COVENANTS NOT TO COMPETE IN ALABAMA

Defending Non-Compete Actions

Birmingham, Alabama
September 5, 2002

David R. Donaldson
Donaldson & Guin, LLC
2 North 20th Street
Suite 1100
Birmingham, Alabama 35205

205-226-2282
www.dglawfirm.com

1. Introduction.

It is the public policy of Alabama that non-compete agreements are disfavored. *Cherry, Bekaert & Holland v. Brown*, 582 So.2d 502 (Ala.1991); *Associated Surgeons, P. A. v. Watwood*, 295 Ala. 229, 326 So.2d 721 (Ala.1976). Contracts restraining employment are disfavored because they tend not only to deprive the public of efficient service, but tend to impoverish the individual. *James S. Kemper & Co. Southeast, Inc. v. Cox & Associates*, Inc., 434 So.2d 1380 (Ala.1983).

To be enforceable, a non-compete agreement must pass muster under § 8-1-1, Code of Alabama. The Plaintiff must also demonstrate that it has a protectable interest that would be served by enforcement of the agreement and that the agreement's time and place restrictions are not unreasonable. *See Beasley v. Central Bank of the South*, 439 So.2d 70, 73 (Ala. 1983).

Subsection (a) of § 8-1-1 makes all non-compete agreements void unless they fit within one of the limited exceptions listed under subsections (b) or (c). Subsection (a) states:

> (a) Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind otherwise than is provided by this section is to that extent void.

The exceptions set out in subsections (b) and (c), state:

> (b) One who sells the good will of a business may agree with the buyer and one who is employed as an agent, servant or employee may agree with his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a specified county, city, or part thereof so long as the buyer, or any person deriving title to the good will from him, or employer carries on a like business therein.

> (c) Upon or in anticipation of a dissolution of the partnership, partners may agree that none of them will carry on a similar business within the same county, city or town, or within a specified part thereof, where the partnership business has been transacted.

Subsection (b) is thus comprised of two separate exceptions, upholding noncompete agreements (1) where there is a sale of goodwill, or (2) between a former servant or employee and his former employer. Subsection (c), on the other hand, addresses noncompete agreements between former partners.

2. Are the Plaintiff and Defendant parties to the agreement?

As a threshold matter, a person who has not signed a non-compete agreement generally cannot be enjoined from competing. *See Russell v. Mullis*, 479 So. 2d 727, 729 (Ala. 1985). A typical scenerio where this issue arises is where a business is sold and a key employee or family member of the Seller goes into a competing business. On the other hand, there has been some confusion over whether a successor in interest to an employer may enforce his predecessor's noncompete agreements.

a. Against Whom May a Noncompete Agreement Be Enforced?

In *Yost v. Patrick*, 17 So. 2d 240 (Ala. 1944) the owner of Ewell Lumber Company agreed to sell its business to McGowin Saw Mill Co. *Id.* at 242. The owner, W.M. McGowin, agreed not to engage in the lumber business within a radius of fifty miles from Ewell for a period of five years. *Id.* After the sale, McGowin's son-in-law began doing business individually under the name McGowin Saw Mill Company in direct competition with the plaintiff. The supreme court affirmed the trial court's denial of the Plaintiff's request for an injunction on the grounds that the son-in-law was not a

party to the contract. *Id.* at 245. Similarly, in *Russell v. Mullis*, 479 So. 2d 727 (Ala. 1985), the court, citing *Yost*, refused to enforce a noncompete agreement against the wife of a convenient store seller because she did not sign the agreement.

The court has given similar treatment to agreements between employers seeking to restrict employee mobility. For instance, in *Dyson Conveyor Maintenance, Inc. v. Young & Vann Supply Co.*, 529 So. 2d 212 (Ala. 1988), the court addressed the validity of a "no switching" agreement between two companies which prevented either company from hiring the other's employees. *Id.* 212. The court disagreed with the lower's court's decision that the "no switching" agreement did not fall within the scope of § 8-1-1. *Id.* at 214.

> We disagree with the trial court's conclusion that the agreement is not governed by § 8-1-1 simply because it is not a non-competition agreement between an employer and an employee. On the contrary, the fact that it does not fit within a listed exception . . . tends to indicate that, if it is in restraint of trade, it should be prohibited by that section.
>
> The agreement, on its face, appears to violate § 8-1-1 because, by it, Young & Vann's and Dyson Conveyor's employees are "restrained from exercising a lawful profession, trade, or business." James Martin introduced an affidavit stating that the only other company in Alabama that conducts a similar business is in Mobile, and he testified that there was no opening at that company for a job similar to his position at Young & Vann. Thus, the agreement, if enforceable, effectively limits the two companies' employees to their present employment if they are to continue in their trade. This result conflicts with the policy embodied in § 8-1-1 of disfavoring contracts restraining employment. . . . We recognize that this Court has often said that contracts in partial restraint of trade may be allowed . . . . [But] [w]e do not see how the principle that allows "partial restraints" can apply to restrain employees from competing with their former employers without the employees' having entered into such an agreement.

Id. at 214-15. Thus the court held that a noncompete agreement could only be

enforceable against an employee if the employee himself had entered into a binding noncompete agreement. *Id.* at 215. Similarly, in *Defco, Inc. v. Decatur Cylinder, Inc.*, 595 So. 2d 1329 (Ala. 1992), the court struck down an agreement stating that "[t]ransfers of employees between the parties and/or employment of former employees of one party shall be by mutual agreement of the parties." *Id.* The court stated that "the contract at issue here purported to at least partially restrain Defco's employees from engaging in their trade, and there is no evidence that those employees had entered into noncompetition agreements with Defco. Section 8-1-1 makes such agreements void . . . ." *Id.*

Additionally, an employer/employee relationship must exist at the time a noncompete agreement is made for it to be enforceable. In *Pitney Bowes, Inc. v. Berney Office Solutions*, No. 1000178, WL 1637246 (Ala. Dec. 21, 2001), the court addressed whether a noncompete agreement signed before an employer/employee relationship existed is enforceable. *Id.* at *1. Morris began working as a salesman for Montgomery Office Equipment in 1991. *Id.* In 1998, the owner of MOE began negotiating with Pitney Bowes to sell Pitney his company. *Id.* On November 19, 1998, Pitney required Morris and other MOE employees to sign a noncompete agreement. *Id.* On December 16, 1998, MOE was finally sold to Pitney. *Id.* The court held that the noncompete clause was not enforceable. "The employee-employer exception to the voidness of noncompete agreements does not save a noncompete agreement unless the employee- employer relationship exists *at the time the agreement is executed.* Absent the employee-employer relationship when the agreement is executed, the agreement is void." *Id.* at *2.

Furthermore, "The voidness of the agreement in this case did not disappear when Pitney employed Morris almost a month after the signing. Morris did not re-execute the agreement after Pitney employed him." *Id.*

There are some circumstances where a court may enjoin a person even though he did not sign the non-compete agreement. The most common example is where a new employer is enjoined from allowing an employee to violate a non-compete agreement. In *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 229 So. 2d 480 (1969), a supplier of natural gas was enjoined from employing a salesman whose employment violated a non-compete agreement. Another common situation were a court may enforce a non-compete agreement against a third party is where the defendant is acting as a straw man for the person who signed the agreement. For example, in *Files v. Schaible*, 445 So. 2d 257 (Ala. 1984) the owner of Business B who was in competition with the plaintiff, who had Purchased Business A from the Seller was enjoined from operating where the plaintiff was able to prove that the seller of Business A had complete control over the competing business and that the defendant was "merely a front" for the seller. Likewise, in *Tyler v. Eufaula Tribune Publishing Co.*, 500 So. 2d 1005 (Ala. 1986), the court extended a noncompetition clause to the family of a former employee of a publishing company because the former employee's family, who started a competing business, did not have the knowledge or experience to run the business without the former employee's help.

b. Who May Enforce a Noncomepte Agreement?

The court originally had prohibited the enforcement of noncompete agreement by the successor of a employer, but has changed this rule recently. In *Wyatt Safety Supply*

Company, Inc. v. Industrial Safety Products, Inc., 566 So. 2d 728 (Ala. 1990), the court addressed whether a successor in interest to an employer could enforce the former employer's noncompete agreement with its employees. *Id.* at 728. Old Industrial was a corporation located in Mobile that sold safety equipment. *Id.* Lushington and Harridge were employees of Old Industrial. *Id.* Lushington and Harridge had executed noncompete agreements with Old Industrial. *Id.* Old Industrial subsequently went through a series of transactions in which it merged with a shell corporation owned by Control Resources Industries, Inc. *Id.* at 728-29. Old Industrial transferred 100% of its stock to CRI. *Id.* at 729. Lushington and Harridge worked for New Industrial for a short time after this transaction, but soon left and went to work for a competitor. *Id.* The court refused to allow New Industrial to enforce Old Industrial's noncompete agreement against Lushington and Harridge. *Id.* at 730-32. The court stated:

> Although the language of §§ 8-1-1(b) does not explicitly allow Industrial to enforce the noncompetition agreement against Lushington and Harridge, it does explicitly provide for a buyer of the good will of a business *and the buyer's successor* to enforce a noncompetition agreement against the *seller* of the good will; accordingly, the legislature's omission of a provision that would allow Industrial to enforce the agreement against Lushington and Harridge, while the legislature specifically provided for successor purchasers of the good will of a business to be able to enforce such agreements against the seller of the good will, would indicate that the legislature did not intend to give Industrial the benefit of the §§ 8-1-1(b) exception to the general prohibition of such agreements.
>
> . . . .
>
> [W]e hold that Industrial may not enforce the noncompetition agreement against Lushington and Harridge, because the agreement violates the general prohibition of [§ 8-1-1(a)] and does not fall within the exceptions of § 8-1-1 (b) and (c). The legislature did not provide for employers situated as Industrial is to be able to enforce noncompetition agreements against employees situated as Lushington and Harridge are in relation to Industrial. We will not create such a right of enforcement for Industrial

> either, especially in light of our public policy against contracts in restraint of trade.

Id. at 730-33.

Likewise, in *Construction Materials, Ltd., Inc. v. Kirkpatrick Concrete, Inc.*, 631 So. 2d 1006 (Ala. 1994), the court held that a third party beneficiary of a noncompete agreement did not have standing to enforce the agreement. *Id.* at 1010. In *Construction Materials*, Griggs worked as an employee of Construction Materials from 1986 to 1991. *Id.* at 1008. In 1991, Construction Materials entered into a contract with Skilstaf, an employee leasing company, whereby Skilstaf would employ Construction Material's workers and lease them back to Construction Materials. *Id.* Under this agreement, Griggs became a Skilstaf employee. *Id.* Griggs subsequently signed a noncompete agreement with Skilstaf. *Id.* The agreement referred to Construction Materials as a third part beneficiary of the agreement. *Id.* After Griggs left to work for another company, Construction Materials sought to enforce the noncompete agreement. *Id.* at 1009. The court stated that "[b]ecause the record clearly indicates that Griggs was an employee of Skilstaf, not of Construction Materials, when he executed the covenant not to compete, we hold that the covenant was not enforceable against Griggs for the benefit of Construction Materials." *Id.* at 1010.

In *Sevier Insurance Agency, Inc. v. Willis Corroon Corp. of Birmingham*, 711 So. 2d 995 (Ala. 1998), the court reconsidered whether a successor corporation should be able to enforce its predecessor's noncompete agreements. *Id.* at 1000. The court noted that Ala. Code § 10-2A-145(b)(4) explicitly grants surviving corporations all rights and

privileges of any merged or consolidated corporations. *Id.* Therefore, the court chose to overrule *Wyatt Safety Supply Co. v. Industrial Safety Products, Inc.*, 566 So. 2d 728 (Ala. 1990), holding that a successor corporation *could* enforce an employment agreement made between an employee in the predecessor corporation. *Id.*

However, in *Clark Substations, L.L.C. v. Ware*, No. 1010208, 2002 WL 844741 (Ala. May 3, 2002), the court refined the holding of *Sevier*. In *Clark Substations*, Ware and Edwards were both individuals originally employed by Clark Corporation. *Id.* at *1. Each of them signed noncompete agreements with Clark Corp. *Id.* However, Ware's agreement flatly prohibited Clark Corp. from assigning its rights under the agreement, and Edward's agreement allowed assignment only if Edwards provided written consent. *Id.* Clark Substations subsequently purchased Clark Corp. *Id.* After briefly working for Clark Substations, Ware and Edward resigned and started a competing business. *Id.* The court distinguished this situation from that in *Sevier*. *Id.* at *4.

> In *Sevier Insurance* this Court, after discussing the relevant statutes, held that "a successor corporation [can] enforce a nonsolicitation agreement entered into between an employee and a predecessor corporation." That holding must be considered in the context of the reasoning that preceded it.
> . . . .
> Stated simply, this Court reasoned that the policy disfavoring restraints on trade expressed in § 8-1-1 was trumped by the legislative intent formerly expressed in § 10-2A-145(b)(4) and currently expressed in § 10-2B-11.06. Therefore, we may not ignore the limited scope of those latter sections. Former § 10-2A-145 dealt specifically with the effects of a merger of two or more corporations, and § 10-2A-145(b)(4), quoted in *Sevier Insurance*, gave the surviving corporation the same rights as its predecessor corporations. Similarly, § 10-2B-11.06 provides, in pertinent part, that "[w]hen a merger takes effect ... [t]he surviving corporation thereupon and thereafter possesses all the rights ... of a public as well as of a private nature, of every corporation party to the merger." (Emphasis added.)

> While *Sevier Insurance* dealt with the effect of a merger, Clark Corporation and Clark Substations did not merge. Instead, Clark Substations purchased the operating assets of Clark Corporation, a transaction outside the scope of § 10-2B-11.06. . . .

Id. at *4-5. Therefore, "[u]nder these circumstances, this Court must conclude that Clark Substations is not a successor entitled to enforce the noncompetition agreements executed by Ware and Edwards in the course of their employment by Clark Corporation." *Id.* Furthermore, the court held that Clark Substations could not enforce the agreements as an assignee because the agreements specifically restricted assignment of the right to enforce the noncompete agreements. *Id.*

3. Who is an "Employee" Under § 8-1-1(b)?

In *Odess v. Taylor*, 211 So. 2d 805 (Ala. 1968), the court held that "professionals" were not "employees" and thus did not fit the limited employment exemption of § 8-1-1(b). In *Odess*, a Birmingham ear, nose, and throat doctor, Dr. Odess, agreed to allow a young doctor, Dr. Taylor, to practice with him if the young doctor agreed not to practice within fifty miles of Birmingham in the event their association ended. *Id.* at 807-08. After their relationship terminated, Dr. Odess sought to enjoin Dr. Taylor from practicing within fifty miles of Birmingham pursuant to their noncompete agreement. *Id.* at 809. The Alabama Supreme Court agreed with the trial court's decision not to grant Dr. Odess's injunction because of public policy concerns. *Id.* at 810.

> It is common knowledge that there is now an acute shortage of physicians and surgeons in Alabama . . . . The public in Jefferson County would suffer by removing a highly trained specialist from practicing his profession in that area. We hold under the facts of this case the lower

> court was justified in finding that it would be adverse to the public interest to enjoin the respondent from practicing his profession.

Id. Furthermore, the court held that one practicing a profession should not be considered an "employee" under the statute. *Id.* at 811.

> It is significant that the term "profession" is omitted in Section 23. Said section pertains to a "business" to an "agent, servant, or employee" and to soliciting old "customers" of a former "employer." Having included "profession" in Section 22, and omitted the term in Section 23, such interpretation being aided by resort to the maxim "expressio unius est exclusio alterius" . . . . the lower court correctly found that Section 23 does not apply to covenants restraining the practice of a profession. . . .

Id. at 811-12. In *Gant v. Warr*, 240 So. 2d 353 (Ala. 1970), the court extended the reasoning expressed in *Odess*, voiding noncompete agreements involving "professionals," to include a partner in a public accounting firm. The court has also held that veterinarians were "professionals," *Friddle v. Raymond*, 575 So. 2d 1038 (Ala. 1991).

The court has not treated favorably employers' attempts to get around the limitation of § 8-1-1(b)'s to "employees" and not "professionals." For instance, in *Cherry, Bekaert & Holland v. Brown*, 582 So. 2d 502 (Ala. 1991), the court held that an accounting firm's attempt to circumvent Alabama's general prohibition on noncompete agreements involving professionals through a "buy/sell" agreement was void. *Id.* at 506. The employment agreement at issue contained both a standard noncompete agreement and a "buy/sell" agreement. *Id.* The "buy/sell" agreement, which only became active upon the determination of a court that the noncompete agreement was void, required a withdrawing partner to purchase any former CB&H client he serves within a 3 year

period following his withdrawal from the partnership for an amount equal to 150% of the fees charged to the client by CB&H during the last 12 month period when CB&H served the client. *Id.* The court held that this was a *de facto* noncompete agreement void as an unlawful restraint on a professional. *Id.*

Similarly, in *Anniston Urologic Associates, P.C. v. Kline*, 689 So. 2d 54 (Ala. 1997), A urologist challenged the enforceability of a stock redemption agreement that acted as a restraint on trade. *Id.* at 55-56. Dr. Kline became both an employee and a stockholder of Anniston Urologic. *Id.* at 55. Both his employment agreement and stock redemption agreement provided that if Dr. Kline voluntarily terminated his employment with Anniston Urologic he was required to sell his stock back to the corporation. *Id.* The agreements further provided that if Dr. Kline practiced medicine within 25 miles of Anniston during the year following his termination, the purchase price of his stocks would be reduced by $75,000. *Id.* The court held that this constituted an invalid restraint on a professional's trade under § 8-1-1. *Id.* at 56. However, the court upheld an agreement reducing the buy back price of Dr. Kline's stocks by $20,000 for not giving the corporation 9 months notice as required by the agreement. *Id.* at 59-60.

Recently, the court has qualified its prior holding in *Odess* in deference to the will of the state legislature. In *Walker Regional Medical Center, Inc., v. McDonald*, 775 So. 2d 169 (Ala. 2000), the Supreme Court of Alabama answered two questions certified to it by the U.S. District Court for the Northern District of Alabama. The questions certified to the court were:

(1) Is the portion of the agreement wherein defendant agreed 'to establish a

> practice of obstetrics and gynecology exclusively in Jasper, Alabama ... for a period of not fewer than forty-eight (48) consecutive months' an illegal restraint on [the defendant's] profession and, to that extent, void under Alabama Code § 8-1-1(a) as against public policy?
> (2) If the above-referenced provision of the agreement is void under Alabama Code § 8-1-1(a) as against public policy, is the provision severable from the loan repayment provisions of the agreement and/or the promissory notes such that plaintiff may properly engage in collection efforts as authorized by the express terms of the Agreement?

Id. at 170. Because the court answered the first question in the negative, the court did not address the second. *Id.* Under McDonald's agreement with Walker Baptist Medical Center, the medical center loaned McDonald money with which to finish his residency in exchange for his promise "to establish a practice of obstetrics and gynecology exclusively in Jasper, Alabama . . . for a period of not fewer than forty-eight (48) consecutive months." *Id.* If McDonald upheld his end of the bargain, the loans would be forgiven. *Id.* Walker subsequently decided not to locate his practice in Jasper and to not repay the loans. *Id.* at 171. Walker argued that the agreement was void under § 8-1-1. *Id.* The Supreme Court of Alabama disagreed. *Id.*

> It is true that § 8-1-1(a) places a broad general ban on *every* contract that restrains *anyone* from exercising a lawful profession. There are two exceptions to this otherwise uncompromising provision, neither is applicable to this case. Therefore, it would appear on its face that the agreement whereby McDonald is required to establish a medical practice "exclusively" in Jasper violates § 8-1-1(a). However, by a rule of statutory construction, specific provisions relating to specific subjects are understood as exceptions to general provisions relating to general subjects. We find this principle of statutory construction applicable to these parties' Physician Recruitment Agreement.

Id. The court noted that the Alabama Legislature in enacting Ala. Code § 16-47-121, which explicitly provided for the enactment of loans to medical students like the one

received by McDonald, clearly provided evidence of the legislature's intent to promote exactly the kind of agreement as the one before the court. *Id.* at 172. Based on this reasoning, the court upheld the agreement. *Id.*

4. What Constitutes a "Sale"?

To satisfy the "sale of goodwill" exception under 8-1-1(b), there must be a "sale." The only case exploring what constitutes a "sale" gave the word a broad definition. In *First Alabama Bancshares, Inc. v. McGahey*, 355 So. 2d 681 (Ala. 1977), the court reversed a trial court decision refusing to enforce a noncompete agreement between a bank holding company and one of its former stockholders and officers. *Id.* at 684. The principal question addressed by the court was "whether the exchange of stock involved in a merger constitutes a 'sale' of good will within the meaning of § 8-1-1." *Id.* at 682. By contract, McGahey, the respondent, agreed not to compete with Bancshares, if a subsequent merger between his employer, Citizens Bank, and the Bank of Guntersville was approved, by entering into the banking business in Guntersville for five years following the merger. *Id.* The court noted that in Alabama, because the goodwill of a corporation is an asset owned by the stockholders, an individual stockholder may sell the goodwill of a corporation in proportion to his interest in that corporation. *Id.* at 683. That being said, since the goodwill of Citizens Bank was acquired by Bancshares in the merger, it was a "sale" within the meaning of § 8-1-1 and McGahey should have been enjoined from competing against Bancshares in the Guntersville banking industry. *Id.* at 683-84. The *Bancshares* decision was reaffirmed a few years later in *Central Bank of the South v. Beasley*, 439 So. 2d 70 (Ala. 1983), which enforced a two-year noncompete

agreement against the former officer and director of First National Bank after its merger with Central Bank.

5. Temporal and Geographic Scope of the Agreement.

Even if a noncompete agreement fits within one of the limited exceptions under § 8-1-1(b), it must be reasonable in temporal and geographic scope. For example, in *Hill v. Rice*, 67 So. 2d 789, (Ala. 1953), the Alabama Supreme Court emphasized that the temporal and spacial limits placed on a party in a noncompete clause should not be broader than "reasonably necessary," *Id.* at 794-95.

> As to the reasonableness of such covenants, "the test generally applied is whether or not the restraint is necessary for the protection of the business or good will of the employer, and, if so, whether it imposes on the employee any greater restraint than is reasonably necessary to secure to the business of the employer, or the good will thereof, such protection, regard being had to the injury which may result to the public from restraining the breach of the covenant, in the loss of the employee's service and skill and the danger of his becoming a charge upon the public."

Id. at 794 (quoting 119 A.L.R. 1452). However, by 1968 the court was willing to enforce a noncompete clause that prohibited a former employee of a directional advertising corporation from soliciting old or established customers of his former employer for one year even though the employer did business in 48 states. *Parker v. EBSCO Industries*, 209 So. 2d 383 (Ala. 1968). "Our cases have not placed a strict or rigid construction on the words 'county, city or part thereof' and any language tending towards inflexibility in *Yost v. Patrick* . . . was rendered ineffective . . . ." *Id.* at 386.

In *Daughtry v. Capital Gas Company*, 229 So. 2d 480 (Ala. 1969), the court

upheld a noncompete agreement between a former employee, Daughtry, and his former employer, CGS, and also upheld an injunction issued against another gas company that had subsequently hired Daughtry. *Id.* at 481. The noncompete agreement specifically prevented Daughtry from competing with CGS in Bullock, Lee, Macon, or Tallapoosa counties for two years after termination of his employment. *Id.* The court upheld the scope of this agreement even though CGS did 90% of its business solely in Macon county. *Id.* at 484.

In *Cullman Broadcasting Co., Inc. v. Bosley*, 373 So. 2d 830 (Ala. 1979), the owner of a radio station sought to enjoin a former radio station announcer from working at another radio station pursuant to a noncompete agreement. *Id.* at 831. The noncompete agreement provided that the radio announcer was not allowed to work for any radio station, television station, or CATV system, with studio or transmitting facilities in Cullman County for one year after termination of his employment. *Id.* at 833. The lower court had refused to grant the radio station's injunction because it found that the scope of the noncompete clause was unreasonable and overbroad. *Id.* The Alabama Supreme Court applied the "reasonableness" test and reversed, stating:

> We believe that the appellant possessed a substantial right in its business sufficiently unique to warrant the type of protection contemplated by this non- competition agreement. The very nature of radio broadcasting is such that often the only personalized contact the broadcaster makes with the listening audience is through its individual announcers. To the casual listener, the only personal means of identifying the broadcaster (and its advertisers) is through the announcer. For better or worse, the announcer establishes the identity of the broadcaster and conveys the broadcaster's message to the community. Therefore, we do not deem it unconscionable for a broadcaster to seek to restrain a former announcer from identifying a different broadcaster and conveying a different message.

> This restraint. . . must be relevant and reasonable. A review of the cases from other jurisdictions previously cited as well as the relevant Alabama case law indicates that a restraint on employment consisting of a one year proscription in just one county is consistent with the standard of relevancy and reasonableness.

Id. at 836. However, in *Booth v. WPMI Television Co., Inc.*, 533 So. 2d 209 (Ala. 1988), the court held that a noncompete clause between a television advertising salesman and his former employer, a television station, was overbroad to the extent that it included advertising other than television advertising.

In *Reed v. Herren*, 423 So. 2d 139 (Ala. 1982), the court held that a ten year plus restriction on competition was unreasonable. *Id.* at 142. In *Reed*, Herren entered into an agreement with the City of Birmingham for an exclusive license to operate the Highland Racquet Club. *Id.* at 139. A few years later, Herren sold the club to Reed. *Id.* Both parties agreed not to make any new agreement with the city for at least ten years. *Id.* at 140. However, Reed soon sought a new license from the city. *Id.* Herren sued, but the court refused to recognize the ten year plus limitation. *Id.* at 142-43. The court held that "we are of the opinion that the ten- year-plus restriction on competition, particularly where a governmental agency is involved, is inordinate and therefore unreasonable, thus rendering the non-competition provision of the contract void and unenforceable." *Id.*

In *Kershaw v. Kershaw*, 523 So. 2d 351 (Ala. 1988), the court addressed the validity of mutual noncompete clauses between two brothers, entered into after the brothers divided ownership of a railroad maintenance business, because the scope of the clause was ambiguous. *Id.* at 353. One brother controlled KM Co., a manufacturer and

seller of railroad maintenance equipment, and the other controlled KK, Inc., a railroad service provider. *Id.* at 354. Soon after, KK, Inc. sued KM Co. for violation of the agreement. *Id.* The district court found that KM Co. had violated the agreement by *leasing* equipment rather than *selling* it, and enjoined KM Co. from leasing equipment for five years anywhere in the U.S. where KK, Inc. had done business since 1983 as required by the agreement. *Id.* The Alabama Supreme Court reversed the lower court because the scope of the agreement was overbroad. *Id.* at 359. "[W]e find the provision to be overly broad and ambiguous, because it would also prohibit the defendants from doing business with any *new* railroad company within the United States and Canada. Furthermore, by its terms, the provision prohibits trade in unidentifiable areas and subjects KM Co. to the future decisions of KK, Inc." *Id.*

The court has made it clear that in some circumstances, an agreement including *both* a nonsolicitation agreement and a noncompete agreement is valid. In *Central Bancshares of the South, Inc. v. Puckett*, 584 So. 2d 829 (Ala. 1991), the court enforced a covenant not to compete against two former bank executives. *Id.* at 832. Puckett and Brannon had worked as executive officers of Central Bancshares of the South. *Id.* at 829. After both were passed over as C.E.O., they decided to leave Central Bancshares and start their own bank. *Id.* The noncompete agreements between the former executives and the Bank prohibited Puckett and Brannon from soliciting business from any of the Bank's customers and from competing with the Bank in the banking business in the state of Alabama for two years. *Id.* at 829-30. However, the trial court only enforced the prohibition on soliciting the Bank's customers. *Id.* at 830. The Alabama Supreme Court

reversed, holding that both the prohibition on soliciting the Bank's customers and the prohibition on competing with the Bank in the banking business in the state of Alabama were valid. *Id.* at 831-32.

> While we agree with the trial judge that Central Bank has a protectable interest in its customer relations and relations with its employees, we do not agree that that protectable interest is limited to its customers and employees. As the trial judge indicated, Central Bank has a prominent position in the banking industry in the state of Alabama. Moreover, Brannon and Puckett, as key employees of Central Bank, had peculiar access to all of the techniques and strategies of the bank responsible for that position.
> . . . .
> We find that the restriction regarding competition in the banking business is reasonably related to Central Bank's protectable interest, because the restriction is designed to protect Central Bank only in the area in which it has a legitimate interest: the banking industry. The agreement specifically prohibits Brannon and Puckett from competing in the banking business; it does not preclude Brannon and Puckett from pursuing work outside of banking.

Id. at 832.

6. When Does a Former Employer Have a Protectable Interest?

In *DeVoe v. Cheatham*, 413 So. 2d 1141 (Ala. 1982), the court reversed a trial court's injunction of a former employee of a vinyl roof installer from working for a competing vinyl roof installer because the former employer had no "protectable interest." *Id.* at 1141.

> If an employee is in a position to gain confidential information, access to secret lists, or to develop a close relationship with clients, the employer may have a protectable interest in preventing that employee from competing. But in the present case, DeVoe learned no more than the normal skills of the vinyl top installation trade, and he did not engage in soliciting customers. There is no evidence that he either developed any special relationship with the customers, or had access to any confidential information or trade secrets. A simple labor skill, without more, is simply

> not enough to give an employer a substantial protectable right unique in his business. To hold otherwise would place an undue burden on the ordinary laborer and prevent him or her from supporting his or her family.

Id. at 1143. The court came to a similar conclusions in *Greenlee v. Tuscaloosa Office Products and Supply, Inc.*, 474 So. 2d 669 (Ala. 1985), and *Chavers v. Copy Products Company, Inc.*, 519 So. 2d 942 (Ala. 1988). In both cases the court held that a noncompete clause was unenforceable against a copy machine service and repair technician.

In *Calhoun v. Brendle, Inc.*, 502 So. 2d 689 (Ala. 1986), the court refused to enforce a noncompete clause between a fire equipment company and one of its former employees because the company did not have a protectable interest. *Id.* at 692. This decision was largely based on the fact that any information the former employee could have obtained was not confidential. *Id.* at 693.

> [Brendle] has not shown a protectable interest in its customer lists. In fact, the evidence it offered tended to show that over ninety percent of the businesses in the Montgomery area are its customers and that that information is available to anyone by looking at fire extinguishers which bear its tags. It makes no effort to keep confidential its customer lists. These are in sight of anyone on its premises. One does not have an unfettered right to be free of competition in this country, and contracts which seek to restrain one in the exercise of his right to practice a lawful trade or profession are disfavored.
>
> There is no evidence to support a finding that Calhoun developed a close or special relationship with Brendle's customers during his employment with Brendle. The undisputed evidence is that Calhoun was not Brendle's sole contact with any customer, and that he was not given a particular territory to service.

Id. Similarly, in *Orkin Exterminating Company, Inc. v. Etheridge*, 582 So. 2d 1102 (Ala. 1991), the court held that the trial court could reasonably have determined that a pest

exterminating company did not have a protectable interest in widely available customer lists.

In *Sheffield v. Stoudenmire*, 533 So. 2d 125 (Ala. 1989), the court refused to enforce a noncompete agreement against the former employee of an insurance agency. *Id.* Although the employee, during his one year employment, had access to the insurance agency's list of policy holders and the expiration dates of their policies, the court held that the insurance agency had no protectable interest because this information was not particularly "substantial or unique." *Id.* at 126. Furthermore, the court held that the noncompete agreement, prohibiting the former employee from competing with the insurance agency "in any way" within a fifty mile radius of Thomasville, was overbroad. *Id.* at 126 -27.

In *Ex parte Caribe, U.S.A., Inc.*, 702 So. 2d 1234 (Ala. 1997), the court held that sufficient evidence existed to support a trial court's decision that a break bulk cargo liner service business, Caribe, had a protectable interest sufficient to support a noncompete clause against a former employee, Ramano, who had worked as a general manager for only six weeks because the court determined:

> he was in a position where he had access to confidential and proprietary information, i.e., highly beneficial business information about Caribe's customers, such as customer lists, which included names of contact persons and their telephone numbers; that he was in a position where he could develop close personal relationships with customers of Caribe and generate business and customers for Caribe's benefit; that, as a salesman for Caribe, Romano solicited customers with which he had had no familiarity or contact before working with Caribe; that the break bulk cargo liner service business is highly competitive and the acquisition and protection of customer lists, pricing lists, trade routes, and a regular clientele are of crucial importance; that the information and

> documentation obtained by Romano, or to which he had access, while employed by Caribe was sufficiently "substantial or unique"; that although some of the information about Caribe's customers that was provided to Romano . . . could not be considered "top-secret," that information was not easily obtainable, but rather was publicly available, if at all, only through expertise, purchase, investigation, or extensive research; that Caribe treated all aspects of its business, including, but not limited to, the customer lists, pricing lists, voyage histories, deck plans, tariffs, and the like in a confidential manner; and that Romano, in executing the employment agreement acknowledged that the information and documentation received by him, including information concerning Caribe customers, were confidential business and financial information.

Id. at 1241.

For a former employer or the seller of goodwill to have a protectable interest, the former employee or buyer must actually be in competition with the seller or former employer. For instance, in *Robinson v. Computer Services Inc.*, 346 So. 2d 940 (Ala. 1977), the court refused to enforce a noncompete agreement between a data center organization, CSI, engaged in the business of providing data processing services to customers, and its former president, Robinson, who went into a similar, but not identical, business as CSI after he terminated his employment with CSI. *Id.* at 943. The court began its analysis by stating that "[c]ontracts restraining employment are looked upon with disfavor, because they tend not only to deprive the public of efficient service, but tend to impoverish the individual." *Id.* Furthermore:

> [t]he courts will not specifically enforce . . . the naked terms of a negative covenant in a personal services contract restricting other employment, unless, supporting the affirmative promise, the employer has a substantial right unique in his business which it is the office of the court to protect, and the restriction laid upon the employee has a reasonable relevancy to that result, and imposes no undue hardship.

Id. (citing *Hill v. Rice*, 67 So. 2d 789 (Ala. 1953)). Considering the fact that Robinson

was not engaged in an identical business, the court believed enforcing the noncompete agreement would be unreasonable. *Id.*

> Even though Robinson's new business venture could cause CSI to lose some of its clients, it does not necessarily follow that Robinson violated the non-compete clause. For example, a person years ago could have owned an ice-making business. An employee could have sold ice to many customers and could have signed a non-compete agreement. He leaves that employment voluntarily or involuntarily. Should he be enjoined from selling refrigeration equipment to businesses and homeowners because that would decrease the demand for ice? The answer is obvious. Robinson, as we understand his business, is attempting to sell a product that would surely eliminate the customer's future need for CSI service, but he is not engaged in the same service.
>
> The record shows that because of advancements in data processing technique, many organizations could utilize in-house computers and would no longer have to contract out their data processing needs.

Id.

Likewise, in *Russell v. Birmingham Oxygen Services, Inc.*, 408 So. 2d 90 (Ala. 1981), Birmingham Oxygen Services. Inc. brought suit against Jerry Russell and James Edwards from whom it had purchased a respiratory therapy business. *Id.* at 91-92. As a term of the sale, Russell and Edwards had covenanted not to compete "with the Business of Birmingham Oxygen Services, Inc. for ten years." *Id.* at 92. Subsequently, Russell and Edwards created a new partnership that rented respiratory equipment similar to the services provided by the business sold to BOS. *Id.* However, BOS never actually engaged in the respiratory services business, but their wholly owned subsidiary, Southeastern Medical, did. *Id.* The court reversed the trial court's injunction of Russell and Edwards because "if the corporate entity of Birmingham Oxygen Service, Inc., does not operate an oxygen services business, Russell and Edwards cannot be in competition

with it, for Russell and Edwards did not contract to refrain from operating altogether, just to refrain from competing with Birmingham Oxygen." *Id.* at 93. Furthermore, Southeastern Medical, with whom Russell and Edward were competing, "has no standing to enforce the contract entered into by Birmingham Oxygen and Russell and Edwards. A third person has no rights under a contract between others unless the contracting parties intend that the third person receive a direct benefit enforceable in court." *Id.*

7. Should "Partial Restraints on Trade" Be Treated Differently Than "True" Noncompete Agreements?

Until recently, the court often treated "partial restraints on trade," such as a nonsolicitation agreement, differently than agreements considered to be "true noncompete agreements." In *Hibbett Sporting Goods, Inc. v. Biernbaum*, 391 So.2d 1027 (Ala. 1980), the court upheld a noncompete agreement between a shopping mall and a sporting goods store, Hibbett. *Id.* at 1029. The owner of Hibbett and the owner of the shopping mall orally agreed that the owner of the shopping mall would not lease space to another "sporting goods store." *Id.* Hibbett's owner soon after sought to enjoin the owner of the mall from leasing space to Athlete's Foot. *Id.* at 1028. The court held that "Under the contract, [the owner of the mall] is prevented only from leasing space . . . to another "sporting goods store"; therefore, the contract is sufficiently limited as to time, territory and type of business. The contract obviously is in partial restraint of trade, but because it is sufficiently limited in geographic area and type of business restrained, it is not void." *Id.* at 1029.

In *Famex, Inc. v. Century Insurance Services, Inc.*, 425 So. 2d 1053 (Ala. 1983),

the court upheld a nonsolicitation clause between an insurance marketing company and an agent. *Id.* at 1054. Famex and American were both subsidies of the Fireman's Fund Insurance Company. *Id.* at 1053. American actually wrote the insurance policies while Famex marketed them. *Id.* Century entered into an agreement with Famex whereby Century would sell FFI insurance and Famex would provide Century with materials and information necessary to sell the insurance. *Id.* at 1054. The agreement included a noncompete agreement stipulating that in case the relationship ended, Century would not solicit FFI clients for three years. *Id.* Century began marketing non-FFI insurance to FFI clients. *Id.* Relying on *Hibbett*, the court held that the agreement was only a "partial restraint on trade" not invalidated by § 8-1-1(a). *Id.* In *Gafnea v. Pasquale Food Company, Inc*., 454 So. 2d 1366 (Ala. 1984), the court followed similar reasoning, upholding a noncompete agreement between a franchisor and franchisee because it was merely a partial restraint on trade.

In *Hoppe v. Preferred Risk Mutual Insurance Co.*, 470 So. 2d 1161 (Ala. 1985), following the reasoning of *Famex*, the court held that a covenant not to solicit the customers of a former employer was enforceable. *Id.* at 1163-64. However, the court noted that "[a] prohibition against soliciting the plaintiff's customers whose identities became known to the defendant in confidence as a result of the parties' prior relationship is not the same as a prohibition against engaging in a lawful profession, trade, or business." *Id.* at 1163. But at the same time the court held that this case was governed by *Famex*, concluding that "because Century was not prohibited from doing business, but only from soliciting Famex insureds, the clause in question was a partial restraint of trade

and, therefore, not violative of § 8-1-1." *Id.* at 1164. Similarly, in *Tomlinson v. Humana, Inc.*, 495 So. 2d 630 (Ala. 1986), the court enforced a noncompetition agreement against a pathologist without distinguishing *Odess* because the agreement, prohibiting the pathologist from providing primary pathological services at specific hospitals, was only a partial restraint on trade. *Id.* at 631-32.

In *Corson v. Universal Door Systems, Inc*., 596 So. 2d 565 (Ala. 1991), the court enforced a nonsolicitation agreement between an automatic door company and one of its former technician/salesmen. *Id.* at 566. After working for UDS for almost four years, Corson quit UDS and took a job with one of UDS's competitors. *Id.* at 567. The Alabama Supreme Court held that the nonsolicitation agreement between Corson and UDS was only a partial restrain on trade which did not implicate § 8-1-1. *Id.* at 568. The agreement specifically prohibited Corson from soliciting UDS customers in Alabama, Georgia, Tennessee, Kentucky, Florida, North Carolina, South Carolina, and Mississippi, even though UDS did no business in Kentucky, North Carolina, or South Carolina during the term of Corson's employment with UDS. *Id.* The court held that this broad restriction was still reasonable considering the fact that less onerous restrictions were placed on nonsolicitation agreements, which were only "partial restraints on trade," than on true covenants not to compete. *Id.*

> We fail to understand how a covenant prohibiting only the solicitation of the employer's customers amounted to any restriction at all on the employee's right to practice his trade in those states in which the employer had no customers. Universal's customer list, moreover, while including some prominent businesses, is relatively small in relation to the total number of Alabama establishments using automatic doors.

Id. The court also held that the trial court had the power to limit the scope of the agreement if it chose to do so. *Id.* at 569.

In *Sevier Insurance Agency, Inc. v. Willis Corroon Corp. of Birmingham*, 711 So. 2d 995 (Ala. 1998), the Alabama Supreme Court clarified some of the confusion which had existed over the differential treatment accorded to "partial restraints on trade" and "true" noncompete agreements. *Id.* at 998. In *Sevier*, the court addressed separate appeals brought by Willis Corroon Corporation to enforce identical employment contracts signed by Taylor and Dean, both of whom were former employees of Corroon. *Id.* at 996. Taylor and Dean had signed employment agreements with CCA Inc. *Id.* CCA was then subsequently taken over by Corroon. *Id.* Corroon filed two separate actions against Tayolr and Dean for breaching their noncompete agreements. Taylor and Dean argued that the agreements were "covenants not to compete," while Corroon argued that they were "nonsolicitation agreements." *Id.* at 997. In the first action, filed against Taylor, the trial court found that the agreement was a valid "nonsolicitation agreement." *Id.* In the second action, filed against Dean in a different court, the court found that the agreement was an invalid "noncompete clause." *Id.* The court acknowledged that its previous cases had left open a considerable amount of confusion. *Id.* at 998. In some cases such as *Hoppe v. Preffered Risk Mut. Ins. Co.*, 470 So. 2d 1161 (Ala. 1985), the court had held that a "nonsolicitation agreement" was not covered by § 8-1-1, while in other cases such as *James S. Kemper & Co. Southeast, Inc. v. Cox & Associates, Inc.*, 434 So. 2d 1380 (Ala. 1983), the court had held that such an agreement was covered by § 8-1-1. *Id.* The court, reviewing the case history and legislative intent, held that § 8-1-1 was

intended to cover *all* types of restraints in trade, whether partial or total, including nonsolicitation agreements. *Id.* This reasoning effectively abrogated *Hoppe*, *supra*, *Famex, Inc. v. Century Ins. Services, Inc.*, 425 So. 2d 1053 (Ala. 1982), and *Hibbet Sporting Goods, Inc. v. Biernbaum*, 391 So. 2d 1027 (Ala. 1980).

8. What Effect Does a Void Noncompete Agreement Have on the Rest of the Contract?

In *Mann v. Cherry, Bekaert & Holland*, 414 So. 2d 921 (Ala. 1982), the court held that a contract for the sale of an accounting practice that contained an invalid covenant not to compete was, nevertheless, valid as to the sale of the practice. *Id.* at 922. "The mere inclusion of a non-competition covenant in a contract in violation of § 8-1-1(a) does not necessarily render the entire contract void. The very wording of the statute says that such a contract 'is to that extent void.' That language is clear and unambiguous and, therefore, leaves no room for judicial construction." *Id.* at 924. The court distinguished *Thompson v. Wiik, Reimer & Sweet*, 391 So. 2d 1016 (Ala. 1980), because in that case "the sole consideration . . . was the covenant not to compete. Under § 8-1-1, that part of the agreement would fail in its entirety because there was no other lawful basis to the contract." *Id.* In this case:

> [D]efendant received all that he bargained for because it is undisputed that plaintiff has not attempted to compete for the clients . . . . he should not be allowed to use the unenforceability of the noncompetition covenants to escape from his obligation under the contract. Had plaintiff actually competed for the subject clients, a different result would be necessary.

Id. at 925.

In *Salisbury v. Semple*, 565 So. 2d 234 (Ala. 1990), the purchaser of an

ophthalmology practice sought a declaration that the purchase agreement was void because the contract included an unenforceable covenant not to compete. *Id.* at 234. The Alabama Supreme Court affirmed summary judgment for the defendant seller. *Id.* The defendant was an elder ophthalmologist who had a greed to sell his practice to the plaintiff with whom he had practiced. *Id.* Although the plaintiff was aware that the defendant was no longer in any shape to compete with him, he request the contract to include a noncompete clause. *Id.* at 235. The contract specifically provided that 70% of the purchase price was allocated to the covenant not to compete, while 30% was allocated to the purchase of goodwill and assets. *Id.* at 236. The plaintiff stopped making payments and sought a declaration that the part of the contract allocated to the covenant not to compete was unenforceable because of the noncompete agreement, reducing the plaintiff's obligation to only 30% of the contract price. *Id.* The court disagreed. *Id.* Relying on *Mann v. Cherry, Bekaert & Holland*, 414 So. 2d 921 (Ala. 1982), the court held that:

> The plaintiff admits that the defendant has not violated the covenant not to compete. Furthermore, the plaintiff received the defendant's medical practice, the fixtures, the optical business, and the goodwill, as contemplated by the contract. In short, the plaintiff has received all that he bargained for. We hold that the plaintiff, like the buyer in the *Mann* case, is now estopped from refusing to perform his obligation to pay the agreed purchase price under the contract simply because it contains a covenant not to compete. We note that any other result would be particularly inequitable in view of the fact that the covenant not to compete was included in the contract at the plaintiff's request.

Id.

In *Pierce v. Hand, Arendall, Bedsole, Greaves & Johnston*, 678 So. 2d 765 (Ala.

1996), the Alabama Supreme Court overturned a trial court's decision that a partner in a law firm was not entitled to deferred compensation because a noncompetition agreement in his employment contract was void. *Id.* at 766. The court held that only the noncompetition provision in the employment contract was void. *Id.* at 768. Furthermore, the court held that the attorney should not have been equitably estopped from asserting his claim to deferred compensation under the agreement even. *Id.*

> This Court has carefully examined the record and finds it clear that the trial court did not correctly apply to the relevant facts the law of Alabama as it relates to the propriety of invoking the doctrine of equitable estoppel. The Hand-Arendall firm drafted the noncompetition provisions into the partnership agreement, which was signed by the parties in 1977. Thus, Hand-Arendall, the party asserting the doctrine of equitable estoppel, is predicating its claim on its own wrongful conduct. It is not permitted to do so.

Id. at 769. Lastly, the court held that DR 2-109 of the Alabama Code of Professional Responsibility, which restricts noncompetition agreements among lawyers except as condition to payment of retirement benefits, did not provide an exception to § 8-1-1 because the deferred payments established by the partnership agreement did not constitute "retirement benefits." *Id.*

In *Robinson v. Boohaker, Schillaci & Co., P.C.*, 767 So. 2d 1092 (Ala. 2000), the Alabama Supreme Court answered a question certified to them by the U.S. District Court for the Northern District of Alabama regarding the applicability of estoppel and in pari delicto as affirmative defenses in controversies over the enforceability of noncompete agreements. *Id.* at 1093. The District Court specifically asked:

> Under Alabama law, does the doctrine of *in pari delicto* as an affirmative defense bar a former professional employee from recovering

> compensation under an agreement with his former employer, when such former professional employee directly participated in the negotiation of an unlawful non-compete provision contained within the agreement, while having knowledge that the non-compete agreement was unlawful under Alabama law, when the former employee violates the non-compete provision by entering into competition with his former employer?

Id. In *Robinson*, Robinson, an accountant, terminated his relationship with his employer, Boohaker, Schillaci & Co., and exercised his rights under a buy-back provision in his employment agreement which required BS&C to repurchase Robinson's stock over a five year period. *Id.* Robinson's employment agreement also contain a noncompete agreement prohibiting him from competing with BS&C for five years after termination of his employment. *Id.* When BS&C stopped making payments, claiming that Robinson had breached the noncompete agreement, Robinson sued. *Id.* The court first noted that the doctrine of equitable estoppel is distinct from the doctrine of in pari delicto. *Id.* at 1094.

> The party asserting equitable estoppel must be free from fault. An employee who is innocent of wrongdoing in the making of the agreement (i.e., is unaware of its illgality and is not a participant in the drafting) can assert the illegality of a covenant not to compete when the guilty employer asserts the employee's breach of such covenant as a defense to the employee's claim for payment under the agreement containing the covenant. The guilt of the employer precludes it from arguing under such circumstances that the employee is equitably estopped. As this court observed in *Kline*, the evidence that the stockholders/physicians other than the departing employee directly participated in the drafting of the covenant not to compete precluded the employer from contending that the employee was equitably estopped from recovery because he had violated the noncompetition agreement.

Id. at 1094-95. Therefore in this case, since one of the defendant partners drafted the noncompete agreement, BS&C cannot assert the defense of equittable estoppel based on

the simple fact that Robinson breached the agreement. *Id.* at 1095. However, under the doctrine of in pari delicto:

> if both parties are in equal fault then Robinson, on the one hand, could not excuse his breach of the covenant not to compete by pointing to its illegality. On the other hand, the equally guilty firm could not obtain injunctive relief to enforce the covenant. A court will not interfere where the parties are *in pari delicto,* or in equal or mutual fault, but will leave them where they have placed themselves.

Id. In this case, the court noted that it did not have enough information to determine the extent to which the firm's obligation to Robinson may be independent of the consideration provided by Robinson in the form of his covenant not to compete, and thus left the question whether Robinson's guilt may defeat his right to recover under the agreement. *Id.*