South Carolina Law Review

Volume 28 | Issue 3 Article 3

Winter 12-1-1976

Contracts

Patrick A. Reardon

CONTRACTS

I. COMMERCIAL PROPERTY LEASES

In *E & S Inv. Co. v. Richland Bowl, Inc.*,[1] plaintiff (E & S) sued on a 20-year commercial lease on a building it owned in Columbia, South Carolina. Richland Bowl was the lessee and United Bowling Centers, Inc. (United) was guarantor of the lessee. The lease contemplated Richland Bowl's use of the building as a bowling center for the entire 20-year term. The lessee, however, developed problems with its operation, and the lease was twice assigned to other tenants. All parties consented to these assignments; however, the assignments stipulated that Richland Bowl and United remained untimately liable upon default by the assignees.

In 1969, the last assignee vacated the premises after continued arrearage in the rental payments. E & S then re-entered the property and on June 15, 1970, signed a superceding 10-year lease with TG&Y Stores. This lease stipulated that E & S would bear the costs, up to $50,000, of converting the structure from a bowling center to a retail store. The actual costs incurred were $49,200. TG&Y moved into the building on November 26, 1970.

Meanwhile an action to collect on the rent deficiencies was brought by E & S against Richland Bowl and United in 1969 in the Court of Common Pleas of Richland County. The case was referred to the Master in Equity who found for the plaintiff, E & S, and entered damages of $36,034.52 against the defendant. The Circuit Judge affirmed the Master's finding of liability on the part of Richland Bowl and United, but reversed the Master's finding that the TG&Y lease was more valuable to E & S than the Richland Bowl lease. Past damages of $70,103.15 and future damages of $39,844.05 (discounted to present value) were found by the Circuit Judge. Appeal to the South Carolina Supreme Court followed.[2]

The supreme court affirmed the finding of the defendants' liability on the lease.[3] Most of the majority opinion, and all of the

1. 264 S.C. 582, 216 S.E.2d 522 (1975).

2. *Id.* at 586-97, 216 S.E.2d at 523-28.

3. The appellants excepted to their liability on the basis that E & S's own acts breached the lease. In addition exception was made to a factual ruling below that appellant United had not offered to perform the lease after default by the assignees. It was

dissent by Justice Bussey, was spent with the "most complex" issue of damages.

The original lease between E & S and Richland Bowl stipulated an annual rent of $35,200. In addition the lessee covenanted to maintain the building and perform other duties. The TG&Y lease stipulated an annual rent of $42,542.88, but, because E & S now had to perform duties previously placed upon Richland Bowl, the earlier lessee, the court found that the new lease had a value of $36,091.30 to E & S. Both the majority and dissenting opinions generally agreed with the above valuation. Divergence between the two opinions arose over how to deal with the $49,200 in modifications made by E & S.

The original lease stipulated that damages recoverable upon a default by the lessee would be the difference between the total rent due, including future rents, and the amount "realized" upon a reletting to third parties.[4] The majority held that E & S could recover the $49,200 expended on modification as damages arising out of Richland Bowl's breach. The court, however, limited E & S's recovery to the difference between the cost of the modifications and their value beyond 1981. In other words, the court said that only those costs which were attributable to the breach of Richland Bowl could be recovered and that any value the modifications retained at the end of the original lease period were not damages arising out of the breach.[5] The court remanded the case for a determination of the value the modifications would have in 1981. No future damages would arise as the majority found the TG&Y annual rent to be greater than the rent stipulated under the original Richland Bowl lease.[6]

---

alleged that E & S refused this offer. Finally the appellants urged that E & S's failure to forward part of an assignee's rent payment to Richland Bowl constituted conversion of the funds. Part of the assignee's rent payments were to be a refund over the life of the lease of the lessee's security deposit. All exceptions, however, were overruled.

4. 264 S.C. at 590, 216 S.E.2d at 526. The court noted that it could find no satisfactory definition of "realize", including that definition found in cases applying the Internal Revenue Code of 1954. While the Code sections addressing realization of income, Int. Rev. Code of 1954, §§ 1001-1002, may not have been of value to the court, the applicable Code sections show that the tax laws would treat the facts of this case in the manner the majority did. *I.e.*, the $49,200 modification costs would be capitalized, *id.* § 263, and gross income, *id.* § 61(a)(5) would be reduced by the amount of depreciation attributable to that year, *id.* § 167. Also the additional expenses borne by E & S under the TG&Y lease would be ordinary and necessary business expenses. *Id.* § 162.

5. The court was careful to refrain from referring to "permanent" improvements, noting that some improvements may have a value beyond 1981, although they are not "permanent" in a true sense. 264 S.C. at 591-92, 216 S.E.2d at 526-27.

6. *Id.* The TG&Y lease was found to have a value of $36,091.30 to E & S while the

In dissenting, Justice Bussey rejected this view and instead looked upon the $49,200 expenditure on modifications as a transaction between E & S and TG&Y separate from the original lease. He would have affirmed the trial judge's finding that $6,500 of the rent paid by TG&Y was a 13% annual return on the $49,200 expenditure by E & S. Therefore, reducing the rent paid by TG&Y by this $6,500 and the value of the extra duties assumed by the lessor produced a fair market rental value of the property as vacated by Richland Bowl of $29,601.30 per annum or $5,598.70 less than was stipulated in the original lease. In other words, the dissent would have ignored the post-breach modification costs and instead would have measured the damages as being the amount by which the rent stipulated in the lease exceeded the property's fair market rental value at the time of the breach. Accordingly, the trial judge and Justice Bussey would have entered future damages against the defendant of $39,844.05, discounted to present value.[7]

The measure of damages recoverable for a tenant's failure to pay rent has been stated on numerous occasions.

> It is the rule in South Carolina that when a lessee declines to perform his contract, a cause of action immediately arises in favor of the lessor for full damages, present and prospective, which were the necessary and direct result of the breach; and the measure of damages is the difference between the rent fixed in the lease and the rental value of the premises for the entire term at the time of the breach, together with such special damages as may have resulted from the breach.[8]

When this rule is compared with the outcome in *E & S Inv. Co. v. Richland Bowl, Inc.*, it becomes apparent that the majority holding is consistent with the rule. This consistency is illustrated by a diversity case whose facts were strikingly similar to those in *E & S*.

At issue in *Richman v. Joray Corp.*[9] were the damages due a landlord upon the tenant's failure to pay rent for the demised bowling center. The appellate court awarded the landlord dam-

---

Richland Bowl lease stipulated an annual rent of $35,200.00.

7. *Id.* at 594-99, 216 S.E.2d at 528-29.

8. Richman v. Joray Corp., 183 F.2d 667, 671 (4th Cir. 1950), *citing* Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E. 614, 54 A.L.R. 1348 (1927); *accord*, United States Rubber Co. v. White Tire Co., 231 S.C. 84, 97 S.E.2d 403 (1956).

9. This case was twice appealed to the Fourth Circuit Court of Appeals; 192 F.2d 660 (1951) and 183 F.2d 667 (1950).

ages based on the difference between the original rent and the lesser rent obtained upon reletting for the remainder of the lease, plus $200 special damages arising out of the reletting.[10] Unlike *E & S*, the landlord in *Richman* was able to relet the building permanently as a bowling center, and therefore no structural modifications were necessary. *E & S* can be viewed as going one step past *Richman* and allowing recovery of modifications. Implicit in *E & S*, though not stated, is the reservation that such modifications must be special damages arising from the breach. As one court has stated, these expenses must be "reasonably necessary in order to obtain a tenant and mitigate damages."[11]

The holding in E & S should not be interpreted as a license for landlords victimized by defaulting tenants to incur large modification costs and then to shift them off on the former tenant. First, the modifications must be reasonably necessary in order to obtain a tenant for the building. Clearly this was the case here. Three different concerns tried and failed in operating a bowling center in the building. The only real solution seemed to be modifying the structure for a more efficient use. Second, the modifications must be a true mitigation of damages; in other words, it must be cheaper to the defendant for the plaintiff to modify the building and obtain a new tenant than to rent the building as it was vacated.[12]

The theories underlying the above discussion are twofold: (1) contract damages are designed only to restore the injured party to the position he would have held had the other party not breached,[13] and (2) the injured party had an affirmative duty to

---

10. 192 F.2d 660, 663.

11. Babsdon Co. v. Thrifty Parking Co., 149 So. 2d 566, 569 (Fla. Dist. Ct. App. 1963).

12. The decision whether to relet the structure as vacated or to make modifications and then relet must be based on which course leaves the former tenant liable for the least damages under the original lease.

13. South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329 (1960); *accord*, McManus v. Midland Valley Lumber Co., 232 F. Supp. 885 (E.D.S.C. 1964), vacated 348 F.2d 898 (4th Cir. 1965). *See generally* 5 A. CORBIN, CONTRACTS § 1002 (1964); 11 W. WILLISTON, CONTRACTS § 1338 (3d ed. 1968). Determining damages for breach of commercial leases generally should present fewer problems than with other types of contracts for the following reasons: (1) a landlord's costs are relatively fixed under the ordinary lease, (2) a comparison of the rent paid by the new tenant with that paid by the defendant is usually simple, and (3) documentation of special damages arising out of the breach should be relatively simple.

Not discussed herein is the argument that special damages were not within the contemplation of the parties at the time the lease was entered into. *See* 5 A. CORBIN, CONTRACTS § 1010 (1964); 11 W. WILLISTON, CONTRACTS § 1344 (3d ed. 1968). Apparently

mitigate damages.[14] As has been shown, the majority opinion in *E & S* is consistent with these two policies. The dissent, however, while requiring a mitigation of damages, would have allowed the injured party to benefit from the breach. By viewing the $49,200 modification expenditure as a separate transaction between E & S and TG&Y outside the context of the original lease with Richland Bowl, E & S would have the potential of finding itself in a better situation than if Richland Bowl had performed its contract. While arguments justifying this position can be made,[15] the dissent's view is generally felt not to be consistent with general contract damages law.[16]

The court's holding in *E & S Inv. Co. v. Richland Bowl, Inc.*, represents a significant precedent in the area of commercial leases. When read with earlier holdings and general policies underlying contract damages, the case can be viewed as setting forth the limits of recovery under commercial leases.

II. REAL ESTATE SALES CONTRACTS

Dorman Realty & Insurance Co. Inc. v. Stalvey[17] addressed for the first time the question of whether an informal, oral listing of real property with a realtor gives that realtor the right to collect his commission if the owner independently obtains a purchaser for the listed property. The South Carolina Supreme Court held that, unless the owner clearly intended to give up his right to sell the property himself, he was deemed to have reserved that right for himself.[18]

The case involved an oral agreement entered into during the summer of 1970 between the defendant Theta W. Stalvey[19] and

---

this defense would be unavailable if the special damages arose under legitimate mitigation efforts.

14. United States Rubber Co. v. White Tire Co., 231 S.C. 84, 97 S.E.2d 403 (1957); Burkhalter v. Townsend, 139 S.C. 324, 138 S.E. 34 (1927); Harper v. Western Union Tel. Co., 133 S.C. 55. 130 S.E. 119, 42 A.L.R. 286 (1926). *See generally* 5 A. CORBIN, CONTRACTS § 1039 (1964); 11 W. WILLISTON, CONTRACTS § 1353 (3d ed. 1968). Note that the doctrine of mitigation of damages applies only if the plaintiff has a reasonable opportunity to avoid the damages. Williams v. McRae, 168 F. Supp. 650 (W.D.S.C. 1958).

15. It may be argued, for example, that the plaintiff should not be required to spend his funds for the benefit of the defendant. Then too, the extra compensation can be viewed as a source to pay the plaintiff's attorney fees and legal costs.

16. *See* 5 A. CORBIN, CONTRACTS § 1041 (1964).

17. 264 S.C. 94, 212 S.E.2d 591 (1975).

18. *Id.* at 98, 212 S.E.2d at 593.

19. Throughout the relevant transactions Mrs. Stalvey acted through her husband, David Stalvey, who functioned as her agent.

the plaintiff Dorman Realty and Insurance Co. (Dorman). The agreement provided that Dorman would attempt to obtain a purchaser for a certain 240-acre parcel of Stalvey property in Horry County. A few weeks after this arrangement was reached, it was alleged by the defense that Mrs. Stalvey's husband notified Dorman's vice-president, T. M. Hendrix, that Mrs. Stalvey herself would locate a purchaser for the property. At the trial, Hendrix neither admitted nor denied the conversation.[20]

On September 17, 1970, Mrs. Stalvey sold the property through her husband to the codefendant Jack Jones. Because there was uncertainty as to whether a commission was due Dorman on the sale and because Jones was eager to complete the transaction in one day, Jones and Mrs. Stalvey agreed that Jones would be liable for any commissions due Dorman. The Court of Common Pleas of Horry County entered a judgment of $12,000 against both defendants.[21]

On appeal to the South Carolina Supreme Court, the appellant[22] raised several issues, but the court reached only one issue in reversing the trial court. The issue addressed by the supreme court was whether an agreement between a seller of real property and a realtor was to be deemed an "exclusive sales contract" or an "exclusive agency contract," when the contract itself was silent on the point. Under an exclusive sales contract, the seller is liable for the commission to the agent even if the seller himself obtains a purchaser. Under an exclusive agency contract, however, the seller is barred from selling through another agent, but he may still sell the property himself free of any obligation to the agent.

In ruling that the instant contract was "no more than an exclusive agency contract for an indefinite period of time," the supreme court held that

> An owner's right to sell his own real estate is inherent and this right is retained even when a broker is employed, unless the contract provides in inequivocal terms or by necessary implication that the owner's right to sell has been relinquished. The right of an owner to sell his own property is an implicit condition of every contract of agency unless negatived.[23]

---

20. 264 S.C. at 96-97, 212 S.E.2d at 592 (1975).

21. *Id.* at 97, 212 S.E.2d at 592-93. The judgment represents a ten percent commission on the sale price of $120,000.

22. Only Jones appealed the judgment of the trial court.

23. 264 S.C. at 98-99, 212 S.E.2d at 593-94.

By way of dictum, the court held that even denominating a written contract as an "exclusive sales contract" is not "necessarily determinative" if the facts do not point to that conclusion. As a final point, the court noted that the instant agreement had no more effect than an unaccepted offer or unilateral contract which could be revoked any time prior to the realtor's accepting the contract and making it enforceable by selling the property. The refusal of Hendrix to refute the alleged conversation with Mr. Stalvey prior to the sale of the land to Jones was viewed by the court as indicating that the unilateral contract offer had in fact been cancelled.[24]

In deciding this case, the only authority cited by the court was a detailed annotation. The court expressed preference for exclusive agency contracts over exclusive sale contracts, reflecting the majority view noted by the annotation.

> The basic principle implied by the tenor of virtually all the cases within [this area] is that the inherent right of an owner of real property to sell it himself is retained . . . unless the broker's contract in some way or other imposes liability upon the owner for such a sale, either expressly or by the grant to the broker of such exclusive right as the court may deem necessarily implies such liability.[25]

The court's reluctance to look merely to the label in determining the nature of the written real estate broker contract also appears to reflect the majority rule.[26]

In finding that the Dorman-Stalvey agreement had no more effect than an offer or a unilateral contract, the supreme court gave legal effect to the fact that the agreement involved no consideration. Some authorities have held that the absence of consideration makes such real estate broker contracts unenforceable until the time the realtor "accepts" the contract by selling the property.[27] Other authorities have held that the realtor's efforts to procure a purchaser may be sufficient consideration to convert

---

24. *Id.* at 98-100, 212 S.E.2d at 594. On September 18, 1970, the day after Jones purchased the property, Dorman signed a written sales agreement with one J. Watson Smith.

25. Annot., 88 A.L.R.2d 936, 941-42 (1963); *accord*, 12 C.J.S. *Brokers* § 94 (1938); RESTATEMENT (SECOND) OF AGENCY, Explanatory Notes, § 449, comment b at 361-62; Note, *Real Estate Brokers Contracts in South Carolina*, 18 S.C.L. REV. 819, 832-33 (1966).

26. *See* Annot. 88 A.L.R.2d 936, 940-41 (1963).

27. 1 A. CORBIN, CONTRACTS § 50 (1963); RESTATEMENT (SECOND) OF AGENCY, Explanatory Notes, § 449, comment a at 361 (1958).

the contract to a bilateral one.[28] South Carolina obviously has chosen the former view.[29] It is interesting to note that both Georgia[30] and North Carolina[31] have adopted rules similar to the rule adopted here.

In *Dorman Realty & Insurance Co. v. Stalvey*, the South Carolina Supreme Court has reaffirmed the oft-stated policy that the law favors the free alienability of land. By establishing a strong preference for exclusive agency contracts over exclusive sales contracts and by casting a shadow on the enforceability of real estate broker contracts which do not include an obvious form of consideration, the court has protected the owner's ability to sell his realty free of liability to a realtor. Furthermore, it is arguable that, with both the owner and the realtor working to sell the land, the alienability of land is in fact promoted.

Regardless of the effect the case will have on this policy, the decision certainly will give land owner-sellers greater freedom in their dealings. To realtors, the case means that informal, oral broker contracts are very undesirable. Likewise, poorly designed contracts which purport to be exclusive sales contracts without sufficient clarity will present problem. In the future, a realtor who seeks to use an exclusive sales contract form will find it desirable to use forms which convey the nature of the agreement with absolute clarity. Perhaps boldface statements to this effect or special collateral agreements to this end will be used to establish the nature of the contract. Because this issue has been similarly decided in other jurisdictions, existing form books should be of value to the practitioner drafting such contracts.[32]

---

28. Thompson v. Hudson, 76 Ga. App. 807, 47 S.E.2d 112 (1948); 1 A. CORBIN, CONTRACTS § 50 (1963); Note, *Real Estate Brokers Contracts in South Carolina*, 18 S.C.L. REV. 819, 833 (1966).

29. The supreme court's ruling that the contract was unenforceable is dictum as the court had earlier ruled that the terms of the alleged contract had not been breached. Therefore, the issue of whether the contract was enforceable was rendered moot.

30. *See* Stone v. Reinhard, 124 Ga. App. 355, 183 S.E.2d 601 (1971) and other cases cited therein; *accord*, Contract Mgmt. Consultants v. Huddle House, 134 Ga. App. 566, 215 S.E.2d 326 (1975). *But see* note 12 *supra*, indicating that Georgia holds a different view from South Carolina as to realtor sales efforts constituting sufficient consideration so as to create an enforceable contract.

31. Peeler Ins. & Realty, Inc. v. Harmon, 20 N.C. App. 39, 200 S.E.2d 443 (1973).

32. *See, e.g.*, MODERN LEGAL FORMS §§ 8051-57 (1968). Such proposed forms may have to be modified to call greater attention to the exclusive sales provisions.

III. EMPLOYMENT CONTRACTS

In *Almers v. South Carolina National Bank of Charleston*,[33] the South Carolina Supreme Court determined the enforceability of a pension forfeiture clause in an employment contract which divests a retired employee of his company-paid pension benefits[34] should he subsequently accept employment with a competing firm. Herbert J. Almer, the plaintiff-appellant, had been employed by the defendant-respondent South Carolina National Bank of Charleston (SCN) for 17 years and was fourth in command upon leaving in 1965. In that same year, Almers was employed by Southern Bank and Trust Co. in Greenville, S.C. in a position "substantially the same" as he had left at SCN.

Following Almers' employment with Southern Bank and Trust Co., SCN terminated Almers' pension benefits which had been created solely by SCN contributions.[35] This action was based on a restriction in the pension plan stating that an employee would forfeit his unpaid benefits if, in SCN's opinion, the former employee accepted other employment in South Carolina which was competing with or detrimental to SCN. The forfeiture applied to any subsequent employment with a competitor in South Carolina without regard to the location in the state or the length of time the former employee had been separated from SCN.

Almers brought an action to obtain his pension benefits in Greenville county court. The Standing Master ruled the restriction invalid, but the county court reversed the Master. Almers then appealed to the South Carolina Supreme Court.

The South Carolina Supreme Court, in an opinion by Justice Ness with Justice Littlejohn dissenting, held the pension restriction void as being contrary to public policy. The court adopted the view that pension covenants divesting otherwise qualified employees of their benefits if they should work for a competitor of the former employer were analogous to covenants not to compete and were bound by standards of reasonableness as to the time and geographical limitations of the restraint. This reasoning was consistent with a series of South Carolina cases ruling on

33. 265 S.C. 48, 217 S.E.2d 135 (1975).

34. Such employer-paid pension plans are called "non-contributing plans."

35. It was estimated that Almers' benefits would have been worth approximately $20,000. In the event of forfeiture, these funds would be applied to benefit other members of the pension plan.

covenants not to compete.[36]

The court listed three factors which would be examined to determine if the forfeiture restrictions were unreasonable: (1) "the economic injury to the employee," (2) "the practical affect (sic) of the *presence* of the forfeiture clause," and (3) the existence of a "legitimate commercial interest" which may be protected by an employer.[37]

In determining the economic injury of the forfeiture upon the plaintiff Almers, the court ruled that the forfeiture was unenforceable "if [it] was unduly burdensome or oppressive, tending to deprive a person of the right to support himself and his family."[38] Expressing the belief that pension forfeiture clauses are likely to work an extraordinary hardship because retired employees as a group are ill-prepared to bear the resulting financial loss, the court held that the economic injury to the plaintiff was too great.

The court found that the presence of the forfeiture provision was an effective deterrent to other SCN employees seeking competitive employment.[39] To support this conclusion, the court noted that Congress had found that forfeiture provisions were detrimental to the economy.[40]

In analyzing the third and final factor, the court's job was facilitated by SCN's concession that it had "no valid commercial interest worthy of protection with a forfeiture clause."[41] The court, however, went beyond this concession and observed that covenants not to compete would be looked upon favorably only when they served to protect valid business interests, such as goodwill or trade secrets. Because a pension forfeiture clause, unlike a covenant not to compete, is not specifically enforceable, the court said that the intent is not to protect these legitimate busi-

36. Eastern Business Forms, Inc. v. Kistler, 258 S.C. 429, 189 S.E.2d 22 (1972); Oxman v. Profitt, 241 S.C. 28, 126 S.E.2d 852 (1962); Oxman v. Sherman, 239 S.C. 218, 122 S.E.2d 559 (1961); Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961); South Carolina Fin. Corp. of Anderson v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329 (1960). *See generally* Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960); Annot., 43 A.L.R.2d 94 (1955); Annot., 11 A.L.R.2d 15 (1955).

37. 265 S.C. at 58, 217 S.E.2d at 140.

38. *Id.* at 56, 217 S.E.2d at 139. The court borrowed this standard from an earlier case involving a covenant not to compete. Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961).

39. Other authorities refer to this effect as an *in terrorem* effect.

40. 265 S.C. at 57, 217 S.E.2d at 139. The court here referred to the finding set forth in 3 U.S. CODE CONG. & ADMIN. NEWS 4679 (1974).

41. 265 S.C. at 59, 217 S.E.2d at 140.

ness interests but to restrict competition. This final argument is most significant, as the court noted:

> *From this discussion it would seem that the forfeiture provisions should always be void.* Nevertheless, our discussion throughout this case illustrates that the covenant not to compete and forfeiture upon competing are but alternative approaches to accomplish the same practical result. Therefore, we would not substitute the reasoning of the pure logician for the realities of the business world and embark on a separate course of treatment for covenants not to compete and forfeiture provisions. When pruned to their quintessence, they tend to accomplish the same results and should be treated accordingly.[42]

Taken alone, the emphasized sentence would indicate that forfeiture provisions are always unenforceable. However, the remainder of the quotation indicates that pension forfeitures are to be dealt within the same manner as covenants not to compete, which are not always unenforceable. This seeming disparity can perhaps be reconciled by reading the opinion to say that forfeiture provisions are *always* anti-competitive and never protect legitimate business interests, while covenants not to compete, in proper instances, can protect legitimate business interests.[43] Regardless of how this quotation is read, it is clear that pension forfeitures are subject to extreme judicial scrutiny in South Carolina.

In explaining its holding, the court rejected a contrary line of cases from other jurisdictions. These cases had held that forfeiture covenants in noncontributory pension plans are valid because they merely deny the competing former employee his pension benefits. On the basis of this characteristic they are distinguished from covenants not to compete which totally prohibit

---

42. *Id.* at 59, 217 S.E.2d at 140 (emphasis added).

43. This view is supported by the court's discussion of the three factors used to analyze the forfeiture. That discussion did not focus upon the facts peculiar to this case but rather took note of facts generally applicable to the public. The broad terms used perhaps indicate that this was a ruling on all pension forfeitures. If this is the court's holding, this opinion is the most hostile ruling on pension forfeitures in any jurisdiction. Earlier in its opinion, however, the court said:

> . . . [W]e hold that a forfeiture clause in a profit or pension plan which provides that upon employment with a competitor a participant is divested of rights under the plan is invalid unless it contains reasonable time and geographic limitations.

265 S.C. at 56, 217 S.E.2d at 139.

This statement supports the conclusion that the court did not invalidate all pension forfeitures.

competing employment.[44] The leading case of this view is one that was before Judge Donald Russell in the United States Fourth Circuit Court of Appeals, *Rochester Corp. v. Rochester*.[45] Underlying this line of cases is a belief that competition is not overly restrained because the former employee is not legally barred from obtaining competing employment. Rather the former employee only loses a benefit from the former employer against whose interest the employee has chosen to act.[46] Perhaps even more fundamental than this is a belief that freedom of contract is a basic tenet of the law and that, in the absence of a legislative declaration to the contrary, a contract voluntarily entered into by the parties should be enforced. Justice Littlejohn's dissent in *Almers* is an excellent essay supporting this type of judicial restraint.[47]

Although Judge Russell had claimed in *Rochester Corp. v. Rochester*[48] that the holding therein is the majority rule, the view adopted by the South Carolina court is well supported by authority.[49] This latter group of cases generally agree with the South Carolina Supreme Court in finding pension forfeiture clauses analogous to covenants not to compete and holding that they are only enforceable when the restraint is reasonable. In addition,

---

44. Distinguishing the cases in this area as being of one view or another should not imply that they adopt one or the other of two sets of uniform rules. The converse is true. As one court has noted, these cases represent a collection of "fractionated postulates." Van Hosen v. Bankers Trust Co., 200 N.W.2d 504, 505 (Iowa 1972).

45. 405 F.2d 118 (4th Cir. 1971) (applying Virginia law). *See also* Almers v. South Carolina Nat. Bank of Charleston, 265 S.C. 48, 54, 217 S.E.2d 135, 138, and Food Fair Stores, Inc. v. Greeley, 264 Md. 105, 285 A.2d 632, 638 (1972). *See generally* Note, *Contracts: Restraint of Trade: Forfeiture of Pension Rights on Acceptance of Employment With Competitor*, 50 CORNELL L.Q. 673 (1965); Note, *Forfeiture of Pension Benefits for Violation of Covenants Not to Compete*, 61 NW. U.L. REV. 290 (1966); Annot. 18 A.L.R.2d 1246 (1968).

46. Rochester Corp. v. Rochester, 450 F.2d 118, 122-23 (4th Cir. 1971). This view also can be reformulated as holding that the former employee's noncompetitive acts are the consideration which create pension benefits. Therefore competitive employment causes no forfeiture; the employee has yet to "earn" any benefit to forfeit. Justice Littlejohn, dissenting in *Almers*, adopts this viewpoint, *inter alia*. 265 S.C. at 63, 217 S.E.2d at 142.

47. 265 S.C. at 59-63, 217 S.E.2d at 140-42.

48. 405 F.2d 118, 122-23 (4th Cir. 1971).

49. *See, e.g.*, Muggill v. Reuben H. Donnelley Corp., 62 Cal. 2d 239, 398 P.2d 147, 42 Cal. Rptr. 107 (1965); Flammer v. Patton, 245 So. 2d 854 (Fla. 1971); Van Hosen v. Bankers Trust Co., 200 N.W.2d 504 (Iowa 1972); Food Fair Stores Inc. v. Greeley, 264 Md. 105, 285 A.2d 632 (1972); Lavey v. Edwards, 264 Or. 331, 505 P.2d 342 (1973); Note, *Contracts: Restraint of Trade: Forfeiture of Pension Rights on Acceptance of Employment with Competitor*, 50 CORNELL L.Q. 673 (1965); Note, *Forfeiture of Pension Benefits for Violation of Covenants Not to Compete*, 61 NW. U.L. REV. 290 (1966); Annot., 18 A.L.R.3d 1246 (1968).

these cases generally have joined South Carolina in observing that enforcing pension forfeitures often creates a severe financial hardship on older employees and thus are contrary to the public policy favoring an economically self-sufficient citizenry. Finally, several authorities have noted that the presence of the forfeiture clause in employment contracts will have an *in terrorem* effect upon other pension beneficiaries who otherwise might seek competitive employment.[50] As the South Carolina Supreme Court noted, this produces under-utilization of skilled personnel in the state.[51]

To summarize, in *Almers v. South Carolina National Bank of Charleston*, the South Carolina Supreme Court has chosen to follow a minority, but growing, view in expressing its hostility to pension forfeitures. However, the exact fate of these forfeitures continue to remain uncertain under the *Almers* decision.

Patrick A. Reardon

50. This effect is even more pronounced with pension forfeitures than with covenants not to compete which require judicial enforcement and often only sanction the offending employee by court-ordered specific performance. Note, *Forfeiture of Pension Benefits for Violations of Covenants Not to Compete*, 61 NW. U.L. REV. 290, 299 (1966), *cited with approval*, Lavey v. Edwards, 264 Or. 331, 335, 505 P.2d 342, 344 (1973).

51. These policies perhaps explain why this court and other courts have not sought to sever unreasonable aspects of pension forfeitures or to rewrite them in a reasonable fashion. Instead these courts seem to be choosing to excise them whenever possible. At least one court has discussed severing pension forfeitures. Lavey v. Edwards, 264 Or. 331, 505 P.2d 342 (1973). *See* Eastern Business Forms, Inc. v. Kistler, 258 S.C. 429, 189 S.E.2d 22 (1972) (discussing judicial severing of covenants not to compete).