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Illustrations:

1. A employs B as advertising manager of his retail clothing store. As part of the employment agreement, A promises to pay B a pension on B's retirement on condition that B not work in the retail clothing business in the same town. B works for A for fifteen years, but does not deal with customers and acquires no confidential trade information in his work. The restraint is unreasonable under the rule stated in § 188, but the condition is not an essential part of the agreed exchange and its non-occurrence will be excused. A's promise to pay the pension is enforceable even though B works as an advertising manager in the retail clothing business in the same town. Compare Illustration 8 to § 188.

2. A employs B as a research chemist in his nationwide pharmaceutical business. As part of the employment agreement, A promises to pay B a pension on B's retirement on condition that B not work in any branch of the chemical industry at any place in the country for three years after retirement. B works for fifteen years and acquires valuable confidential information that would be useful to A's competitors and would harm A's business. B can find employment as a research chemist outside of the pharmaceutical industry. The restraint is unreasonably broad under the rule stated in § 188, but the condition is not an essential part of the agreed exchange and its non-occurrence will be excused. If the court concludes that the confidential information acquired by B is such as unreasonably to harm A's business, that B can find employment as a research chemist outside the pharmaceutical industry, and that B obtained the term in good faith and in accordance with fair dealing (see § 184), the court will hold that A's promise to pay the pension is conditional on B's not working in the pharmaceutical industry at any place in the country within three years of his retirement. Compare Illustration 7 to § 188.

Reporter's Note

This Section is new, but its style follows that of § 229. It rejects what is sometimes called the “employee's choice” rule under which an employer may condition his promise to pay pension benefits to the employee on the employee's not competing. Courts that follow this rule have held that even where the restraint is unreasonable, and would be unenforceable if it were promised, it is valid when it takes the form of a condition simply because the employee can always choose to ignore the restraint and forego the benefit. The rule is incompatible with the corresponding rule relating to promises and is rejected in favor of the rule stated in this Section. See § 178. This is in accord with the recent trend. See Neuffer v. Bakery and Confectionery Workers Int'l, 307 F.2d 671 (D.C.Cir.1962) (dictum); Muggill v. Reuben H. Donnelley Corp., 62 Cal.2d 239, 42 Cal.Rptr. 107, 398 P.2d 147 (1965); Flammer v. Patton, 245 So.2d 854 (Fla.1971); Lavey v. Edwards, 264 Or. 331, 505 P.2d 342 (1973); Southwestern Bell Telephone Co. v. Gravitt, 551 S.W.2d 421 (Tex.Civ.App.1976), ref. n.r.e. (pension plan conditions). There also is some doubt as to whether the rule applies in some of the jurisdictions where it was previously assumed to be the law. See Bradford v. New York Times Co., 501 F.2d 51 (2d Cir.1974). Even in those jurisdictions that adhere to the rule, its effect may be avoided by holding, for example, that the term is unconscionable (§ 208) or that it involves extreme forfeiture (§ 229). Compare Tweddle v. Tweddle Litho Co., 80 Mich.App. 418, 264 N.W.2d 9 (1978) and authorities discussed therein. The rule has been criticized by legal writers. See Goldschmid, Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law, 73 Colum.L.Rev. 1193 (1973); Note, Forfeiture of Pension Benefits for Violation of Covenants Not to Compete, 61 NW.L.Rev. 290 (1966). As to conditional promises generally, see 6A Corbin, Contracts § 1396 (1962); 14 Williston, Contracts § 1628 (3d ed.1972). Although this Section's principal impact is on restraints in employment agreements, it also applies to conditions that are contrary to other public policies.

Comment b. Illustrations 1 and 2 are new. They are supported by the authorities cited above.
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**Case Citations - by Jurisdiction**

**C.A.3**

**C.A.3**, 2004. Subsec. (1) and com. (b) cit. in case quot. in disc. Employer sought to compel arbitration on former employee's discrimination claims, invoking provisions of arbitration agreement in employment contract. The district court denied motion, holding that agreement to arbitrate was unenforceable. Reversing, this court held, inter alia, that the 30-day-notice provision and the provision that each party bear his or her own costs, expenses, and attorney's fees, were unconscionable when viewed as of the time the contract was made, and remanded for a determination of whether “the loser pays arbitral costs” provision was unconscionable and whether the unconscionable provisions of the agreement could appropriately be severed. Parilla v. IAP Worldwide Services VI, Inc., 368 F.3d 269, 288.

**C.A.5**

**C.A.5**, 1987. Subsec. (1) and com. (b) cit. in sup. An Iranian oil company and an American oil company negotiated an agreement stipulating that disputes were to be arbitrated in Iran according to Iranian law. When a dispute arose, the American company refused to arbitrate in Iran, citing political unrest and danger to Americans. The Iranian company brought suit in federal district court alleging breach of contract and seeking to compel arbitration in Mississippi; the district court held that it was not empowered to compel arbitration in a different forum. Affirming, this court held, inter alia, that the plaintiff could not rely on the doctrine of impossibility to render the forum selection clause without force because plaintiff, an entity of the Iranian government, was partly to blame for the political situation and had reason to know of it at the time the contract was made. The court concluded that the venue provision was not severable because the essence of the bargain was to arbitrate in Iran. National Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326, 334.

**C.A.7**

**C.A.7**, 1984. Com. (b) cit. in disc. The plaintiff petitioned this court to review an EPA action imposing stricter air quality standards. The court had originally remanded for clarification of the EPA order. The EPA reinstated the order with a clarification, and the plaintiff again appealed. The court enjoined the EPA order on the second appeal, holding that the EPA could not make a state pollution control plan more stringent than the state had intended by calling revision by deletion “partial approval.” The court analogized that a court that refuses to enforce a contract because it is against public policy, will not enforce the remainder of the contract if it gives the promisee a substantially better deal than he bargained for. The EPA, said the court, must follow the procedures set forth by the Clean Air Act for the promulgation of its own more stringent regulations. Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1036.
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Alaska

Alaska, 1987. Quot. in disc., com. (b) cit. in ftn. Two former hotel managers sued a corporate hotel owner and its sole shareholder to obtain a bonus that had been promised to them on the condition that they were still employed when the hotel was sold. The trial court found for the plaintiffs, holding that the bonus was payable because the employment on sale condition, a condition precedent, was not met but was excused by the plaintiffs' forced resignations. Reversing, this court held that the condition precedent was neither met nor excused, reasoning in part that the continued employment condition could not be excused on the ground that it violated public policy. Klondike Industries Corp. v. Gibson, 741 P.2d 1161, 1166, 1167.


Cal.App. 1993. Cit. in disc. §§ 183-185. A producer of natural gas sought declaratory relief regarding the obligations of the producer and a purchaser under contracts for the sale of natural gas. The purchaser filed a petition to compel arbitration under a contract clause; after arbitration, the trial court granted the producer's petition to vacate the arbitration award. The court of appeal granted the purchaser's petition for a writ of mandate; on review, the California Supreme Court vacated and remanded for reconsideration. This court issued a peremptory writ commanding the trial court to rescind its order, holding, inter alia, that the arbitration award was not unenforceable with respect to a repricing provision of the purchase contract, even though it rested on an incorrect view of the need for agency certification of the character of some of the natural gas under the Natural Gas Policy Act, as the actual price to be paid for the gas was not unlawful. Pacific Gas and Electric Co. v. Superior Court (Anacapa Oil Corp.), 15 Cal.App.4th 576, 611, 19 Cal.Rptr.2d 295, 319.

Cal.App. 1991. Cit. in disc. §§ 183-185. A seller sued a buyer on contracts for the sale of natural gas, seeking a declaration that it was entitled to receive the ceiling price for gas produced from its wells. Upon the buyer's petition to compel arbitration, an arbitration panel entered an award in favor of the buyer, construing the contracts to allow repricing of the gas at its market price. The trial court vacated the award, holding that the arbitrators exceeded their authority in their construction of the contract. The buyer then filed this petition for a writ of mandate to overturn the trial court's order. This court granted the petition, holding, inter alia, that the award did not violate public policy even though it compelled payment of a price for some of the gas that exceeded an applicable federal ceiling price. Noting that the seller made the public policy challenge only to impugn the arbitrators' legal reasoning, the court said the seller could avoid a potentially illegal outcome by simply declining to accept as payment more than the ceiling price it believed to be applicable. Pacific Gas & Elec. v. Superior Court, 234 Cal.App.3d 428, 277 Cal.Rptr. 694, 725.

Idaho

Idaho, 2011. Quot. in sup. Insured motorist injured in a car accident with a tortfeasor brought suit for breach of contract, inter alia, against her insurer, after defendant denied her claim for underinsured-motorist benefits because she had failed to exhaust tortfeasor's bodily-injury policy. The trial court granted summary judgment for defendant. Vacating and remanding, this court held that the exhaustion clause in plaintiff's underinsured-motorist policy, which required her to deplete all of tortfeasor's bodily-injury insurance before she could collect underinsurance benefits, was void because it violated Idaho state public policy. The court further held that, although the exhaustion clause in plaintiff's policy was void, severable, and unenforceable, the rest of her policy remained intact; to the extent that a term requiring the occurrence of a condition was unenforceable for public-policy reasons, a court could excuse the nonoccurrence of the condition unless its occurrence was an essential part of the agreed exchange. Hill v. American Family Mut. Ins. Co., 150 Idaho 619, 249 P.3d 812, 821.

Wyo.
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Wyo. 1993. Cit. in disc. §§ 185-188. Former employers of veterinarian sued for alleged breach of a covenant not to compete contained in the parties' employment agreement. Modifying and affirming the trial court's judgment enforcing the covenant but denying employers' damages claim and remanding, this court held, inter alia, that, although the covenant was generally reasonable and enforceable due to additional consideration being provided veterinarian in an addendum to her employment agreement, its three-year term was an unreasonable restraint of trade because there was no reasonable relationship between the three-year requirement and employers' special interests. Enforcement of a one-year term would be appropriate, said the court, as a replacement veterinarian would be able to demonstrate his or her own professionalism to virtually all of the clinic's clients within a one-year durational limit. Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 539.