

EQUITY—PARTIAL ENFORCEMENT OF RESTRICTIVE COVENANT IN
EMPLOYMENT CONTRACT

Fullerton Lumber Co. v. Torborg, 70 N.W.2d 585 (Wis. 1955)

Defendant was employed as manager of plaintiff's lumber yard pursuant to a contract containing a restrictive covenant prohibiting defendant from engaging in the lumber business within a fifteen-mile radius of plaintiff's yard for a period of ten years after termination of employment. Subsequently, defendant voluntarily concluded his employment and opened a competing lumber yard in violation of the covenant. As a result, plaintiff suffered substantial loss of business¹ and sought to enforce the covenant by enjoining defendant's competing operations. The trial court, finding that the ten-year restriction was unreasonable and unnecessary, refused to enforce the covenant. On appeal, the Supreme Court of Wisconsin reversed and remanded, ordering the lower court to issue an injunction enforcing the covenant for a period of time found reasonable and necessary.²

Historically, courts have viewed restrictive covenants with disfavor. In particular, covenants between employer and employee have been carefully examined, because the former has often used his superior bargaining position to exact oppressive concessions as a condition of employment.³ Situations often arise, however, where an employee, by virtue of the nature of his employment, has acquired confidential information or the "good will" of the public with whom he transacts business. Under such circumstances the courts have validated restrictive covenants, provided the restrictions are found to be "reasonable."⁴ In determining reasonableness the courts have had three primary interests to reconcile: (1) that of the employer in protecting his established business; (2) that of the employee in being able to freely choose his occupation; and (3) that of the public in maintaining a productive, competitive economy.⁵

The arbitrary rule that a restrictive covenant will be enforced only if found to be reasonable as written has proved inadequate in situa-

1. Plaintiff's total sales declined approximately 70% after defendant commenced business operations. *Fullerton Lumber Co. v. Torborg, 70 N.W.2d 585, 588 (Wis. 1955)*.

2. *Fullerton Lumber Co. v. Torborg, 70 N.W.2d 585 (Wis. 1955)*. The court indicated that three years would be a "reasonable" time. *Id.* at 592.

3. *Sternberg v. O'Brien, 48 N.J. Eq. 370, 22 Atl. 348 (Ch. 1891)*; *Milwaukee Linen Supply Co. v. Ring, 210 Wis. 467, 246 N.W. 567 (1933)*.

4. *Poultry Producers of Southern California, Inc. v. Barlow, 189 Cal. 278, 208 Pac. 93 (1922)*; *Axelson v. Columbine Laundry Co., 81 Colo. 254, 254 Pac. 990 (1927)*; *Grand Union Tea Co. v. Walker, 208 Ind. 245, 195 N.E. 277 (1935)*; *Eigelbach v. Boone Loan & Inv. Co., 216 Ky. 69, 287 S.W. 225 (1926)*; *Sherman v. Pfefferkorn, 241 Mass. 468, 135 N.E. 568 (1922)*; *Eureka Laundry Co. v. Long, 146 Wis. 205, 131 N.W. 412 (1911)*.

5. See the discussion of this problem in *John Roane, Inc. v. Tweed, 89 A.2d 548 (Del. 1952)*.

tions in which *some* restrictions on the employee's future activity could be justified, but not the *particular* limitations stipulated in the employment contract. Consequently, the English courts have developed the "blue pencil" rule,⁶ which provides that a restrictive covenant, unreasonable as written, will be enforced if the objectionable features of the agreement can be eliminated by striking out the offending word or phrase.⁷ A majority of American courts have adopted a similar position, and have enforced such restrictive covenants where the agreement is considered "divisible" so that the objectionable portions can be severed.⁸ The divisibility doctrine is also set forth in the *Restatement of Contracts*.⁹

Even though accepted by a majority of courts, the divisibility doctrine has been the subject of considerable recent criticism; indeed, it has often been honored only by clever avoidance.¹⁰ While the rule provides the courts with a relatively simple formula for validating an otherwise unreasonable restrictive covenant, its application is mechanical, and emphasizes only the form of the agreement rather than the intent of the parties. Under a literal application of the divisibility doctrine, the restrictive provision will fail entirely unless the terms of the agreement are drafted so that any objectionable features can be physically deleted.¹¹

Dissatisfaction with the cumbersome limitations of the divisibility doctrine has led to the formulation of the so-called "partial enforcement" rule.¹² Under this doctrine a restrictive covenant containing provisions which are both unreasonable as written and "indivisible" will not fail completely, but will be enforced to the extent found rea-

6. See *Attwood v. Lamont*, [1920] 3 K.B. 571, for a discussion of the rule.

7. *Price v. Green*, 16 M. & W. 346, 153 Eng. Rep. 1222 (1847).

8. See, e.g., *Kessler v. Jefferson Storage Corp.*, 125 F.2d 108 (6th Cir. 1941); *Consolidated Syrup Corp. v. Kaiser*, 22 N.Y.S.2d 307 (Sup. Ct. 1940); *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251 (1886); *General Bronze Corp. v. Schmeling*, 208 Wis. 565, 243 N.W. 469 (1932).

9. RESTATEMENT, CONTRACTS § 518 (1932), provides:

Where a promise in reasonable restraint of trade . . . has added to it a promise in unreasonable restraint, the former promise is enforceable unless the entire agreement is part of a plan to obtain a monopoly; but if full performance of a promise indivisible in terms, would involve unreasonable restraint, the promise is illegal and is not enforceable even for so much of the performance as would be a reasonable restraint.

10. For example, in *Edwards v. Mullin*, 220 Cal. 379, 30 P.2d 997 (1934), an agreement not to compete in the "northern portion of the state of California" was construed to be divisible and was enforced as to the City of San Francisco. See also *Fleckenstein Bros. Co. v. Fleckenstein*, 76 N.J.L. 613, 71 Atl. 265 (Ct. Err. & App. 1908).

11. See, e.g., *Interstate Finance Corp. v. Wood*, 69 F. Supp. 278 (E.D. Ill. 1946); *Beit v. Beit*, 135 Conn. 195, 63 A.2d 161 (1948); *Wisconsin Ice & Coal Co. v. Lueth*, 213 Wis. 42, 250 N.W. 819 (1933).

12. See *Williston & Corbin, On the Doctrine of Beit v. Beit*, 23 CONN. B.J. 40, 50 n.2 (1949).

sonable and necessary as to time¹³ and area.¹⁴ While subjected to early criticism,¹⁵ the doctrine of partial enforcement is being accepted by an increasing number of courts¹⁶ and leading authorities in the field of contracts.¹⁷

Concededly, the application of the partial enforcement rule will inevitably result in the enforcement of a contract different from that for which the parties bargained.¹⁸ Where the only alternative is to refuse enforcement entirely, however, this objection loses much of its force. Clearly, partial enforcement more nearly effectuates the intent of the contracting parties than does invalidating the covenant in its entirety.¹⁹ To permit partial enforcement of restrictive covenants within the limits of the established public policy prohibiting contracts in restraint of trade does not appear to be an undue extension of equitable principles. While not yet accepted by the majority of courts, the clear trend of the better-reasoned recent cases is toward application of this rule, and the decision of the Supreme Court of Wisconsin in the principal case is a sound one.

EVIDENCE—PHYSICIAN-PATIENT PRIVILEGE EXCLUDES
TESTIMONY REGARDING ACCUSED'S SANITY BY
PSYCHIATRIST OF PUBLIC MENTAL HOSPITAL

Taylor v. United States, 222 F.2d 398 (D.C. Cir. 1955)

Defendant was indicted for grand larceny, robbery, and house-breaking. Prior to trial, a court-appointed psychiatrist,¹ after examining defendant on several occasions, concluded that he was afflicted with severe schizophrenia² and was mentally incompetent to

13. *Whiting Milk Co. v. O'Connell*, 277 Mass. 570, 179 N.E. 169 (1931); *Brannen v. Bouley*, 272 Mass. 67, 172 N.E. 104 (1930); *Edgcomb v. Edmonston*, 257 Mass. 12, 153 N.E. 99 (1926).

14. *Metropolitan Ice Co. v. Ducas*, 291 Mass. 403, 196 N.E. 856 (1935).

15. *Compare* 15 B.U.L. REV. 834 (1935), *with* 32 B.U.L. REV. 224 (1952).

16. *John Roane, Inc. v. Tweed*, 89 A.2d 548 (Del. 1952); *Ceresia v. Mitchell*, 242 S.W.2d 359 (Ky. 1951); *American Weekly, Inc. v. Patterson*, 179 Md. 109, 16 A.2d 912 (1940).

17. 6 CORBIN, CONTRACTS § 1390 (1951); 5 WILLISTON, CONTRACTS § 1660 (rev. ed. 1937); *Williston & Corbin, On the Doctrine of Beit v. Beit*, 23 CONN. B.J. 40 (1949).

18. This was the argument of the dissenting judge in the principal case. *Fullerton Lumber Co. v. Torborg*, 70 N.W.2d 585, 594 (Wis. 1955).

19. It should be noted that if there is any evidence of a deliberate plan to coerce the acceptance of oppressive conditions, the restrictive covenant will be held invalid under either the "divisibility" or "partial enforcement" test. *Fullerton Lumber Co. v. Torborg*, 70 N.W.2d 585, 592 (Wis. 1955); 5 WILLISTON, CONTRACTS § 1660 (rev. ed. 1937).

1. The psychiatrist was appointed under 18 U.S.C. § 4244 (1952), which authorizes the court, on its own motion, to appoint a psychiatrist to examine an accused if there is "reasonable cause to believe" he is mentally incompetent for trial.

2. Schizophrenia is one of the most common of mental illnesses. The schizophrenic, commonly considered to have a "split personality," is generally afflicted with delusions and hallucinations which may result in criminal or anti-social behavior. GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 72-85 (1952).