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Covenants not to compete,[1] despite their increasing prevalence and their obvious tendency to restrain competition, have seldom

1. Among the more common covenants not to compete are: the covenant by the seller of a business and good will not to compete with the buyer, Davis v. Ebsco Industries, Inc., 150 So. 2d 460 (Fla. Dist. Ct. App. 1963); a covenant by a shopping center lessor not to lease space in the center or on nearby property to anyone compet-

been attacked under either federal or state antitrust laws.[2] In January 1965, however, William H. Orrick, Jr., then Assistant Attorney General in charge of the Antitrust Division, noted that the Division was becoming concerned about one aspect of the problem—the taking of overbroad covenants not to compete in connection with the purchase of a competitor.[3] He suggested that such an agreement might have anticompetitive effects under either the Sherman Act[4] or section 7 of the Clayton Act.[5] This note will explore the present status of covenants not to compete under both state and federal antitrust laws and will suggest a basis for the future development of the law.

At common law, covenants not to compete have been upheld in a long line of decisions beginning with *Mitchel v. Reynolds*.[6] For such a covenant to be valid at common law, it must be ancillary to the main purpose of a valid contract, necessary to protect the covenantee in the enjoyment of the benefits of the contract, and not primarily intended to restrain competition.[7] The prime concern of the common law was preventing harm to the covenantor and protecting the general public interest[8] rather than preventing restraints on competition—the prime concern of antitrust law.

No instances have been found in which a covenant not to compete has been directly challenged by a state under its antitrust

ing with one of his lessees, Utica Square, Inc. v. Renberg's, Inc., 390 P.2d 876 (Okla. 1964); an employee's or partner's agreement not to compete with his employer or partners for a period after the termination of the employment or partnership, Lakeside Oil Co. v. Slutsky, 8 Wis. 2d 157, 98 N.W.2d 415 (1959); Brown v. Stough, 292 P.2d 176 (Okla. 1956); an agreement by the licensee of know-how or trade secrets to observe territorial restraints upon the sale of the goods made pursuant to the know-how, United States v. E. I. duPont de Nemours & Co., 118 F. Supp. 41 (D. Del. 1952), *aff'd*, 351 U.S. 377 (1956).

2. See generally Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625 (1960); Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. ANTITRUST SECTION 211 (1959).

3. Speech before the Antitrust Section of the N.Y. State Bar Ass'n, Jan. 28, 1965, BNA A.T.R.R. No. 186, at A-14 (Feb. 2, 1965). Mr. Orrick's successor, Mr. Donald F. Turner, has not yet indicated a concern with this problem.

4. Section 1 makes illegal every contract, combination or conspiracy in restraint of trade among the states. Section 2 prohibits monopolizing, or attempting to monopolize, any part of the commerce among the states. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-2 (1964).

5. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964), prohibits the acquisition of the stock or assets of one corporation by another "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

6. 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711). The court there held that a covenant not to compete for five years, made ancillary to the lease of a bakery, was valid as a partial restraint of trade because it was reasonable from three viewpoints: the possibility of harm to the covenantor, the possibility of harm to the public, and the benefit enjoyed by the covenantee.

7. United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). See generally 2 RESTATEMENT, CONTRACTS §§ 514-16 (1933).

8. See 5 WILLISTON, CONTRACTS § 1636 (rev. ed. 1937).

statutes. A state prosecution is possible under statutes making certain covenants illegal, rather than merely void,[9] but an apparent lack of official concern, coupled with difficulty in discovering violations, renders such an attempt unlikely. Nevertheless, a substantial body of law has developed through private contract actions in which the validity of such a covenant under the statute has been litigated; typically, the covenantee sues for specific performance or damages, and the covenantor raises the statute as a defense.[10] The applicable state antitrust statutes fall into two general categories. One is the basic antitrust statute, prohibiting contracts, combinations, and conspiracies in restraint of trade.[11] In a number of states, this statute would be the only basis for an antitrust attack on a covenant not to compete. A few states, however, have, either in addition to or instead of the basic statute, a statute prohibiting contracts by which anyone is restrained from the exercise of any lawful business, trade, or profession.[12] Such statutes normally contain specific exceptions permitting the seller of good will of a business, corporate stock, or a partnership interest to agree to refrain from carrying on his former business for a reasonably limited time and within a reasonably limited area.[13]

In applying antitrust statutes to covenants not to compete, most state courts continue to use the basic common-law tests of legality,[14]

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9. In the majority of states, agreements in violation of the antitrust statutes are both illegal and void; the state therefore has a right to sue. See, *e.g.*, CAL. BUS. & PROF. CODE §§ 16726, 16755; COLO. REV. STAT. ANN. § 55-4-1 (1963); MINN. STAT. § 623.01 (1961); MO. REV. STAT. § 416.010 (1959). On the other hand, some statutes provide only that agreements in violation of the statute are void. This seems particularly true of specific statutes prohibiting restraints on the exercise of a business. See, *e.g.*, ALA. CODE tit. 9, § 22 (1958); MONT. REV. CODES ANN. § 13-807 (1949); S.D. CODE § 10.0705 (1939).

10. See, *e.g.*, Lakeside Oil Co. v. Slutsky, 8 Wis. 2d 157, 98 N.W.2d 415 (1959); Cottingham v. Engler, 178 S.W.2d 148 (Tex. Civ. App. 1944).

11. *E.g.*, GA. CODE ANN. § 20-504 (1965); KAN. GEN. STAT. § 50-101 (1949); N.Y. GEN. BUS. LAW § 340; N.C. GEN. STAT. § 75-1 (Replacement 1965). For a compilation of state antitrust statutes, see 4 TRADE REG. REP. ¶¶ 30201-35501.

12. ALA. CODE tit. 9, §§ 22-24 (1958); ARIZ. REV. STAT. ANN. § 44-1401 (1956); CAL. BUS. & PROF. CODE §§ 16600-02; FLA. STAT. § 542.12 (1963); MICH. COMP. LAWS §§ 445.761, .766 (1948); MONT. REV. CODES ANN. §§ 13-807 to -809 (1947); N.D. CENT. CODE § 9-08-06 (1959); OKLA. STAT. tit. 15, §§ 217-19 (1961); S.D. CODE § 10.0706 (1939); TEX. REV. CIV. STAT. arts. 7426, 7437 (1948).

13. *E.g.*, FLA. STAT. § 542.12 (1963); S.D. CODE § 10.0706 (1939). The Arizona statute, which does not expressly grant such exceptions, has been construed to provide them. See Bonney v. Northern Ariz. Amusement Co., 78 Ariz. 155, 277 P.2d 248 (1954), upholding a stockholder's covenant, ancillary to the sale to the company of his stock, not to compete with the company in a specified county for five years.

14. Some courts have expressly held that state antitrust statutes were meant to apply common-law standards to covenants not to compete. *E.g.*, Engles v. Morgenstern, 85 Neb. 51, 122 N.W. 688 (1909). See also Morehead Sea Food Co. v. Way, 169 N.C. 679, 86 S.E. 603 (1915); N.C. GEN. STAT. § 75-2 (Replacement 1965). More frequently, however, the courts simply apply common-law standards without comment. See John T. Stanley Co. v. Lagomarsino, 53 F.2d 112 (S.D.N.Y. 1931); Harbif v. Maslia, 214 Ga.

at least to the extent that they are not prevented from doing so by the language of a specific statute. Under both general and specific state statutes, a bare covenant not to compete, not ancillary to a valid main transaction, is usually void.[15] Nevertheless, there have been some relatively recent cases in which non-ancillary covenants have been upheld. The Kansas Supreme Court has upheld an agreement among milk haulers by which route territories for hauling between producers and markets were divided.[16] In an earlier decision, the Florida Supreme Court upheld a non-ancillary contract prohibiting a landowner from using his property for a cafeteria for 41/2 years, emphasizing that the contract bound only the parties and restricted the use of only one piece of property.[17] On the other hand, an ancillary covenant may still violate state antitrust laws. If the main purpose of the covenant is to restrain competition or create a monopoly, rather than to implement a valid principal transaction, the covenant is illegal.[18] The state courts, like the federal courts applying federal law,[19] have been willing to infer this illegal intent from the market position of the parties, the effect of the agreement upon actual or potential competition, the lack of a justification for the restriction in the legitimate needs of the covenantee, and other factors.[20]

Ultimately, most litigation concerning covenants not to compete raises the question of whether the covenant is, in fact, reasonable. Since reasonableness must necessarily depend upon the facts of the individual case, there has been a broad range of decisions, particularly in states that do not have specific statutes covering covenants not to compete.[21] These varying results are explicable

654, 106 S.E.2d 905 (1959); Lakeside Oil Co. v. Slutsky, 8 Wis. 2d 157, 98 N.W.2d 415 (1959).

15. *In re* Holmes' Estate, 132 Kan. 443, 295 Pac. 716 (1931); Nichols v. Anderson, 43 N.M. 296, 92 P.2d 781 (1939) (dictum).

16. Okerberg v. Crable, 185 Kan. 211, 341 P.2d 966 (1959). The court applied a standard of reasonableness and found that no appreciable harm to the producers had resulted from the agreement.

17. Janet Realty Co. v. Hoffman's, Inc., 154 Fla. 144, 17 So. 2d 114 (1944); *cf.* Robey v. Plain City Theatre Co., 126 Ohio St. 473, 186 N.E. 1 (1933), upholding a non-ancillary agreement whereby the owner of a theatre agreed not to use his building for public gatherings. In neither case did the courts refer to existing state statutes invalidating combinations or contracts in restraint of trade.

18. Hopkins v. Crantz, 334 Mich. 300, 54 N.W.2d 671 (1952).

19. See notes 37-38 *infra* and accompanying text.

20. Maola Ice Cream Co. v. Maola Milk & Ice Cream Co., 238 N.C. 317, 77 S.E.2d 910 (1953); Shute v. Shute, 176 N.C. 462, 97 S.E. 392 (1918); Herbert v. W. G. Bush & Co., 298 S.W.2d 747 (Tenn. Ct. App. 1956); Norfolk Motor Exchange v. Grubb, 152 Va. 471, 147 S.E. 214 (1929).

21. A number of decisions have upheld covenants unlimited as to time. Kutash v. Gluckman, 193 Ga. 805, 20 S.E.2d 128 (1942); Storer v. Brock, 351 Ill. 643, 184 N.E. 868 (1933); Gallagher v. Vogel, 157 Neb. 670, 61 N.W.2d 245 (1953). Similarly, covenants covering a number of states or the entire United States have been upheld. William T. Wiegand Glass Co. v. Wiegand, 105 N.J. Eq. 434, 148 Atl. 174 (1930)

primarily by the different views taken by the courts as to what is necessary in the particular instance for the protection of the covenantee in his enjoyment of the main contract. Many of the statutes specifically prohibiting covenants not to compete, while exempting certain types of covenants, also provide express temporal and geographic limits for the exempted covenants, thus removing from the courts the function of determining the reasonableness of the covenant. Typical is California's statute,[22] which restricts the operation of a covenant ancillary to the sale of good will or corporate shares to the area in which the business sold was carried on, and for only so long as the buyer, or a person deriving title from him, carries on a like business in that area.[23] It has been held under such statutes that an otherwise valid covenant which exceeds the temporal or geographic limits of the statute is to be construed as having the maximum limits allowed by the statute and, as so construed, is valid.[24]

Recent state decisions involving shopping centers have drawn attention to one particular kind of ancillary restraint: an agreement by a lessor not to use his land in competition with his lessee. The

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(entire United States); Diamond Watch Co. v. Roeber, 106 N.Y. 473, 13 N.E. 419 (1887) (all states except Nevada and Montana); Ace Tackless Corp. v. American Tackless Corp., 1957 Trade Cas. 72575 (N.Y. Sup. Ct.) (entire United States); Eldridge v. Johnson, 195 Ore. 379, 245 P.2d 239 (1952) (Oregon and Washington for 10 years). On the other hand, numerous restraints which were shorter or more restricted geographically have been found to violate state antitrust statutes because the restraints were greater than necessary to achieve the legitimate object of the contract. Beit v. Beit, 135 Conn. 195, 63 A.2d 161 (1948) (one county); Thomas v. Costal Industrial Services, Inc., 214 Ga. 382, 108 S.E.2d 328 (1959) (34 counties in Georgia and 12 counties in South Carolina); Paramount Pad Co. v. Baumrind, 4 N.Y.2d 393, 175 N.Y.S.2d 809, 151 N.E.2d 609 (1958) (3 years); Francis Rogers & Sons v. Eichert, 97 N.Y.S.2d 659 (Sup. Ct. 1950) (5 years). For a collection of cases arising under both common law and statutes relating to the duration and the geographical extent of covenants not to compete, see, respectively, Annot., 45 A.L.R.2d 77 (1956), and Annot., 46 A.L.R.2d 119 (1956).

22. CAL. BUS. & PROF. CODE § 16601.

23. There is evidenced in these statutes a less permissive attitude toward employee covenants not to compete after the termination of employment. Some states do not provide any exceptions for employee covenants, allowing them to fall within the absolute ban of the statute. See, *e.g.*, E. S. Miller Lab. v. Griffin, 200 Okla. 398, 194 P.2d 877 (1948); OKLA. STAT. tit. 15, §§ 217-19 (1961). On the other hand, the lack of a specific exception in the statute did not prevent the Oklahoma court from upholding a covenant in a shopping center lease which restricted the amount of space that could be rented to the lessee's competitors. Utica Square, Inc. v. Renbergs, Inc., 390 P.2d 876 (Okla. 1964); *cf.* Boughton v. Socony Mobil Oil Co., 231 Cal. App. 2d 188, 41 Cal. Rptr. 714 (Dist. Ct. App. 1964) (restriction in a deed). Other statutes, although granting exceptions for employee covenants, provide more definite limits for them. MICH. COMP. LAWS § 445.766 (1948) (limited to ninety days in the employee's own territory); S.D. CODE § 10.0706 (1939) (limited to ten years within a twenty-five mile radius of the employer's principal place of business).

24. Yost v. Patrick, 245 Ala. 275, 17 So. 2d 240 (1944); Mahlstedt v. Fugit, 79 Cal. App. 2d 562, 180 P.2d 777 (Dist. Ct. App. 1947). For a general discussion of the severability of such contracts, see Note, 16 W. RES. L. REV. 161, 178-80 (1964).

current boom in shopping center construction has made such agreements increasingly important from the standpoint of state antitrust policy. The increasing concern with the problem is reflected in two recent Texas decisions[25] which have invalidated covenants in shopping center leases because the covenants violated the state antitrust statute.[26] In both cases, the courts appeared to be primarily interested in ensuring that the covenant would not be allowed to extend beyond its traditional scope and bind a third party whose property was not directly involved in the transaction between the lessor and lessee.

In contrast to the relatively large body of state law relating to the status of covenants not to compete, there is little authority directly indicative of the position of such covenants under either the Sherman Act or the Clayton Act. The leading case on ancillary covenants not to compete, *United States v. Addyston Pipe & Steel Co.*,[27] stated that the basic treatment of those covenants under the federal antitrust statutes would be the same as under the common law. The court's statement that the Sherman Act was intended to codify the common law has subsequently been supported by the United States Supreme Court.[28] The federal courts have considered it a settled principle, hardly worthy of discussion, that a reasonable covenant not to compete, made incident to the sale of a business and good will, is valid as long as it is not a device to control commerce, although such an agreement clearly does restrain trade to some extent.[29] Typical is an early decision upholding a five-year covenant ancillary to the sale of a river steamer.[30] But it would appear that a non-ancillary agreement would, under Judge Taft's dictum in *Addyston*,[31] be held to violate the Sherman Act. Such an

25. In Schnitzer v. Southwest Shoe Corp., 364 S.W.2d 373 (Tex. 1963), the lessor and a third party, who also owned property in the center, had given the lessee an exclusive right to sell shoes in the center. In holding the covenant invalid, the court suggested that a different result would have been reached had the covenant been made only by the lessor. In Kroger Co. v. J. Weingarten, Inc., 380 S.W.2d 145 (Tex. Civ. App. 1964), an agreement by the lessor and a third party not to permit their property within two miles of the shopping center to be used in competition with the lessee was held to violate the same statute.

26. TEX. REV. CIV. STAT. art. 7426 (1948).

27. 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). See also Bork, *supra* note 2, at 211.

28. See Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

29. Darius Cole Transp. Co. v. White Star Line, 186 Fed. 63 (6th Cir. 1911), *cert. denied*, 225 U.S. 704 (1912); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898) (dictum); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (dictum).

30. Cincinnati, P., B.S. & P. Packet Co. v. Bay, 200 U.S. 179 (1906); *accord*, Thomas v. Sutherland, 52 F.2d 592 (3d Cir. 1931) (allowing a restraint running for one hundred years because it was ancillary to the sale of a business).

31. 85 Fed. 271, 282 (6th Cir. 1898).

agreement would amount merely to market division among competitors, a type of restraint which has long been viewed as illegal per se.[32]

The greatest difficulty in determining the status under federal antitrust law of ancillary covenants not to compete is that in all cases to date the ancillary covenants have been only one of a number of practices that together have been found to violate sections 1 or 2 of the Sherman Act or section 7 of the Clayton Act. The Supreme Court has intimated in a number of decisions that the covenants themselves would not have been illegal had they not been a part of a general conspiracy to restrain competition or create a monopoly. In one instance, a covenant ancillary to the sale of a dairy was held illegal, but in that case the acquisition itself violated the Clayton Act.[33] In an earlier decision, the Court held that long-term covenants not to compete exacted from former competitors whose motion picture theaters had been acquired, although not necessarily illegal in themselves, were illegal as part of a general scheme to monopolize.[34] Most frequently, successful federal antitrust attacks upon covenants not to compete have been based on the contention that the primary purpose of the transaction was to restrain competition or create a monopoly.[35] Although it has been suggested that it is often difficult to determine primary intent,[36] the courts have been willing to infer the requisite illegal purpose from the existence of a restraint greater than that necessary for the protection of the covenantee,[37] or from the already dominant market position of one of the parties.[38] The inference of an illegal purpose from such factors may be merely a more convenient and traditional way for some courts to express a feeling that a particular restraint is unreasonable.

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32. *E.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. General Dyestuff Corp., 57 F. Supp. 642 (S.D.N.Y. 1944); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 26 (1955).

33. Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458 (1960).

34. Schine Chain Theaters v. United States, 334 U.S. 110 (1948); *accord*, United States v. Crescent Amusement Co., 323 U.S. 173 (1944). See also United States v. American Tobacco Co., 221 U.S. 106 (1911); United States v. General Dyestuff Corp., 57 F. Supp. 642 (S.D.N.Y. 1944).

35. Such a purpose serves to remove the protection ordinarily afforded ancillary covenants under the antitrust statutes. Shawnee Compress Co. v. Anderson, 209 U.S. 423 (1908); Darius Cole Transp. Co. v. White Star Line, 186 Fed. 63 (6th Cir. 1911), *cert. denied*, 225 U.S. 704 (1912); Bork, *supra* note 2, at 211.

36. Carpenter, *Validity of Covenants Not To Compete*, 76 U. PA. L. REV. 244, 261-62 (1928).

37. Shawnee Compress Co. v. Anderson, 209 U.S. 423 (1908); United States v. Great Lakes Towing Co., 208 Fed. 733 (N.D. Ohio 1913).

38. Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458 (1960). See also United States v. Eastman Kodak Co., 226 Fed. 62 (W.D.N.Y. 1915), in which a company controlling 75-80% of the trade received covenants not to compete for five to twenty years from officers of purchased competitors.

The most important unresolved issue in this area of federal antitrust law concerns the standard of reasonableness to be applied to ancillary covenants. Since most attacks on ancillary covenants ultimately raise the question of reasonableness, the standard applied will largely determine the extent to which these covenants will be legal. A recent decision by the Seventh Circuit[39] suggests that there are two relevant issues of reasonableness: whether the covenant is reasonably necessary to protect the main transaction, and whether the covenant unreasonably restrains competition. The court held that a covenant by a dealer not to compete after the termination of his dealership was unreasonable as to geographic scope, and hence unnecessary to protect the main transaction; however, the court held that, absent proof of a substantial restraint of trade, it did not violate the antitrust laws.[40] The opposite result would appear preferable. A covenant not to compete is basically a horizontal market division removed from its illegal-per-se category[41] only because it is reasonably necessary to protect a valid principal transaction. When the covenant exceeds the limits justified by that transaction, it ought to fall within the prohibition of the antitrust statutes. Thus, the *sole* standard under federal law should be whether the restraint is reasonably necessary to protect the main transaction.[42] Such a standard requires a close scrutiny, involving considerations similar to those relevant under state law,[43] to determine whether the restraint is warranted in view of the particular interests to be protected by the covenant.

A second unresolved issue in federal law is the relationship between the anti-merger provisions of section 7 of the Clayton Act[44] and a covenant by the seller of a business not to compete. Although the covenant itself, not being an acquisition, could not violate section 7, it is arguable that the validity of the covenant under sections 1 and 2 of the Sherman Act should be determined by the standards of section 7 of the Clayton Act. If the principal transaction were to violate section 7, the ancillary covenant would also be illegal, both as a covenant not ancillary to a valid transaction[45] and as a

39. Snap-On Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963).

40. *Id.* at 837.

41. See authorities cited *supra* note 32.

42. The following cases appear to support the proposition that the general standard is whether the restraint is necessary to protect the main transaction: Tri-Continental Financial Corp. v. Tropical Marine Enterprises, Inc., 265 F.2d 619 (5th Cir. 1959); Hall Mfg. Co. v. Western Steel & Iron Works, 227 Fed. 588 (7th Cir. 1915); United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387 (S.D.N.Y. 1942), *aff'd as modified*, 321 U.S. 707 (1944); United States v. Great Lakes Towing Co., 208 Fed. 733 (N.D. Ohio 1913).

43. See notes 51-57 *infra* and accompanying text.

44. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964).

45. See Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

means to an illegal end.[46] It has been suggested that if the acquisition were legal, a covenant reasonably designed to protect the acquisition should also be legal.[47] This position, unfortunately, places the emphasis upon a separate examination of the two factors—the acquisition and the covenant. A more careful examination of the entire transaction, viewed as a whole, would be preferable. It is conceivable, for example, that a covenant not to compete exacted from key personnel of a purchased competitor could be a major factor in the determination of whether the effect of the acquisition is substantially to lessen competition or to tend to create a monopoly in any line of commerce.[48] Finally, in the situation where the acquisition is legal but the covenant unreasonable, the covenant clearly ought to be held a violation of the antitrust laws.[49]

Because the ordinary covenant not to compete, in itself, only forecloses one competitor from the market and thus is unlikely to have a very significant effect upon competition, federal concern with these covenants will probably continue to be restricted to a few specific situations. One of these arises when one of the parties has sufficient market power, especially in a relatively small market,[50] that the covenant may be seen as part of an overall scheme to restrain competition. Another situation arises when the covenant is used to reinforce an acquisition that violates the anti-merger provisions of the Clayton Act. Otherwise, the primary task of policing covenants not to compete will continue to fall upon the states, either under their general antitrust statutes or under specific statutes relating to restrictions upon the exercise of a business. While it would be impractical for state attorneys general, even where authorized, to search out and challenge all illegal covenants, state officials could take a more active role in policing, at least to the extent of establishing guidelines for "reasonable" covenants.

In policing these covenants, and especially in judging their reasonableness, the courts, both state and federal, must not blindly and uncritically apply prior authority, some of which permitted unlimited ancillary covenants. The favored position under our anti-

46. See cases cited notes 33-34 *supra.*

47. See Bork, *supra* note 2, at 220.

48. This reinforcing effect of the covenant may have been important in a recent suit filed by the Justice Department challenging, under section 7, the acquisition by the Lima *News* of its only competitor, the Lima *Citizen,* and the securing of five-year covenants not to compete from nine of the *Citizen's* employees. United States v. Lima News, Civil No. 64-178, N.D. Ohio, Nov. 19, 1964; 5 TRADE REG. REP. ¶ 45064. This reinforcing effect would be particularly evident if the employees possessed special skills or knowledge relatively scarce in the area affected.

49. See notes 39-43 *supra* and accompanying text.

50. This raises the often complicated and obscure question of relevant market determination. See generally MASSEL, COMPETITION AND MONOPOLY 236-78 (1962); Bock, *The Relativity of Economic Evidence in Merger Cases,* 63 MICH. L. REV. 1355 (1965); Stekler, *Market Definitions and the Antitrust Laws,* 9 ANTITRUST BULL. 741 (1964).

trust laws occupied by covenants not to compete is justified only because such covenants, like mergers, often serve useful economic and social functions.[51] The reasonableness of the restraint, then, must be determined by the necessity of the restraint in achieving the legitimate purposes of the covenant.[52] A restraint intended to protect the good will of a business, for example, would be reasonable only for the period during which the seller's re-entry is likely to draw customers away because of his prior dealings with them.[53] While this would normally justify only a short temporal restriction, longer restrictions may be warranted in covenants ancillary to shopping center leases.[54] Conversely, while a shopping center lease would not support a broad geographic restraint, which normally would be unnecessary to protect the lessee's investment, the permissible geographical restraint ancillary to the sale of a business might be much broader.[55] Still other considerations, leading possibly to different conclusions as to the reasonableness of a particular restraint, are relevant to covenants ancillary to an employment contract[56] and to the licensing of know-how or trade secrets.[57]

51. In the sale of a business, for example, a covenant not to compete given by the seller tends to make transferable an asset, good will, that otherwise might not be transferable. 6A CORBIN, CONTRACTS § 1385 (1962).

52. Thomas v. Costal Industrial Services, Inc., 214 Ga. 832, 108 S.E.2d 328 (1959); Paramount Pad Co. v. Baumrind, 4 N.Y.2d 393, 175 N.Y.S.2d 809, 151 N.E.2d 609 (1958).

53. This and other limits are suggested in Annot., 45 A.L.R.2d 77, 99-102, 153 (1956). These limits were expressly rejected in Rinker Materials Corp. v. Holloway Materials Corp., 167 So. 2d 875 (Fla. Dist. Ct. App. 1964), where the court, having found that competition had not been restricted, upheld a ten-year restriction.

54. The success of a center depends largely on attracting diverse shops, and this may often best be accomplished by granting some kind of exclusive occupancy. Furthermore, the effect of the restraint is lessened because it only restricts the use of specific property. See Savon Gas Stations Number Six, Inc. v. Shell Oil Co., 309 F.2d 306 (4th Cir.), *cert. denied*, 372 U.S. 911 (1962).

55. At most, however, the covenant should be limited to the area in which the business had operated. In Annot., 46 A.L.R.2d 119, 253 (1956), it is suggested that a restraint covering a reasonable expectation of future expansion may be valid. If the purpose of the covenant is to protect already existing good will, such a restraint is greater than necessary.

56. See generally Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625 (1960), in which limits of six months to one year, and the area in which the employee was employed, are suggested.

57. See generally Macdonald, *Know-How Licensing and the Antitrust Laws*, 62 MICH. L. REV. 351 (1964), where the author argues that restraints need be limited only by the "life" of the know-how and to products made by use of the know-how.