{77}\) Id. at 606, 49 N.E. at 1033.

\(^{78}\) 106 N.Y. 473, 13 N.E. 419 (1887).
Montana, in a business competitive with that of the buyer, the manufacture and sale of friction matches.\textsuperscript{79} Diamond Match had successfully enforced the covenant against Roeber.\textsuperscript{80} The Ohio Supreme Court, obviously not in agreement with the holding of the New York Court of Appeals, ventured an explanation for it:

In this case, and in those similar to it, the question seems to be considered as one wholly between the parties; and if the restraint is no more than the purchaser requires as a protection to the enjoyment of what he purchased, and for which the vendor received a fair consideration, then it is argued that there is no objection to the contract, because the limits of trade and commerce are now so great, under modern conditions, that a general restraint is not more than is reasonable to afford protection to the purchaser in his business.\textsuperscript{81}

The court rejected this reasoning as "fallacious" because "it ignores the interest of the public."\textsuperscript{82} Noting that Congress and a number of states had enacted statutes declaring monopolies and restraints of trade unlawful, the court reasoned that private contract law could not be used to immunize general restraints of trade injurious to the public welfare:

Therefore, contracts whereby men are purchased out of their business, and restrained from carrying it on anywhere else, should receive no aid from the courts. No more efficient method could be devised for the creation of the monopoly in any business. . . . To say in such cases that the vendor should be bound not to carry on his business, because he has received an adequate consideration for his agreement, is no answer to the objection that the agreement tends to foster the formation of a monopoly, and is therefore against public policy.\textsuperscript{83}

\textsuperscript{79} Id. at 477-78, 13 N.E. at 419.
\textsuperscript{80} Id. at 486, 13 N.E. at 423.
\textsuperscript{81} 57 Ohio St. at 607, 49 N.E. at 1033.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 609, 49 N.E. at 1034. The Ohio Supreme Court had earlier voiced the same concern that private contracts could be used to create a monopoly if a purchaser of businesses secured promises in general restraint of trade from all the sellers. Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666, 671-72 (1880). The court emphasized that contracts in general restraint of trade are "absolutely void", Id. at 671, and observed that "[c]ourts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." Id. at 672. Justice Stevens, writing for the United States Supreme Court nearly one hundred years later in National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978), voiced the same sentiment, observing that it is no defense under Section 1 of the Sherman Act (15 U.S.C. § 1 (1982)) that injury to the public from a restraint may be minimal or that competition itself may not be desirable. Id. at 692, 695, 696.
The court had noted earlier in the opinion that the holding in *Diamond Match*, approving a nearly nationwide restraint, constituted a departure from "the well-established rule of the earlier decisions, notably *Mitchel v. Reynolds*, . . . followed and approved by Ranney, J., in *Lange v. Werk*".84 The court found no justification for departing from what it deemed to be long-settled rules of construction, even in the face of changed economic conditions:

The reasoning of the cases in which a departure from the common law had been adopted, fails to persuade us that we should disregard the rule that has been so long settled in this state by the decisions of this court; on the contrary, the changed conditions, on which the argument proceeds, tend more strongly to convince us that, in the interest of a wise public policy, it should be more firmly adhered to.85

By the end of the 19th century, the law of ancillary restraints was settled in Ohio. It can be summed up in a few words. Contracts in restraint of trade were presumptively unenforceable, and general restraints were absolutely void and unenforceable. Partial restraints were enforceable to the extent they were supported by consideration and were reasonable. A restraint would be deemed to be reasonable if it was no greater than that needed fairly to protect the interests of the covenantee and not so broad as to interfere with the interests of the public.

IV. The Current State of the Law.

Although the foregoing detailed review of pre-1900 decisions by the Ohio Supreme Court may seem, at first blush, a purely academic exercise, it is not. With the exception of a modest gloss on the law of employee noncompetition

84 57 Ohio St. at 606-07, 49 N.E. 1033. It is not at all clear from the court’s opinion what it meant by the "well-established rule" of the earlier cases. If the "rule" was that general restraints are void, then *Diamond Match* was no departure, because the New York Court of Appeals expressly held that the restriction before it was partial, not general. *Diamond Match Co. v. Roeber*, 106 N.Y. 473, 484-85, 13 N.E. 419, 423 (1887). If it meant that a country-wide restraint would be void, the New York court had been careful to note that the restraint before it did not cover the entire country but instead expressly exempted Nevada and Montana. Id. If it meant that a state-wide restraint would be void as a general restraint, that "rule" was not even addressed in either *Mitchel v. Reynolds* or *Lange v. Werk*. If it meant that it had been the rule at common law that courts should evaluate the public interest before enforcing a contract in restraint of trade, the New York decision was no departure, because the court had specifically considered the limited foreclosure of commerce that would result. Id. In fact, the New York decision did not constitute a radical departure from common law rules on enforceability of restrictive covenants, and the Ohio Supreme Court’s characterization of it as such reflects more passion than analysis.

Even if the court had based its disapproval of *Diamond Match* on the ground that all country-wide restraints were unreasonable at common law, it would have been mistaken on that ground as well. See Eaton, *supra* note 12, at 134-36. See also infra note 148.

85 57 Ohio St. at 609-10, 49 N.E. at 1034.
covenants\textsuperscript{86} and the court's holding in \textit{Raimonde v. Van Vlerah},\textsuperscript{87} that contracts in restraint of trade may be reformed and enforced to the extent reasonable, the Ohio Supreme Court has not materially departed from or added to its ancillary restraint analysis in the last 90 years. The nineteenth-century case law has not been supplanted.

Despite limited guidance from the Ohio Supreme Court on the subject of ancillary restraints, lower courts have repeatedly spoken on a multitude of issues left unaddressed by the Supreme Court. We will review some of these lower court decisions as they apply to three major categories of ancillary restraints: (1) restrictive covenants incident to the sale of a business; (2) restrictive covenants incident to the leasing of real or personal property; and (3) restrictive covenants incident to employment relationships.\textsuperscript{88} This will be followed by a review of other categories of ancillary restraints, including those incident to franchising.

This review of the case law will show that the courts have remained sensitive to competition analysis\textsuperscript{89} in evaluating restraints, balancing the competitive

\textsuperscript{86} See the discussion of Rogers v. Runfola & Assocs., Inc., 57 Ohio St. 3d 5, 565 N.E.2d 540 (1991), at notes 234-39 \textit{infra} and accompanying text; Raimonde v. Van Vlerah, 42 Ohio St. 2d 21, 325 N.E.2d 544 (1975), at notes 230-33 \textit{infra} and accompanying text; Extine v. Williamson Midwest, Inc., 176 Ohio St. 403, 200 N.E.2d 297 (1964), at notes 224-29 \textit{infra} and accompanying text; and Briggs v. Butler, 140 Ohio St. 499, 45 N.E.2d 757 (1942), at notes 216-23 \textit{infra} and accompanying text.

\textsuperscript{87} 42 Ohio St.2d 21, 325 N.E.2d 544 (1975).

\textsuperscript{88} A threshold issue in every restrictive covenant case is whether the law of Ohio governs the parties' agreement. Where the parties are not both in Ohio, where the contract is not to be performed entirely in Ohio or where other features of the contract implicate the interests of other states, resolution of the conflict of laws may prove troublesome. This difficulty can be averted, in part, by the inclusion of a choice-of-law clause specifying Ohio law. It is the policy of the Ohio courts to give effect to the parties' choice of law. See, e.g., Schulke Radio Prods., Ltd. v. Midwestern Broadcasting Co., 6 Ohio St.3d 436, 438-39, 453 N.E.2d 683, 686 (1983). Whether an Ohio choice-of-law clause will be enforced in a forum outside Ohio depends upon the conflicts of law policy of the forum state. Ohio choice-of-law clauses have been given effect in some cases outside Ohio, see, e.g., Nordson Corp. v. Plasschaert, 674 F.2d 1371, 1374-75 (11th Cir. 1982) (Ohio law not contrary to fundamental policy of Georgia on enforcement of noncompetition covenants); Barnes Group, Inc. v. O'Brien, 591 F. Supp. 454, 459 (N.D. Ind. 1984) (public policy interests of Indiana do not outweigh parties' choice of Ohio law), but not in others, see, e.g., Barnes Group, Inc. v. C & C Prods., Inc., 716 F.2d 1023, 1030-32 (4th Cir. 1983) (Ohio law conflicts with fundamental policy of Alabama on enforceability of employee noncompetition covenants). Whether to follow the parties' choice-of-law clause in enforcing noncompetition covenants can sometimes pose daunting analytical difficulties. See, e.g., Scott v. Snelling & Snelling, Inc., 732 F.Supp. 1034, 1039-41 (N.D. Cal. 1990) (Cal. law applied instead of parties' choice of Pa. law); DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677-79 (Tex. 1990) (Tex. law applied instead of parties' choice of Fla. law), \textit{cert. denied}, 59 U.S.L.W. 3476 (U.S. Jan. 14, 1991).

\textsuperscript{89} As Professor Hovenkamp has demonstrated, however, competition as we understand it was not a factor in evaluating the reasonableness of restraints at common law. See Hovenkamp, \textit{supra} note 5, at 1030-41. It was not until Judge Taft's opinion in \textit{Addyston Pipe & Steel Co.}, at the earliest, that the enforceability of ancillary restraints was evaluated by reference to competition, i.e., the condition existing when producers are making independent decisions about output and pricing, the necessary effect of which is to keep prices lower than they might otherwise be in a market affected by collusion. \textit{Id.} at 1025-27, 1040-44. As Justice Holmes attempted to explain in his dissent in \textit{Northern Secs. Co. v. United States}, 193 U.S. 197, 403 (1904), even if Section 1 of the Sherman Act were to take its content from the common law definition of restraint of trade, the "act says nothing about competition". At common law,
benefits of a restraint against its anti-competitive effects and taking into account, at the same time, the specific features of the restrictive covenant before them, such as the hardship enforcement may cause an employee.

A. **Restrictive Covenants Incident to the Sale of a Business.**

Judge Taft explained in *Addyston Pipe & Steel*[^80] that a promise by the seller of a business not to compete with the buyer finds its justification in the need to secure to the buyer the enjoyment of the goodwill of the business.[^91] Chief Justice Parker recognized this justification in *Mitchel v. Reynolds*[^92] in holding that the promise by the baker not to engage for a period of five years in competition with the purchaser of his business was enforceable. He reduced the matter very simply to whether the seller or the purchaser "shall have the trade in this neighborhood"[^93] and observed that the public interest is not adversely affected by such a covenant: "the concern of the public is equal on both sides".^[94]

The Ohio cases proceed on the same principle. Citing *Lange v. Werk*,[^95] the Ohio Supreme Court commented in *Lufkin Rule*,[^96] as already discussed above,[^97] that restrictive covenants incident to the sale of a business may be enforced if they meet these criteria:

[A]greements that only impose a partial restraint, made in connection with the purchase of a business, that are reasonably necessary to make available the good will purchased with the business, and are reasonable, and not oppressive, may be enforced.^[98]

The protectable interest of the covenantee is the goodwill purchased from the covenantor.

[^80]: United States v. Addyston Pipe & Steel Co. 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).

[^90]: *Id.* at 281.


[^92]: *Id.* at 197, 24 Eng. Rep. at 352.

[^93]: *Id.*

[^94]: 2 Ohio St. 520 (1853)

[^96]: Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 49 N.E. 1030 (1898).

[^95]: *See supra* notes 68-85 and accompanying text.

[^97]: *57 Ohio St.* at 602, 49 N.E. at 1032.
It is settled that such a promise in restraint of trade is appropriate in the sale of any business in which goodwill forms a part of the assets acquired. Unlike restrictive covenants incident to employment relationships, in which the need for protection of the covenantee is often subject to extended debate, there has never been any serious question about the propriety of such a covenant in connection with the sale of an on-going business. The explanation is not difficult to find. Competition between the seller and purchaser is, concededly, restrained, but the restraint is essential if the purchaser is to retain the value of the business and its goodwill. Without this restraint, the purchaser faces the risk of unfair competition from the former owner. The ability of the purchaser to compete against others is strengthened by the restraint, and the buying public correspondingly benefits from the increased competition. Although not articulated in the cases, justification for the restraint can be found in conventional rule of reason analysis: The restraint on the seller’s ability to compete is offset by the benefit to competition in the market for the business’ goods or services.

Geographic Scope. Because the need to protect the business’ goodwill is never in dispute, the reasonableness of these covenants has tended to turn exclusively on their duration and geographic extent. In evaluating geographic extent, the courts have looked to see whether the restraint is "no more extensive than was necessary to afford a fair protection to the purchaser". Where the seller’s business had been confined to Cincinnati, for example, it was entirely reasonable to enforce a covenant that prohibited the seller from engaging in business in Cincinnati for a period of five years from the sale. To the extent, however, that the restraint reached beyond this, and prohibited the seller from engaging in business in another city where the purchaser might also set up his trade, it was unreasonable and unenforceable.

99 Indeed, even in the absence of such a promise, the Ohio courts will imply a promise on the part of the seller not to solicit the customers of his former business in competition with the buyer, thereby impairing the goodwill purchased by the buyer. See Suburban Ice Mfg. & Cold Storage Co. v. Mulvihill, 21 Ohio App. 438, 442, 153 N.E. 204, 205 (1926). See generally Note, Sale of a Business -- Restraints on the Vendor’s Right to Compete, 13 W. RES. L. REV. 161, 165-67 (1961).

100 See infra notes 241-66 and accompanying text.

101 It has been held, however, that it would be unreasonable to enforce a covenant absolutely preventing a vendor from later engaging in the same business as the vendee where the "work is of a menial character", i.e., window washing, and it was the vendor’s only means of earning a livelihood. Queen City Cleaning Co. v. Davis, 7 Ohio Cir. Dec. 474, 476 (Ct. App. 1916).

102 See infra note 186 for a discussion of rule of reason analysis applicable to vertical restraints under Section 1 of the Sherman Act (15 U.S.C. § 1 (1982)).

103 Thomas v. Administrator of Miles, 3 Ohio St. 275, 276 (1854). For a review of the early cases on the reasonableness of the geographic scope of the restriction, see generally Kales, Contracts to Refrain from Doing Business or from Entering or Carrying on an Occupation, 31 HARV. L. REV. 193, 197-206 (1917).

104 Thomas v. Administrator of Miles, 3 Ohio St. 275, 276 (1854).
The Ohio Supreme Court emphasized in *Lufkin Rule* that the reasonableness of a restraint depends in large measure upon whether it is co-extensive with the geographic boundaries of the seller's business. In explaining the restraint in another case,\(^{106}\) the *Lufkin Rule* court described the need for this limitation:

> The good will being in general nothing more than the probability that the old customers will resort to the old place for the purpose of trade, it is apparent that in this case the restraint imposed was reasonable, being no more than was required to secure the good will of the business to the purchaser, and was not oppressive, as she was at liberty to carry on the same business outside of the limits to which the good will of her former business, carried on in Felicity, extended.\(^{107}\)

The seller's scope of business is not in every case determinative, however. Noting, correctly, that "such contracts are for the protection of the vendee", the court held in *Paragon Oil Co. v. Hall*\(^{108}\) that the covenant was not unreasonable even though it extended beyond the geographic scope of the seller's business. The seller's business had been confined to Xenia, but the purchaser was engaged in the business of selling and delivering oil and gasoline throughout the State of Ohio, excepting Cleveland.\(^{109}\) In the sale of his business to the plaintiff, defendant agreed to refrain from engaging in the business of selling and delivering oil and gasoline throughout the State of Ohio outside of Cleveland.\(^{110}\) The court encountered no difficulty in holding that this restriction was reasonable, because it was necessary for the protection of the purchaser:

> It thus appears that the only restraint placed by the contract upon defendant was that he should not engage in the business within the territory where the plaintiff was conducting its business. That it considered it necessary to make this stipulation to protect the business which it had established and was carrying on, and intended to carry on, is obvious; and that it was not an unreasonable requirement, seems to us equally clear.\(^{111}\)

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\(^{106}\) *Morgan v. Perhamus*, 36 Ohio St. 517 (1881). This case is discussed at *supra* notes 64-67 and accompanying text.

\(^{107}\) *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 605, 49 N.E. 1030, 1033 (1898).

\(^{108}\) 4 Ohio Cir. Dec. 576 (Ct. App. 1893).

\(^{109}\) *Id.* at 579.

\(^{110}\) *Id.*

\(^{111}\) *Id.*
The Ohio Supreme Court’s refusal in *Lufkin Rule* to approve a nationwide restriction such as that approved by the New York Court of Appeals in *Diamond Match* has not been followed in later cases. The court emphasized in *Lufkin Rule* that it was no defense to a general restraint to argue that the nationwide extent was necessary to give protection to the purchaser’s legitimate interests. The defense must give way, the court reasoned, to the public interest in a market free of monopoly. Other courts have not found this reasoning persuasive.

The United States Circuit Court of Appeals for the Sixth Circuit held in *Prame v. Ferrell* that *Diamond Match* was perfectly good authority for the proposition that a nationwide restraint should be enforced. In ruling on an appeal from the federal trial court for the Northern District of Ohio, the court of appeals ignored *Lufkin Rule* and other Ohio authorities and found no difficulty in enforcing a covenant coextensive with the continental United States:

> By the sale of appellant's interest no monopoly was created. The competition in the sale of grain separators and cleaners then was, and always since has been, active and substantial. No public interest will thus be violated by imposing the restraint demanded. In our opinion, the covenant of restraint, as so construed by us, was entirely reasonable, taking into account the circumstances and situation of the parties and the business involved.

The court emphasized that enforcement of the covenant was necessary to protect the goodwill of the business from interference at the hands of the seller.

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112 Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 609, 49 N.E. 1030, 1033 (1898).
114 The view that such a general restraint is absolutely void has been volunteered as dictum, however. The court commented in *Ehrhardt v. Hamilton Fan & Blower Co.*, No. C-850265, slip op. at 6 (Ohio Ct. App. Mar. 19, 1986) (1986 WL 3423 (Ohio App.)), that a noncompetition promise extending throughout the entire United States would be “unenforceable on its face”, citing Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 49 N.E. 1030 (1898).
115 57 Ohio St. at 607, 49 N.E. at 1033.
117 This is a decision antedating, obviously, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The federal court was under no duty to follow the substantive law of the forum state.
118 166 F. at 705.
119 Id. at 705-06. Likewise, the Circuit Court of Appeals for the Seventh Circuit enforced a noncompetition covenant unlimited as to time or geography by confining its reach to the United States. *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 F. 588, 593 (1915). Unless the covenant were enforced at least to this extent, the vendor would be able, the court observed, to “sell property, retain the proceeds, and then repossess itself of the property with impunity”. Id.
Without holding that a nationwide restraint was reasonable, an intermediate Ohio appellate court recognized, in common with the Sixth Circuit in Prame v. Ferrell, that the Diamond Match holding may be justifiable under certain circumstances. In Kex Manufacturing Co. v. Plu-Gum Co.\textsuperscript{120} the purchaser of a tire repair business secured from the seller a promise not to re-enter the business anywhere within the United States. The restraint was held by the court of appeals for Cuyahoga County to be void and unenforceable.

The buyer urged unsuccessfully that the restriction was appropriate because it, the buyer, was engaged in the business of tire repairs outside the State of Ohio. The court turned aside the suggestion, finding, instead, that the tire repair business was local and holding that any restraint on the seller could be justified only if it were also local.\textsuperscript{121} The court acknowledged, however, that Diamond Match was good authority for imposition of a nationwide restraint under the proper circumstances:

\begin{quote}
So necessarily the repairing of tires must be a local business, and, with that in mind, in analyzing this contract, one will see how broad and wide it is, and I know of no contract that has been sustained under circumstances such as these. The Diamond Match Co. v. Roeber Case... is authority for the proposition that a contract will be sustained where it covers practically the whole United States. But that is not this kind of a case. There are cases which cover a large part of the United States, but those are different than the case at bar. In other words, the contracts have been sustained when it was necessary to do so to preserve the business which was sold, and, if that covered a broader area than a local trade, a contract for that purpose for a reasonable time would be upheld, but no contract has been upheld where it is for all time, or where the time is so unreasonably long that it would necessarily forever prohibit the vendor from engaging in a like business.

We think, from all the authorities, that this contract was absolutely void as being against public policy.\textsuperscript{122}
\end{quote}

In common with the holding in Kex Manufacturing, the Ohio courts have routinely enforced noncompetition covenants incident to the sale of business

\textsuperscript{120} 162 N.E. 816 (Ohio Ct. App. 1928).

\textsuperscript{121} Id. at 817.

\textsuperscript{122} Id.
where the restriction has extended no farther than a specific metropolitan area.\textsuperscript{123}

It should be no surprise that the Ohio Supreme Court's disapproval of nationwide restraints in \textit{Lufkin Rule} has been all but ignored. The court's concern with a restraint of this scope was fundamentally a concern with interstate commerce. The Sherman Act and the federal merger law, enacted in 1914 as the Clayton Act,\textsuperscript{124} directly address restraints of trade in interstate commerce and, as a practical matter, remove them from the scope of state law. A nationwide restrictive covenant may restrain or tend substantially to lessen competition within a relevant market and thereby violate Sections 1 or 2 of the Sherman Act\textsuperscript{125} or Section 7 of the Clayton Act.\textsuperscript{126} Concededly, interstate restraints may be a subject of the ancillary restraint doctrine -- and evaluating impact on competition is one of the steps in ancillary restraint analysis\textsuperscript{127} -- but interstate market foreclosure and economic impact have become virtually the exclusive province of the federal antitrust laws.\textsuperscript{128}

\textit{Duration.} The duration of a restraint has received considerably less attention as a criterion of reasonableness. Indeed, it would be fair to say that the Ohio courts have not analyzed the matter in the least. They have approved, without discussion, covenants of six months,\textsuperscript{129} five years,\textsuperscript{130} ten years\textsuperscript{131}

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{124}Ch. 323, 38 Stat. 730 (1914).
  \item \textsuperscript{125}15 U.S.C. §§ 1, 2 (1982).
  \item \textsuperscript{126}15 U.S.C. § 18 (1982).
  \item \textsuperscript{127}As the analysis in Prame v. Ferrell, 166 F. 702, 705 (6th Cir.), \textit{cert. denied}, 215 U.S. 605 (1909), discussed at \textit{supra} notes 116-19 and accompanying text, shows, the courts had the ability in applying ancillary restraint analysis to evaluate market and economic impact with some refinement.
  \item \textsuperscript{128}Market foreclosure and economic impact have not received comparable attention under the ancillary restraint doctrine, and courts have approved multi-state restrictive covenants even in the face of demonstrable anti-competitive effects, as the holding in Diamond Match Co. v. Roeber, 106 N.Y. 473, 13 N.E. 419 (1887), reflects. As one respected commentator has recently noted, "[t]he widespread use of covenants not to compete in cases involving asset acquisitions suggests that many of the great mergers of the turn of the century were anticompetitive". Hovenkamp, \textit{Antitrust Policy, Federalism, and the Theory of the Firm: An Historical Perspective}, 59 \textit{ANTITRUST L.J.} 75, 83 (1990).
  \item \textsuperscript{129}Stephens v. Pahl, 23 Ohio N.P. (n.s.) 377, 378-379 (Super. Ct. 1921).
  \item \textsuperscript{130}Thomas v. Administrator of Miles, 3 Ohio St. 275, 276 (1854); Bukontz v. Moskowitz, 2 Ohio L. Abs. 299 (Ct. App. 1924); Paragon Oil Co. v. Hall, 4 Ohio Cir. Dec. 576, 579 (Ct. App. 1893); Empson v. Bissinger, 8 Ohio Dec. Reprint 629, 630-31 (C.P. 1883).
  \item \textsuperscript{131}J.D. Nichols Stores, Inc. v. Lipschutz, 120 Ohio App. 286, 293, 201 N.E.2d 898, 903 (1963); Barnett v. Gloger, 8 Ohio L. Abs. 75, 76 (Ct. App. 1929); Queen City Cleaning Co. v. Davis, 27 Ohio Cir. Dec. 474, 475 (Ct. App. 1916).
\end{enumerate}
\end{footnotesize}
and fifteen years. Beyond this, one can find decisions in which the restraint has no fixed duration other than the life of the vendee's business. As long as the vendee continues in the business acquired from the covenantor, the covenant not to engage in competition is deemed reasonable.

If one looks for an explanation for this judicial indifference, it may perhaps be found in cases such as the Sixth Circuit's decision in *Prame v. Ferrell.* In approving nationwide enforcement of a covenant, the court considered it of no consequence that the covenant was of unlimited duration. It simply took the view that duration was a matter of no consequence:

It is conceded that under the authorities a covenant so limited as to territory may be valid, notwithstanding the lack of limit as to time.

There is no basis for removing duration from the reasonableness equation. Any discriminating analysis of whether a restraint is only as broad as needed to protect the legitimate interests of the purchaser will necessarily take it into account. The general formulations of the ancillary restraint doctrine repeatedly identify duration as a criterion of reasonableness. The *Restatement (Second) of Contracts* affords slightly more guidance in applying this criterion by observing that

if the restraint is to last longer than is required in light of those interests [*i.e.*, the legitimate interests of the purchaser], taking account of such factors as the permanent or transitory nature of technology and information, it is unreasonable.

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133 Morgan v. Perhamus, 36 Ohio St. 517, 518, 521 (1881); Ewing v. Davis, 15 Ohio Cir. Dec. 203, 205-06, 208 (Ct. App 1903); Anderson v. Joyce, 16 Ohio Dec. 320, 325 (C.P. 1905); Kevil v. Standard Oil Co., 8 Ohio N.P. 311, 313 (Super. Ct. 1901).


135 See supra notes 116-19 and accompanying text.

136 166 F. at 705. The New York Court of Appeals had earlier made the same observation -- that unlimited duration was of no significance if the restraint was otherwise enforceable -- in *Diamond Match Co. v. Roeber*, 106 N.Y. 473, 484, 13 N.E. 419, 423 (1887). One contemporary commentator observed that it was "commonly understood" that unlimited duration would not render a covenant invalid, but unlimited geographic scope would. Eaton, supra note 12, at 128.

137 See supra notes 39-50 and accompanying text.

The Restatement formulation of the ancillary restraint doctrine has been cited by at least one Ohio court and it has been approved by courts in other jurisdictions.

One measure of the reasonableness of duration is whether the length of the restriction is adequate to permit the creation by the buyer of goodwill independent from that of the seller. As Professor Corbin has put it, the restraint should continue only as long as the personal business and customer relationships of the seller are still such that his re-entry into the business will draw business from the buyer by reason of their continuance. The seller's promise should never bind him after his re-entry into the business would affect the buyer's business no more than would his entry as a stranger. At that point, doubts as to which may properly be resolved in favor of the buyer, the public interest in free competition should control.

Continuing Authority of Lufkin Rule. The nearly total absence, for several decades, of any case law on the enforceability of restrictive covenants incident to the sale of a business speaks eloquently for the settled state of Ohio law: a restraint is ancillary and reasonable if it is no greater than needed to protect the legitimate interests of the vendee. The test emerges clearly from the decisions of the Ohio Supreme Court.

The fact remains, however, that Lufkin Rule raises a serious and continuing obstacle to the enforceability of any such covenants of broad geographic scope. The Ohio Supreme Court's holding that a nationwide restriction -- considered a "general" restraint -- was unreasonable because contrary to the public interest stands undisturbed. Although it may be predicted with some

142 6 A. CORBIN, supra note 1, § 1391 at 79. See also Kerr, supra note 13, at 881-82; Note, Validity and Enforceability of Restrictive Covenants Not to Compete, 16 W. RES. L. REV. 161, 183-85 (1964); Note, supra note 99, at 176.
143 See supra notes 39-85 and accompanying text. The legality of restrictive covenants ancillary to the sale of a business has repeatedly been reviewed under Section 1 of the Sherman Act (15 U.S.C. § 1 (1982)), as well. The analysis closely follows that of the ancillary restraint doctrine generally, with the additional Section 1 requirements for proof of market definition and impact on interstate commerce. See, e.g., Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265-69 (7th Cir. 1981), cert. denied, 455 U.S. 921 (1982); Verson Wilkins Ltd. v. Allied Prods. Corp., 723 F.Supp. 1, 7-15 (N.D. Ill. 1989).
confidence that, if the issue were presented today to the Ohio Supreme Court, it would decide it differently, siding now with the New York Court of Appeals' analysis in *Diamond Match*, and even though the decision can be dismissed as a product of the antitrust populism of the 1890's, the holding is controlling on the lower Ohio courts as well as federal courts sitting in diversity.

Under *Raimonde v. Van Vlerah*, discussed below, such a restraint may be enforced to the extent reasonable, but *Lufkin Rule* may foreclose the conclusion that a nationwide, or greater, restraint can ever be reasonable. The proposition is facially absurd in view of modern commercial practices and the international dimensions of many markets, but the case has yet to be repudiated by the court that wrote it.

Having reviewed the ancillary restraint doctrine as it applies to the sale of a business, let us turn now to another setting in which restrictive covenants are routinely negotiated--leases.

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145 A federal court applying Ohio law would be bound to follow *Lufkin Rule* even though it could prognosticate a different holding by the Ohio Supreme Court if the case were to be decided today. See generally 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4507 at 91-92 (1982). *Lufkin Rule* could be ignored only if the federal court had before it "persuasive data" that the Ohio Supreme Court would now hold that a nationwide restraint of trade incident to sale of a business could not constitute an impermissible general restraint. See, e.g., In re Ryan, 851 F.2d 502, 508-09 (1st Cir. 1988)(federal court declined to deviate from 1869 Vermont Supreme Court holding in absence of "persuasive data" showing that the court would necessarily now repudiate the holding). There can be no certainty that a federal court would conclude it could ignore *Lufkin Rule* or that the Ohio Supreme Court would abandon it if presented the opportunity.

146 42 Ohio St.2d 21, 325 N.E.2d 544 (1975).

147 See infra notes 230-33 and accompanying text.

148 The distinction between general and partial restraints had been repudiated even by the English courts by the time *Lufkin Rule* was decided. To the extent the Ohio Supreme Court purported to be following long-established English precedent in refusing to enforce, or even seriously consider, a "general" restraint, it was simply wrong. It was able to do so only by ignoring the House of Lords' decision in Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., [1894] A.C. 535, rejecting the distinction. The Law Lords there enforced a world-wide noncompetition covenant against the seller of a gun manufacturing concern, noting that "regard must be had to the changed conditions of commerce and of the means of communication which have been developed in recent years". *Id.* at 547. They rejected any further reliance on the partial-general distinction, emphasizing, instead, that the validity of restraints of trade must "now ultimately turn upon whether they are reasonable, and whether they exceed what is necessary for the fair protection of the covenantees". *Id.* at 558.

149 Restrictive covenants incident to the sale of real property may also be enforceable if they satisfy the criteria for evaluating the reasonableness of a restraint ancillary to the sale of a going business. See, e.g., Robey v. Plain City Theatre Co., 126 Ohio St. 473, 477-78, 186 N.E. 1, 3 (1933). It is no impediment to their enforcement that no goodwill is transferred in the process. *Id.* at 477, 186 N.E. at 2. For examples of cases in which such covenants have survived challenges under Section 1 of the Sherman Act, see, e.g., Drury Inn v. Olive Co., 878 F.2d 340, 343-44 (10th Cir. 1989); Sound Ship Bldg. Corp. v. Bethlehem Steel Corp., 387 F. Supp. 253, 255-57 (D.N.J. 1975), aff'd, 533 F.2d 96 (3d Cir.), cert. denied, 429 U.S. 860 (1976).
B. Restrictive Covenants Incident to Leasing.

In listing the range of ancillary restraints at common law, Judge Taft made no mention in *Addyston Pipe & Steel* of restrictive covenants incident to leases. The use of restrictive covenants in leases is a comparatively recent development. With few exceptions, the controlling case law dates from the last three decades, and its emergence can be tied directly to the transformation in retail trade caused by the appearance of the shopping center, both the strip center and the mall.

Lease covenants may protect either a tenant or the landlord. As an inducement to open a store in a shopping center, a prospective tenant may require from the lessor a promise that it will not lease within the same center to another tenant that would offer competitive product lines or otherwise compete with the tenant. This is often referred to as an exclusivity clause. Conversely, a landlord may require from a major tenant a promise that it will not open another store within a certain distance of the shopping center. This is typically referred to as a radius clause.

No Ohio decisions have addressed the enforceability of radius clauses, but both the state and federal courts applying Ohio law have arrived at a consensus on the standard for evaluating lease restrictions in favor of tenants. As will be seen below, that standard is taken from and consistent with the ancillary restraint doctrine at common law. Under the standard, radius and other restrictive clauses should be enforceable as long as they are reasonable. They are reasonable where the competitive benefits secured by the restraint outweigh the anti-competitive effects of the restraint.


132 See, e.g., State ex rel. Brown v. Palzes, Inc., 39 Ohio Misc. 155, 156, 317 N.E.2d 262, 263 (C.P. 1974). See generally 3 M. Friedman, *Leases* § 28.3 (2d ed. 1983); Baum, *supra* note 151, at 235-42; Note, *supra* note 151, at 1204-05. A tenant may insist upon additional protections as well. The tenant may secure from the landlord the right to veto prospective tenants. This is typically referred to as an approval clause. See Note, *Texas and Federal Antitrust Implications of Restrictive Covenants not to Compete in Shopping Center Leases*, 20 Tex. Tech. L. Rev. 1189, 1190 (1989); Note, *supra* note 151, at 1204, 1235-38. Or, the tenant may secure the landlord's promise not to lease to competitors who engage in discounting. See Note, *supra* note 151, at 1204, 1208, 1234-35.

Unlike the sale of a going business, in which goodwill is transferred, the lease of premises transfers no goodwill. The primary justification for enforcement of noncompetition covenants incident to the sale of a business -- protection of the goodwill transferred -- consequently has no role to play in evaluating the reasonableness of restrictions imposed on a lessee's use of premises or on a landlord leasing to a tenant's competitors. Because the transfer of goodwill is not a factor in the reasonableness equation, the courts have engaged directly in competition analysis in reviewing restrictive lease covenants and have enforced them where the pro-competitive outweigh the anti-competitive effects.

The Ohio Supreme Court has recognized that a promise by a lessor not to lease to a competitor of a tenant is enforceable. The court considered in Gillen-Crow Pharmacies Inc. v. Mandzak whether a promise by a lessor not to sell or lease to a tenant's competitor within one-half mile of the leased premises was enforceable. In affirming the lower courts' determination that the covenant was enforceable, the Ohio Supreme Court simply noted in passing that

"[i]t is generally accepted that a restrictive covenant in a lease, which is designed to prevent competitive use of the premises retained by the covenantor, is enforceable in equity by way of injunctive relief . . . ."156

The Ohio Supreme Court subsequently discussed directly the enforceability of an exclusive leasing clause. It considered in C. K. & J. K., Inc. v. Fairview Shopping Center Corp. the legality of a shopping center lease restriction in which the lessor promised a tenant that it would not permit any other tenant to sell alcoholic beverages, other than beer, in the shopping center. The action was brought by a tenant of Fairview Shopping Center seeking to expand the sale of alcoholic beverages at its bowling alley in the center -- a use that was prohibited by the lease restriction between the landlord and another tenant, the Fairview

154 See Huebner-Toledo Breweries Co. v. Singlar, 18 Ohio Cir. Dec. 329, 332-33 (Ct. App. 1906) (restriction prohibiting lessee from selling beer at the leased premises, a saloon, other than that produced by lessor, unenforceable). In the absence of any transfer of goodwill, there is, a fortiori, no justification for implying any noncompetition covenant, and it has been held that a promise of exclusivity in favor of the lessee will not be implied. Smoke & Spirits, Inc. v. Jacobs, Visconsi & Jacobs Co., No. CA 86-07-044, slip op. at 2 (Ohio Ct. App. March 16, 1987) (LEXIS, States library, Ohio file).
Lounge. After evaluating the legality of the restraint under the Valentine Act, the court considered whether the restriction violated public policy. Having already concluded that the restriction did not unreasonably restrain trade in violation of the Valentine Act, the court had no difficulty concluding that there was no violation of public policy:

We have already held that the restrictions in leases before us are reasonable in scope and effect and are necessary in order to obtain desirable tenants. These restrictions are not void as contrary to public policy.

It will prove helpful to consider the criteria used by the court to conclude that the restriction was reasonable. While the court's analysis is thin at best, certain principles can be discerned. Citing Savon Gas Stations Number Six, Inc. v. Shell Oil Co., the court observed that the Court of Appeals for the Fourth Circuit had in that case approved a shopping center lease restriction giving a gas station the exclusive right to sell gasoline on the tract of land on which the shopping center was located:

The court determined . . . that the restriction could not be characterized as imposing an "unreasonable or undue restraint upon * * * commerce" because the legitimate needs of a shopping center often required that such restrictions be available.

The court then cited a number of other decisions in which it had been held that shopping center lease restrictions did not violate antitrust statutes, and it stated that it shared the same view. The court held that there would be no violation of the Valentine Act "as long as the scope and effect of the restriction is not unreasonably broad". It explained that the lease restriction before it was not unreasonably broad:

The restriction in the case at bar is not unreasonably broad in scope or effect. The restriction does not affect the entire community, only the shopping center (a restaurant with a full

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158 Id. at 203, 407 N.E.2d at 508.
159 OHIO REV. CODE §§ 1331.01 et seq.
160 63 Ohio St. 2d at 206, 407 N.E.2d at 510.
163 63 Ohio St. 2d at 206, 407 N.E.2d at 510.
liquor permit operates across the street). In addition appellant is permitted to sell beer. As a consequence, appellees have not violated R.C. Chapter 1331.165

This test of reasonableness coincides with the general test for evaluating the reasonableness of an ancillary restriction announced by the same court more than 120 years earlier in *Lange v. Werk.*166

Unlike restrictive covenants given in connection with the sale of a business or entered in connection with employment, restrictive lease covenants have been extensively evaluated for reasonableness under the federal and state antitrust statutes. The focus of analysis under the statutes is still the reasonableness of the restriction. These statute-based decisions must be reviewed, if only because they contain much of the more recent analysis on the enforceability of restrictive lease covenants.167 We will now turn to them.

The Ohio Attorney General filed a complaint in September 1973 against Andrew Palzes, Inc., a women's clothing store in Brecksville, alleging that the exclusivity clause in its lease violated the Valentine Act.168 Under the exclusivity clause, the lessor agreed not to lease other space in the Brecksville Shopping Center to any other retailer of "so-called 'High Priced Quality' Women's Wear".169 Subsequent to entering into the lease with Palzes, the landlord entered into another lease with a second women's clothing store, Bambi Fashion Shop. The landlord restricted the second lessee to the sale of clothing to "teenage petite and junior miss sizes", with a ceiling of $25 per individual garment other than suits and coats, and suits and coats to be sold for less than $40.170

Following commencement of an action by the Attorney General to bar enforcement of the covenant in favor of Palzes, the parties agreed to a final injunction, including the following findings of fact:

...[T]he agreement fixed the prices above which Bambi could not sell; ... the agreement was intended to limit and eliminate

165 *Id.* (footnote omitted).

166 2 Ohio St. 520, 530 (1853). See *supra* notes 39-46 and accompanying text. The holding also coincides with an early decision by the Circuit Court of Appeals for the Sixth Circuit addressing a covenant under which a lessee was prohibited from using the premises, a mill, to make strawboard in competition with the lessor. American Strawboard Co. v. Haldeman Paper Co., 83 F. 619, 624 (1897). The court approved the restriction because it was "no larger than necessary for the protection of the owner and lessor." *Id.*

167 For an overview of the cases addressing the legality of lease restrictions under state and federal antitrust statutes, see generally 3 M. Friedman, *supra* note 152, at § 28.8.


169 *Id.* at 156, 317 N.E.2d at 263.

170 *Id.* at 157, 317 N.E.2d at 264.
competition between Bambi and Palzes; and... the agreement did, in effect, so limit competition between the two defendant retail women's stores.\textsuperscript{171}

With these findings, it did not take much imagination to conclude that Palzes had been party to a classic price-fixing agreement, \textit{per se} illegal under the Valentine Act.\textsuperscript{172} Observing that the Ohio courts have followed, in applying the Valentine Act, the federal courts' interpretation of the Sherman Act, the court then went on to describe the status of price-fixing agreements as \textit{per se} illegal under Section 1 of the Sherman Act.\textsuperscript{173}

The Ohio Attorney General brought a companion case in May of 1974 against Zayre of Ohio, Inc., \textit{State ex rel. Brown v. Zayre of Ohio, Inc.}\textsuperscript{174} The Attorney General challenged an exclusive lease in favor of Zayre at the Mentor City Shopping Center, where Zayre was the major tenant. Under the lease, the landlord covenanted not to lease to any store "advertised as a so-called discount type operation"; not to lease to any apparel store unless it was a "so-called higher priced store"; and not to lease to any drug store if it was engaged in discounting.\textsuperscript{175} Zayre partially waived the restriction against a discounter as a tenant when it permitted A & P, another tenant at the shopping center, to sublease storeroom space to Esco Distributing Company, a discount catalog showroom, on condition that Esco pay Zayre $8,000 per year for each year of its sublease.\textsuperscript{176}

In common with the final judgment in \textit{Palzes}, the parties agreed to the terms of the final order. The parties stipulated to the following facts:

The court finds that the above-described covenants in the lease agreement between the landlord and Zayre are a combination to create and carry out restrictions in trade or commerce, to prevent,
hinder and limit competition, and to affect the prices both Zayre and its potential competitors may charge. The use of these lease provisions to prevent for a period of time the entry of Esco, another discount store operation and potential competitor of Zayre, and then to condition entry upon the payment of $8,000 per year from one competitor to another, demonstrates the anticompetitive character of such a combination. The necessary and probable effect of such restraints is to impede the ability of Esco, or any other potential competitor of Zayre effectively to compete on price and otherwise, and thereby deprive the consuming public of the benefits of free and open competition.\textsuperscript{177}

These findings were more than adequate to support the conclusion that Zayre had engaged in price-fixing, \textit{per se} illegal under the Valentine Act.\textsuperscript{178} The legal discussion in the opinion closely tracks that in \textit{Palzes} and draws directly on some of the text from the \textit{Palzes} opinion.

Taken together, the \textit{Palzes} and \textit{Zayre} cases stand for the unremarkable proposition that price-fixing agreements, even when embodied in leases, are \textit{per se} illegal, necessitating no inquiry into market conditions and permitting no inquiry into justification. Even though both decisions are consent decrees, their publication as opinions of the Cuyahoga County Court of Common Pleas has given them circulation and precedential value they might not otherwise deserve. As will be seen, however, they have been distinguished, rather than followed, in later cases and are likely no longer good law.

The Ohio Supreme Court addressed the legality under the Valentine Act of restrictive lease covenants in \textit{Fairview Shopping Center}.\textsuperscript{179} The restrictive clause before the court did not limit the price at which other stores could sell; it barred the lessor from permitting the sale at the shopping center of any non-beer alcoholic beverages, regardless of price, by any tenant other than the covenantee, Fairview Lounge.\textsuperscript{180}

\textsuperscript{177} \textit{Id.}

\textsuperscript{178} \textit{Id.} at 121, 324 N.E.2d at 188-189.


\textsuperscript{180} \textit{Id.} at 202, 407 N.E.2d at 507.
The court noted at the outset that it would be guided in its interpretation of the Valentine Act by the federal courts' interpretation of the Sherman Act. The court neither cited or referred to Palzes or Zayre nor essayed any discussion of the per se rule. It held, instead, that the appropriate test for evaluating the legality under the Valentine Act of restrictions in a shopping center lease is the "rule of reason" -- the operative test under the ancillary restraint doctrine:

"Contracts in restraint of trade are not illegal except when unreasonable in character. When such contracts are incident and ancillary to some lawful business and are not unreasonable in their scope and operation they are not illegal."  

An attempt to rely upon Palzes and Zayre to invalidate a lease covenant was turned aside by the Court of Appeals for Stark County in Carm's Foods, Inc. v. Fred W. Albrecht Grocery Co. There, a grocery store, Carm's, sued to enforce against another tenant its exclusive right to operate the only supermarket in the shopping center, Hillsdale Shopping Center. The covenant was the same type of covenant addressed by the Ohio Supreme Court in Fairview Shopping Center: a promise by the lessor that the tenant would have the exclusive right to conduct a particular type of retail trade in the shopping center.

181 Id. at 204, 407 N.E.2d at 509. Without explicitly holding that the Ohio courts in interpreting the Valentine Act should follow the federal courts in their interpretation of the Sherman Act, the Ohio Supreme Court had made it very clear earlier in List v. Burley Tobacco Growers' Co-op. Ass'n, 114 Ohio St. 361, 374, 151 N.E. 471, 475 (1926), that this was the appropriate approach for determining the content of the Valentine Act. See also State ex ref. Monnett v. Buckeye Pipe Line Co., 61 Ohio St. 520, 548, 56 N.E. 464, 467 (1900); Freeman v. Miller, 21 Ohio Dec. 766, 772 (Super. Ct. 1909). Accord Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 737-38 (6th Cir. 1987) (Ohio law).

182 63 Ohio St.2d at 205, 407 N.E.2d at 509, quoting List v. Burley Tobacco Growers' Co-op. Ass'n, 114 Ohio St. 361, 151 N.E. 471 (1926) (Syllabus 4). The United States Supreme Court held that the legality of agreements and combinations under Section 1 of the Sherman Act should be evaluated under the rule of reason in Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911). See generally 7 P. AREEDA, supra note 173, at ¶ 1501. It did so because it concluded that Congress had intended that the terms used in Section 1 should have the meaning and construction they had acquired at common law. See United States v. American Tobacco Co., 221 U.S. 106, 179-81 (1911); Standard Oil Co. v. United States, 221 U.S. at 51-59; United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 346-55 (1897) (White, J., dissenting). On Congress' intention in incorporating into the Sherman Act terms having established common law meanings, see generally Bork, Legislative Intent and the Policy of The Sherman Act, 9 J. L. & ECON. 7, 21-26, 36-37 (1966); Carey, The Sherman Act: What Did Congress Intend? 34 ANTITRUST BULL. 337 (1989); Hovenkamp, supra note 5, at 1029-41; Letwin, Congress and The Sherman Antitrust Law: 1887-1890, 23 U. CHI. L. REV. 221, 242-47 (1956).

The Valentine Act was, likewise, deemed to be declaratory of the common law of restraints of trade. See, e.g., List v. Burley Tobacco Growers' Co-op. Ass'n, 114 Ohio St. at 378, 151 N.E. at 476 ("The established interpretation of modern anti-trust legislation is that such laws are declaratory of the common law, and are enacted to provide the machinery for preventing the abuses of combination and cooperation and for penalizing and punishing those transactions which by the settled principles of the common law are declared to be unlawful").


184 Id. slip op. at 2.
The trial court had declined to enforce the covenant because, on the authority of Zayre, it concluded that the covenant was a violation of the Valentine Act. The court of appeals pointed out that Zayre was a price-fixing case and that there was absolutely nothing in the exclusive covenant before the court to suggest any price-fixing:

The very essence of the shopping center mechanism for merchandising is the mutually beneficial development of a compodium [sic] of different merchandising and service appliers offering to the public a diverse range of purchasing opportunities. This area of commerce would be virtually paralyzed if the view were adopted that restrictive provisions, mutually enforceable, in a shopping center, going to the provision of different, rather than like, goods and services violate the Valentine Act. Such a center could hardly induce tenants or be commercially viable. The essence of competition is not within a shopping center but between shopping centers. That is particularly true in urban areas.185

The court's analysis correctly focused on the competitive implications of the restrictive covenant. The covenant restrained competition within a narrow compass -- the shopping center -- but thereby contributed to increased competition between shopping centers. This weighing of pro-competitive against anti-competitive effects stands at the center of rule of reason analysis under the ancillary restraint doctrine.186

The United States District Court for the Southern District of Ohio viewed Palzes and Zayre the same way in Child World Inc. v. South Towne Centre Ltd.187 Plaintiff, operating a toy store under the name Children's Palace, sought to enforce an exclusivity clause against its landlord, the owner of South Towne Centre in Miami Township. The landlord promised that it would not use or permit any other person to use the shopping center or any other property within

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185 Id. slip op. at 3.
186 The same analysis is followed under Section 1 of the Sherman Act (15 U.S.C. § 1 (1982)). For example, in evaluating non-price vertical restraints, such as limitations on a dealer's resale activities, the federal courts follow the rule of reason. E.g., Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977). Under this methodology for evaluating vertical restraints, the pro-competitive effects are weighed against the anti-competitive effects. See, e.g., Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 666 (7th Cir.), cert. denied, 484 U.S. 977 (1987); Graphic Prods. Distribs., Inc. v. Itek Corp., 717 F.2d 1560, 1572-78 (11th Cir. 1983). If the restraints strengthen interbrand competition, they will be deemed reasonable, even though intrabrand competition may thereby be reduced. See, e.g., Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 810 (6th Cir. 1988); Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d at 666.
six miles of the shopping center for the operation of a toy store. When the owner of the shopping center entered into an agreement with Toys "R" Us, Inc., to build a toy store within a half-mile of the shopping center, plaintiff, Child World, brought an action to enforce the covenant, Section 43(A) of the lease agreement.

The court addressed the legality of Section 43(A) under both Section 1 of the Sherman Act and the Valentine Act. After concluding that the clause did not constitute a per se illegal restraint under Section 1, the court considered whether it was per se illegal under the Valentine Act. The court held that the clause was not per se illegal, and it readily distinguished Palzes and Zayre as price-fixing cases:

Unlike the provisions deemed illegal per se in Palzes and Zayre, Section 43(A) in no way attempts to manipulate or limit the prices of any other store at South Towne Shopping Center or elsewhere. Nor does Section 43(A) prohibit Defendants' rental or sale to any store except the "copycat" store, that is, a toy and games store selling primarily toys, games, children's furniture and sporting goods in the image of a Children's Palace store. Thus, Defendants are free under Section 43(A) to lease or sell to stores selling competitive goods at every and any price range. There is no evidence in the record as to any impact upon prices stemming from Toys "R" Us' inability to erect a store on Defendants' property. Accordingly, the Court concludes that Section 43(A) is not illegal per se under the Valentine Act.

The court then turned to consider whether the clause was nonetheless a violation of the Valentine Act under the rule of reason. The court found no material difference between Section 43(A) and the clause before the Ohio Supreme Court in Fairview Shopping Center. It turned aside defendants' contention that it was a matter of some consequence that the clause in Fairview Shopping Center created an exclusive within the shopping center itself whereas

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188 Id. at 1123-24.
189 Id. at 1124.
190 For examples of cases, other than Palzes and Zayre, in which a per se violation of the Valentine Act has been established, see State ex rel. Monnett v. Buckeye Pipe Line Co., 61 Ohio St. 520, 548-49, 56 N.E. 464, 467-68 (1900) (combination of competitors restraining competition in the production, transportation and refining of petroleum in order to stabilize prices); Fisher v. Flickinger Wheel Co., 18 Ohio Cir. Dec. 501, 508-09 (Cir. Ct. 1906) (combination of wood wheel manufacturers in Ohio, Michigan and Indiana to control production and stabilize prices); Freeman v. Miller, 21 Ohio Dec. 766, 770-72 (Super. Ct. 1909) (resale price maintenance agreement between supplier and retailers of certain proprietary articles, such as perfumes).
191 Id. at 1130.
192 Id. at 1133.
Section 43(A) established a six-mile exclusivity radius, with the shopping center at the middle. The court noted that, in any event, it need not consider whether enforcement of the covenant to the full six-mile extent would be reasonable, because the issue before it was whether it would be reasonable to enforce it to the extent of one-half mile, the distance of the proposed Toys "R" Us store from Children's Palace. Having already held that Section 43(A) did not violate Section 1 of the Sherman Act under the rule of reason, the court had no difficulty concluding that there was no violation of the Valentine Act under the rule of reason.

It was axiomatic at common law that a restrictive covenant was to be viewed with disfavor. As the Ohio Supreme Court explained in *Lufkin Rule Co. v. Fringeli,* restrictive covenants are presumptively unreasonable. The necessary procedural implication that follows is that plaintiff, the covenantee, bears the burden of overcoming the presumption of unreasonableness. In contrast, the district court in *Child World* imposed on the defendants the "burden of showing unreasonableness". Having raised the statutory violation as an affirmative defense, it was appropriate for the court to leave with the defendants the burden of showing a violation of Section 1 under the rule of reason.

Although the court did not directly consider whether, entirely apart from the various affirmative statutory antitrust defenses, enforcement of the covenant would be reasonable, it observed in discussing the failure of defendants to carry their burden under Section 1 that the facts "underscore the reasonableness of Section 43(A) as applied". The court did not explain how it arrived at this determination, but it presumably took into account some of the criteria it listed as bearing on reasonableness under Section 1:

(1) the relevant product and geographic markets, together with the showing of unreasonable impact upon competition in these markets, due to the restrictive covenant; (2) the availability of alternate sites for the entity excluded by the operation of such a

193 Id.
194 Id. at 1134.
195 Id. The court followed the directive of the Ohio Supreme Court in *Fairview Shopping Center* and other cases that courts should follow the federal courts' interpretation of the federal antitrust statutes in enforcing the Valentine Act. *See generally supra* note 181 and accompanying text.
196 57 Ohio St. 596, 602-03, 49 N.E. 1030, 1032 (1898).
197 *See supra* note 74 and accompanying text.
198 634 F. Supp. at 1132.
199 Id. at 1130.
200 Id. at 1131.
covenant; (3) the significance of the competition eliminated by the exclusivity clause, and whether present or future competitors were the parties excluded; (4) the scope of the restrictive covenant and whether it varied depending upon particular circumstances; and (5) the economic justification for the inclusion of the restrictive covenant in the lease.²⁰¹

Palzes and Zayre may be the only judicial decisions anywhere condemning lease covenants as per se violations of antitrust statutes,²⁰² and they constitute, at this point, little more than an anomaly in the development of the law of restrictive lease covenants. Not only can they be readily distinguished because of explicit findings that the covenants in question were intended to and had the effect of fixing prices, but they may very well no longer constitute good law, even on their facts. The Ohio Supreme Court held in Fairview Shopping Center, decided six years after the two decisions, that lease covenants are to be evaluated under the rule of reason. The court did not carve out or create any exception for covenants that may have price implications. Efforts to classify lease restrictions as per se illegal under Section 1 of the Sherman Act have since been rejected by the federal courts,²⁰³ and the United States Supreme Court has since significantly curtailed the reach of the per se rule generally,²⁰⁴ holding, for example, that even though concerted conduct may have impact on pricing, that circumstance is not sufficient to warrant application of the per se rule.²⁰⁵

As the Ohio Supreme Court recognized in Fairview Shopping Center, analysis under the rule of reason is not qualitatively different from analysis under

²⁰¹ Id. at 1130-31.

²⁰² One commentator has recently observed that no federal court has ever held a lease restriction per se illegal. Note, supra note 152, at 1197. The Federal Trade Commission has done so, however. The Commission ruled in Tysons Corner Regional Shopping Center, 85 F.T.C. 1004, 1008-10 (1975), that an approval clause, giving a major tenant veto power over the admission of new tenants to a shopping center, was per se illegal under Section 1 of the Sherman Act and therefore a violation of Section 5(a) of the FTC Act (15 U.S.C. § 45(a) (1982)). It so concluded because the power to exclude competitors gave it, in the Commission's view, the power to control prices. 85 F.T.C. at 1009-10.

The FTC negotiated consent decrees with a number of developers and retailers over the terms of lease restrictions following Tysons Corner. They reflect the Commission's interest in the mid- and late 1970's in the activities of regional shopping malls but have limited precedential value, as such. For a review of the consent decrees and discussion of their implications, see generally Marsh, supra note 153, at 857-64; Note, supra note 151, at 1202-03.


the ancillary restraint doctrine. They are, in point of fact, one and the same. Lease restrictions are evaluated under Ohio law using the classic ancillary restraint criterion of reasonableness: Is the restraint no broader than necessary to protect the legitimate interests of the covenantee? 206

The nature of the covenantee's interests to be protected, the geographic reach of the restriction and the availability of alternate sites for the competitor affected by the restriction can all be taken into account in evaluating reasonableness, but no effort will be made here to detail how each of these has been weighed in the cases. Suffice it to say that, Palzes and Zayre to the contrary notwithstanding, lease restrictions have readily been enforced by the Ohio courts, and Ohio law on their enforceability is generally consistent with the law of other jurisdictions. 207

C. Restrictive Covenants Incident to Employment.

By far the largest body of case law on the enforceability of restrictive covenants has grown out of efforts by employers to enforce noncompetition covenants against former employees. Judge Taft observed that these promises not to compete were among the ancillary restraints upheld at common law. 208 They were enforced, he noted, if they were "reasonably necessary" for protection of the employer "from the danger of loss to the employer's business caused by the unjust use on the part of the employe of the confidential knowledge acquired in such business". 209 The focus was on protection of the competitive position of the covenantee.

206 Proving reasonableness under the ancillary restraint doctrine will, in most cases, pose fewer difficulties than proving unreasonableness under the Sherman Act or the Valentine Act. Proof of a violation of Section 1 of the Sherman Act or the Valentine Act under the rule of reason will in virtually every case necessitate a detailed inquiry into the boundaries of the relevant service or product and geographic markets, the barriers to entry into the market, the percentage of the relevant market adversely affected by the restraint and other economic details demanded by the antitrust case law. For representative decisions applying these elements of proof to lease restriction cases, see, e.g., Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188-91 (7th Cir. 1985) (Ill. law); Harold Friedman, Inc. v. Thorofare Mktgs. Inc., 587 F.2d 127, 143 (3d Cir. 1978) (Section 1 of Sherman Act); Drabbant Enters., Inc. v. Great Atlantic & Pacific Tea Co., 688 F. Supp. 1567, 1578-82 (D. Del. 1988) (Section 2 of Sherman Act); Child World, Inc. v. South Towne Centre, Ltd., 634 F. Supp. 1121, 1130-31 (S.D. Ohio 1986) (Section 1 of Sherman Act; Valentine Act). No such rigorous economic analysis stands as an obstacle to a covenantee's enforcement of a restrictive lease covenant. Nor is it needed if a practice is deemed to be illegal per se. See Note, supra note 151, at 1211-12.

207 See generally 3 M. FRIEDMAN, supra note 152, at §§ 28.1, .8.

208 United States v. Addyston Pipe & Steel Co. 85 F. 271, 281-82 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).

http://ideaexchange.uakron.edu/akronlawreview/vol24/iss3/1
Chief Justice Tindal had earlier addressed the enforceability of noncompe-
tition covenants against former employees in *Homer v. Graves*.210 Following
*Mitchel v. Reynolds*,211 he observed that a restraint of trade, not amounting to
a general restraint, could be enforced if it were reasonable.212 It was a matter
of no consequence that *Mitchel v. Reynolds* was a case in which the covenant
sought to be enforced was incident to the sale of a business whereas the covenant
sought to be enforced in *Homer v. Graves* was incident to an employment
relationship. The question was simply whether the restraint, barring a surgeo-
dentist from practicing within 100 miles of York at any time after his termination
of employment, was "a reasonable restraint of trade".213

The Chief Justice commented that the covenant in *Mitchel v. Reynolds*
was enforced because it was "not unreasonable either as to the time or distance,
and not larger than might be necessary for the protection of the plaintiff in his
established trade".214 Applying this standard to the covenant before him, he
concluded that the restraint was unreasonable because it "shut out" the former
employee "from a much wider field than can by possibility be occupied
beneficially" by the employer.215

The Ohio Supreme Court did not address the enforceability of employee
noncompetition covenants until 1942 in *Briggs v. Butler*,216 but it followed the
same analysis. Before turning to the particulars of the case law on employee
restraints, it will prove instructive to review the few decisions of the Ohio
Supreme Court on the subject.

Butler was a former employee of Briggs, who operated an advertising
company in the Toledo area under the name The Welcome Wagon Service
Company. Upon beginning employment with Briggs, Butler signed a "Hostess
Contract" outlining her responsibilities and providing that she would not for a
period of five years after termination of employment engage in the same kind of
business in competition with Briggs' company in Toledo or any other town in the
United States or Canada in which he may be engaged in business.217

Butler terminated her employment with Briggs and joined her husband's
newly organized business, the Toledo Newcomers Service Company, a competitor

213 Id. at 743, 131 Eng. Rep. at 287.
214 Id.
215 Id. at 744, 131 Eng. Rep. at 288.
216 140 Ohio St. 499, 45 N.E.2d 757 (1942).
217 Id. at 502, 45 N.E.2d at 759.
of Briggs. In her new employment, she engaged in activities essentially the same as those she had previously performed on behalf of Briggs. Briggs then brought an action to enforce the noncompetition covenant.

Noting that the decision in each case of this type "turns upon and in great measure is governed by its own peculiar facts," the court held that the covenant was reasonable and enforceable. It observed that Butler was not prevented from engaging in a trade or profession, but only from engaging in direct competition with the plaintiff:

The clear purpose and effect of the contract is to prevent or at least to limit the appropriation of the benefits of information and experience secured in her service with the plaintiff and the employment thereof for her own personal advantage and to the disadvantage of the plaintiff by becoming a direct competitor, as in fact did occur in this instance.

The court turned aside any suggestion that Briggs needed to show that Butler's services were unique as a condition for enforcement of the covenant. Acknowledging that this was an essential element of proof in any attempt to secure specific enforcement of a personal services contract, the court found no need for any demonstration of uniqueness where a post-employment restraint is sought to be enforced:

That necessity of showing the uniqueness of the employee's service does not exist where the covenant sought to be enforced is one limiting or precluding competitive activities subsequent to the termination of the employment. . .

The court concluded that the covenants of the contract should be enforced because they do not impose a restraint beyond that reasonably required for the protection of the employer in his business, . . . are not unreasonably restrictive upon the rights of the employee and do not contravene public policy. . .
It observed that this conclusion was "in no wise inconsistent with" earlier decisions of the Ohio Supreme Court on the enforceability of covenants incident to the sale of a business.\(^{223}\)

The court in *Briggs* neither suggested nor undertook any departure from the ancillary restraint analysis of the earlier cases. It saw no need to, and did not, fashion any new or special rule for the enforcement of noncompetition covenants incident to employment.

In its next review of an employment noncompetition covenant, the Ohio Supreme Court held, in *Extine v. Williamson Midwest, Inc.*,\(^{224}\) that covenants can be enforced partially if they are divisible. Approving the "blue pencil" test,\(^ {225}\) the court declined to enforce two of the four restrictions on Extine's post-employment activities.\(^ {226}\) The court observed, in passing, that trade restraints are reasonable if no broader than needed to protect the legitimate interests of the covenantee:

"An agreement in restraint of trade is reasonable if, on consideration of the subject matter, the nature of the business, the situation of the parties and the circumstances of the particular case, the restriction is such only as to afford fair protection to the interests of the covenantee and not so large as to interfere with the public interests or impose undue hardship on the party restricted."\(^ {227}\)

This general formulation of reasonableness reads as though it were borrowed directly from Chief Justice Tindal's formulation 130 years earlier in *Horner v. Graves.*\(^ {228}\) The court then suggested a list of specific factors that

\(^{223}\) Id. The court cited Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 49 N.E. 1030 (1898); Morgan v. Perhamus, 36 Ohio St. 517 (1881); Thomas v. Administrator of Miles, 3 Ohio St. 275 (1854); and Lange v. Werk, 2 Ohio St. 520 (1853).

\(^{224}\) 176 Ohio St. 403, 200 N.E.2d 297 (1964).

\(^{225}\) Under the "blue pencil" approach to enforcement of a restrictive covenant, the court ascertains whether it can enforce a covenant partially by striking a clause that would otherwise make the covenant unreasonable. To do so, the court must first conclude that the contract is divisible and that the offending term -- typically relating to the geographic scope or duration of the covenant -- can be severed without rewriting the contract. For a review of Ohio case law on the divisibility of restrictive employment covenants, see generally Burndy Corp. v. Cahill, 196 F. Supp. 619, 623-26 (D. Minn. 1961), rev'd on other grounds, 301 F.2d 448 (8th Cir. 1962); Kreider, Trends in the Enforcement of Restrictive Employment Contracts, 35 U. Cin. L. Rev. 16, 24-30 (1966); Note, supra note 142, at 178-81.

\(^{226}\) 176 Ohio St. at 406-07, 200 N.E.2d at 299-300.

\(^{227}\) Id. at 405-06, 200 N.E.2d at 299, quoting 17 C.J.S., Contracts § 247 at 1124 (1963).

might be taken into account, other than limitations of time or space, in evaluating reasonableness:

[W]hether the employee represents the sole contact with the customer; whether the employee is possessed with confidential information or trade secrets; whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition; whether the covenant seeks to stifle the inherent skill and experience of the employee; whether the benefit to the employer is disproportional to the detriment to the employee; whether the covenant operates as a bar to the employee’s sole means of support; whether the employee’s talent which the employer seeks to suppress was actually developed during the period of employment; and whether the forbidden employment is merely incidental to the main employment.\(^\text{229}\)

The court abandoned the blue pencil test eleven years later in *Raimonde v. Van Vlerah*.\(^\text{230}\) It there held, instead, that covenants will be enforced, regardless of the divisibility of contract terms, to the extent reasonable:

We hold that a covenant not to compete which imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect the employer’s legitimate interests. A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if it is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public. Courts are empowered to modify or amend employment agreements to achieve such results.\(^\text{231}\)

\(^{229}\) 176 Ohio St. at 406, 200 N.E.2d at 299.

\(^{230}\) 42 Ohio St. 2d 21, 325 N.E.2d 544 (1975).

\(^{231}\) Id. at 25-26, 325 N.E.2d at 547. The court’s decision to enforce restrictive covenants to the extent reasonable was anything but revolutionary. The United States Circuit Court of Appeals for the Sixth Circuit had done the same more than 60 years earlier in *Prame v. Ferrell*, 166 F. 702, 704-05 (6th Cir.), cert. denied, 215 U.S. 605 (1909). On the gradual abandonment of the blue pencil rule in favor of partial enforcement, see generally 6A A. CORBIN, supra note 1, at § 1390; Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 710 (1985); Kreider, supra note 225, at 24-26. For a discussion of partial enforcement in a representative jurisdiction outside Ohio, see Comment, *Enforcement of Restrictive Covenants in Pennsylvania Employment Contracts*, 80 DICK. L. REV. 693, 708-10 (1976).
The *Raimonde* court ventured no substantive change in ancillary restraint analysis as it is applied to employment relationships.

The Ohio Supreme Court's decisions on the enforceability of employment restraints neither recognize nor suggest any special rule for evaluating restraints ancillary to employment.\(^{232}\) If they support any inference in favor of a special rule for evaluating employment covenants, it is only that the covenantee should be protected in every case to the extent reasonable. In rejecting the blue pencil test, the *Raimonde* court made it clear that it would not permit the rule of divisibility to stand in the way of protecting employers' interests to the extent reasonable.\(^{233}\)

Although it has been stated that the decision to reform a particular overbroad or otherwise unreasonable restriction is within the trial court's discretion, see, e.g., Professional Investigations & Consulting Agency, Inc. v. Kingsland, No. 90AP-108, slip op. at 4-5 (Ohio Ct. App. Oct. 11, 1990) (1990 WL 152914 (Ohio App.)) (reformation denied), the trial court has an affirmative duty to determine whether an unreasonable restraint can be enforced at least partially, see, e.g., Rogers v. Runfola & Assoc., Inc., 57 Ohio St. 3d 5, 8, 565 N.E.2d 540, 544 (1991); Miller Medical Sales, Inc. v. Worstell, No. 89 AP-918, slip op. at 2-3 (Ohio Ct. App. April 24, 1990) (1990 WL 52526 (Ohio App.)). The court's task is not at an end simply because it has concluded that a restraint, as written or sought to be applied, is unreasonable.


> Whether this distinction is logically tenable seems open to question. If it is rightful to protect the business when it is purchased it should be lawful to protect an established business from injury by an employee, unless circumstances of great hardship exist. The ultimate question should be the same in both cases, what is necessary for the protection of the promisee's rights and is not injurious to the public.

14 S. WILLSTON, *supra* note 1, at § 1643 at 148-51 (footnotes omitted; emphasis added).

\(^{233}\) In addition to satisfying the criterion of reasonableness, an employee noncompetition covenant is enforceable by the employer only if it is supported by adequate consideration. This is fully consistent with the general test of enforceability of restrictive covenants announced in *Lange v. Werk*, 2 Ohio St. 520, 528 (1853), see *supra* note 42 and accompanying text, but it is in the area of employment restraints that lack of consideration is repeatedly and most often raised as an affirmative defense. Any covenant entered into after commencement of employment must be supported by separate, independent consideration. E.g., Moraine Indus. Supply, Inc. v. Sterling Rubber Prods. Co., No. 86-3956, slip op. at 2 (6th Cir. Nov. 3, 1987) (LEXIS, Genfed library) (Ohio law) (change from at-will employment is
The Ohio Supreme Court underscored this judicial objective in Rogers v. Runfola & Associates, Inc. Rogers and Marrone were employed as court reporters for a number of years by Runfola & Associates, a court reporting firm in Columbus. When they resigned and set up their own reporting firm, Runfola reminded them that they had signed employment contracts with noncompetition covenants. The employees thereupon filed an action seeking a declaration that the covenants were unenforceable; Runfola counterclaimed for enforcement.

After turning aside contentions that the underlying employment contracts were unenforceable, the court considered whether the covenants were reasonable. Focusing on the covenants' prohibition against engaging in court reporting or stenography in Franklin County for two years and their prohibition against soliciting, for a lifetime, any of Runfola's clients, the court concluded that the restraints, and "resultant hardships" on Rogers and Marrone, exceeded those that were reasonable to protect Runfola's "legitimate business interests".

The court stated that this conclusion did not end its inquiry, however. Even though, as worded, the covenants were unreasonable, the court explained that it "must also determine" whether some restrictions would be necessary to


Continued employment is not itself sufficient consideration to support enforcement of a restrictive covenant. E.g., Prinz Office Equip. Co. v. Pesko, No. 14155, slip op. at 4-6 (Ohio Ct. App. Jan. 31, 1990) (1990 Ohio App. LEXIS 367); Etna Prods., Inc. v. Stofey, No. 953, slip op. at 3 (Ohio Ct. App. Sept. 28, 1981) (LEXIS, States library, Ohio file); Morgan Lumber Sales Co. v. Toth, 41 Ohio Misc. 17, 19 (C.P. 1974). Accord, e.g., Martin v. Credit Protection Ass'n, 793 S.W.2d 667, 670 (Tex. 1990). It should be, as other jurisdictions have held. See generally Annot., Sufficiency of Consideration for Employee's Covenant not to Compete, Entered into after Inception of Employment. 51 A.L.R. 3d 825, 835-39 (1973). In noting in Rogers v. Runfola & Assocs., Inc., 57 Ohio St. 3d at 6, 565 N.E.2d at 542, that courts will not inquire into the adequacy of consideration, the Ohio Supreme Court implied that there should be no special, idiosyncratic test of consideration for employment restrictive covenants. The court did not explicitly repudiate, however, the line of Ohio cases holding that continued employment does not constitute adequate consideration.

235 Id. at 6, 565 N.E.2d at 542.
236 Id. at 8, 565 N.E.2d at 544.
protect Runfola's business interests. It had no difficulty identifying protectable interests. It observed that Runfola had invested "time and money in equipment, facilities, support staff and training" for the employees. It also observed that Runfola had developed over the years a clientele with whom the former employees had had "direct contact". These interests were more than sufficient to justify partial enforcement of the covenants, even in the face of hardship to the employees.

A review of the case law will confirm that Ohio has recognized no analysis for employment ancillary restraints that differs in any material respect from the analysis generally applicable. The rule of reason remains the test. Protection of the covenantee's market position against unfair advantage that might otherwise be gained by a competitor hiring a former employee has been the judicial objective. We will begin with a review of the types of employer interests for which protection may be appropriate and then consider the weight to be given to employee hardship and the public interest in evaluating reasonableness, followed by consideration of the scope of restraints.

1. Employer's Interests to be Protected.

Unlike goodwill, which is the protected interest of the covenantee in every sale of a business, the covenantee's interests to be protected against competition from a former employee may vary from case to case. Two broad categories of interest are conceded, however. It is universally recognized that an

237 Id.
238 Id.
239 Id. at 8-9, 565 N.E.2d at 544.
240 Even though this review of the common law of employment noncompetition covenants necessarily focuses on Ohio law, analysis of the enforceability of these covenants under Section 1 of the Sherman Act draws heavily upon the ancillary restraint doctrine. Section 1, which prohibits unreasonable restraints of competition, rarely has even colorable application to an employee restrictive covenant, which is, typically, intended to protect a competitor, not competition in a relevant market. See DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 687-88 (Tex. 1990), cert. denied, 59 U.S.L.W. 3476 (U.S. Jan. 14, 1991); Handler & Lazaroff, supra note 140, at 752-55. For representative cases in which employee restrictive covenants have been evaluated under Section 1, see, e.g., Bradford v. New York Times Co., 501 F.2d 51, 59-60 (2d Cir. 1974); United States v. Empire Gas Corp., 537 F.2d 296, 307-08 (8th Cir. 1976), cert. denied, 429 U.S. 1122 (1977); see also Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082 (2d Cir. 1977) (restriction on former partner's employment), cert. denied, 434 U.S. 1035 (1978). For rather ambitious views of the applicability of Section 1 to employee noncompetition covenants, not borne out by the case law, see generally Sullivan, Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade, 1977 U. ILL. L. F. 621; Goldschmid, Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants under Federal Law, 73 COLUM. L. REV. 1193 (1973). For an opposing view, see Handler & Lazaroff, supra note 140, at 752-55.
employer has a protectable interest in maintaining the confidentiality of trade secrets and other proprietary information. It is equally well established that an employer has a protectable interest in preserving the goodwill incident to an employee’s customer contacts on behalf of the employer. Judicial recognition of other protectable interests has been limited, but there is no analytical or conceptual bar to recognizing other interests as circumstances may warrant. The various categories of protectable interests are discussed below.

**Trade Secrets.** If an employer has disclosed trade secrets or other confidential information to enable an employee to perform his job, a covenant preventing the employee from subsequently accepting employment with a direct competitor has, typically, been deemed reasonable. Judge Taft explained why the restriction is needed to protect the employer’s interests:

> Again, it was of importance that business men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly; they would naturally be reluctant to do so unless such assistants were able to bind themselves not to set up a rival business in the vicinity after learning the details and secrets of the business of their employers.²⁴¹

It is also consistent with the public interest:

> "... In such a case the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business."²⁴²

The Ohio courts have encountered no difficulty in holding that a trade secret or confidential business information²⁴³ is appropriately protected with a

²⁴¹ United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898), aff’d, 175 U.S. 211 (1899).
²⁴³ In determining whether information is protectable as a trade secret or other confidential information, the Ohio courts have followed the definition of a trade secret set out at Section 757 of the Restatement of Torts (1939) and the definition appearing in Ohio's trade secret statute, OHIO REV. CODE § 1333.51(A)-(3). See, e.g., Valvo Cincinnati, Inc. v. N & D Machining Serv., Inc., 24 Ohio St. 3d 41, 44, 492 N.E.2d
Unlike a trade secret misappropriation case, in which the plaintiff must demonstrate actual or threatened disclosure or use of the confidential information, there is no justification for imposing upon an employer the burden of proving actual or threatened use or disclosure. The noncompetition covenant is superior. Unlike a trade secret misappropriation case, in which the plaintiff must demonstrate actual or threatened disclosure or use of the confidential information, there is no justification for imposing upon an employer the burden of proving actual or threatened use or disclosure.
inquiry, instead, is whether the employer has a legitimate interest to be protected. If the employee had been given access to trade secrets or confidential information in connection with the performance of his employment responsibilities, that circumstance is alone sufficient to support the conclusion that a covenant restricting the employee from going to work for a direct competitor is reasonable. 247

In an action for injunctive relief, it is enough, therefore, to show that the covenant has been breached. The employer need not go the additional step and show that not only has it been breached but that, as a result of the breach, trade

enjoin the disclosure or use of a trade secret until its illegal use is eminent [sic] or until it has already occurred. By that time, much of the damage may be done. Third, even if a clearly illegal use of the trade secret by a former employee can be shown, most courts will not enjoin that person from working for the competition on that basis. Instead, they will merely enjoin future disclosure of the trade secret. Yet, policing the former employee's compliance with that injunction will be difficult. Finally, even if the employee does not maliciously attempt to use his former employer's trade secrets in the new employer's workplace, avoiding this use can be difficult. It would be difficult for the employee to guard the trade secret of the former employer and be effective for the new employer....

In order to avoid these problems, many employers ask their employees to sign non-competition agreements. These agreements prevent an employee from working with the competition within a limited geographic range of the former employer and for a limited time. As seen above, Virginia courts will only enforce these agreements if they are reasonable. Yet, when they are valid, they make the guarding of a trade secret easier since they remove the opportunity for the former employee to pass on the trade secret to the competition, either malevolently or benevolently. This does not supplant the need for law protecting trade secrets. Non-competition agreements cannot prevent disclosure anywhere in the world and until the end of time, for they would be held unreasonable. Instead, a non-competition agreement will merely prevent the illegal use of a trade secret next door in the near future, where the use might do the most damage.

Id. at 561-62. Accord AMP Inc. v. Fleischhacker, 823 F.2d 1199, 1203-04 (7th Cir. 1987) (Ill. law); Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264, 1268-69 (8th Cir. 1978) (Minn. law); see also Hutter, Drafting Enforceable Employee Non-Competition Agreements to Protect Confidential Business Information: A Lawyer's Practical Approach to the Case Law, 45 ALB. L. REV. 311, 313-17 (1981).

247 See, e.g., AMP Inc. v. Fleischhacker, 823 F.2d 1199, 1203-04 (7th Cir. 1987) (Ill. law); Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264, 1265-69 (8th Cir. 1978) (Minn. law). Proof of the employee's knowledge of or access to trade secrets establishes, a fortiori, that the employer will sustain irreparable harm if the covenant is not enforced. E.g., Levine v. Beckman, 48 Ohio App. 3d 24, 27-28, 548 N.E.2d 1267, 1271 (1988). There is no basis for imposing on the employer the burden of demonstrating that the employee had access to extraordinarily sensitive confidential information before enforcing a noncompetition covenant. The test of reasonableness is not whether the new employer's access to information will deal a mortal blow to the former employer. The court in Frank, Seringer & Chaney, Inc. v. Jesko, No. 89CA004577, slip op. at 3-4 (Ohio Ct. App. Dec. 6, 1989) (1989 WL 147951 (Ohio App.)), mistakenly required the former employer to show that the employee, an accountant, possessed "trade secrets or confidential information... beyond that which was ordinary and customary in the accounting practice...."
 secrets or confidential information have been or are about to be put to use or disclosed by the employee.\footnote{248} Any such additional requirement of proof would effectively defeat the purpose for which a restrictive covenant is intended -- to prevent compromise of an employer’s trade secrets.

**Customer Contacts.** The Ohio courts have also readily recognized an employer’s interest in protecting the goodwill an employer may develop through customer contacts. Protection of this interest was the primary object of the covenant in *Briggs v. Butler*,\footnote{249} and, as already discussed above,\footnote{250} the Ohio Supreme Court held reasonable a restriction intended to protect this interest. The court of appeals for Cuyahoga County had earlier described, in *Federal Sanitation Co. v. Frankel*,\footnote{251} why an employer has a legitimate interest in preventing a former employee from exploiting his customer contacts to the employer’s detriment:

"It is clear that if the nature of the employment is such as will bring the employee in personal contact with the patrons or customers of the employer, who enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him, by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons or customers of his former employer, and thereby gain an unfair advantage, equity will interfere on behalf of the employer and restrain the breach of a negative covenant not to engage in such competing business, either for himself or for another, providing the covenant does not offend against the rule that as to the time during which the restraint is imposed, or as to the territory it embraces, it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer."\footnote{252}
Restrictive covenants have routinely been enforced against former salesmen and other employees on this basis.\textsuperscript{253}

\textit{Other Interests.} The Ohio courts have recognized a range of other interests that may justify a noncompetition covenant. If the services of the employee are "unique", it may be reasonable for the employer to secure a promise that the employee will not take those services to a direct competitor. Television or radio personalities, for example, may fall within this category of "unique" employee.\textsuperscript{254} Where it has been found that the employee’s services are unique, noncompetition covenants have been enforced.\textsuperscript{255}

As the Supreme Court emphasized in \textit{Briggs v. Butler},\textsuperscript{256} however, there is no need to show that the employee’s services are unique to obtain injunctive relief to enforce a noncompetition covenant.\textsuperscript{257} Any analysis that implies that


For a thoughtful discussion of the former employee’s "customer contact” as a legitimate interest to be protected and the various settings in which it can arise, see generally Arthur Murray Dance Studios of Cleveland, Inc. v. Witten, 105 N.E.2d 685, 705-09 (C.P. 1952).


256 140 Ohio St. 499, 45 N.E.2d 757 (1942).

257 Id. at 510-11, 45 N.E.2d at 763. See supra note 221 and accompanying text.
proof of uniqueness is a condition precedent to enforcement directly conflicts with *Briggs v. Butler*.\(^{258}\)

An employer's investment in training an employee has repeatedly been recognized as a justification for imposing a noncompetition covenant. The Ohio Supreme Court did so explicitly in *Rogers v. Runfola & Associates, Inc.*\(^ {259}\) Where the employer has been able to show that it would create an unfair advantage for the employee to give a direct competitor the benefit of the specialized training invested in the employee by the employer, it has been held that the former employer's interest is sufficient to make the restriction reasonable.\(^ {260}\) In other cases, the courts have considered the employer's investment in training as one of the circumstances justifying enforcement of a covenant, even if not the sole justification.\(^ {261}\)

It is axiomatic that the general knowledge and experience acquired by an employee during the course of employment do not constitute trade secrets of the employer.\(^ {262}\) An employer is not, as a general proposition, free to bar an employee from the use of this general knowledge and experience on behalf of a new employer:

\(^{258}\) Enforcement was erroneously denied in WKBN Broadcasting Corp. v. Levin, No. 88 C.A.175, slip op. at 2 (Ohio Ct. App. May 5, 1989) (1989 WL 49497 (Ohio App.)), because the employer had failed to show that the services of the former employee were extraordinary, peculiar or unique. Enforcement was granted in Parma Int'l Inc. v. Bartos, No. 89 CA004573, slip op. at 3-4 (Ohio Ct. App. February 7, 1990) (LEXIS, States library, Ohio file), because it had been found that the employee's services were unique. The court in *Parma Int'l* correctly recognized that, under New York law, a non-competition covenant will be enforced to protect the employer from the "special harm" that may be caused by his competitor gaining the services of a unique employee. American Broadcasting Cos. v. Wolf, 52 N.Y.2d 394, 403, 420 N.E.2d 363, 367, 438 N.Y.S.2d 482, 486 (1981). Uniqueness of the employee's services constitutes, at best, an alternate basis for finding a covenant to be reasonable, and controlling Ohio law does not conflict with New York law on this proposition.

\(^{259}\) 57 Ohio St. 3d 5, 8-9, 565 N.E.2d 540, 545 (1991).


A former employee can use to his own advantage all the skills and knowledge of common use in the trade that he acquires during his employment. A person who enters employment as an apprentice and leaves it as a master cannot be enjoined from using his enhanced skills and knowledge in future employment. He can be enjoined only from developing or using the unique and advantageous materials and processes revealed to him in a confidential employer-employee relationship under substantial measures of security.\textsuperscript{263}

Nonetheless, there is no analytical bar under the ancillary restraint doctrine to enforcement of a noncompetition covenant to prevent an employee from conferring on a direct competitor the former employer's substantial investment in specialized training. Even though the information imparted may not rise to the level of trade secrets or confidential information and may, indeed, be known in the trade, it may nonetheless be reasonable to enforce a restrictive covenant to prevent, for example, a newly-trained employee from going to work for a direct competitor.\textsuperscript{264} In any event, the Ohio Supreme Court's clear recognition in Rogers v. Runfola & Associates, Inc. of the employer's investment in training as a protectable interest effectively removes from debate the propriety of protection of this interest.

The foregoing are the employer interests that have repeatedly been the subject of noncompetition covenants.\textsuperscript{265} Experience suggests that these are the


\textsuperscript{264} On the need to protect the employer's investment in training regardless of the confidentiality of the information imparted to the employee, see generally Comment, \textit{supra} note 231, 52 U. CHI. L. REV. at 716-18.

\textsuperscript{265} Blake observed that efforts to enforce noncompetition covenants to protect an employer's investment in the training of an employee had almost invariably proved futile unless the employer could show that it was confidential or otherwise protectable information that had been imparted to the employee during the training. \textit{See} Blake, \textit{supra} note 6, at 651-53. The \textsc{Restatement of Contracts} (1932) recognized at Section 516(f) that an employee noncompetition covenant would be reasonable, and therefore enforceable, if limited to such a territory and duration "as may be reasonably necessary for the protection of the employer". Comment h to Section 516(f) specifically noted that any such promise would not ordinarily be enforced against a former employee "so as to preclude him from exercising skill and knowledge acquired in his employer's business" unless trade secrets or customer lists of the former employer were the subject of protection. The more recent case law does not bear out this view.

For a justification for the protection of the employer's investment in training even though the information imparted to the employee may not constitute trade secrets or confidential information, see Comment, \textit{supra} note 231, 52 U. CHI. L. REV. at 716-18. It has recently been held by an intermediate
interests most likely to justify protection by way of a restrictive covenant, but the ancillary restraint doctrine is sufficiently elastic to leave open the possibility that other interests may also be deserving of protection.266

2. **Hardship to Employee.**

Another criterion of reasonableness is the degree of hardship the covenant imposes on the employee. This necessarily emerges from the third branch of the test for the enforceability of a restrictive covenant approved by the Ohio Supreme Court in *Lange v. Werk*:267

... 1. That the restraint is partial; 2. That it is founded upon a valuable consideration; and 3. *That it is reasonable and not oppressive.*268

How important is hardship to the employee in evaluating reasonableness? Simply stated, it is not dispositive, and hardship will not defeat enforcement of an otherwise reasonable restraint.

The Ohio Supreme Court observed in *Grasselli v. Lowden*269 that reasonableness is not measured by reference to a restraint's "effect upon the rights and interests of the covenantor" but rather upon its effect upon the rights of the covenantee and the rights and interests of the public.270 Hardship to the covenantor was, thus, not a separate focus of inquiry. The test of reasonableness was, instead, whether the restraint was no broader than necessary to protect the

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266 The general case law reflects a doctrinal rigidity that has, largely, confined the protectable employer's interests to trade secrets or confidential business information and the employer's relationships with its customers. *See generally Blake, supra note 6, at 653-74; Carpenter, supra note 13, at 268-69; Handler & Lazaroff, supra note 140, at 729.* In commenting on the enforceability of employment noncompetition covenants, the reporter to the *RESTATEMENT OF CONTRACTS* (1932) observed that covenants could be enforced only to prevent the use of trade secrets or customer lists or only if the services of the employee were unique. *Id.* § 516(f), comment h. The ancillary restraint doctrine does not mandate this fixation on trade secrets and customer contacts, and the Ohio courts properly recognize a range of other interests. *See notes 254-65 supra and accompanying text.*

267 2 Ohio St. 520 (1853).

268 *Id.* at 528 (emphasis added).

269 11 Ohio St. 349 (1860).

270 *Id.* at 357. *See supra notes 52-60 and accompanying text.*
legitimate interests of the covenantee. If it was broader than those interests, then it was "oppressive" and, consequently, interfered with the interests of the public.271

The Ohio Supreme Court in later decisions clearly intended no departure from this analysis, emphasizing in Briggs v. Butler,272 for example, that its holding on the enforceability of the noncompetition covenant before it was totally consistent with earlier decisions by the court. Nonetheless, the court explained, in enforcing the covenant, that it was "not unreasonably restrictive upon the rights of the employee".273 By the time it decided Raimonde v. Van Vlerah,274 the court had, through inadvertence rather than analysis, insinuated hardship into the original Lange v. Werk reasonableness calculus:

A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if it is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public.275

Even if hardship to the employee is separately evaluated, as this formulation implies, it should not be viewed in isolation. There is no suggestion in Raimonde that any departure was intended from the Grasselli directive that reasonableness is not measured by a restraint's "effect upon the rights and interest of the covenantor".276 Viewing hardship in isolation would mean that an otherwise reasonable covenant could not be enforced if inconvenience to the employee were of a sufficient magnitude. This would have the effect of overriding all employer interests, no matter how certain or paramount, and it could cause exactly the unfair competition that ancillary restraints are intended to

271 In following the three-part test of enforceability used in Lange v. Werk, the Grasselli court repeated that the restraint must be reasonable and "not oppressive". 11 Ohio St. 349, 357 (1860). The reference to "oppressive" was borrowed directly by the court from the formulation of reasonableness in Homer v. Graves, 7 Bingham 735, 131 Eng. Rep. 284 (1831):
Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable.
Whatever is injurious to the interest of the public is void, on the grounds of public policy.
Id. at 743, 131 Eng. Rep. at 287. See supra note 11 and accompanying text for the full quote.

272 140 Ohio St. 499, 511, 45 N.E.2d 757, 763 (1942).
273 Id.
274 42 Ohio St. 2d 21, 325 N.E.2d 544 (1975).
275 Id. at 26, 325 N.E.2d at 547 (emphasis added).
276 Grasselli v. Lowden, 11 Ohio St. 349, 357 (1860).
foreclose. Indeed, to evaluate reasonableness by reference to employee hardship alone would put the unscrupulous competitor in the enviable position of being able to nullify another firm’s noncompetition covenants merely by selectively hiring those employees who would experience the greatest personal hardship from enforcement.

Consistently with the analytical flexibility inherent in the ancillary restraint doctrine, the Ohio courts have viewed hardship to the employee as something less than a dispositive circumstance. The Supreme Court’s decision in Rogers v. Runfola & Associates, Inc.277 proves the point. After acknowledging that the covenants under review would, if enforced, impose “excessive hardship” on the former employees,278 the court advanced to consider what restrictions should nonetheless be enforced against the employees. Taking into account the business interests of the former employer warranting protection, the court modified the covenants and enforced them in part.279

One measure of hardship to the employee is the availability of other employment if the covenant is enforced. The fact that an employee can, by reason of his training and experience, seek or accept employment with a firm other than a direct competitor has repeatedly been deemed to be convincing evidence that a covenant is not unreasonable.280 No Ohio decisions have been found in which an employee’s inability to find satisfactory alternative employment has, itself, foreclosed enforcement of an otherwise reasonable covenant.281

278 Id. at 8, 565 N.E.2d at 544. The majority was unmoved by the dissent’s eloquent plea for mercy. The dissent stressed that enforcement of the covenants, even partially, would cause “particularly onerous” hardship to the employees. Id. at 10, 565 N.E.2d at 545.
279 Id. at 9, 565 N.E.2d at 544.
281 A covenant barring an employee from working anywhere in the world in a business the same as or similar to that of his former employer was deemed unreasonable in Columbus Midway, Inc. v. Holtz, No. 3378, slip op. at 2 (Ohio Ct. App. Dec. 29, 1988) (1988 WL 142304 (Ohio App.)). The employee was barred from working in the trash compactor parts business anywhere, and the court of appeals found no
In addition to the availability of alternative employment, hardship to the employee can be evaluated by reference to the severity of sanctions for breach of the noncompetition covenant. The courts typically consider the sanction as an integral part of the reasonableness evaluation, but it can better be considered under the heading of employee hardship. Forfeiture of insurance renewal commissions has, for example, not been deemed unreasonable. Likewise, forfeiture of stock rights has not been deemed unreasonable, and forfeiture of pension rights has been held not to impose an undue hardship or be otherwise unreasonable. Although there is no reason why liquidated damages cannot be awarded in the appropriate case for breach of a noncompetition covenant, it

error in the trial court's determination that the restraint thereby imposed an undue hardship on the employee. Hardship was caused by the overbreadth of the covenant, which was itself a basis for holding the restriction unreasonable. To the same effect, see Williams v. Hobbs, 9 Ohio App. 3d 331, 333, 460 N.E.2d 287, 290 (1983).

Section 188(1) of the Restatement (Second) of Contracts (1981) provides that an ancillary restraint may be unreasonable if it is broader than needed to protect the promisee's legitimate interests or if the promisee's need is outweighed by hardship to the promisor and likely injury to the public. The reporter observes that the harm to the employee may be excessive if the restraint limits his personal freedom by preventing him from earning his livelihood if he quits. Id. § 188, comment c. This provision of the Restatement has been strenuously, and correctly, criticized as suggesting that employee hardship can, standing alone, block enforcement of an otherwise reasonable restraint. See Handler & Lazaroff, supra note 140, at 739-48.


284 E.g., Knapp v. S. Jarvis Adams Co., 135 F. 1008, 1012-14 (6th Cir. 1905) (Ohio parties).


286 See, e.g., Grasselli v. Lowden, 11 Ohio St. 349, 361-62 (1860) (restriction incident to sale of business); Lange v. Werk, 2 Ohio St. 520, 533-35 (1853) (same).
has been held that liquidated damages may make unreasonable an otherwise enforceable employee noncompetition covenant. 287

3. Public Interest.

As the Ohio Supreme Court explained in Grasselli v. Lowden, 288 if a restraint is no broader than needed to protect the legitimate interests of the covenantee, it is necessarily consistent with, and has no adverse effect upon, the public interest. 289 By necessary implication, it is in the public interest to enforce a covenant to the extent necessary to protect the legitimate interest of the covenantee. 290

There is no need to look any further to identify the public interest. Although, in common with employee hardship, this interest was separately identified by the court in Raimonde v. Van Vlerah 291 as one element of the tripartite test for evaluating the reasonableness of an employee noncompetition covenant, 292 separate consideration of the public interest is unwarranted. Isolation of public interest as an independent criterion of reasonableness would suggest that enforcement of an otherwise reasonable covenant could be barred if inconsistent with the public interest. The proposition is self-contradictory since enforcement of a properly limited restrictive covenant is, ipso facto, in the public interest. 293

287 E.g., Menter & Rosenbloom Co. v. Gray, Hosea's Reports 95, 98-100 (Super. Ct. 1899). Cf. Cad Cam, Inc. v. Underwood, 36 Ohio App. 3d 90, 521 N.E.2d 498 (1987) (liquidated damages clause was an unenforceable penalty and injunctive relief not available because restraint was unreasonable). Whether enforcement of a liquidated damages provision would be reasonable is directly related to whether the scope of the covenant is broader than that reasonably necessary to protect the legitimate interests of the covenantee. In Cad Cam, the court of appeals concluded that the liquidated damages provision was in fact a penalty clause, imposing damages entirely disproportionate to any actual injury that might be suffered by the former employer from the employee's departure and employment by a direct competitor. 36 Ohio App. 3d at 93-94, 521 N.E.2d at 501-02.

288 11 Ohio St. 349 (1860).

289 Id. at 357-58.

290 See generally Handler & Lazaroff, supra note 140, at 718-27, 731-39.

291 42 Ohio St. 2d 21, 325 N.E.2d 544 (1975).

292 Id. at 26, 325 N.E.2d at 547. See supra note 275 for the text of the test.

293 It has been held that it would not be in the public interest to enforce a noncompetition covenant against a radiologist where to do so would have prevented him from working at one of the few osteopathic hospitals in Franklin County in which he could practice his specialty. Williams v. Hobbs, 9 Ohio App. 3d 331, 333, 460 N.E.2d 287, 290 (1983). Evaluation of the public interest was not dispositive, for the trial court had also found that the restrictive covenant was unreasonable because greater than that required for protection of the radiologist's former employer. Id. To the same effect, see Northwest Ohio
4. **Scope of the Restraint.**

In evaluating whether a restriction is no broader than that needed to protect the legitimate interests of the covenantee, it is necessary in every case to look at geographic extent and duration. Even if the restraint is justified by the need to protect the employer's interests, it is enforceable only to a degree, temporally and geographically, appropriate for protection of those interests.

Before addressing the geographic and temporal scope of restraints, however, it may be profitable to consider another aspect of scope that bears directly upon reasonableness: the immediacy of competitive harm. The more remote the prospect of competitive harm from the employee's new job, the less likely a restraint will be found to be reasonable. A covenant restricting an employee from accepting work with a new employer engaged in the "same or similar" business as the former employer is less likely to be enforced, for example, than a covenant restricting the employee from accepting employment in a position directly competitive with the position he had occupied in his former employment. Likewise, a covenant restricting an employee from working for a company engaged in any activity competitive with an activity of the former employer could be unreasonable if the employee's new responsibilities were not competitive with those in which he had been engaged on behalf of his former employer.

Anesthesia Servs., Inc. v. Lymanstall, No. 7-87-4, slip op. at 3 (Ohio Ct. App. August 4, 1989) (1989 WL 87027 (Ohio App.)) (covenant not enforced against anesthetist because it was broader than necessary for protection of former employer, caused undue hardship to the anesthetist and was injurious to the public).

To the extent the formulation of the ancillary restraint doctrine in the **Restatement (Second) of Contracts** (1981) suggests that the public interest may constitute a separate, independent basis for denying enforcement of an otherwise reasonable covenant, id. § 188(1)(b), it has properly been criticized as an unwarranted departure from the case law. See Handler & Lazaroff, supra note 140, at 731-39. The single exception may be the prohibition against enforcement, on public policy grounds and the Code of Professional Responsibility, of noncompetition covenants against lawyers. See, e.g., Cohen v. Lord, Day & Lord, 75 N.Y.2d 95, 101, 550 N.E.2d 410, 413, 551 N.Y.S. 2d 157, 160 (1989).

See, e.g., Die-Gem Co. v. Miller, No. 13806, slip op. at 2-3 (Ohio Ct. App. March 1, 1989) (1989 WL 16889 (Ohio App.)) (restriction modified to bar employee from selling the three categories of products comprising eighty percent of former employer's sales). Enforceability does not turn upon proof that the employee is doing exactly the same work in the new position as in the former. Unfair competition can occur even though job responsibilities may differ in the new employment, and its prevention is properly the subject of a noncompetition covenant. To the extent that the court in WKBN Broadcasting Corp. v. Levin, No. 88 C.A. 175, slip op. at 4 (Ohio Ct. App. May 5, 1989) (1989 WL 49497 (Ohio App.)), declined to enforce a covenant because the employee did not "seek to perform precisely the same work", it was mistaken.
An employee moving from one division of a large corporation to a non-competitive division of a second corporation does not, under normal circumstances, pose any threat of unfair competition to the former employer. The situation would be different, of course, if there were some prospect that the employee, even though engaged in a non-competitive activity for the new employer, would be in a position, or might otherwise have the incentive, to compromise the former employer's trade secrets, know-how, customer contacts or other interests by disclosing information or otherwise assisting the new employer in its competitive efforts against his former employer.

**Geographic Scope.** Where a covenant had no geographic restriction specified, it had universally been held that it was unenforceable and void. This is no longer true, as the Ohio Supreme Court's holding in *Raimonde v. Van Vlerah* permits a court to enforce a covenant to the extent reasonable. Covenants can now be enforced even though they may be silent as to geographic scope. Oblivious to the holding of *Luftin Rule Co. v. Fringel* that a restraint extending beyond the State of Ohio would be deemed to be a general restraint and therefore void and unenforceable, both lower Ohio courts and federal courts have, since *Raimonde*, enforced employment restrictions of world-wide scope or covering Canada, United States and Western Europe, the United States alone or having no geographic limitations whatsoever. It was held in *Hubman Supply Co. v. Irvin* that *Luftin Rule* foreclosed enforcement of

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295 See generally Blake, supra note 6, at 676-77; Hutter, supra note 246, at 335; Kales, supra note 103, at 196-97.
297 42 Ohio St. 2d 21, 25-26, 325 N.E.2d 544, 547 (1975).
299 57 Ohio St. 596, 603-04, 49 N.E. 1030, 1033 (1898). See supra notes 68-85 and accompanying text.
301 Nordson Corp. v. Plasschaert, 674 F.2d 1371, 1377 (11th Cir. 1982) (Ohio law).
304 119 N.E.2d 152 (Ohio C.P. 1953).
any covenant having a scope beyond the State of Ohio,\(^\text{305}\) but this may be the only decision in which the implications of *Lufkin Rule* have been accurately understood.\(^\text{306}\)

Where Ohio courts have focused on the geographic extent of the employer’s business, they have encountered no difficulty enforcing covenants of multi-state scope.\(^\text{307}\) As a general proposition, a restraint is reasonable in geographic scope if it is coextensive with the geographic scope of the co-venantee’s business\(^\text{308}\) or if it is no broader than the territory assigned to a salesman or manager.\(^\text{309}\) In the case of research and development personnel, whose activities are not confined to any particular geographic segment of a business, restrictions at least coextensive with the market area of the employer’s business are appropriate.\(^\text{310}\)

\(^{305}\) Id. at 154-55 (enforcement denied).


\(^{310}\) E.g., Nordson Corp. v. Plasschaert, 674 F.2d 1371, 1377 (11th Cir. 1982) (Ohio law) (coventen enforced to include United States, Canada and Western Europe); Ganguly v. Mead Digital Sys., No. 8225, slip op. at 4-6 (Ohio Ct. App. Sep. 20, 1984) (LEXIS, States library, Ohio file) (world-wide enforcement).
The more narrowly focused a restriction, the more readily it will be deemed to be reasonable, and restrictions that merely limit an employee from soliciting his former employer's customers are routinely enforced.311

**Duration.** In evaluating reasonableness of duration, a wide range of considerations may be taken into account,312 but the Ohio decisions have, typically, approved as reasonable various periods of restriction without any discussion of the basis for doing so. This approach is consistent with that taken in the decisions enforcing restrictive covenants incident to the sale of business. As suggested above,313 by the time the courts get to this stage in their analysis, their attention span is usually exhausted.

The most that can be found in the Ohio decisions is some suggestion that one measure of reasonable duration is the length of time it would take to hire and train a replacement employee.314 Another measure of reasonable duration may be the time it would take a competitor to independently develop, through reverse-engineering or otherwise, trade secrets or confidential information sought to be protected by a restrictive covenant.315

The lack of specific guidance on evaluating duration leaves with the courts a great deal of flexibility in determining reasonableness, even to the point of implying a reasonable time for the restriction where the agreement is totally silent as to duration.316 Since *Raimonde*, the courts have routinely modified contractual provisions for the purpose of arriving at a duration that is, in the

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312 See generally Blake, supra note 6, at 677-78; Note, supra note 142, at 170-73 (restrictive covenants generally).

313 See supra notes 129-42 and accompanying text.


court’s view, reasonable. \(^{317}\) Regardless of the analysis, or lack of it, reflected in the opinions, courts have enforced covenants under Ohio law for one year, \(^{318}\) 18-months, \(^{319}\) two years \(^{320}\) or longer. \(^{321}\) In the event of successful enforcement of a covenant by the former employer, duration is measured from the entry of final judgment after any appeals, not from the date of termination of employment. \(^{322}\)


\(^{322}\) Rogers v. Runfola & Assocs., Inc., 57 Ohio St. 3d 5, 9, 565 N.E.2d 340, 344 (1991); Trim-Line of Toledo, Inc. v. Carroll, No. L-86-176, slip op. at 2 (Ohio Ct. App. Feb. 25, 1987) (1987 WL 7056 (Ohio App.)); Columbus Medical Equip. Co. v. Watters, 13 Ohio App. 3d 149, 152, 468 N.E.2d 343, 348 (1983); Duracote Corp. v. Ryan, No. 1247, slip op. at 2 (Ohio Ct. App. April 15, 1983) (LEXIS, States library, Ohio file). As the court of appeals observed in Trim-Line of Toledo, any other approach would have the effect of "sanctioning litigation as a delay tactic". Slip op. at 2. If time were measured from the date of termination, an employee could successfully defeat enforcement of a reasonable covenant by simply delaying the conclusion of litigation until the restriction period had lapsed, thereby mooting the controversy. Apparently oblivious to these authorities, the Court of Appeals for the Sixth Circuit held in Moraine Indus. Supply, Inc. v. Sterling Rubber Prods. Co., 891 F.2d 133, 135-36 (6th Cir. 1989), that a preliminary injunction enforcing a noncompetition covenant could not extend beyond the period of the restraint as provided in the employment contract. The court relied upon authorities from other jurisdictions but ignored what should have been controlling Ohio law in a diversity case. The Ohio Supreme Court expressly disapproved the Sixth Circuit’s holding in Rogers.
D. *Restrictive Covenants Incident to Other Relationships.*

Although Judge Taft, writing in 1914, was able to identify five categories of restrictive covenants recognized at common law, the courts have since recognized a number of additional settings in which restrictive covenants may be appropriate. Restrictive covenants are frequently used in supplier-customer relationships, joint ventures and licensing. As will be shown below, conventional ancillary restraint analysis is equally applicable in evaluating restrictions in these settings.

**Supplier-Customer Relationship.** The supplier-customer relationship may justify a restrictive covenant under a variety of different circumstances. If, for example, the supplier is manufacturing a product pursuant to the specifications of the customer, a covenant restricting the manufacturer from making and selling the same product to a competitor of the customer may be reasonable. Under Ohio law, any such restriction on a manufacturer's exploitation of its know-how must be specifically provided for by contract; it will not be implied.

Another restraint that may be appropriate in the supplier-customer relationship is a promise by a distributor that he will not compete against his supplier for a reasonable period of time after termination of the distribution relationship. It was held in *Ideal Milk Co. v. Blevins* that such a covenant of two years' duration, limited to the distributor's geographic territory, was reasonable and therefore enforceable where the purpose of the restriction was to "prevent the solicitation of plaintiff's customers" in the event the distributorship was terminated. Although not discussed by the court, the identity of plaintiff's customers was presumably confidential and proprietary and therefore

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323 W. Taft, supra note 5, at 10.
324 Judge Taft had earlier itemized these five categories of restrictions in United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899), as covenants incident to employment, to the sale of a business or property or to creation and operation of a partnership. Id. at 281. See supra note 35 and accompanying text.
325 See, e.g., Gordon v. Deckebach, 9 Ohio Dec. Reprint 324, 326-27 (Dist. Ct. 1883) (enforcement of restrictive covenant would be reasonable only until such time as patents were issued on secret manufacturing process). Accord, e.g., Baker's Aid v. Hussmann Foodservice Co., 730 F.Supp. 1209, 1214-15 (E.D.N.Y.1990) (New York law; covenant enforced under "rule of reason" to prohibit manufacturer from using for a ten-year period specifications of customer for the manufacturer of commercial rack ovens).
328 Id. at 78, 307 N.E.2d at 179.
an appropriate subject for protection by means of a restrictive covenant.\textsuperscript{329} This kind of restraint very closely resembles, obviously, a noncompetition covenant incident to employment. Although the distributor in \textit{Ideal Milk Co.} was an independent businessman, he could just as readily have been an employee and perform the same functions.

A manufacturer may choose to impose a wide range of resale restrictions on its dealers or distributors, and these have repeatedly been addressed under Section 1 of the Sherman Act. They run the gamut from a promise to sell the product only from certain specified locations,\textsuperscript{330} to a promise not to sell to customers outside a specific territory\textsuperscript{331} to a promise not to resell to certain categories of customers.\textsuperscript{332} A manufacturer may also exact a promise from a dealer or distributor not to carry goods competitive with those of the manufacturer.\textsuperscript{333} With the exception of resale price maintenance agreements, these "vertical" ancillary restrictions are all subject to evaluation under the rule of reason.\textsuperscript{334} Although there is no inevitability to it, distribution restrictions of these kinds have long been evaluated almost exclusively under the Sherman Act or Valentine Act. There are virtually no common law Ohio decisions,\textsuperscript{335} but the


\textsuperscript{331} \textit{See, e.g.,} Assam Drug Co. v. Miller Brewing Co., 798 F.2d 311, 314 (8th Cir. 1986); Dart Inds., Inc. v. Plunkett Co., 704 F.2d 496, 499 (10th Cir. 1983). \textit{See generally 8 P. AREEDA, supra note 330, at ¶ 1641b.}

\textsuperscript{332} \textit{See, e.g.,} Davis-Watkins Co. v. Service Merchandise Co., 686 F.2d 1190, 1195,1200-01 (6th Cir. 1982); Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1005-07 (5th Cir.) (La. law, following federal courts' application of Section 1 of the Sherman Act), cert. denied, 454 U.S. 822 (1981). \textit{See generally 8 P. AREEDA, supra note 330, at ¶ 1641c.}

\textsuperscript{333} \textit{See, e.g.,} Roland Mach. Co. v. Dresser Inds., Inc., 749 F.2d 380, 393-96 (7th Cir. 1984); Hendricks Music Co. v. Steinway, Inc., 689 F.Supp. 1501, 1505-06, 1531-33, 1543 (N.D. Ill. 1988). \textit{See generally 8 P. AREEDA, supra note 330, at ¶ 1610.}

\textsuperscript{334} \textit{See, e.g.,} Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n. 18, 57 (1977). Vertical agreements to fix prices have been deemed to be \textit{per se} illegal under the Sherman Act and therefore not subject to rule of reason evaluation. \textit{See, e.g.,} Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984). \textit{See generally 8 P. AREEDA, supra note 330, at ¶¶ 1620-40; supra note 186.}

\textsuperscript{335} In at least one reported case, however, resale price maintenance agreements were held to be void and unenforceable under Ohio's common law of restraints of trade. \textit{See Freeman v. Miller,} 21 Ohio Dec. 766, 769-71 (Super. Ct. 1909).
statutory analysis has evolved directly from, and very closely approximates, analysis under the ancillary restraint doctrine. The legality of the restraints is governed by the rule of reason. 336

**Combinations Among Competitors.** Agreements between competitors made solely for the purpose of restricting competition are always void. By definition, they restrain trade, and the Ohio courts have consistently declined to enforce them. 337 If, however, the agreement restricting competition between or among the competitors is ancillary to a proper purpose, the agreement may be enforceable.

Judge Bork had occasion to review restraints ancillary to a combination among competitors in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.* 338 The case was decided under the Sherman Act, but its analysis of ancillary restraints is equally applicable to restrictive covenants evaluated under contract principles. The plaintiff, Rothery, was an authorized agent of Atlas Van Lines.

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337 See, e.g., Emery v. Ohio Candle Co., 47 Ohio St. 320, 322, 24 N.E. 660, 660-61 (1890) (combination among 95% of the manufacturers of candles east of Utah to increase the price and decrease the manufacture of candles); Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666, 672 (1880) (combination of salt manufacturers for the purpose of regulating the price and grade of salt); Hoffman v. Brooks, 6 Ohio Dec. Reprint 1215, 1218 (Ct. App. 1884) (combination of tobacco warehousemen in Cincinnati for the purpose of limiting competition and fixing prices); McHirney & Johnston White Lead Co. v. Consolidated Lead Co., 8 Ohio Dec. Reprint 762, 763-64 (Super. Ct. 1883) (combination among manufacturers of white lead west of Buffalo for the purpose of restricting prices); Graf v. Master Horseshoers' Protective Ass'n, 15 Ohio Dec. 18, 22 (Super. Ct. 1904) (price-fixing agreement among dealers in plumbing supplies). For a brief judicial review of early decisions from other states refusing to enforce agreements among competitors, see Northern Secs. Co. v. United States, 193 U.S. 197, 338-41 (1904). See generally H. Thorelli, supra note 5, at 36-50; Hovenkamp, supra note 5, at 1029-41.

There is some question whether such an agreement is unlawful under New York law. A processor of scrap metal in Rochester agreed with its only competitor to refrain from shredding scrap for sale to steel mills and other users in return for payment by the competitor of two percent of its annual gross sales from the sale of shredded scrap for the next seven years. The appellate division of the New York Supreme Court held that the contract was valid and enforceable under either New York law or the Sherman Act. Atkin v. Union Processing Corp., 90 App. Div. 2d 332, 335-36, 457 N.Y.S.2d 152, 155-56 (4th Dep't 1982), aff'd mem., 59 N.Y.2d 919, 453 N.E.2d 522, 466 N.Y.S. 2d 293 (1983), cert. denied, 465 U.S. 1038 (1984). In opposing the denial of certiorari, Justice White expressed incredulity, noting that the agreement was a naked market division between two direct competitors and therefore per se illegal under Section 1 of the Sherman Act. 465 U.S. at 1039-40. The decision may reflect an idiosyncrasy of New York law in paying special deference to contracts that restrain trade between only two parties. See Hovenkamp, supra note 5, at 1035-36.

Atlas is a nationwide common carrier of used household goods that has engaged independent moving companies throughout the country as its agents. The companies execute a standard agency contract with Atlas by which they agree to adhere, when making shipments on Atlas' authority, to such terms as standard operating procedures, maintenance and painting specifications and uniform rates. When Rothery and other agents declined to comply with certain new Atlas requirements, they were terminated. They subsequently sued, alleging that they had been terminated pursuant to a group boycott comprised of competing moving companies that were participants in the Atlas system.

In analyzing whether the Atlas system constituted an unlawful combination of competitors, Judge Bork concluded that the restrictions imposed by Atlas were necessary if the system were to function effectively. Stated differently, the "ancillary restraints are essential to the efficiency of a contract integration". Without the restrictions, the system could not even exist, much less function as an effective competitor:

... [T]hese restraints are ancillary to the contract integration or joint venture that constitutes the Atlas van line. The restraints preserve the efficiencies of the nationwide van line by eliminating the problem of the free ride. There is, on the other hand, no possibility that the restraints can suppress market competition and so decrease output. Atlas has 6% or less of the relevant market, far too little to make even conceivable an adverse effect upon output. If Atlas should reduce its output, it would merely shrink in size without having any impact on market price. ... Under the rule of Addyston Pipe & Steel, BMI, NCAA and Pacific Stationery, therefore, it follows that the Atlas agreements do not violate section 1 of the Sherman Act.

Restraints ancillary to agreements among competitors may be reasonable, and therefore enforceable, on a variety of different grounds. In Rothery, the ancillary restraints were necessary if the Atlas system were even to exist as a competitor of other nationwide moving companies. Ancillary restraints may also

339 Id. at 211.
340 Id. at 213.
341 Id. at 229.
342 Id.
343 Id. (footnote omitted).
be necessary for the purpose of carrying out research and development activities that a single competitor could not efficiently carry out on its own. If the ancillary restraints are essential to the existence of the combination, they may be reasonable. 344

Although there appear to be no Ohio decisions addressing restraints ancillary to combinations among competitors, 345 they should be subject to the same rule of reason analysis as any other ancillary restraint. Specifically, is the restraint reasonably limited in territory and duration and no broader than necessary to protect the legitimate interests of the covenantee?

**Licensing.** Covenants restraining competition may also be appropriate with trademark or know-how licensing. If, for example, a party is given access to valuable training, business assistance or confidential information pursuant to a trademark license, the licensor may reasonably require, as a condition of the license, that the licensee will refrain from directly competing against the licensor following termination of the license. Franchise agreements typically provide for this kind of restrictive covenant.

A transmission repair shop franchisor sought to enforce a post-termination covenant in *Interstate Automatic Transmission Co. v. W.H. McAlpine Co.* 346 In evaluating whether to enforce the covenant against a former franchisee in the Toledo area, the court observed that a covenant incident to a franchise agreement has elements both of a covenant incident to an employment contract and one incident to the sale of a business. 347 Citing *Raimonde v. Van Vlerah,* 348 the

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345 A partnership is not typically viewed as a joint venture or combination among competitors, but it can be so viewed in the appropriate case. For an Ohio decision holding unreasonable a noncompetition covenant ancillary to a partnership agreement between two physicians, see Droba v. Berry, 139 N.E.2d 124, 126-29 (Ohio C.P. 1955).


347 Id. slip op. at 1-2.

348 42 Ohio St. 2d 21, 325 N.E.2d 544 (1975).
court observed that, under Ohio law, a noncompetition covenant must -- whether incident to the sale of a business or to employment -- satisfy the following criteria: (1) it must be ancillary to an otherwise lawful contract and reasonable in duration and territorial scope; (2) it must be no greater than required to protect the covenantee; (3) it must not impose undue hardship on the covenantor; and (4) it must not be injurious to the public.349

The court had no difficulty concluding that the one-year duration and ten-mile radius of the covenant were reasonable, but it held that the covenant was broader than necessary to protect the legitimate interests of the covenantee. Specifically, the covenant would have prevented the franchisee, if enforced, from opening a transmission repair shop within ten miles of his former place of business even though the franchisor was not operating another repair shop within the franchisee’s territory at the time of termination.350 The court held that the covenant was therefore unreasonable and unenforceable.351

The court of appeals for Lucas County enforced a noncompetition covenant against a former franchisee in *Discount Muffler Shops, Inc. v. Seely.*352 Pursuant to the franchise agreement, the franchisee promised that he would not operate within 75 miles of Toledo a muffler installation business for a period of three years following termination of his franchise agreement.353 The franchisee, Seely, breached the covenant and was sued by the franchisor. The court readily concluded that the covenant was reasonably necessary to protect the legitimate interests of the franchisor:

The record further discloses that appellant [franchisor] provided appellee [Seely] with the initial financing necessary to start the business and offered some continued assistance in building the business. Although the evidence is insufficient to establish that appellant’s method of operation constituted a trade secret, the evidence does indicate that appellant’s operations were sufficiently different from those of other muffler installers to provide

349 No. C80-320, slip op. at 2.
350 Id. slip op. at 4-5.
351 For a similar holding, see *American Nursing Care of Toledo, Inc. v. Leisure*, 609 F. Supp. 419, 432-33 (N.D. Ohio 1984) (Ohio law; enforcement of covenant against former franchisees would impose undue hardship on franchisees and would exceed any protection reasonably needed by franchisor).
353 Id. slip op. at 2-3.
appellant with a significant competitive edge. Because appellee operated his own shop under the franchise arrangement, appellee also had sole direct contact with the customers of the shop.

Considering the foregoing factors, we find that some restrictions prohibiting appellee from competing with appellant is reasonably necessary to protect appellant's legitimate interests.  

Following the holding in *Raimonde* that a court may reform an otherwise unreasonable covenant, the court modified the covenant to extend 25 miles from Toledo for a period of one year.  

The federal court in Akron applied a comparable analysis to enforce a noncompetition covenant in *Patio Enclosures, Inc. v. Swanson*. The court expressed some concern that Ohio law did not offer clear guidance on what analysis should apply to evaluation of a noncompetition covenant incident to a franchise agreement. After reviewing authorities from other jurisdictions, the court concluded that covenants incident to a franchise should not be analyzed in the same fashion as covenants incident to an employment relationship. Instead, the court reasoned that it would be preferable to emphasize that the franchise noncompetition covenant should be viewed as one in which both of the parties are "business entities" rather than employer-employee.  

The court explained the proper analysis for evaluation of the reasonableness of a noncompetition covenant incident to a franchise relationship in the following terms:

In the absence of any guiding precedent from the Ohio Supreme Court, the Court applies Ohio law in the same manner as the Court expects that the Ohio Supreme Court would. The Court finds that consideration of the reasonableness of Swanson's covenant not to compete must include concerns applicable to the sale and purchase of franchise materials between what are

3 Id. slip op. at 3.
35 Id.
357 Id. slip op. at 12.
358 Id. slip op. at 16.
essentially co-investing parties in the creation and maintenance of franchise outlets. Thus, the reasonableness of a franchise covenant not to compete depends upon the mutual protection of the interests of the former franchisee, the remaining franchisees, the franchisor and the general public. Having examined Raimonde, the Court finds that Raimonde is inapposite to the case at hand because the restrictive test applied to an employee's covenant not to compete fails to account for the additional interests present in the franchisee-franchisor relationship. The test of franchise covenant not to compete's enforceability is whether the restriction is reasonably necessary for the protection of the franchisor and remaining franchisees and whether an undue hardship is placed upon the former franchisee by enforcement of the terms of the covenant. The two most common hardship concerns are the duration of time and geographical extent of the limitation.359

The test in Patio Enclosures does not differ in any material respect from the general formulation of the ancillary restraint doctrine of Lange v. Werk. While it is understandable how the court, by focusing attention on the list of reasonableness criteria in Raimonde,360 may have concluded that Ohio has established a different test for evaluating restrictive covenants ancillary to employment, this is not the case, as detailed in the preceding discussion.361 The test formulated by the court for evaluating the reasonableness of a restrictive covenant ancillary to a franchise relationship is entirely consistent with the ancillary restraint doctrine generally.

In evaluating the ancillary restraints, the court eschewed any doctrinaire adherence to formulae. For example, it turned aside the franchisee’s contention that the covenant could be enforced only if it could be shown that, without it, the franchisor’s trade secrets would be disclosed or its goodwill lost.362 The court explained that its evaluation of reasonableness was not confined to whether trade secrets or goodwill had been compromised:

359 Id. slip op. at 17-18 (emphasis added).
360 These criteria are taken verbatim from Extine v. Williamson Midwest, Inc., 176 Ohio St. 403, 200 N.E.2d 297 (1964). For the text of the criteria, see supra note 229 and accompanying text.
361 See supra notes 232-40 and accompanying text.
362 No. 5:90CV 0328, slip op. at 19.
While these are common elements used to justify enforcement of a restrictive covenant in the employee setting, they are not the only considerations, especially in the franchise setting. The Court finds that Patio has a protectable interest in its method of doing business. Further, because the franchise itself is a protectable interest, Patio may demonstrate harm arising from breach of a franchisee's covenant not to compete without proving that its information constitutes a trade secret. Although some courts have found similar types of franchise information to be trade secrets, the Court need not define the aid franchisor provides to franchisees as a trade secret in order to enforce a restrictive covenant signed by the franchisee. 363

Another licensing setting in which an ancillary restrictive covenant may be appropriate is the licensing of know-how and trade secrets. Although there appear to be no reported Ohio decisions addressing a restrictive covenant incident to a know-how license, its reasonableness should be governed by the same considerations that govern the reasonableness of any restrictive covenant. If the promise to refrain from competing against the licensor of the know-how is limited to the scope of the know-how licensed, the protection gained by the covenantee should be no broader than that required for protection of its legitimate interests. 364

Whereas a promise by the licensee of a trade secret that it will not, following termination of the licensing agreement, compete against the licensor can readily be justified as necessary to protect the licensor against subsequent use, even if inadvertent, of its trade secrets, it is difficult to see how any such covenant could be justified incident to a patent license. The patent laws give the owner of a patent a monopoly over its use, and any limitation on a former licens-

363 Id. at 19-20 (footnote omitted). For an example of a case in which it was held that a noncompetition covenant incident to a franchise agreement could not be enforced by the franchisor without proof of threatened use by the franchisee of the franchisor's trade secrets, see Scott v. Snelling & Snelling, Inc., 732 F.Supp. 1034, 1044-45 (N.D. Cal. 1990). After concluding that the franchise noncompetition covenant was subject to Section 16600 of the California Business and Professions Code, prohibiting any contract by which anyone is restrained from engaging in a profession, trade or business, the court considered whether the franchisor had satisfied the judicially-created exception to Section 16600 for threatened use or disclosure by the former franchisee of the franchisor's trade secrets. Id.

ee's ability to compete against the licensor could be viewed as an unlawful extension of the patent monopoly. The former licensee could, of course, infringe the patent by using it in competition with the licensor, but any protection that the licensor may need against the activities of a former licensee is provided by the patent monopoly.

The situation is different if know-how or trade secrets are the subject of the license. They are, by their nature, ephemeral and their value to the licensor inheres in their continued confidentiality. If a former licensee makes use of or discloses the trade secrets, they thereby cease to be the exclusive property of the licensor, depriving the licensor of the competitive advantage their continued secrecy gives.

V. Conclusion.

Judge Taft was confident in 1898 that he had identified all of the settings in which restraints ancillary to a contract may be reasonable. He could not have foreseen the commercial developments that would later lead to widespread use of these restraints in entirely new settings, including leases, franchises and know-how licensing. He could, however, look back on nearly 200 years of English and American decisions since Mitchell v. Reynolds and observe that the ancillary restraint doctrine had been sufficiently flexible to have remained during that period largely unchanged.

As this review of Ohio law shows, the doctrine retains its flexibility even today. The Ohio Supreme Court has not materially added to or altered the application of the doctrine since Judge Taft's decision in Addyston Pipe & Steel, and the Court has never suggested any hybrid analysis for particular applications of the doctrine. Whether the restraint under review is ancillary to the sale of a business, a lease, employment, a franchise or other contractual relationship, analytical uniformity is called for. The specific interests under review may differ from one setting to another, but the method of evaluating reasonableness should consistently focus on the competitive implications of the restraint. If the

competitive benefits outweigh the adverse competitive effects, the rule of reason is satisfied and the restraint should be enforced.