§ 186. Promise in Restraint of Trade

(1) A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade.

(2) A promise is in restraint of trade if its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation.

Comment:

a. Rule of reason. Every promise that relates to business dealings or to a professional or other gainful occupation operates as a restraint in the sense that it restricts the promisor's future activity. Such a promise is not, however, unenforceable unless the restraint that it imposes is unreasonably detrimental to the smooth operation of a freely competitive private economy. A rule of reason of this kind necessarily has somewhat vague outlines. Whether a restraint is reasonable is determined in the light of the circumstances of the transaction, including not only the particular facts but general social and economic conditions as well. The promise is viewed in terms of the effects that it could have had and not merely what actually occurred. Account is taken of such factors as the protection that it affords for the promisee's legitimate interests, the hardship that it imposes on the promisor, and the likely injury to the public. See § 188 and Comments *b* and *c* to that Section. A restraint that is reasonable in some circumstances may be unreasonable in others.

b. Typical restraints. The rule stated in this Section has little impact on some of the most significant promises in restraint of trade. Among the leading examples are promises that are intended to or that tend to create a monopoly, in the sense of control or domination of a market, and those that significantly lessen competition by, for example, tying the purchase of one product to another controlling prices or limiting production. The effect of such restraints is largely governed by federal and state legislation. See Introductory Note to this Topic. (No implication is intended in the Illustrations in this Topic with respect to the application of such legislation.) Another example consists

of promises that restrict the alienation of a property interest. These promises usually involve land and such restraints are dealt with as part of the larger problem of restraints on alienation of land in general. See Restatement of Property, Division IV, Part II. Among the residue of promises that are left to be governed by the general common law restriction on promises in restraint of trade, the most commonly litigated are those to refrain from competition. They are given special treatment in the two sections that follow.

Illustrations:

1. A, B and C, competing manufacturers, promise each other not to sell goods in which they deal at prices below fixed minimums. Their promises are unreasonably in restraint of trade and are unenforceable on grounds of public policy.

2. A, B and C, who are competing merchants in a city where there are many competitors, promise to become partners in order to reduce the expense of doing business. The economic situation of A, B and C is such as to make the partnership reasonable. Their implied promises not to compete individually in the same market are not unreasonably in restraint of trade and enforcement is not precluded on grounds of public policy.

3. A transfers a tract of land in fee simple to B. As part of the transaction, B promises never to transfer the land. B's promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy. See Restatement of Property § 406.

REPORTER'S NOTE

Subsection (1) of this Section is based on former § 514. Subsection (2) is based on former § 513. See 6A Corbin, Contracts §§ 1379–83, 1397–1400, 1402–04 (1962); 14 Williston, Contracts §§ 1633–35, 1646 (3d ed. 1972).

Comment b. Illustration 1 is based on Illustration 8 to former § 515; see also Illustration 9 to former § 515. Illustration 2 is based on Illustration 5 to former § 516. Illustration 3 is based on Illustration 23 to former § 515.

§ 187. Non-Ancillary Restraints on Competition

A promise to refrain from competition that imposes a restraint that is not ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade.

Comment:

a. Importance of rules. The common law on restraint of trade has played a particularly important role with respect to promises to refrain from competition. Parties who have challenged such promises have ordinarily been content to assert their unenforceability under the common law and have not sought relief under federal or state legislation. There is, therefore, an especially well-developed and significant body of judicial decisions applying the general rule of reason stated in the preceding section to such promises. Because of the importance of these decisions, the rules that they embody are given special attention in this Section and the one that follows. (No implication is intended with respect to the application of federal or state legislation to such promises.)

b. Non-ancillary restraints. In order for a promise to refrain from competition to be reasonable, the promisee must have an interest worthy of protection that can be balanced against the hardship on the promisor and the likely injury to the public. See § 188 and Comments *b* and *c* to that Section. The restraint must, therefore, be subsidiary to an otherwise valid transaction or relationship that gives rise to such an interest. A restraint that is not so related to an otherwise valid transaction or relationship is necessarily unreasonable. The promisee's interest may arise out of his acquisition from the promisor of a business. See § 188(2)(a). It may arise out of a relation between himself as employer or principal and the promisor as employee or agent. See § 188(2)(b). Or it may arise out of a relation between himself and the promisor as partners. See § 188(2)(c). This enumeration does not purport to be exhaustive, but a promise not to complete that is not ancillary to some such transaction or relationship as these is unreasonable because it protects no legitimate interest of the promisee. This is so even though the promise would be enforceable if it were an ancillary promise. In order for a restraint to be ancillary to a transaction or relationship the promise that imposes it must be made as part of that transaction or relationship. A promise made subsequent to the transaction or relationship is not ancillary to it. In the case of an ongoing transaction or relationship, however, it is enough if the promise is made before its termination, as long as it is supported by consideration and meets the other requirements of enforceability.

Illustrations:

1. A is about to go into a business that would compete with B's business in the same city. B pays A $50,000 in return for A's promise not to compete. A's promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy.

2. A and B, competing manufacturers, promise each other that A will not sell goods in one designated territory and that B will not sell goods in another designated territory. Their promises are unreasonably in restraint of trade and are unenforceable on grounds of public policy.

c. Promises to stifle competition in bidding. An important application of the rule stated in this Section occurs in connection with promises not to bid at auctions or at other competitive sales, since such restraints are generally not, by their nature, ancillary to an otherwise valid transaction or relationship. See Illustration 3. The same principle applies to promises to bid so as to affect adversely the final result, even though the number of bidders is not diminished. See Illustration 4. However, two or more persons may agree to bid for something for their collective benefit, either because they intend to hold it collectively or to divide it later into such parts as each wishes to hold, neither desiring outright ownership of the whole. Such restraints are ancillary to a relationship of joint venture, in the nature of partnership, between the parties and such promises are not unenforceable if they do not otherwise offend the test of reasonableness. See Illustration 15 to § 188.

Illustrations:

3. A and B attend an art auction. Both intend to bid on a valuable painting, but A, desiring to buy it himself at as low a price as possible, pays B $1,000 in return for B's promise to refrain from bidding on the painting. B's promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy. The result would be the same if the promise were made in connection with a private rather than a public sale of the painting.

4. A, B and C, building contractors, make an agreement under which they will bid individually but each promises to pay to a fund 2 per cent of the gross amount of the contract price on any successful bid by one of them, the total amount of the fund to be divided equally among the three at the end of each year. Their promises are unreasonably in restraint of trade and are unenforceable on grounds of public policy.

REPORTER'S NOTE

This Section is based on former § 515(e). The remaining subsections to former § 515 are dealt with elsewhere in this Topic. See § 188(1) and the Introductory Note to Topic 2. See 6A Corbin, Contracts §§ 1402–13, 1468–69 (1962 & Supp. 1980); 14 Williston, Contracts §§ 1647, 1648 (3d ed. 1972).

Comment b. Illustration 1 is based on Illustration 24 to former § 515; see also Illustration 13 to former § 515. Illustration 2 is based on Illustration 10 to former § 515.

Comment c. Promises to stifle competition in competitive bidding, the subject of former § 517, are dealt with under the general rule stated in this Section. Illustration 3 is based on Illustrations 2 and 5 to former § 517; see also Illustration 1 to former § 517. Illustration 4 is based on Illustration 6 to former § 517.

§ 188. Ancillary Restraints on Competition

(1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if

(a) the restraint is greater than is needed to protect the promisee's legitimate interest, or

(b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.

(2) Promises imposing restraints that are ancillary to a valid transaction or relationship include the following:

(a) a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of tbe business sold;

(b) a promise by an employee or other agent not to compete with his employer or other principal;

(c) a promise by a partner not to compete with the partnership.

Comment:

a. Rule of reason. The rules stated in this Section apply to promises not to compete that, because they impose ancillary restraints, are not necessarily invalid. Subsection (1) restates in more detail the general rule of reason of § 186 as it applies to such promises. Under this formulation the restraint may be unreasonable in either of two situations. The first occurs when the restraint is greater than necessary to protect the legitimate interests of the promisee. The second occurs when, even though the restraint is not greater than necessary to protect those interests, the promisee's need for protection is out-

weighed by the hardship to the promisor and the likely injury to the public. In the second situation the court may be faced with a particularly difficult task of balancing competing interests. No mathematical formula can be offered for this process.

b. Need of the promisee. If a restraint is not ancillary to some transaction or relationship that gives rise to an interest worthy of protection, the promise is necessarily unreasonable under the rule stated in the preceding Section. In some instances, however, a promise to refrain from competition is a natural and reasonable means of protecting a legitimate interest of the promisee arising out of the transaction to which the restraint is ancillary. In those instances the same reasons argue for its enforceability as in the case of any other promise. For example, competitors who are combining their efforts in a partnership may promise as part of the transaction not to compete with the partnership. Assuming that the combination is not monopolistic, such promises, reasonable in scope, will be upheld in view of the interest of each party as promisee. See Subsection (2)(c) and Comment *h*. (It is assumed in the Illustrations to this Section that the arrangements are not objectionable on grounds other than those that come within its scope.) The extent to which the restraint is needed to protect the promisee's interests will vary with the nature of the transaction. Where a sale of good will is involved, for example, the buyer's interest in what he has acquired cannot be effectively realized unless the seller engages not to act so as unreasonably to diminish the value of what he has sold. The same is true of any other property interest of which exclusive use is part of the value. See Subsection (2)(a) and Comment *f*. In the case of a post-employment restraint, however, the promisee's interest is less clear. Such a restraint, in contrast to one accompanying a sale of good will, is not necessary in order for the employer to get the full value of what he has acquired. Instead, it must usually be justified on the ground that the employer has a legitimate interest in restraining the employee from appropriating valuable trade information and customer relationships to which he has had access in the course of his employment. Arguably the employer does not get the full value of the employment contract if he cannot confidently give the employee access to confidential information needed for most efficient performance of his job. But it is often difficult to distinguish between such information and normal skills of the trade, and preventing use of one may well prevent or inhibit use of the other. See Subsection (2)(b) and Comment *g*. Because of this difference in the interest of the promisee, courts have generally been more willing to uphold promises to refrain from competition made in connection with sales of good will than those made in connection with contracts of employment.

c. Harm to the promisor and injury to the public. Even if the restraint is no greater than is needed to protect the promisee's interest, the promisee's need may be outweighed by the harm to the promisor and the likely injury to the public. In the case of a sale of a business, the harm caused to the seller may be excessive if the restraint necessitates his complete withdrawal from business; the likely injury to the public may be too great if it has the effect of removing a former competitor from competition. See Comment *f*. In the case of a post-employment restraint, the harm caused to the employee may be excessive if the restraint inhibits his personal freedom by preventing him from earning his livelihood if he quits; the likely injury to the public may be too great if it is seriously harmed by the impairment of his economic mobility or by the unavailability of the skills developed in his employment. See Comment *g*. Not every restraint causes injury to the public, however, and even a post-employment restraint may increase efficiency by encouraging the employer to entrust confidential information to the employee.

d. Extent of the restraint. The extent of the restraint is a critical factor in determining its reasonableness. The extent may be limited in three ways: by type of activity, by geographical area, and by time. If the promise proscribes types of activity more extensive than necessary to protect those engaged in by the promisee, it goes beyond what is necessary to protect his legitimate interests and is unreasonable. If it covers a geographical area more extensive than necessary to protect his interests, it is also unreasonable. And if the restraint is to last longer than is required in light of those interests, taking account of such factors as the permanent or transitory nature of technology and information, it is unreasonable. Since, in any of these cases, the restraint is too broad to be justified by the promisee's need, a court may hold it to be unreasonable without the necessity of weighing the countervailing interests of the promisor and the public. What limits as to activity, geographical area, and time are appropriate in a particular case depends on all the circumstances. As to the possibility of divisibility, see § 183.

e. Examples of ancillary restraints. The rule stated in Subsection (1) has its most significant applications with respect to the three types of promises set out in Subsection (2). In each of these situations the promisee may have need for protection sufficient to sustain a promise to refrain from competition as long as it is reasonable in extent. They involve promises by the seller of a business, by an employee or agent, and by a partner. The list is not an exclusive one and there may be other situations in which a valid transaction or relation-

ship gives the promisee a legitimate interest sufficient to sustain a promise not to compete.

f. Promise by seller of a business. A promise to refrain from competition made in connection with a sale of a business may be reasonable in the light of the buyer's need to protect the value of the good will that he has acquired. In effect, the seller promises not to act so as to diminish the value of what he has sold. An analogous situation arises when the value of a corporation's business depends largely on the good will of one or more of the officers or shareholders. In that situation, officers or shareholders, either on the sale of their shares or on the sale of the corporation's business, may make an enforceable promise not to compete with the corporation or with the purchaser of its business, just as the corporation itself could on sale of its business make an enforceable promise to refrain from competition.

Illustrations:

1. A sells his grocery business to B and as part of the agreement promises not to engage in a business of the same kind within a hundred miles for three years. The business of both A and B extends to a radius of a hundred miles, so that competition anywhere within that radius would harm B's business. The restraint is not more extensive than is necessary for B's protection. A's promise is not unreasonably in restraint of trade and enforcement is not precluded on grounds of public policy.

2. The facts being otherwise as stated in Illustration 1, neither A's nor B's business extends to a radius of a hundred miles. The area fixed is more extensive than is necessary for B's protection. A's promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy. As to the possibility of refusal to enforce limited to part of the promise, see § 184(2).

3. A sells his grocery business to B and as part of the agreement promises not to engage in business of any kind within the city for three years. The activity proscribed is more extensive than is necessary for B's protection. A's promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy. As to the possibility of refusal to enforce only part of the promise, see § 184(2).

4. A sells his grocery business to B and as part of the agreement promises not to engage in a business of the same kind within the city for twenty-five years, although B has ample opportunity to make A's former good will his own in a much shorter period of time. The time fixed is longer than is necessary for A's protec-

tion. A's promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy. As to the possibility of refusal to enforce only part of the promise, see § 184(2).

5. A, a corporation, sells its business to B. As part of the agreement, C and D, officers and large shareholders of A, promise not to compete with B within the territory in which A did business for three years. Their promises are not unreasonably in restraint of trade and enforcement is not precluded on grounds of public policy.

g. Promise by employee or agent. The employer's interest in exacting from his employee a promise not to compete after termination of the employment is usually explained on the ground that the employee has acquired either confidential trade information relating to some process or method or the means to attract customers away from the employer. Whether the risk that the employee may do injury to the employer is sufficient to justify a promise to refrain from competition after the termination of the employment will depend on the facts of the particular case. Post-employment restraints are scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through loss of his livelihood. This is especially so where the restraint is imposed by the employer's standardized printed form. Cf. § 208. A line must be drawn between the general skills and knowledge of the trade and information that is peculiar to the employer's business. If the employer seeks to justify the restraint on the ground of the employee's knowledge of a process or method, the confidentiality of that process or method and its technological life may be critical. The public interest in workable employer-employee relationships with an efficient use of employees must be balanced against the interest in individual economic freedom. The court will take account of any diminution in competition likely to result from slowing down the dissemination of ideas and of any impairment of the function of the market in shifting manpower to areas of greatest productivity. If the employer seeks to justify the restraint on the ground of the employee's ability to attract customers, the nature, extent and locale of the employee's contacts with customers are relevant. A restraint is easier to justify if it is limited to one field of activity among many that are available to the employee. The same is true if the restraint is limited to the taking of his former employer's customers as contrasted with competition in general. A restraint may be ancillary to a relationship although, as in the case of an employment at will, no contract of employment is involved. Analogous rules apply

to restraints imposed on agents by their principals. As to the duty of an agent not to compete with his principal during the agency relationship, see Restatement, Second, Agency §§ 393, 394.

Illustrations:

6. A employs B as a fitter of contact lenses under a one-year employment contract. As part of the employment agreement, B promises not to work as a fitter of contact lenses in the same town for three years after the termination of his employment. B works for A for five years, during which time he has close relationships with A's customers, who come to rely upon him. B's contacts with A's customers are such as to attract them away from A. B's promise is not unreasonably in restraint of trade and enforcement is not precluded on grounds of public policy.

7. A employs B as advertising manager of his retail clothing store. As part of the employment agreement, B promises not to work in the retail clothing business in the same town for three years after the termination of his employment. B works for A for five years but does not deal with customers and acquires no confidential trade information in his work. B's promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy. Compare Illustration 1 to § 185.

8. A employs B as an instructor in his dance studio. As part of the employment agreement, B promises not to work as a dance instructor in the same town for three years after the termination of his employment. B works for five years and deals directly with customers but does not work with any customer for a substantial period of time and acquires no confidential information in his work. B's promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy.

9. A employs B as a research chemist in his nationwide pharmaceutical business. As part of the employment agreement, B promises not to work in the pharmaceutical industry at any place in the country for three years after the termination of his employment. B works for five years and acquires valuable confidential information that would be useful to A's competitors and would unreasonably harm A's business. B can find employment as a research chemist outside of the pharmaceutical industry. B's promise is not unreasonably in restraint of trade and enforcement is not precluded on grounds of public policy.

10. A employs B to work with rapidly changing technology, some parts of which entail valuable confidential information. As

part of the agreement B promises not to work for any competitor of A for ten years after the termination of the employment. The confidential information made available to A will probably remain valuable for only a much shorter period. The time fixed is longer than is necessary for A's protection. B's promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy. As to the possibility of refusal to enforce only part of the promise, see § 184(2).

h. Promise by partner. A rule similar to that applicable to an employee or agent applies to a partner who makes a promise not to compete that is ancillary to the partnership agreement or to an agreement by which he disposes of his partnership interest. The same is true of joint adventurers, who are treated as partners in this respect.

Illustrations:

11. A, B and C form a partnership to practice veterinary medicine in a town for ten years. In the partnership agreement, each promises that if, on the termination of the partnership, the practice is continued by the other two members, he will not practice veterinary medicine in the same town during its continuance up to a maximum of three years. The restraint is not more extensive than is necessary for the protection of each partner's interest in the partnership. Their promises are not unreasonably in restraint of trade and enforcement is not precluded on grounds of public policy.

12. A, an experienced dentist and oral surgeon, takes into partnership B, a younger dentist and oral surgeon. In the partnership agreement, B promises that, if he withdraws from the partnership, he will not practice dentistry or oral surgery in the city for three years. Their practice is limited to oral surgery, and does not include dentistry. The activity proscribed is more extensive than is necessary for A's protection. B's promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy. As to the possibility of refusal to enforce only part of the promise, see § 184(2).

13. A works for five years as a partner in a nationwide firm of accountants. In the partnership agreement, A promises not to engage in accounting in any city where the firm has an office for three years after his withdrawal from the partnership. The firm has offices in the twenty largest cities in the United States. A's promise imposes great hardship on him because this area includes almost all that in which he could engage in a comparable account-

ing practice. The promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy. As to the possibility of refusal to enforce only part of the promise, see § 184(2).

14. A, a doctor who has a general practice in a remote area, takes into partnership B, a younger doctor. In the partnership agreement, B promises that, if he withdraws from the partnership, he will not engage in the practice of medicine within the area for three years. If B's unavailability in the area will be likely to cause injury to the public because of the shortage of doctors there, the court may determine that B's promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy.

15. A and B attend an art auction and each plans to bid on a valuable painting. They decide to acquire it as a joint venture and each promises the other to bid for its purchase jointly and, if successful, to deal with it jointly. Their promises are not unreasonably in restraint of trade and are not unenforceable on grounds of public policy. Compare Illustrations 3 and 4 to § 187.

REPORTER'S NOTE

Subsection (1) is based on former § 515(a)–(c). Subsection (2) is based on former § 516(a), (d), (f). Clauses (c) and (e) of former § 516 are dealt with under § 186 since they do not involve promises to refrain from competition as such. Clause (b) of former § 516 is omitted in view of the fact that the enumeration in Subsection (2) is not exclusive. This rearrangement avoids the overlap and duplication of former § 515 and § 516. See 6A Corbin, Contracts, §§ 1383–89, 1391–94A (1962 & Supp. 1980); 14 Williston, Contracts, §§ 1636–47 (3d ed. 1972). With respect to state statutes in this field, see Krendl & Krendl, Noncompetition Covenants in Colorado: A Statutory Solution?, 52 Denver L.J. 499 (1975).

Comment a. There is no clear limit to the period of time during which a restraint must be imposed in order to be considered "ancillary." A restraint may be "ancillary" even if it is imposed at the end of the transaction or relationship. For a case holding a restraint to be "ancillary" to an employee's employment agreement although it was negotiated at the end of the employment relationship, see Marine Contractors Co. v. Hurley, 365 Mass. 280, 310 N.E.2d 915 (1974). That continued employment terminable at will is sufficient consideration for an employee's covenant not to compete, see Hogan v. Bergan Brunswig Corp., 153 N.J. Super. 37, 378 A.2d 1164 (1977); Deck and Decker Personnel Consultants v. Pigg, 555 S.W.2d 705 (Mo. Ct. App. 1977).

Comment b. On the sale of good will as justifying the seller's covenant not to compete, see Plunkett v. Reeves Apothecary, Inc., 351 So.2d 867 (La. Ct. App. 1977). The difference in judicial attitudes is pointed up when a sale of a business is combined with post-sale employment of the

seller by the buyer. When such a transaction includes a covenant not to compete, a court will often analyze the transaction to see if the restraint is attributable more to the sale of good will than to the employment contract, and will require less specific justification for the restraint if it is more attributable to the sale. See, e.g., Alexander & Alexander, Inc. v. Wohlman, 19 Wash. App. 670, 578 P.2d 530 (1978); H.B.G. Corp. v. Houbolt, 51 Ill. App.3d 955, 10 Ill. Dec. 44, 367 N.E.2d 432 (1977).

Comment d. For cases refusing to enforce restrictions involving a geographic area larger than that in which an employee worked, see, e.g., Britt v. Davis, 239 Ga. 747, 238 S.E.2d 881 (1977); Brewer v. Tracy, 198 Neb. 503, 253 N.W.2d 319 (1977). But cf. Hammons v. Big Sandy Claims Serv., 567 S.W.2d 313 (Ky. Ct. App. 1978); Wolf and Company v. Waldron, 51 Ill. App.3d 239, 9 Ill. Dec. 346, 366 N.E.2d 603 (1977). On the limitation of a restraint to activities formerly engaged in by the promisor, compare Howard Schultz & Assoc. v. Broniec, 239 Ga. 181, 236 S.E.2d 265 (1977) with 4408, Inc. v. Losure, ___ Ind. App. ___, 373 N.E.2d 899 (1978) and Weed Eater, Inc. v. Dowling, 562 S.W.2d 898 (Tex. Civ. App. 1978), ref. n.r.e. The requirement that the restraint last no longer than necessary to protect the promisee's interest, taking into account the transitory nature of technology and information, was cited (in Tentative Draft) and applied in Gary Van Zeeland Talent, Inc. v. Sandas, 84 Wis.2d 202, 267 N.W.2d 242 (1978).

Comment e. The list in Subsection (2) is not exhaustive. Courts have sometimes exhibited considerable flexibility in determining whether a restraint is ancillary to a legitimate transaction or relationship. For cases involving covenants in a lease, by either the landlord or the tenant, see Restatement, Second, Property (Landlord and Tenant), Reporter's Notes to §§ 6A.2, 12.2. For other cases in which courts have enforced restraints as ancillary to transactions or relationships other than those listed in Subsection (2), see Island Air, Inc. v. LaBar, 18 Wash. App. 129, 566 P.2d 972 (1977) (agreement by potential purchaser of business not to use confidential information to compete with current owner); Justin Belt Co. v. Yost, 502 S.W.2d 681 (Tex. 1973) (covenant contained in agreement settling prior litigation); Chenault v. Otis Eng'r Corp., 423 S.W.2d 377 (Tex. Civ. App. 1967), ref. n.r.e. (leave of absence agreement); Novelty Bias Binding Co. v. Shevrin, 342 Mass. 714, 175 N.E.2d 374 (1961) (covenant contained in restitution agreement between employee who embezzled funds and his employer); see also Note, 52 Tex. L. Rev. 1024 (1974). Several cases have recently held that a restraint which is contained in a franchise agreement is considered ancillary and is therefore enforceable, e.g., Williams v. Shrimp Boat, Inc., 229 Ga. 300, 191 S.E.2d 50 (1972); Shakey's, Inc. v. Martin, 91 Idaho 758, 430 P.2d 504 (1967); McDonald's System, Inc. v. Sandy's, Inc., 45 Ill. App. 57, 195 N.E.2d 22 (1963).

Comment f. Illustration 1 is based on Illustrations 2 and 3 to former § 516 and on Mattis v. Lally, 138 Conn. 51, 82 A.2d 155 (1951). Illustration 2 is based on Illustration 2 to former § 515. Illustration 3 is based on Illus-

tration 1 to former § 515. Illustration 4 is new. Examples of opinions scrutinizing prohibitions to see if they are the minimum necessary for the buyer's protection are Alexander & Alexander, Inc. v. Wohlman, 19 Wash. App. 670, 578 P.2d 530 (1978); Plunkett v. Reeves Apothecary, Inc., 351 So.2d 867 (La. Ct. App. 1977); and Bess v. Bothman, 257 N.W.2d 791 (Minn. 1977). Less sensitive analyses are found in Esmark, Inc. v. McKee, 118 Ariz. 511, 578 P.2d 190 (Ct. App. 1978); and H.B.G. Corp. v. Houbolt, 51 Ill. App.3d 955, 10 Ill. Dec. 44, 367 N.E.2d 432 (1977). Illustration 5 is based on Illustration 1 to former § 516. But cf. Wren v. Pearah, 220 Ark. 888, 249 S.W.2d 985 (1952).

Comment g. See Blake, Employee Agreements Not to Compete, 73 Harv. L. Rev. 625 (1960); Kniffen, Employee Noncompetition Covenants: The Perils of Performing Unique Services, 10 Rutgers-Camden L.J. 25 (1978); Wetzel, Employment Contracts and Noncompetition Agreements, 1969 U. Ill. L.F. 61; Kreider, Trends in the Enforcement of Restrictive Employment Contracts, 35 U. Cin. L. Rev. 16 (1966). With respect to the effect of federal antitrust law, see Goldschmid, Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law, 73 Colum. L. Rev. 1193 (1973). Illustration 6 is based on House of Vision v. Hiyane, 37 Ill.2d 32, 225 N.E.2d 21 (1967); see also Ruhl v. F.A. Bartlett Tree Expert Co., 245 Md. 118, 225 A.2d 288 (1967). Illustration 7 is based on Purchasing Assoc. v. Weitz, 13 N.Y.2d 267, 196 N.E.2d 245 (1963). Illustration 8 is based on Arthur Murray Dance Studios v. Witter, 62 Ohio Abs. 17, 105 N.E.2d 685 (C.P. 1952).

Many cases put great emphasis on the former employee's customer contacts or lack of them. Compare 4408, Inc. v. Losure, ___ Ind. App. ___, 373 N.E.2d 899 (1978) (upholding restriction); Wolf and Company v. Waldron, 51 Ill. App.3d 239, 9 Ill. Dec. 346, 366 N.E.2d 603 (1977) (upholding injunction limited to dealing with former clients); and Eastern Distrib. Co. v. Flynn, 222 Kan. 666, 567 P.2d 1371 (1977) (upholding modification of restriction to those countries and those sales activities in which employee had been engaged); with Folsom Funeral Serv. v. Rodgers, ___ Mass. App. ___, 372 N.E.2d 532 (1978) (refusing to enforce restriction because customer contacts did not have great impact on undertaking business); Brewer v. Tracy, 198 Neb. 503, 253 N.W.2d 319 (1977) (refusing to enforce area prohibition that included nine communities in which employee had not worked); Evans Laboratory v. Melder, 262 Ark. 868, 562 S.W.2d 62 (1978) (refusing to enforce prohibition against dealing with former customers in absence of proof of solicitation by former employee; employer had lost 278 out of 307 customers on former employee's route; about half had given former employee their business; note the dissent as well). Courts appear more likely to enforce restrictions against route salesmen or persons having access to customer information not readily available publicly. Compare the various opinions in 4408, Inc. v. Losure, supra; Eastern Distrib. Co. v. Flynn, supra; Brewer v. Tracy, supra; and Gaynor & Company v. Stevens, 61 A.D.2d 775, 402 N.Y.S.2d 398 (1978).

See also Hortman v. Sanitary Supply Co., 241 Ga. 337, 245 S.E.2d 294 (1978) (restriction on salesman entering into "any business transactions" with former employer's competitors is unreasonable). Illustration 9 is based on Illustration 10 to former § 516. Illustration 10 is new. On trade secrets, see Note, 29 Hastings L.J. 297 (1977).

For a case suggesting that a post-employment restraint may be justified on the ground that the employee's services are "special, unique or extraordinary," even in the absence of confidential trade information or the means to attract customers, see Purchasing Associates v. Weitz, supra. More recent New York decisions have used the absence of either trade secrets or "special, unique or extraordinary" services as a reason for refusing to enforce employees' covenants not to compete. See, e.g., Columbia Ribbon Co. v. A-1-A Corp., 42 N.Y.2d 496, 398 N.Y.S.2d 1004, 369 N.E.2d 4 (1977); Legal Recording & Research Bureau v. Wicka, 62 A.D.2d 486, 405 N.Y.S.2d 526 (1978); Gaynor & Company v. Stevens, supra. In Sprinzen v. Nomberg, 63 A.D.2d 939, 406 N.Y.S.2d 322 (1978), an arbitration award was set aside as against public policy because it enforced a covenant not to compete in the absence of the factors described in this paragraph.

Comment h. Illustration 11 is based on Cockerill v. Wilson, 51 Ill.2d 179, 281 N.E.2d 648 (1972), and on Illustration 6 to former § 516. Illustration 12 is based on Karpinski v. Ingrasci, 28 N.Y.2d 45, 320 N.Y.S. 1, 268 N.E.2d 751 (1971); see also Illustration 4 to former § 515. Illustration 13 is based on Lynch v. Bailey, 275 A.D. 527, 90 N.Y.S.2d 359, aff'd mem., 300 N.Y. 615, 90 N.E.2d 484 (1949); see also Illustration 6 to former § 515. Illustration 14 is new. In Canfield v. Spear, 44 Ill.2d 49, 254 N.E.2d 433 (1969), such reasoning was rejected, the court saying that other young doctors will tend to move in, alleviating the shortage; see also Field Surgical Assoc. v. Shadab, 59 Ill. App.3d 991, 17 Ill. Dec. 514, 376 N.E.2d 660 (1978). In Long v. Huffman, 557 S.W.2d 911 (Mo. Ct. App. 1977), an argument similar to that in Illustration 14 was rejected based in part on a view that the shortage of physicians was "pandemic." Notwithstanding these cases, it would seem self-evident that the public interest is greater when access to serving professionals, especially physicians, is restricted, than it is when a purely business transaction is involved. Illustration 15 is based on Illustration 3 to former § 517.