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Article 16

Contracts - Partial Enforcement of Covenants Unreasonably Restricting Competition

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rule of caveat emptor will now be ignored in this field. On the contrary, the court expressly limits the application of the rule to misrepresentations of the sort therein involved, that is, false statements of previous price offers. "The law recognizes the fact that men will naturally overstate the value and qualities of the articles which they have to sell. All men know this and a buyer has no right to rely on such statements."[16] The *Kabatchnick* decision seems to mean only that misrepresentations of a prior offer by a seller to a purchaser are now classified as statements of fact rather than of value.

CONTRACTS–PARTIAL ENFORCEMENT OF COVENANTS UNREASONABLY RESTRICTING COMPETITION

Defendant sold his wholesale fruit and vegetable business, including good will, and leased the premises. The sales contract provided that defendant "was forever barred and prevented from engaging in any kind of business" in the county where the business was conducted. Claiming that the restriction was too broad and was an unreasonable restraint on trade, defendant re-entered the fruit and vegetable business and was met by an injunction. The court held that though the restrictive agreement was unreasonable and the terms thereof indicated no line of division, the agreement would be enforced only as to a reasonable amount of time and area. It was decided that defendant could not engage in the fruit and vegetable business in the county for a period of ten years, the duration of the lease. *Ceresia v. Mitchell*, 242 S. W. 2d 359 (Ky., 1951).

Any agreement is in restraint of trade when its performance would limit competition in any business.[1] Under the early common law, all such agreements were void because they were considered to be against public policy.[2] After a few centuries, English courts upheld agreements in partial restraint of trade when they were incidental to a sale of property or a business.[3] Today, American jurisdictions hold that contracts not to compete are enforceable if they are ancillary to the sale of a business and are reasonably limited as to time and area.[4] They are also in agreement that if a promise is a reasonable restraint of trade, it will be enforced unless it is part of a plan which tends to create a monopoly.[5]

[16] Kimball v. Bank, 144 Mass. 321, 324, 11 N.E. 113, 114 (1887).

[1] Rest., Contracts § 513 (1932).

[2] 6 R.C.L. 785 (1929).

[3] Broad v. Jollyfe, Cro. Jac. 596 (1620); 76 U. of Pa. L. Rev. 244, 245 (1928).

[4] Beit v. Beit, 135 Conn. 195, 63 A. 2d 161 (1948); Rest., Contracts § 515 (1932).

[5] Harris Calorific Co. v. Marra, 345 Pa. 464, 29 A. 2d 64 (1942); 5 Williston, Contracts § 1659 (rev. ed., 1937).

When agreements not to compete are found to be unreasonable, the courts are in disagreement as to whether such restraints must be held completely void or may still be enforced in part.[6]

Where the contract contains both valid and invalid restraints, the courts will decree enforcement of the valid parts of the contract, provided they are separable in their terms from the invalid.[7] This rule has been applied in those agreements where excessive limitations were placed on the area[8] and the time.[9] Many cases can be found wherein the courts state that the divisibility of contracts depends upon the intention of the parties and the surrounding circumstances.[10] However, most courts, while stating the above rule, follow the procedure of merely examining the contract to see if there are any disjunctive words; if there are none, they hold the whole covenant indivisible and unenforceable. Illinois also follows this easy, but often unjustifiable, method.[11] Illinois courts state that where a contract contains but a single territorial covenant which is void because it unreasonably restrains trade, the entire contract must fall.[12]

The majority of American jurisdictions follow this method and hold contrary to the *Ceresia* case. They hold that if a restrictive covenant is not divisible by its terms and is unreasonable as to time or area, partial enforcement thereof would be making a new contract for the parties.[13] The logic of the majority is that if the parties had intended a narrower covenant, they would have agreed to it.[14]

The *Ceresia* case represents the modern trend which allows the contract to be enforced to the extent that it is reasonable although the contract is not divisible.[15] In a recent treatise on contracts, it is stated:

> In the best considered modern cases, . . . the court has decreed enforcement as against a defendant whose breach has occurred within an area in which

[6] General Bronze Corp. v. Schmeling, 208 Wis. 565, 243 N.W. 469 (1932); Suesskind v. Wilson, 124 Ohio St. 54, 176 N.E. 889 (1931); 5 Williston, Contracts § 1659 (rev. ed., 1937).

[7] General Bronze Corp. v. Schmeling, 208 Wis. 565, 243 N.W. 469 (1932).

[8] Ibid.

[9] Oregon Steam Navigation Co. v. Winsor, 20 Wall. (U.S.) 64 (1874).

[10] E.g., Waddell v. White, 51 Ariz. 526, 78 P. 2d 490 (1938); Diamond Match Co. v. Roeber, 106 N.Y. 473, 13 N.E. 419 (1887).

[11] Parish v. Schartz, 344 Ill. 563, 176 N.E. 757 (1931); Lanzit v. J.W. Sefton Mfg. Co., 184 Ill. 326, 56 N.E. 393 (1900).

[12] Interstate Finance Corp. v. Wood, 69 F. Supp. 278 (E.D. Ill., 1946); Union Strawboard Co. v. Bonfield, 193 Ill. 420, 61 N.E. 1038 (1901).

[13] Beit v. Beit, 135 Conn. 195, 63 A. 2d 161 (1948).

[14] Ibid.

[15] Hill v. Central West Public Service Co., 37 F. 2d 451 (C.A. 5th, 1930); Metropolitan Ice Co. v. Ducas, 291 Mass. 403, 196 N.E. 856 (1935); Fleckenstein Bros. Co. v. Fleckenstein, 76 N.J.L. 613, 71 Atl. 265 (S. Ct., 1908).

restriction would clearly be reasonable, even though the terms of the agreement imposed a larger and unreasonable restraint.[16]

Two outstanding authorities on contracts, Professors Corbin and Williston, have recognized and approved the modern trend. Williston, criticizing the majority rule applicable to indivisible covenants, states, "I have concluded and have so stated in Section 1660 of the Revised Edition of my treatise on Contracts, that in such a case the unquestionably legal part of the covenant should be enforced."[17] Corbin states that divisibility as to the legal and illegal parts of the restrictive covenants is not the test. The test should be whether partial enforcement is possible without injury to the public and without injustice to the parties involved.[18]

From a study of the cases, it would seem that the logic of the majority jurisdictions is weak; the modern trend appears to be the more logical view. Since it is obvious that the basic intent of the parties is to protect the purchaser's investment, the terms of the contract should be construed so as to effectuate this intention, if fairly possible. Though the indivisible covenant restricting competition may be unreasonable as a whole, an equitable result would probably be obtained if the covenantee were reasonably protected by partial enforcement of the covenant. This would furnish the covenantee with that which he bargained for—reasonable protection from competition from one who would generally have an undue competitive advantage.

Recognizing the problem in this phase of the law, some state legislatures have attempted a solution by enacting applicable statutes.[19] These statutes have been construed to authorize courts to enforce otherwise unreasonable covenants as to a reasonable amount of time and area.[20]

The court, in the instant case, by decreeing partial enforcement of the restrictive covenant, adopted a logical line of reasoning and effected a more equitable result. The *Ceresia* case refused to place a distinct hardship on the purchaser and denied the seller an unjust enrichment; this is because the purchaser, of course, had paid a valuable consideration for the agreement which restricted competition. A contrary result might not only be a powerful temptation to commit fraud, but would place a premium on bad faith and dishonesty.[21]

[16] 6 Corbin, Contracts § 1390 (1951), at 500.

[17] 23 Conn. Bar J. 40 (1949).

[18] 6 Corbin, Contracts § 1390 (1951); Davey Tree Expert Co. v. Ackelbein, 233 Ky. 115, 25 S.W. 2d 62 (1930).

[19] Cal. Civ. Code (1941) c. 526, § 1; Ala. Code (1940) tit. 9, § 23.

[20] Herrington v. Hackler, 181 Okla. 396, 74 P. 2d 388 (1937); Edwards v. Mullin, 220 Cal. 379, 30 P. 2d 997 (1934).

[21] Dissenting opinion, Beit v. Beit, 135 Conn. 195, 207, 63 A. 2d 161, 166 (1948).