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which the warrant procedure could be carried out. If the recipient refuses to consent upon notice of an upcoming visit, application for a warrant could be made. If the caseworker could articulate facts that suggested that violations or child abuse had been committed the warrant would issue. If not, the home visit would not be necessary. In short, the decision should be for an impartial magistrate, not for the caseworker in the field.

GEORGE R. HODGES

Contracts—Partial Enforcement of Restrictive Covenants†

A restrictive covenant in an employment contract which unduly restricts the covenantor will be closely scrutinized by the courts because it violates the public policy against restraint of trade. According to the traditional view as stated in the *Restatement of Contracts*,[1] if the covenant can be construed to be reasonable it will stand but if not[2] it falls; to do otherwise would be to rewrite the contract for the parties. In *Ehlers v. Iowa Warehouse Co.*[3] the Supreme Court of Iowa has overruled prior cases based on the *Restatement* rule and joined the growing minority of states which have adopted the "partial-enforcement" doctrine long advocated by Professors Williston[4] and Corbin.[5]

The plaintiff in *Ehlers*, a former employee of the defendant truck rental company, sought a declaratory judgment that two restrictive covenants in his employment contract with the defendant were unreasonably broad. The company counterclaimed for an injunction against viola-

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†The following closely related materials have appeared in this Review: Note, *Covenants Not To Compete*, 38 N.C.L. REV. 395 (1960); Note, *Restraints on Trade—Covenants in Employment Contracts not to Compete within the Entire United States*, 49 N.C.L. REV. 393 (1971); 26 N.C.L. REV. 402 (1948).

[1]Where a promise in reasonable restraint of trade in a bargain 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 not enforceable even for so much of the performance as would be a reasonable restraint. RESTATEMENT OF CONTRACTS § 518 (1932) [hereinafter cited as RESTATEMENT].

[2]*See* RESTATEMENT § 515.

[3]____Iowa ____, 188 N.W.2d 368 (1971).

[4]S. WILLISTON & G. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS § 1660 (rev. ed. 1937) [hereinafter cited as WILLISTON].

[5]6A A. CORBIN, CORBIN ON CONTRACTS § 1390 (1962) [hereinafter cited as CORBIN].

tion of the covenants. The first covenant at issue prohibited the plaintiff from disclosing his list of the company's customers to third parties or from using it in a competitive truck rental business after the termination of his employment. There was no time limit as to the duration of the restriction. The second restrictive covenant prohibited the plaintiff from engaging in a competitive business within a 150-mile radius of Waterloo, Iowa, for a period of two years.

In the course of the plaintiff's employment he had made contacts on behalf of the company in many—but not all—of the towns around Waterloo. The plaintiff was the company's principal representative, and in some instances he was the company's only contact with the customers. While still employed by the company and without its knowledge, the plaintiff, in direct violation of both restrictive covenants in his contract, secured verbal commitments from twenty-five per cent of the company's customers to do business with him after the termination of his employment.

The defendant showed the need to enforce the covenants to some extent since the plaintiff, while employed by the company, had gained access to and influence over the customers.[6] Secondly, the truck rental business in the area was highly competitive, and therefore there was no danger of violating the public policy against monopolies by enforcing the covenants.[7] A permanent restriction would have been unreasonable, but rather than completely rejecting the first covenant the court applied a two-year limitation. Since a period of two years was mentioned in the second covenant the court had evidence of what the defendant felt was reasonably necessary to protect itself. By partially enforcing the covenants the Supreme Court of Iowa reversed its former position which was in line with the so-called majority rule.[8] Since the court applied the "partial enforcement" doctrine,[9] it implicitly decided that the first covenant would have been held reasonable and thus enforceable had it originally contained a two-year restriction.

The second covenant was also held to be overly broad. The court's concern was to protect the defendant from an unfair advantage, but it determined that to enforce the 150-mile geographic limitation would have been unfair to the plaintiff. The geographic limitation was consid-

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[6]The burden is on the employer to show this need if the covenant is to be enforced at all. ___ Iowa at ___, 188 N.W.2d at 373.

[7]*Id.*

[8]The majority rule is expressed in *Brecher v. Brown*, 235 Iowa 627, 17 N.W.2d 377 (1945).

[9]___ Iowa at ___, 188 N.W.2d at 370.

ered to be unreasonable since it was not necessary to protect the defendant in cities where the plaintiff had not done business during his employment. Rather than reject the entire covenant the court enforced what it found to be a reasonable restriction: the court enjoined the plaintiff from doing business with those persons or firms which he had contacted while in the defendant's employ—but left the plaintiff free to contact those firms, regardless of their location, with which he had had no business dealings while he represented the defendant.

Restrictive covenants in employment contracts are closely scrutinized by the courts because the law frowns on contracts in restraint of trade;[10] in fact the oldest English cases voided all such covenants.[11] The classical notion was that a man cannot barter away his life and freedom,[12] but the modern cases have recognized that some restrictions are necessary to protect the parties. Restrictive covenants are now generally enforced if the court finds the restraint reasonably necessary to protect a legitimate interest of the covenantee in view of its effect on the covenantor and the public interest.[13] For example, where *A* promises *B* that he will not work in Chicago but *B* does business only in New York, the promise is unreasonable because it does not protect a legitimate interest of *B*.[14] Moreover, the legitimate interest of the covenantee must be weighed against the possible detriment to the covenantor.[15] One who sells a window-cleaning business does not by working as a janitor with some window-washing duties violate a covenant against competition, since to enforce the promise would deprive the seller of his right to work while enforcing only a questionable interest of the covenantee.[16] In addition, agreements not to compete are contrary to the public interest unless they are ancillary to another agreement such as an employment contract or the sale of a business.[17] Even when construed to be reasona-

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[10]Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 646-51 (1960).

[11]*E.g.*, Dyer's Case, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (1414). *See also* 5 WILLISTON § 1634.

[12]5 WILLISTON § 1652. *See* RESTATEMENT § 591; Pechon v. National Corp. Serv., Inc., 234 La. 397, 100 So. 2d 213 (1958) (employment contract for life held no more than employment at will).

[13]5 WILLISTON § 1636; RESTATEMENT §§ 515-16.

[14]5 WILLISTON § 1636, at 4581; *see* Carpenter & Hughes v. DeJoseph, 217 Misc. 2d 1003, 213 N.Y.S.2d 856 (Sup. Ct. 1960), *modified and aff'd*, 13 App. Div. 2d 611, 213 N.Y.S.2d 860 (1961) where a city-wide covenant not to compete with a former employer was held unenforceable, but the employee was forbidden to solicit his former employer's patients.

[15]____ Iowa at ____, 188 N.W.2d at 373-74; 5 WILLISTON § 1636, at 4581.

[16]Mitchell v. National Window Cleaning Co., 155 Ga. 215, 116 S.E. 532 (1923).

[17]Purchasing Associates, Inc. v. Weitz, 13 N.Y.2d 267, 273, 196 N.E.2d 245, 248, 246 N.Y.S.2d 600, 604-05 (1963); Wetzel, *Employment Contracts and Noncompetition Agreements*, 1969 U. ILL. L.F. 61.

ble these agreements are strictly interpreted, and courts are inclined to find that an act does not violate a restrictive covenant.[18] In the United States the courts are less likely to enforce restrictive covenants in employment contracts than those in sales contracts because the former are more likely to injure the promisor and the public.[19]

An unreasonable covenant does not necessarily invalidate the entire contract.[20] There are three theories as to the extent of enforceability of unreasonable covenants. The "all or nothing at all" view, the strictest of the three, holds that an unreasonable covenant fails completely. For example, where a covenant prohibited an employee from engaging in similar work for five years either in the city in which she worked or in any other city in which the company did business or intended to do business the court found the restriction to be unreasonable and the entire covenant failed.[21] The geographic limitation was simply too broad to be enforced by the court.

According to another theory, the covenant fails unless the offensive term is severable from the rest of the covenant.[22] If the restrictions are separate and distinct so that if the unreasonable term is removed a gramatically meaningful covenant is left, then the court will enforce the reasonable term while voiding the "blue-pencilled" term. The Supreme Court of North Carolina has adopted the "blue-pencil" test. In a case in which the promise was not to compete in Fayetteville, any other town in North Carolina, or any other town in the United States where the company was doing business or intended to do business, the lower court's application of the "all or nothing at all" rule was reversed. The North Carolina Supreme Court held that while the nation-wide restrictions were clearly unreasonable and unenforceable the city-wide and state-wide restrictions were severable, and the lower court was ordered to make a separate determination of their enforceability.[23] On the other hand, an employee's promise not to engage in a business anywhere in the state except in one city was held indivisible according to the language used by the parties since there were no county or city boundaries along which the covenant could be divided. Therefore the blue-pencil

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[18]Purchasing Associates, Inc. v. Weitz, 13 N.Y.2d 267, 272, 196 N.E.2d 245, 247-48, 246 N.Y.S.2d 600, 604 (1963); 5 WILLISTON § 1636, at 4583.

[19]___ Iowa at ___, 188 N.W.2d at 375; 5 WILLISTON § 1643.

[20]Kelly v. Kosuga, 358 U.S. 516, 521 (1959); 5 WILLISTON § 1659.

[21]Welcome Wagon, Inc. v. Morris, 224 F.2d 693 (4th Cir. 1955).

[22]This is the majority view. Brecher v. Brown, 235 Iowa 627, 17 N.W.2d at 370.

[23]Welcome Wagon Int'l, Inc. v. Pender, 255 N.C. 244, 120 S.E.2d 739 (1961).

test was not met and the entire covenant was held void.[24] Similarly, an agreement not to engage in any business whatsoever would be indivisible and totally invalid.[25]

An increasing number of states as well as leading scholars have rejected the all-or-nothing and blue-pencil tests in favor of the "partial-enforcement" doctrine.[26] This doctrine was expressed by the *Ehlers* court as follows: "[U]nless the facts and circumstances indicate bad faith on the part of the employer we will enforce noncompetitive covenants to the extent they are reasonably necessary to protect his legitimate interests without imposing undue hardship on the employee when the public interest is not adversely affected"[27] without regard to the divisibility of the covenant.

The extent of the relief that will be granted depends upon the relative equities in each case. In one case a promise by an employee not to compete with his employer's laundry business for ten years was held to be unreasonable, but the court enforced a restraint against soliciting customers for a period of nine months as being reasonable based on fairness and justice.[28] Similarly, where a defendant had managed the plaintiff's lumberyard under an employment contract containing a covenant not to work for another lumberyard within fifteen miles for ten years after the termination of employment and the defendant opened a competing business in the same town, the Supreme Court of Wisconsin decided that a three-year limitation would probably be sufficient to protect the plaintiff's interests.[29] The courts that follow the older theories refuse to look beyond the terms which the parties themselves have written, while under the partial-enforcement doctrine the courts feel free to modify the agreement and enforce instead a restriction that is reasonable.

The proponents of the older theories believe that the partial-enforcement doctrine ignores certain fundamental contract principles. It has been argued that there is a basic presumption against agreements in restraint of trade and that when a restrictive term is unreasonable it is because a party has grasped for too much. Therefore, according to

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[24]Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N.E. 1048 (1895); 5 WILLISTON § 1659, at 4680-81.

[25]5 WILLISTON § 1659, at 4681.

[26]*Id.* § 1660; 6A CORBIN § 1390. The major cases are listed in *Ehlers*. ___ Iowa at ___, 188 N.W.2d at 370.

[27]___ Iowa at ___, 188 N.W.2d at 370.

[28]Schmidl v. Central Laundry & Supply Co., Inc., 13 N.Y.S.2d 817 (Sup. Ct. 1939).

[29]Fullerton Lumber Co. v. Torborg, 270 Wis. 133, 70 N.W.2d 585 (1955)

this view, it is better to eliminate the restriction altogether.[30] According to the blue-pencil test the covenant reflects the intent of the contracting parties, and the court's modification of an indivisible covenant is, in effect, the imposition of what the court feels is "right" for the parties. The court virtually rewrites the contract.[31] The partial-enforcement doctrine dilutes these basic contract principles and allows the employer to overreach, secure in the knowledge that the covenant will be enforced to some extent.[32] This knowledge impairs the ideal situation because it destroys the bargaining power of the employee; that is, the employer will know that he runs no risk and therefore will insist upon the harshest terms.[33] The older views insist that when the court is allowed to rewrite the contract the result will depend on subjective considerations that can only lead to vagueness and uncertainty as to the respective duties of the parties. According to *Ehlers* a court must find what is *reasonably* necessary to protect the employer's *legitimate* interests without *undue* hardship to the employee and without *adversely* affecting the public interest.[34] A test under which these factors are weighed is so vague and open-ended as to be likely to result in a manifestation of the court's values and not the parties' intention.

On the other hand, advocates of the partial-enforcement doctrine have argued that its application leads to more equitable results without disregarding the intentions of the parties. The blue-pencil rule has been attacked as legalistic, mechanical, and leading to contradictory results.[35] The legality of contracts ought not depend solely on form. Under the blue-pencil rule it is argued that two contracts could have the same meaning but only one would be enforceable because the writing happened to be susceptible to deletion of the offensive terms while leaving a grammatically meaningful promise.[36]

One authority has noted that most unreasonable covenants, although illegal and unenforceable, are not the product of moral turpitude; rather they result usually from a desire, however overly zealous, to protect a party's own interests. Therefore there is no reason to punish the party by throwing out the entire covenant and affording him no

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[30] *See* ___ Iowa at ___, 188 N.W.2d at 376 (Becker, J., dissenting).

[31] *Id.* (interpretation should not involve rewriting contract); *see* Hamilton v. Wosepka, 261 Iowa 299, 312-13, 154 N.W.2d 164, 168 (1967).

[32] ___ Iowa at ___, 188 N.W.2d at 376-77; 5 WILLISTON § 1660, at 4685.

[33] ___ Iowa at ___, 188 N.W.2d at 376.

[34] ___ Iowa at ___, 188 N.W.2d at 370.

[35] ___ Iowa at ___, 188 N.W.2d at 371; 6A CORBIN § 1390, at 67.

[36] 5 WILLISTON § 1660, at 4683.

protection at all.[37]

The advocates of the all-or-nothing doctrine argue that the partial-enforcement doctrine ignores the intent of the parties, but this argument has two sides. The courts should not destroy a freely bargained contract any more than is necessary to satisfy the various public policies.[38] The partial-enforcement doctrine gives effect to the parties' intentions to the extent that the law would allow. It is further argued that the public interest is best served and the sanctity of the contract is best preserved by reducing the restriction to an enforceable level. The dividing line between the unreasonable covenant and the enforceable covenant is easily ascertainable.[39] Even under the all-or-nothing doctrine the courts must decide that the restriction is too severe to be reasonable.[40] Under the partial-enforcement doctrine the standard of reasonableness is enforced rather than just used as the standard of enforceability.

The partial-enforcement doctrine does not totally disregard the intentions of the parties. When a party accepts a restraint, for instance, over an unenforceably large area it is obviously reasonable to treat him as having accepted a lesser and reasonable geographical restriction.[41] Arguably, then, the application of the partial-enforcement doctrine does not involve rewriting the contract in contravention of the intention of the parties.[42] In *Ehlers,* for example, by applying the two-year limitation already contained in the second covenant to the first covenant, which otherwise was unreasonable because it was of indefinite duration, the court enforced a standard that the parties had implicitly agreed upon. A similar result was reached when the court enforced the geographical restriction only as to a class of customers and not as to all customers within the 150-mile radius.

The inflexible all-or-nothing and blue-pencil theories allow parties to escape their contractual responsibilities.[43] When an overly broad covenant falls entirely the covenantee is left without any protection, while the covenantor is permitted to retain the entire contract considera-

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[37]Corbin, *A Comment on Beit v. Beit,* 23 CONN. B.J. 43, 47 (1949).

[38]Williston, *A Note on Beit v. Beit,* 23 CONN. B.J. 40, 42 (1949).

[39]Corbin, *supra* note 37, at 47.

[40]The concept of reasonableness must be an underlying value in any such determination. When a court decides that a covenant is reasonable it also decides that it is not unreasonable. Similarly, when the court decides that a covenant is unreasonable, it can easily go one step further and decide what is reasonable.

[41]Solari Industries, Inc. v. Malady, 55 N.J. 571, 582, 264 A.2d 53, 59 (1970).

[42]Corbin, *supra* note 37, at 50.

[43]*Id.* at 47.

tion unless separate consideration was exacted for the covenant. He would then be free to open a business next-door to his former employer.[44]

A final argument in favor of the partial-enforcement doctrine is that it does not involve rewriting the contract any more than does the majority blue-pencil rule.[45] Under each theory the contract is modified by the court to make it enforceable. The blue-pencil theory involves a mere mechanical excision of the offending term, while the partial-enforcement doctrine goes one step further and assures that the rewriting by the court leads to the most equitable results under the circumstances.

The conflicting views will certainly collide when the American Law Institute reconsiders the blue-pencil rule set out in section 518 of the *Restatement of Contracts*. If the ALI adopts the partial-enforcement rule, as it likely will, another issue that must be resolved is whether that rule should apply only to employment contracts and not to contracts of sale. The *Ehlers* court endorsed such a limitation, but the present section 518 makes no such distinction.

An employment contract is likely to be a contract of adhesion with the parties in positions of unequal bargaining power.[46] In the sales situation the parties are more likely to have bargained for each term. Some have argued that for this very reason the all-or-nothing doctrine should be applied to contracts of employment to prevent the employer from overreaching with the expectation of at least partial enforcement.[47] This argument is countered by the requirement of the partial-enforcement doctrine that the covenant be made in good faith if it is to be enforced at all.[48] Since the concept of reasonableness is equally ascertainable in the sales and employment situations, there would seem to be no need for a distinction if the premises of the partial-enforcement doctrine are sound. The partial-enforcement doctrine requires an examination by the court of the surrounding circumstances so that whatever considerations are peculiar to either the sales or the employment situation will be considered when deciding what is reasonable and enforceable in each case.[49]

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[44]*Id.* at 50; *see* Beit v. Beit, 135 Conn. 195, 63 A.2d 161 (1948); 6A CORBIN § 1390, at 76.

[45]6A CORBIN § 1390, at 68-69.

[46]*Id.* § 1394, at 89.

[47]___ Iowa at ___, 188 N.W.2d at 376-77 (Becker, J., dissenting); 5 WILLISTON § 1660, at 4685.

[48]*See* ___ Iowa at ___, 188 N.W.2d at 370.

[49]In the sales situation the UNIFORM COMMERCIAL CODE § 2-302(1) allows an unconscionable

If adopted the partial-enforcement doctrine will support the equities of each situation rather than mechanically apply legalistic rules of interpretation. As stated in *Ehlers,* the result will be that the legitimate interests of the covenantee will be protected without undue hardship to the covenantor when the public interest is not adversely affected.[50] This balancing of conflicting interests will enable the courts to dispense justice rather than act as legal technicians.

DAVID M. RAPP

Sales—Strict Liability For Breach of Warranty: *Gore v. George J. Ball, Inc.*

As a general rule two parties may deal with each other as they wish, and if their ensuing agreement is voluntarily and fairly entered into, it will be enforceable in a court of law. However, this fundamental right of freedom of contract is subject to the limitation, *inter alia,* that the agreement may not be against public policy. The vague and somewhat amorphous concept of public policy has been applied by courts to invalidate contracts which in the opinion of the court tend to be injurious to the public welfare, to sound morality, or to the interests of society.[1] In *Gore v. George J. Ball, Inc.*,[2] the North Carolina Supreme Court refused to enforce a limitation-of-damages clause in a contract between a seed seller and a farmer because such a provision "is contrary to the public policy of this State."[3]

In 1965, using an order blank obtained from a George J. Ball, Inc. catalogue, C. O. Gore ordered four ounces of Heinz 1350 tomato seeds at a cost of five dollars. Shortly thereafter Gore received from Ball several packets of seed labeled "Heinz 1350 Tomato Seed." Included

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contract or clause to be enforced according to any one of the three theories:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

[50]*See* text accompanying note 27 *supra.*

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[1]*E.g.,* Pope Mfg. Co. v. Gormully, 144 U.S. 224 (1892); Perkins v. Hegg, 212 Minn. 377, 3 N.W.2d 671 (1942).

[2]279 N.C. 192, 182 S.E.2d 389 (1971).

[3]*Id.* at 203, 182 S.E.2d at 395.