Preliminary Injunctions and TROs in Covenant Not to Compete Cases
Materials for Superior Court Judges' Conference, Summer 2005

TEMPORARY RESTRAINING ORDERS

I. General summary: TROs & preliminary injunctions

A. Temporary restraining orders

1. Purpose: Preserve status quo so that court can rule on a preliminary injunction.

2. Notice required to adverse party:

   TRO may be granted without notice if (1) it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (ii) the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required. Rule 65(b).

3. Content of TRO

   a) Must (1) set forth the reasons for its issuance; (2) be specific in terms; (3) describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained. Rule 65(d).

   b) Must also (1) have date and hour of issuance endorsed on order; (2) be filed w/clerk immediately and entered of record; (3) set forth injury that will result to applicant and explain why irreparable; (4) state why it was granted without notice; and (5) contain expiration date not more than 10 days from entry. Rule 65(b).

4. Duration:

   a) No more than 10 days from entry

   b) May be extended for one additional 10 day period if applicant makes request for extension within original 10-day period and shows good cause for extension. Reasons for granting any extension must be entered of record. May also be extended with consent of enjoined party. Rule 65(b).

5. Hearing on preliminary injunction

   a) At hearing on preliminary injunction, the party who obtained the TRO must go forward with request for preliminary injunction, or court must dissolve the TRO. Rule 65(b).

B. Preliminary injunctions

1. Purpose: Preserve the status quo until a trial on the merits. *See Lambe v. Smith*, 11 N.C. App. 580, 582, 181 S.E.2d 783, 784 (1971).

2. Grounds for granting (all related to preserving status quo and ability to vindicate rights at trial)

    a) It appears by the complaint that plaintiff is entitled to relief demanded and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to plaintiff;

    b) When, during the litigation, it appears by affidavit that a party thereto is doing or threatens is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or

    c) When, during the pendency of an action, it appears by affidavit of any person that the defendant threatens or is about to remove or dispose of his property with intent to defraud the plaintiff. G.S. § 1-485.

3. Burden of proof: On party seeking injunction. *See Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975).

    a) Must prove:

        (1) Likelihood of success on the merits (*see* merits of covenant not to compete cases below, p. 6+) and

        (2) Irreparable harm will result if injunctive relief is not granted, *Visionair, Inc. v. James*, 606 S.E.2d 359, 362 (N.C. App. 2004), or "in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983).

    b) Additional considerations:

        (1) Preliminary injunction appropriate when it "is the most appropriate [remedy] for preserving and protecting [plaintiff's] rights" and not where there is an adequate remedy at law. *A.E.P. Indus*., 308 N.C. at 406, 302 S.E.2d at 762 .

(2) Court may consider advantages/disadvantages (e.g. relative hardship) to the parties in determining whether to issue injunction. Pruitt, 288 N.C. at 372, 218 S.E.2d at 351.

c) Covenant not to compete (and other) cases seeking injunction as primary relief:

> "[W]here the primary ultimate remedy sought is an injunction; where the denial of a preliminary injunction would serve effectively to foreclose adequate relief to plaintiff; where no 'legal' (as opposed to equitable) remedy will suffice; and where the decision to grant or deny a preliminary injunction in effect results in a determination on the merits, plaintiff has made a showing that the issuance of a preliminary injunction is necessary for the protection of its rights during the course of litigation." *A.E.P. Indus.,* 308 N.C. at 410, 302 S.E.2d at 764.

4. Notice

a) **"No preliminary injunction shall be issued without notice to the adverse party."** Rule 65(a). "Notice" is not defined.

b) Rule 6(d) normally governs motion practice: requires 5 days notice before hearing on a motion. Also requires that affidavits be served with the motion, though the rule may not be followed in practice. Formal compliance with 6(d) may not be necessary if opposing party has adequate notice to allow preparation of a defense.

c) In analogous federal practice, most courts do not require compliance with Fed. R. Civ. P. 6(d). *See, e.g., Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.,* 269 F.3d 1149, 1154 (10th Cir.2001); *Ciena Corp. v. Jarrard,* 203 F.3d 312, 319 (4th Cir.2000); *Anderson v. Davila,* 125 F.3d 148, 156-57 (3d Cir.1997); *Levi Strauss & Co. v. Sunrise Intern. Trading Inc.,* 51 F.3d 982, 986 (11th Cir.1995); *Illinois ex rel. Hartigan v. Peters,* 871 F.2d 1336, 1340 (7th Cir.1989). *But see Parker v. Ryan,* 960 F.2d 543, 544-45 (5th Cir.1992) (requiring compliance with Fed. R. Civ. P. 6(d) except in "exceptional circumstances," such as where no facts are in dispute or defendant has a long period of actual, but no formal, notice).

5. Content of injunction

a) Injunction must (1) set forth the reasons for its issuance; (2) be specific in terms; (3) describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained;

b) Injunction is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice in any manner of the order by personal service or otherwise. Rule 65(d).

C. **Security for injunction or TRO**

1. Applicant must provide bond:

a) "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Rule 65(c).

(1) What does it mean to have been "wrongfully enjoined or restrained?"

- Final adjudication substantially favorable to the defendant on the merits of plaintiff's claim. *See Industrial Innovators, Inc. v. Myrick-White, Inc.*, 99 N.C. App. 42, 392 S.E.2d 425 (1990); or

- Final adjudication that does not address the merits – e.g., on jurisdictional grounds – if the defendant also shows that he or she was entitled to engage in the enjoined activity, *see id.*; or

- Voluntary dismissal (not by stipulation of parties). *See id*.

b) No security required of State of N.C., or its counties or municipalities, or officers or agencies acting in official capacity. Damages may be awarded against these parties. Rule 65(c).

c) Surety submits to court's jurisdiction of the court and irrevocably appoints clerk of court as agent for service of process. Rule 65(c).

d) Liability may be enforced upon motion (served on clerk) or by independent action. Rule 65(c).

(1) Wrongfully enjoined or restrained party may seek damages against party that procured the injunction and the surety by motion. No need to show malice or lack of probable cause if proceeding by motion. No right to jury trial if matter heard upon motion.

(2) Award of damages must be based on competent evidence. *Ronald G. Hinson Elec., Inc. v. Union County Bd. of Educ.,* 125 N.C. App. 373, 379, 481 S.E.2d 326, 330 (1997).

2. Bond may not be necessary if restrained party will suffer no material damages, where there is no likelihood of harm, and (perhaps) where applicant for relief has considerable assets. *See Keith v. Day,* 60 N.C. App. 559, 561-62, 299 S.E.2d 296, 297-98 (1983). But "any order that precludes one from earning a livelihood and that has the potential to destroy that person's means of income production for years to come is too potent to issue without security." *Id.*

3. Non-exhaustive list of factors relevant to amount of bond: likely duration of injunction (*i.e.,* time until completion of trial on merits), likelihood of harm to defendant if injunction is ultimately determined to be wrongful, severity of harm to defendant, plaintiff's ability to pay an award of damages if injunction is found to be wrongful.

4. Covenant not to compete cases: Where employer obtains injunction or restraining order against former employee:

   Barr-Mullin, Inc. v. Browning, 108 N.C. App. 590, 424 S.E.2d 226 (1993): Remanding to trial court for further consideration as to proper amount of bond. Trial court had required $10,000 bond for injunction barring former employee and his new company from marketing software. Employee and company had invested considerable resources in developing and marketing software and would lose substantial sales as a result of injunction. Record did not reveal that trial court had considered plaintiff/former employer's ability to respond in damages if injunction was found to be wrongful, or likelihood or amount of harm to defendants.

   Curtis 1000, Inc. v. Youngblade, 878 F. Supp. 1224 (D. Iowa 1995): Bond of $200,000 for preliminary injunction enjoining salesperson from violating covenant not to compete. Employer had high likelihood of success on merits, but salesperson had recently earned salary of $250,000, there was no evidence of salesperson's current salary, and parties agreed that trial could be completed in a year or less.

   Equipment & Sys. For Industry, Inc. v. Zevetchin, 864 F. Supp. 253 (D. Mass. 1994): Rejecting employer's argument for injunction issued with only nominal security and requiring $50,000 bond. Two former employees would be enjoined from representing 13 manufacturers as sales representatives, from selling to 18 and 19 customers, respectively, and would lose commissions and potentially future earnings from loss of reputation and goodwill.

Uncle B's Bakery, Inc. v. O'Rourke, 920 F. Supp. 1405 (D. Iowa 1996): Requiring bond even though employee had signed confidentiality agreement purporting to waive bond requirement, where injunction was also based on noncompete agreement that contained no such waiver. Even if both agreements, had contained waiver, though, court would require bond in some amount. Sets bond of $100,000 to cover enjoined employee's potential loss of salary and benefits (less salary/benefits employee might reasonably earn from alternative employment) and to cover enjoined new employer's cost/inconvenience in finding an interim or permanent replacement for employee.

Rathmann Group v. Tanenbaum, 889 F.2d 787 (8th Cir. 1989): Trial court abused its discretion by failing to condition preliminary injunction on bond. Employer had posted $10,000 bond to obtain TRO, but evidence indicated that former employee could lose $13,000 per month due to injunction.

Standard Register Co. v. Cleaver, 30 F.Supp.2d 1084 (D. Ind. 1998): Requiring $150,000 bond for preliminary injunction; former employee's current salary was $140,000 and trial on merits was expected to take one year.

II. Substantive standards for covenants not to compete

G.S. § 1-75.4: No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is **in writing duly signed by the party who agrees not to enter into any such business within such territory**: Provided, nothing herein shall be construed to legalize any contract or agreement not to enter into business in the State of North Carolina, or at any point in the State of North Carolina, which contract is now illegal, or which contract is made illegal by any other section of this Chapter.

A. Standard for enforceability of non-compete agreements:

1. "Covenants not to compete between an employer and employee are not viewed favorably in modern law." *Visionair*, 606 S.E.2d at 362 (quotation omitted).

2. Covenant enforceable if: (1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory; and (5) not against public policy. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 649-50, 370 S.E.2d 375, 380 (1988); *Triangle Leasing Co., Inc. v. McMahon*, 327 N.C. 224, 228, 393 S.E.2d 854, 857 (1990); *Moses H. Cone Mem'l Health Servs. Corp. v. Triplett*, 605 S.E.2d 492, 497 (N.C. App. 2004).

a) "Public policy" inquiry is sometimes equated to whether covenant protects a "legitimate business interest" of employer. *Professional Liability Consultants, Inc. v. Todd*, 122 N.C. App. 212, 218, 468 S.E.2d 578, 582 (1996) (Smith, J., dissenting) (opinion adopted by 345 N.C. 176, 478 S.E.2d 210 (1996)); *Hartman v. Odell & Assocs., Inc.*, 117 N.C. App. 307, 311, 450 S.E.2d 912, 916 (1994).

b) Legitimate business interests include, among other things, protection of customer relationships and good will and protecting confidential information. *See United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 60-51, 370 S.E.2d 375, 380-81 (1988).

c) Covenant must be "no wider in scope than is necessary to protect the business of the employer." *Market America, Inc. v. Christman-Orth*, 135 N.C. App. 143, 152-53, 520 S.E.2d 570, 578 (N.C. App. 1999) (quotations and citations omitted); *Hartman*, 117 N.C. App. at 316, 450 S.E.2d at 919.

3. To establish a likelihood of success on the merits, employer must make a *prima facie* showing on all elements of claim. *NovaCare Orthotics & Prosthetics East, Inc. v. Speelman*, 137 N.C. App. 471, 475, 528 S.E.2d 918, 921 (N.C. App. 2000).

B. **Cases relevant to particular requirements**

1. Requirement of a writing

a) If covenant was a part of original, oral contract of employment, it was founded on valuable consideration even though covenant was not put into writing and signed until after defendant started work. *See Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 320 S.E.2d 693 (1984)

b) Consideration for noncompete need not be stated in writing. *See Brooks Distributing Co., Inc. v. Pugh*, 324 N.C. 326, 378 S.E.2d 31 (1989) (adopting dissenting opinion of Court of Appeals).

2. Requirement that agreement be part of contract of employment

a) Some cases suggest that covenant must be entered into as part of "original contract of employment." *See New Hanover Rent-A-Car, Inc. v. Martinez,* 136 N.C. App. 642, 644, 525 S.E.2d 487, 644 (2000); *U-Haul Co. v. Jones*, 269 N.C. 284, 286, 152 S.E.2d 65, 67 (1967). But this simply means that covenants entered after the employment contract is formed must be supported by new consideration. *See Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 637, 568 S.E.2d 267, 272 (N.C. App. 2002); *Young v. Mastrom, Inc.*, 99 N.C. App.

120, 123, 392 S.E.2d 446, 448 (1990); *Green Co. v. Kelley*, 261 N.C. 166, 168, 134 S.E.2d 166, 167 (1964).

b) If covenant was part of original, oral contract of employment and was supported by consideration, it was enforceable even though not put into writing and signed until after defendant started work. *See Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 542, 320 S.E.2d 693, 697 (1984).

3. Requirement that agreement be supported by consideration

a) *Young v. Mastrom, Inc.*, 99 N.C. App. 120, 392 S.E.2d 446 (1990): Covenant was not supported by new consideration where it was contained in agreement signed after oral employment contract had been formed and where employee received no new consideration for covenant. Change in compensation from salary to base plus incentive pay did not provide new consideration, because there was no evidence that salary change was linked to covenant, and because employer's compensation promises were so discretionary they were effectively illusory. Note: It is unlikely that *Young* intends to impose a requirement that consideration be specifically linked to covenant. If there is consideration sufficient to support an agreement, and one of the agreement's terms is a covenant not to compete, then the covenant should be enforceable.

b) *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 379 S.E.2d 824 (1989): examples of new consideration include, among others, raise in pay, new job assignment.

4. Requirement that covenant be reasonable as to time and territory

a) "To be valid, the restrictions on the employee's future employability by others must be no wider in scope than is necessary to protect the business of the employer." *Visionair*, 606 S.E.2d at 362 (quotation omitted).

b) Time and territory elements should be considered together. Longer time restrictions may be more acceptable when the territorial restriction is narrow, and vice versa. *See, e.g., Precision Walls, Inc. v. Servie*, 152 N.C. App. at 637-38, 568 S.E.2d at 272-73; *Kennedy v. Kennedy*, 160 N.C. App. at 9-10, 584 S.E.2d at 334.

c) Reasonableness of geographic scope

(1) Employer must prove where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships. See, e.g., *Farr Assocs., Inc. v.*

Baskin, 130 N.C. App. 276, 281, 530 S.E.2d 878, 882 (2000); *Todd*, 122 N.C. App. at 218, 468 S.E.2d at 582 (dissenting opinion later adopted at 345 N.C. 176, 478 S.E.2d 201).

(2) Employer must satisfy this requirement whether or not covenant expressly contains a geographic restriction. For example, if agreement prohibits former employee from working for any of employer's customers, wherever located, the employer must still demonstrate the "numerical or geographic scope of its base." *Todd*, 122 N.C. App. at 219, 468 S.E.2d at 582 (emphasis added) (dissenting opinion later adopted at 345 N.C. 176, 478 S.E.2d 201); *see also Hartman v. W.H. Odell and Associates, Inc.*, 117 N.C. App. 307, 312, 450 S.E.2d 912, 917 (1994) (employer must first show where customers are located and that geographic scope is necessary to maintain those relationships).

(3) Employer must also show that the territory embraced by the covenant is no more than necessary to secure the protection of its business or good will. *Farr Assocs.*, 130 N.C. App. at 281, 530 S.E.2d at 882; *Hartman*, 117 N.C. App. at 312, 450 S.E.2d at 917.

(4) Factors to determine in deciding whether geographic scope of restriction is reasonable include (1) area or scope of restriction, (2) area assigned to employee, (3) area in which employee actually worked, (4) area in which employer operated, (5) nature of business involved, and (6) nature of employee's duty and his knowledge of business operation. *Farr Assocs.*, 130 N.C. App. at 281, 530 S.E.2d at 882; *Hartman*, 117 N.C. App. at 312, 450 S.E.2d at 917.

(5) Some cases suggest that client-based restrictive covenants (*i.e.*, covenants prohibiting former employee from working for employer's clients, without specifying a geographic area) cannot extend beyond contacts made by the employee during his or her employment. *See Farr Assocs.*, 130 N.C. App. at 282, 530 S.E.2d at 883. This is not a fixed rule, however. *See, e.g., Triangle Leasing Co., Inc. v. McMahon*, 327 N.C. 224, 393 S.E.2d 854 (1990) (upholding a non-compete forbidding employee from soliciting any of employer's clients anywhere in the state, although employee's contacts had been limited to Wilmington area). The question is whether the restraint is reasonable and no broader than necessary to protect the employer's legitimate business interests. In *Triangle Leasing*, for example, the evidence showed that the employee's access to customer lists, price sheets, and policies affecting company

business outside of the Wilmington area warranted a broader restriction.

d) Reasonableness of time restriction

(1) "A five-year time restriction is the outer boundary which our courts have considered reasonable, and even so, five-year restrictions are not favored." *Farr Assocs.*, 138 N.C. App. at 280, 530 S.E.2d at 881.

(2) When a non-compete "reaches back to include clients of the employer during some period in the past, that look-back period must be added to the restrictive period to determine the real scope of the time limitation." *Farr Assocs.*, 138 N.C. App. at 280, 530 S.E.2d at 881. For example, if covenant prohibits employee, for three years after employment terminates, from working for any customer of employer at time of termination, or anyone who was a customer within the preceding two years, courts have treated this as a five year restriction. *See id.*; *Professional Liability Consultants, Inc. v. Todd,* 345 N.C. 176, 478 S.E.2d 201 (1996) (adopting dissenting opinion in 122 N.C. App. 212, 468 S.E.2d 578 (1996). Whether or not one views these "look-back" periods as extending the *time* of the restriction, these "look-back" provisions do expand the covenant's scope by enlarging the pool of customers with whom the employee is prohibited from working.

e) Requirement that covenant not contravene public policy

(1) Covenants concerning physicians: distinction is between whether there will be an inconvenience to the public (enforce covenant) or whether there will be a substantial question of potential harm (not enforced). See *Kennedy v. Kennedy*, 160 N.C. App. 1, 11, 584 S.E.2d 328, 334 (N.C. App. 2003) (quoting *Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C. App. 21, 27-28, 373 S.E.2d 449, 453 (1988)).

5. Illustrative cases

a) *Hartman v. W.H. Odell and Associates, Inc.*, 117 N.C. App. 307, 450 S.E.2d 912 (1994): Employer failed to show where its customers were located or that number of its clients (e.g. 2-5) in particular states in territory justified a restriction in that state.

b) *Visionair, Inc. v. James*, 606 S.E.2d 359 (N.C. App. 2004): Non-compete covenant, providing that employee software engineer could not own, manage, be employed by or otherwise participate in, directly

or indirectly, any business similar to employer's within the Southeast for two years after the termination of his employment, was overbroad and unenforceable. For example, covenant would prevent employee from doing even wholly unrelated work at any firm similar to employer, from holding interest in a mutual fund invested in a firm engaged in a similar business, or from working for competitor even though work involved was unrelated to former employee's work for employer.

c) *Kennedy v. Kennedy*, 160 N.C. App. 1, 584 S.E.2d 328 (N.C. App. 2003): Enforcing covenant in which dentist agreed not to open a dentistry practice within 15 miles of employer for a period of 3 years.

d) *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 568 S.E.2d 267 (N.C. App. 2002): Upholding 1 year restriction on work with any competitor of employer. *See also Visionair*, 606 S.E.2d at 363 n.1 emphasizing that covenant in *Precision Walls* involved only a 1 year restriction in 2 states, and limiting *Precision Walls* to cases where covenant barred only identical work with a competing business).

e) *Triangle Leasing Co., Inc. v. McMahon*, 327 N.C. 224, 393 S.E.2d 854 (1990): Upholding 2 year time restriction where covenant prohibited employee from soliciting known customers of employer in areas in which employer operated. Activity prohibited was narrowly confined, so restriction was acceptable.

f) *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 379 S.E.2d 824 (1989): Upholding 2 year restriction on "call[ing] upon, solicit[ing] or interfer[ing] with or divert[ing] in any way any customers served by" employer in the territory assigned to employee salesperson at the time of termination.

g) *Nalle Clinic Co. v. Parker*, 101 N.C. App. 341, 399 S.E.2d 363 (1991): Refusing to enforce, on public policy grounds, covenant precluding doctor, for 2 years, from practicing medicine or surgery within the same county. Evidence showed that pediatric endocrinologists performed highly specialized tests that pediatricians and other doctors did not perform, and that there was need for doctor in county.

h) *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (1988): Enforcing covenant precluding sales representative, for 18 months following termination, from calling upon accounts that he serviced while employed by manufacturer. Employee had obtained knowledge about buying habits of employer's customers, cyclical nature of their ordering, and their special needs, and this information was not generally available to the public.

i) *Beasley v. Banks*, 82 N.C. App. 45, 368 S.E.2d 885 (1988): Refusing to enforce, as covering overly broad territory, restriction in lease agreement between optometrist and optician. Agreement prohibited optician from competing in municipalities in which optician had no established pool of customers.

j) *Masterclean of North Carolina, Inc. v. Guy*, 82 N.C. App. 45, 345 S.E.2d 692 (1986): Refusing to enforce covenant that prohibited former employee – who worked in asbestos removal – from engaging in same kind of or similar business as that engaged in by employer anywhere in United States where employer was then engaged in business or where employer had signified its intent to be in business.

k) *Starkings Court Reporting Services, Inc. v. Collins*, 67 N.C. App. 540, 313 S.E.2d 614 (1984): Declining to enforce covenant in agreement between court-reporting service and court reporter, prohibiting reporter from engaging in court reporting services for 2 years within 50 miles of county. Reporter was independent contractor, owned own equipment and paid own expenses, and had no access to trade secrets or unique information of employer.

l) *Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C. App. 21, 373 S.E.2d 449 (1988): Refusing to enforce covenant, on public policy grounds, where enforcement would give one doctor, a gastroenterologist, an effective monopoly in the area and evidence showed absence of competition would create undesirable and possibly serious delays in patient care.

6. Courts will not "re-write" otherwise unenforceable restrictive covenants, unless offending provision is clearly severable

a) "If a non-compete covenant is too broad to be a reasonable protection to the employer's business it will not be enforced. The courts will not rewrite a contract if it is too broad but will simply not enforce it." *Visionair*, 606 S.E.2d at 362 (quotation omitted).

b) "A court at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable. It may not otherwise revise or rewrite the covenant." *Hartman v. W.H. Odell and Associates, Inc.*, 117 N.C. App. 307, 317, 450 S.E.2d 912, 920 (1994).

III. **Non-disclosure agreements protecting confidential information**

A. **Necessity of geographical or time limit**

Agreements that forbid a former employee from disclosing or using confidential information may be unlimited as to duration and geographic scope. *See*

Chemimetals Processing, Inc. v. McEneny, 124 N.C. App. 194, 197, 476 S.E.2d 374, 376-77 (N.C. App. 1996). Employer must still establish that restriction protects a legitimate business interest.

IV. **Trade Secrets Act** (*See* G.S. § 66-154 for provisions governing injunctive relief)

A. **G.S. § 66-154** expressly authorizes preliminary and permanent injunctions

B. **Definition of trade secret** (G.S. § 66-152):

1. Misappropriation: "[A]quisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.

2. Trade secret: "[B]usiness or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that: (a) derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

C. **Pleading/Proof**

1. Plaintiff must identify trade secret being misappropriated with sufficient particularity to enable defendant to determine what he is accused of misappropriating and a court to determine whether misappropriation has occurred or threatens to occur. Mere allegations that employee has misappropriated trade secrets, and mentioning broad product and technology categories, are insufficient. Employer must identify with some specificity the trade secrets allegedly misappropriated. *See Visionair*, 606 S.E.2d at 364 (quotation omitted).

2. To determine what information should be treated as a trade secret, a court should consider the following factors: (1) the extent to which information is known outside the business; (2) the extent to which it is known to employees and others involved in the business; (3) the extent of measures taken to guard secrecy of the information; (4) the value of information to business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could properly be acquired or duplicated by others. *See Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.,* 160 N.C. App. 520, 525, 586 S.E.2d 507, 511 (2003).

D. **Illustrative cases**:

1. Information regarding customer lists, pricing formulas and bidding formulas can qualify as a trade secret. *See Area Landscaping,* 160 N.C. App. at 524, 586 S.E.2d at 511.

2. Employer did not establish that customer lists and data were protected trade secrets or that former employee misappropriated trade secrets by contacting clients he had treated while employed. Employer offered no evidence that it took special precautions to maintain confidentiality of customer information, which in any event was easily accessible through telephone book. Evidence also suggested that employee had built relationship with particular clients while working with employer and that clients might reasonably follow employee to new business. *See NovaCare Orthotics & Prosthetics East, Inc. v. Speelman,* 137 N.C. App. 471, 528 S.E.2d 918 (2000).

3. Names and addresses in brokerage firm's customer lists were not trade secrets, relying on *NovaCare*. *See UBS PaineWebber, Inc. v. Aiken*,197 F.Supp.2d 436 (W.D.N.C. 2002); *see also Combs & Associates, Inc. v. Kennedy*, 147 N.C. App. 362, 555 S.E.2d 634 (2001) (customer database was not a trade secret; it could have been compiled through public records – e.g. trade show, seminar attendance lists).

4. Employer established prima facie case of trade secret misappropriation with evidence that former employee had helped develop software, had access to source code prior to resignation, and that defendant had modified software, which would have been practically impossible without source code. Employer had taken reasonable steps to maintain secrecy of source code. *See Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 424 S.E.2d 226 (1993).

5. *Byrd's Lawn & Landscaping, Inc. v. Smith,* 142 N.C. App. 371, 542 S.E.2d 689 (2001): Employer's historical cost information pertaining to materials, labor, and equipment required for its service contracts was a trade secret. Although anyone in the business might have ascertained this information, the information had potential value to competitors who had not performed similar services for employer's customers.

V. **Choice of law issues**

A. **General rule**: Contract interpretation is governed by the law of the place where the contract was made. *See Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209 (1999). A contract is made where the last act necessary to make it binding occurred. *See Walden v. Vaugn*, 157 N.C. App. 507, 510, 579 S.E.2d 475, 477 (2003).

B. **Choice of law clauses**: Courts will enforce contract clauses selecting a particular jurisdiction's law to govern the contract. *See id.*

1. Exceptions to enforceability:

    a) When the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice; or

    b) Where "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of applicable law in the absence of an effective choice of law by the parties." *Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 643, 574 S.E.2d 31, 34 (2002). *See also* Restatement (Second) of Conflict of Laws § 187.

C. **Application**: Noncompete agreements that are enforceable under the law selected by the parties, but not under N.C. law, might be unenforceable if the relevant N.C. law represents a "fundamental policy" and N.C. has a materially greater interest in the question of enforceability.

    Cox v. Dine-A-Mate, Inc., 129 N.C. App. 773, 778, 501 S.E.2d 353, 356 (N.C. App. 1998): Refusing to enforce covenant that was unsupported by consideration (employee agreed to it in order to keep his job and received no new consideration) and that didn't have a reasonable territory restriction. Although agreement might have been enforceable under New York law, it would violate North Carolina public policy. Note: presumably *Cox* did not mean to imply that a covenant unenforceable under N.C. law should always be declared invalid even if the parties have chosen to apply the law of a jurisdiction that would enforce the covenant. In each case, the question should be whether the N.C. public policy at issue is fundamental and whether N.C. has a materially greater interest in the question.