No. S147190

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RAYMOND EDWARDS II,

Plaintiff and Appellant,

vs.

ARTHUR ANDERSEN, LLP,

Defendant and Respondent.

After a Decision by the Court of Appeal
Second Appellate District, Division Three, Case No. B178246
Los Angeles Superior Court Case No. BC 294853
Andria K. Richey, Judge Presiding

ANSWERING BRIEF ON THE MERITS

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ISSUES AND ANSWERS

Q. To what extent does Business and Professions Code section 16600 prohibit employee noncompetition agreements?

A. Section 16600 prohibits all restraints on an employee's right to engage in his or her trade or profession, except those restraints specified in sections 16601 through 16602.5, involving the sale of an interest in a business, a concern not present in this case. Section 16600 does not, as the employer contends here, permit any restraint short of entirely precluding the employee from engaging in his or her trade or profession. Reinventing section 16600, as the employer urges here, is a task for the Legislature, not the courts.

Moreover, implying an open-ended exception to section 16600, even for "narrow restraints," would be bad public policy. It would require a judicial examination of each restraint on a case by case basis. The specter of litigation would put a chill on employee mobility and defeat the Legislature's goal of ensuring that no Californian be bound to a single employer, as the employer attempted to bind the employee here. In the long run, the Legislature's policy decision – placing the employee's right to gainful employment ahead of the employer's desire to squelch competition – has benefitted both employees and employers and has fueled the unprecedented growth of California's economy.

There is also no need to contort the plain language of section 16600 by implying a "trade secrets" exception. California's Uniform Trade Secrets Act already provides ample remedies for an employer aggrieved by a former employee's misuse of trade secrets.

Q. Does a contract provision releasing "any and all" claims encompass nonwaivable statutory protections, such as the employee indemnity protection of Labor Code section 2802?

A. An employee's release of "any and all" claims plainly does encompass a waiver of an employee's right to employment-related indemnification under section 2802. "Any and all" does not mean "some but not all."

True, Labor Code sections 432.5 and 2804 would void such a release, if such a release were executed. But in this case, the question is not whether such a provision would be effective to actually release such claims, because the employee refused to waive his non–waivable rights. The question here is whether it is a wrongful act for an employer to insist that a departing employee sign a waiver of nonwaivable claims in order for the employee to obtain work with another employer. Since the employer's previous conduct had placed the employee under a cloud of potential liability, and since the employee objected to signing the release of his right to employer indemnification for that liability, the employer's insistence that he do so was a wrongful act for purposes of the employee's cause of action for interference with prospective economic advantage.

STATEMENT OF THE CASE

A. Factual Background.

1. Andersen requires Edwards to sign a "Non-Compete Agreement" as a condition of employment in Andersen's accounting practice group.

In January 1997, plaintiff Raymond Edwards II, a certified public accountant, accepted an offer of employment with Arthur Andersen LLP. (7AA 1249-1250, ¶¶ 4, 6.)

As a condition of employment, Andersen required that Edwards sign a "Non-Compete-Agreement" that imposed numerous restraints on his future right to practice his profession, including:

- If you leave the Firm, for eighteen months after release or resignation, you agree not to perform professional services of the type you provided for any client on which you worked during the eighteen months prior to release or resignation. This does not prohibit you from accepting employment with a client.

- For twelve months after you leave the Firm, you agree not to solicit (to perform professional services of the type you provided) for any client of the office(s) to which you were assigned during the eighteen months preceding release or resignation.

- You agree not to solicit away from the Firm any of its professional personnel for eighteen months after release or resignation.

(7AA 1250, ¶ 8; 1275, Exh. 3.)

The Non-Compete Agreement also contained a trade secrets clause:

- Upon your release or resignation, you agree not to remove, retain, copy or utilize any confidential, privileged or proprietary information or property of the Firm or its clients. Discoveries, inventions or techniques developed in the course of your employment belong to this Firm and will be disclosed and assigned to it.

(7AA 1275, Exh. 3.)

2. Andersen sells its accounting practice group to HSBC.

Edwards rose to the position of senior manager in Andersen's Private Client Services practice group. He was responsible for income, gift and estate tax planning and compliance services for high income and high net worth individuals, trusts, closely held entities, and private foundations. (7AA 1250, ¶ 7.)

Edwards was on a fast track to becoming an Andersen partner. (7AA 1252, ¶¶ 12-13.) However, in March 2002, Andersen was indicted for obstruction of justice in connection with the investigation of Enron Corporation by the Securities and Exchange Commission. (7 AA 1252-1253, ¶ 14.) In June, Andersen was found guilty. (7AA 1253, ¶ 16.) Immediately, Andersen announced it would cease practicing public accounting in the United States. (7AA 1253, ¶¶ 16-17.)

Meanwhile, Andersen began selling off portions of its accounting practice groups to competitors. (7AA 1254, ¶ 18b.) In May 2002, Andersen informed Edwards and other employees that an HSBC subsidiary (WTAS) would purchase the Private Client Services practice group where Edwards worked. (7AA 1254, ¶ 20.) Although Andersen was getting out

of the business, it nevertheless advised its employees they would be held to their "Non-Compete Agreement." (7AA 1256, ¶ 25; 1289, Exh. 17.)

3. As a condition of approving his employment with HSBC, Andersen insists that Edwards release Andersen from any and all employment-related indemnification claims.

As a condition of the HSBC transaction closing, Andersen required that all Andersen managers, including Edwards, execute a "Termination of Non-Compete Agreement" ("TONC") in order to obtain employment with HSBC. (7AA 1260, ¶ 34.)

The TONC, crafted by Andersen, would have require Edwards, among other things, to:

- Release Andersen from "any and all" claims, including "claims that in any way arise from or out of, are based upon or relate to [Edwards'] employment by, association with or compensation from" Andersen;
- Preserve confidential information and trade secrets indefinitely;
- Refrain from disparaging Andersen indefinitely; and
- Cooperate with Andersen in connection with any investigation of, or litigation against, Andersen without compensation.

Signing the TONC was a condition of Andersen agreeing to Edwards' employment with HSBC and to release him from the 1997 "Non-Compete Agreement." (7AA 1384-1388, Exh. 42.)[1]

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[1] In the broadest possible terms, subdivision (1)(d) of the TONC (continued...)

In other words, Andersen was selling Edwards to HSBC.[2] If Edwards didn't go along, he could not work for HSBC, his right to work for any other employer in the industry would be severely restricted, and if he did find work elsewhere in the industry, he and his potential new employer would face the threat of litigation over the validity of the noncompetition agreement. As Edwards put it at the time, "You mean to tell me that I have to have Master Andersen's permission to leave the plantation?" (7AA 1257, ¶ 27.)

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[1] (...continued)
required that Edwards release and discharge Andersen from "any and all actions, causes of action, claims, demands, debts, damages, costs, losses, penalties, attorneys' fees, obligations, judgments, expenses, compensation or liabilities of any nature whatsoever, in law or equity, whether known or unknown, contingent or otherwise, that Employee now has, may have ever had in the past or may have in the future against any of the Released Parties by reason of any act, omission, transaction, occurrence, conduct, circumstance, condition, harm, matter, cause or thing that has occurred from the beginning of time up to and including the date hereof, including, without limitation, claims that in any way arise from or out of, are based upon or relate to Employee's employment by, association with or compensation from [Andersen] or any of its affiliated firms, except for claims (i) arising out of [Andersen's] obligations set forth in this Agreement or (ii) for any accrued and unpaid salary or other employee benefit or compensation owing to Employee as of the date hereof." (7AA 1385, Exh. 42.)

[2] Andersen's president and chief operating officer admitted as much. (6AA 1105-1106, 1119 ["I believe that certain buyers might be willing, might perceive some value to those (managers)"].)

4. Edwards objects to the proposed release and refuses to abandon his statutory employment rights.

Edwards objected to Andersen, in writing, regarding the TONC. In particular, he objected that under the TONC his statutory right to indemnification from Andersen would be vitiated: "[S]hould a manager be charged or sued . . . for his role in whatever cause of action might be brought by the US Government or a former client, the manager would not be entitled to any rights or compensation/indemnification from Andersen." (7AA 1316-1317, Exh. 24; 1263-1264, ¶ 44; 1265, ¶ 51; 8AA 1509, Exh. 84.) Andersen did not respond to Edwards' objection. (7AA 1264, ¶ 45.)

At the same time, Edwards learned that the Internal Revenue Service had disallowed certain tax shelters that Andersen had sold to its clients, including two of Edwards' clients. Edwards anticipated his clients would sue, and that he could be named as a defendant along with Andersen. (7 AA 1258, ¶ 30.) Edwards again expressed to Andersen his increased concern about the TONC and its waiver of employee indemnification rights, but again Andersen did not respond. (7AA 1258-1259, ¶ 31.)

5. Andersen terminates Edwards' employment and HSBC withdraws its employment offer.

Edwards signed HSBC's conditional employment offer but refused to sign the TONC. (7AA 1264, ¶ 46; 1265, ¶ 50.) As a consequence, HSBC withdrew its offer of employment. (7AA 1264, ¶ 48; 1265-1266, ¶ 52; 8AA 1512, Exh. 85.) Edwards was out of a job and shackled with a non-competition agreement.

B. Finding No Actionable Misconduct By Andersen, The Trial Court Dismisses Edwards' Claim For Intentional Interference With Prospective Economic Advantage.

Edwards sued Andersen for intentionally interfering with his prospective economic advantage of employment with HSBC.[3] (2AA 384.)

One element of such a cause of action is that the interference be proscribed by an independently actionable wrongful act, such as a violation of constitutional, statutory, regulatory, or common law. (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1145.) Edwards contends that Andersen's Non-Compete Agreement violated Business and Professions Code section 16600's policy against restraints on employment, and its release of "any and all" claims violated Labor Code section 2804's policy against waiver of an employee's right to employer indemnification under Labor Code section 2802. (11AA 2103-2108.)

When the case was called for trial, the court heard argument from the parties but took no evidence. (11AA 2224.) Instead, the court granted judgment to Andersen based on the court's determination that, as a matter of law, there was no independent wrongful act by Andersen. (11AA 2233-2234) The court decided the Non-Compete Agreement fell within a "narrow restraint" exception to section 16600 and the TONC did not release Edwards' indemnity rights under section 2802. (RT 173-182.)

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[3] Edwards asserted other claims against Andersen and HSBC, including race discrimination (he is African-American). (2AA 398-399, ¶ 52.) None of those claims is in issue at this time.

C. The Court of Appeal Reverses The Judgment For A Trial On The Merits Of Edwards' Intentional Interference Claim.

Edwards appealed the judgment. (11AA 2238.)

The Court of Appeal reversed for a trial on the merits of Edwards' intentional interference claim. (Slip Opinion, p. 44.) The Court found Andersen had committed two wrongful acts in violation of public policy.

First, the Court held that Andersen violated section 16600 by requiring consideration from Edwards for termination of the Non-Compete Agreement. The agreement would have for specified periods prohibited Edwards from performing work for clients of Andersen's Los Angeles office and clients of any Andersen office for whom he had performed work, violated section 16600. That prohibition applied even if the client approached Edwards and requested his services. (Slip Opinion, pp. 13-14.) While the noncompetition clause was circumscribed in time and scope, it nonetheless restricted Edwards' ability to practice his profession and was a wrongful act in violation of public policy expressed in section 16600. (Slip Opinion, pp. 22-23.)

Second, the Court held that Andersen violated Labor Code sections 2802 and 2804 by insisting that Edwards release "any and all" claims against Andersen as a condition of his obtaining employment with HSBC. "Any and all" claims necessarily encompasses any claim Edwards might have against Andersen for indemnification arising from loss incurred as a direct consequence of the discharge of his duties as an Andersen employee. That violated the Labor Code. (Slip Opinion, pp. 28-32.) Whether or not the release would be enforceable in that regard if it had been signed, requiring Edwards to sign it was wrongful. (Slip Opinion, pp. 32-33.)

LEGAL DISCUSSION

One element of Edwards' cause of action for Andersen's interference with his prospective economic advantage is that the interference be proscribed by an independently wrongful act, such as a violation of constitutional, statutory, regulatory, or common law. (*Reeves v. Hanlon*, *supra*, 33 Cal.4th at p. 1145.)

Edwards contends that Andersen's efforts to interfere with his statutory rights to engage in his profession under Business and Professions Code section 16600 and his right to employer indemnification for employment-related expenses under Labor Code section 2802 each constitute the requisite independent wrongful act.

In essence, Andersen was trying simultaneously to sell Edwards to a new employer, to impede its clients from seeking out Edwards' services in the future if he did not go along with the sale, and to rid itself of any responsibility to Edwards for its own misconduct while it employed Edwards. California law justifiably condemns Andersen's conduct.

I. BUSINESS AND PROFESSIONS CODE SECTION 16600 PROHIBITS AN EMPLOYER FROM LIMITING AN EMPLOYEE'S ABILITY TO ENGAGE IN OTHER EMPLOYMENT IN THE SAME TRADE; NO NON-STATUTORY EXCEPTIONS SHOULD BE IMPLIED.

A. Section 16600 Is Unambiguous: It Bars All Restraints On Employee Mobility Other Than Those Expressly Allowed By Sections 16601-16602.5.

1. The plain terms of the statute.

When interpreting a statute, courts follow the Legislature's intent as exhibited by the plain meaning of the actual words of the law. (*Stephens v. County of Tulare* (2006) 38 Cal.4th 793, 801.)

Business and Professions Code section 16600 provides in plain and simple terms:

> Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.

The statute could not have more plainly expressed the Legislature's intent: An employer cannot by contract restrain a former employee from engaging in his or her profession, trade or business.

2. The statute applies to all *restraints* on the right to engage in a profession, trade or business, not, as Andersen argues, just to flat-out *prohibitions* of such practice.

Andersen urges this Court to interpret section 16600 as voiding noncompetition agreements only to the extent they entirely prohibit one from pursuing his or her vocation. (OB 14, 17, fn. 4 ["The statute covers post-employment covenants that ***prohibit*** engaging in a profession (temporary as well as permanent) not limits on engaging in a profession (left to common law development)" (original emphasis)].)

But the statute does not say "prohibit." It says "restrain."

"Restrain" does not mean "prohibit." It means "to limit or hamper." (Random House Unabridged Dict. (2nd ed. 1993) p. 1642.) The statute thus voids contracts that ***limit or hamper***, not just those that ***prohibit***, engaging in one's trade or profession.

As this Court long ago concluded, and as subsequent cases continue to hold: "The statute makes no exception in favor of contracts only in partial restraint of trade." (*Chamberlain v. Augustine* (1916) 172 Cal. 285, 289; *Morris v. Harris* (1954) 127 Cal.App.2d 476, 478 [same]; *Golden State Linen Service, Inc. v. Vidalin* (1977) 69 Cal.App.3d 1, 12 [section 16600 bars limited territorial restraints on employment]; *Hill Medical Corp. v. Wycoff* (2001) 86 Cal.App.4th 895, 900-901 [limited territorial restrictions on employment, void; "California codified its public policy and rejected the common law 'rule of reasonableness' in 1872, upon the enactment of the Civil Code"]; *Scott v. Snelling & Snelling, Inc.* (N.D.Cal. 1990) 732 F.Supp. 1034, 1042 [no "rule of reason" exception for limited territorial restrictions on competition; "California courts have been clear in their expression that [section 16600] represents a strong public policy of the

state which should not be diluted by judicial fiat"; the statute "should be interpreted as broadly as its language reads"].)

B. The Legislature Has Specified The Only Exceptions To Section 16600; None Applies Here.

Section 16600 begins by specifying that the *only* exceptions are those in following few sections: "*Except as provided in this chapter . . . .*" (Emphasis added.)

The only exceptions specified in the chapter containing section 16600 are for territorially limited noncompetition agreements in conjunction with an owner's the sale of a business, a partner's dissolution of or disassociation from a partnership, or a member's dissolution or termination of interest in a limited liability company, as long as the new owner or remaining partners or members continue to carry on the same business. (Bus. & Prof. Code, §§ 16601, 16602, 16602.5.)

The Legislature specifies no other exception and therefore does not intend for there to be other exceptions. "The expression of some things in a statute necessarily means the exclusion of other things not expressed." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852; *Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 921 ["From the fact that the Legislature specified one class of special taxes that is not subject to the limitations of section 65995, moreover, we may reasonably infer that it intended that all other classes of special taxes fall within the statute. *Expressio unius est exclusio alterius*"].)

The Legislature has modified the law as to noncompetition agreements over time. (*Kaplan v. Nalpak Corp.* (1958) 158 Cal.App.2d 197, 200-201 [noting change in scope of permissible territorial restrictions under section 16601 to more nearly reflect common law]; *Hill Medical*

Corp. v. Wycoff, supra, 86 Cal.App.4th at pp. 902-903 [noting amendments to section 16601 that track developments in forms of business ownership].) If the Legislature wanted to change the plain terms of section 16600 to add additional exceptions, it would have done so.[4]

None of the statutory exceptions applies in this case, nor does Andersen contend one does.

C. There Is And Should Be No Implied "Narrow Restraint" Exception To Section 16600.

1. Legislative history demonstrates that the Legislature rejected a "narrow restraint" exception when it enacted section 16600; the right to work is paramount.

Section 16600's predecessor statute, former Civil Code section 1673, was enacted in 1872. At that time in the development of the common law, courts had sometimes drifted away from their centuries-old ban on all contracts in restraint of employment and begun to uphold agreements providing for "narrow" or "reasonable" restraints. (*Wright v. Ryder* (1868)

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[4] Legislatures know how to state exceptions to a statute like section 16600 when that is their intent. In Michigan, for example, M.C.L. 445.761 provides that all agreements by which any person promises not to engage in any trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are declared to be against public policy and void. However, in 1985 the Michigan Legislature added M.C.L. section 445.774a, which provides that employer and employee may enter a noncompetition agreement if the agreement is reasonable as to its duration, geographical area, and type of employment.

The California Legislature has never undertaken such a modification of section 16600.

36 Cal. 342, 357-358.)[5] The Legislature put a halt to that drift away from the ban by adopting former section 1673. That statute, the substantively identical precursor to section 16600, expressly forbade *all* agreements in restraint of trade except those expressly excepted in former sections 1674 and 1675, the predecessors of sections 16601 and 16602.[6]

The California Code Commissioners' comment to former Civil Code section 1673 explained the statute was necessary because "[c]ontracts in restraint of trade have been allowed by modern decisions to a very dangerous extent." (1 Annotated Civil Code (1872), pp. 502-503; Exh. 2 to Andersen's February 21, 2007 Request for Judicial Notice.) In particular, the Commissioners stressed the public policy consideration that contract restraining a person from practicing his or her trade or profession "tends to enforce idleness, and deprive the State of the services of its citizens."[7]

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[5] For centuries, courts had recognized that covenants not to compete are subject to "great abuses" by employers, who are "perpetually labouring for exclusive advantage in trade, and to reduce it to as few hands as possible." (*Mitchell v. Reynolds* (Q. B. 1711) 24 Eng. Rep. 347, citing *Dyer's Case* (1414) Y. B. Mich. 2 Hen. 5, p. 26.)

[6] "Every contract by which one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void."

[7] Andersen suggests it is "unlikely" the Legislature intended to change common law because section 1673 "was merely part of a large undertaking to codify existing California law into four different codes, including civil, civil procedure, criminal and political codes." (OB 33, fn. 10.) The Code Commissioners' comments quoted above demonstrate otherwise with regard to the adoption of this particular section. (See *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 817 ["Our consideration of this arresting contention – and indeed of the whole question of the true meaning and intent of section 1714 – cannot proceed without reference to the Code Commissioners' Note which appeared immediately following section 1714 in the 1872 code"].)

Former section 1673 was enacted in 1872, not long after slavery was abolished in this Country. The statute recognized that the right to work is a fundamental aspect of personal freedom. "The average individual employee has little but his labor to sell or to use to make a living. He is often in urgent need of selling it and in no position to object to boilerplate restrictive covenants placed before him to sign. To him, the right to work and support his family is the most important right he possesses." (*Arthur Murray Dance Studios v. Witter* (Ohio 1952) 105 N.E.2d 685, 704.) Section 16600 is a restatement of that right.

2. While some cases refer to a supposed "narrow restraint" exception, no California case has ever upheld restraints beyond those expressly authorized by statute.

As Andersen points out, language can be found in various California decisions supporting notions that section 16600 was a "codification" of the common law[8] and that the common law countenanced a "narrow" restraint exception to the restriction on employee non-competition agreements. (OB pp. 31-32.)

But a careful reading of those decisions reveals that what those cases are really saying is that the *statutory* exceptions to section 16600 reflect the same exceptions to the rule against noncompetition agreements that are implied by the common law. None holds that section 16600 codified

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[8] The Code Commissioners' comments to former section 1673 quoted above should squelch any notion that the Legislature intended a wholesale adoption of the common law in this regard. The Commissioners viewed the then-recent common law expansion of exceptions as "very dangerous." (1 Annotated Civil Code (1872), pp. 502-503; Exh. 2 to Andersen's February 21, 2007 Request for Judicial Notice.)

existing common law. None allows a restraint, narrow or otherwise, beyond that necessary to protect rights already guaranteed by other statutes.

For example, the court in *Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, states that "Sections 16600 and 16601 are codifications of the common law and are to be construed and interpreted reasonably in light of the common law decisions on the same subject." (*Id.* at p. 47.) However, the case involved the sale of stock in a business. That is a *statutory* exception to section 16600. (Bus. & Prof. Code, § 16601.) That it was also a common-law exception does not validate *all* common law exceptions without regard to the statute, nor can the case be fairly read as saying it does.

Similarly, even though *South Bay Radiology Medical Associates v. Asher* (1990) 220 Cal.App.3d 1074, states that "[s]ection 16600 embodies the common law prohibition against restraints on trade" (*Id.* at p. 1080), the court goes on to acknowledge that "'[i]n declaring a contract void to the extent it exceeds such statutory limitations as those imposed by section 16600, the Legislature thereby adopted a rule of public policy.'" (*Ibid.*, quoting *Centeno v. Roseville Community Hospital* (1979) 107 Cal.App.3d 62, 70.)[9] As in *Vacco*, the court in *South Bay* in fact applied a statutory exception, the specific partnership-dissolution exception of section 16602,

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[9] The *South Bay* court's reliance on *Centeno v. Roseville Community Hospital*, *supra*, 107 Cal.App.3d 62, is puzzling. The plaintiff in *Centeno* sought to invoke section 16600, but there was no non-competition agreement at issue in the case. The plaintiff, a radiologist, became embroiled in a controversy with his partners which culminated in his no longer being a member of the partnership. The hospital for which the partnership provided radiology services refused to allow him to use their radiology facilities, claiming it had an exclusive contract with the remaining partners. (*Id*. at p. 66.) *Centeno* was thus a restraint-of-trade case, not a non-competition agreement case.

not some general common law rule of reasonableness or narrowness. (*Id*. at pp. 1081-1082.)

As the Court of Appeal in this case concluded: "Fairly read, the foregoing authorities suggest section 16600 embodies the original, strict common law antipathy toward restraints of trade, while the section 16601 and 16602 exceptions incorporated the later common law 'rule of reasonableness' in instances *where those exceptions apply*." (Slip Opinion, p. 22, fn. 6, emphasis added.)

3. A "narrow restraint" exception would severely undermine section 16600.

There are several sound public policy reasons to reject a "narrow restraint" exception to section 16600.

1. *Employees are not chattels*: They should remain free to choose their field of employment and for whom they work. As this Court has explained, section 16600 was intended to ensure

> "that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice." [Citation.] It protects "the important legal right of persons to engage in businesses and occupations of their choosing." [Citation.]

(*Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 Cal.4th 697, 706, quoting *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal.App.4th 853, 859, and *Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1520.) As this Court has stated, "The days when a servant was practically the slave of his master have long since passed." (*Greene v. Hawaiian Dredging Co.* (1945) 26 Cal.2d 245, 251.)

Any restraint, narrow or not, necessarily defeats statutory intent by interfering to lesser or greater extent with an employee's right to pursue

"any lawful employment." That is undoubtedly why section 16600 bars contracts that "restrain."

2. *A bright-line rule against restraints against employment offers much-needed certainty and avoids the in terrorem effect of vaguely-worked noncompetition agreements*. A narrow restraint standard would create uncertainty and provide no clear guidelines for either employees or employers. Under such an amorphous standard, a determination of reasonableness or narrowness would necessarily depend on the facts of each noncompetition agreement and each employee's situation.

Such uncertainty breeds litigation and wastes judicial resources. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1122 [absent bright-line test for application of anti-SLAPP statute, confusion and disagreement inevitably will arise, thus delaying resolution and wasting precious judicial resources]; *Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 272 ["The legislative purpose of section 998 is better served by the bright line rule"].)

Because employers and employees could only guess at what courts might hold in any particular case, and that would naturally encourage employers, who would prefer to stifle competition, to push more and more

restrictive covenants.[10] As the court stated in *Latona v. Aetna U.S. Healthcare Inc.* (C.D.Cal. 1999) 82 F.Supp.2d 1089, the employer is in a far better position to know the applicable law. On the other hand:

> Employees . . . will tend to assume that the contractual terms proposed by their employer . . . are legal, if draconian. Furthermore, even if they strongly suspect that a non-compete clause is unenforceable, such employees will be reluctant to challenge the legality of the contractual terms and risk the deployment of [the employer's] considerable legal resources against them. *Thus, the in terrorem effect of the Agreement will tend to secure employee compliance with its illegal terms in the vast majority of cases.*

(*Id.* at p. 1096, emphasis added.) Accord, *Kolani v. Gluska* (1998) 64 Cal.App.4th 402:

> Many, perhaps most, employees would honor these clauses without consulting counsel or challenging the clause in court, thus directly undermining the statutory policy favoring competition. Employers would have no disincentive to use the broad, illegal clauses if permitted to retreat to a narrow, lawful construction in the event of litigation.

(*Id.* at p. 407.)

3. *It is unlikely that a useful body of appellate law would ever develop in the field of "narrow restraints."* Because of cost and time issues, the vast majority of cases involving noncompetition clauses end with a ruling one way or the other on a request for preliminary injunction. And because the outcome of each case depends on its own specific facts, neither side can predict in advance the outcome of litigation over the enforceability of any particular non-competition agreement.

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[10] See *Baker Pacific Corp. v. Suttles* (1990) 220 Cal.App.3d 1148, 1155: "We reject the concept that a worker, compelled by economic necessity to secure employment, can be thus coerced into signing sweeping agreements exculpating various responsible entities" in the "uninformed hope the agreement will not be enforced by the courts."

As one commentator has noted, in a state with no statute regarding noncompetition agreements, reliance on common law precedent results in unpredictable and inconsistent outcomes. (O'Malley, *Covenants Not to Compete in the Massachusetts Hi-Tech Industry: Assessing the Need for a Legislative Solution* (1999) 79 B.U. L.Rev. 1215, 1217, 1225-1227.) "Covenants not to compete, and in particular, employment covenants not to compete, have provided a steady stream of confusing and uncertain litigation since early Medieval courts and Parliament began to address these contracts." (Note, *Contract Law: As Clear as Mud: The Demise of the Covenant Not to Compete in Oklahoma* (2002) 55 Okla. L.Rev. 491, 491.)

4. *Employee mobility has helped fuel an unprecedented economic boom in California*. States where narrow restraints are authorized have not fared nearly as well, especially where growth in the economy depends on innovation and risk-taking. (See Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete* (1999) 74 N.Y.U. L.Rev. 575.) Thus, section 16600 ultimately benefits California employers as much as California employees. (See *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 901 ["To the extent it is invoked by a California employer to protect itself from 'unfair competition,' moreover, section 16600 . . . is all the more important as a statement of California public policy which ensures that California employers will be able to compete effectively for the most talented, skilled employees in their industries"].)

5. *Employers cannot have their cake and eat it too*. Employers want the freedom to fire employees "at will," for any reason or no reason. (Lab. Code, § 2922.) At the same time, however, they want to control their former employees' ability to find other gainful employment after they are fired. (E.g., an implied "narrow restraint" exception.) Employers can't have it both ways. The Legislature has struck a balance between employer

rights and interests and employee rights and interests through section 16600. The courts should not upset that carefully-drawn balance.

In short, several sound policy reasons support the Legislature's adoption of a no-restraint rule. The Legislature decided that once the narrow-restraint camel got its nose under the tent, there would be no effective way to keep the entire-restraint camel out. Andersen and its cohort employers can argue all they want about their needs and concerns, but their arguments must be addressed to the Legislature, not the courts. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196 ["Such an assessment is, however, a question for the Legislature, and the Legislature has already answered it"].)

a. Authority from other courts is not helpful here.

1. *Ninth Circuit decisions.* Andersen's brief is peppered with citations to Ninth Circuit decisions reading a "narrow restraint" exception into section 16600. The Court of Appeal's decision in this case carefully explained where the Ninth Circuit went wrong in interpreting California law as countenancing such restraints on the right to engage in a lawful profession, trade or business. (Slip Opinion, pp. 14-23.)

In brief, the root of the problem lies in cases such as *Campbell v. Bd. of Trustees of Leland Stanford Jr. Univ.* (9th Cir. 1987) 817 F.2d 499, which interpreted California law as prohibiting only those restraints that preclude one from pursuing an *entire* business, trade or profession. (*Id.* at p. 502.) That interpretation was based on dicta in two cases that were not employee noncompetition-agreement cases at all, *Boughton v. Socony Mobil Oil Co.* (1964) 231 Cal.App.2d 188, 192, and *King v. Gerold* (1952) 109 Cal.App.2d 316.

The issue in *Boughton, supra*, 231 Cal.App.2d 188 was the validity of a covenant in deed to a parcel of land that the land would not be used as a gasoline service station for a specified period of time. A subsequent purchaser sought to have the restriction declared invalid under section 16600. The court upheld the judgment declaring the covenant valid. Section 16600 was not implicated; it was a land use case. If an owner can refuse to sell his or her property at all, he or she can agree to sell only on specified conditions. (*Id.* at pp. 190-192.)

King, supra, 109 Cal.App.2d 316 was an unfair competition case. The issue on appeal was the validity of a provision in a license to produce trailers designed by the licensor that, on termination of the license, the licensee would not continue to produce trailers of the licensor's design. The court held that section 16600 did not bar the licensor's claim to damages for the licensee's continued production of trailers of the licensor's design following termination of the license. The defendant could still sell trailers, just not trailers that violated plaintiff's design rights. (*Id.* at p. 318.)

Thus in *Campbell*, the Ninth Circuit mistook *Boughton* and *King* as creating a narrow restraint exception that those cases did not adopt and did not need to adopt. (*Campbell, supra*, 817 F.2d at p. 502.) Once the Ninth Circuit ball got rolling, however, it could not stop. In *International Business Machines Corp. v. Bajorek* (9th Cir. 1999) 191 F.3d 1033, the court recognized that many subsequent California cases had rejected the narrow restraint notion. Yet the court still felt compelled to follow its own decisions interpreting the statute: "We are not free to read California law without deferring to our own precedent on how to construe it." (*Id* at p. 1041.)

This Court is under no such constraint: "[T]he question being one of the construction of a statute of this state, we cannot be bound by the decision of a federal court, however great our respect for that court, when

such decision is at variance with the views expressed by the highest court of this state." (*City Of Oakland v. Buteau* (1919) 180 Cal. 83, 89-90.)

There should not be one California law in state court and a different California law in federal court. This Court now has the opportunity to clarify for all courts that the Ninth Circuit has misread the cases and California does not have a "narrow restraint" exception to section 16600.

2. *Other states' decisions*. Andersen also resorts to out-of-state authority in support of its reading of section 16600. (OB 36-40.) Ultimately, however, Andersen has to concede that only four states have a statute similar to section 16600. (OB 37.)[11] And of those four, Andersen also has to concede that courts in those states are divided on whether a statute that prohibits contracts in restraint of engaging in a lawful profession, trade or business nevertheless authorizes narrow restraints on such engagement. (OB 37-38, fn. 13.)[12]

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[11] States with different statutes, or no statute at all, have upheld noncompetition agreements that no California court would countenance, including covenants that impose monetary fines on former employees for competing with a former employer. Compare cases cited by Andersen (*BDO Seidman v. Hirshberg* (1999) 93 N.Y.2d 382 [712 N.E.2d 1220, 690 N.Y.S.2d 854] [upholding action for liquidated damages of 1½ times the annual billing of any of employer's clients who become client of former employee]; *Dobbins, DeGuire & Tucker, P.C. v. Rutherford, MacDonald & Olson* (1985) 218 Mont. 392 [708 P.2d 577] [same; 100% of gross annual fees]) with California cases (*Muggill v. Reuben H. Donnelley Corp.* (1965) 62 Cal.2d 239, 242-243 [invalidating forfeiture of pension benefits if retiree works for competitor]; *Gordon Termite Control v. Terrones* (1978) 84 Cal.App.3d 176, 178 [invalidating contract requiring a former employee to pay $50 per account if he solicited former customers].)

[12] North Dakota, for example, agrees with California in *Warner and Co. v. Solberg* (N.D. 2001) 634 N.W.2d 65 [2001 N.D. 156], the court invoked a statute identical to section 16600 and invalidated a contract prohibiting an insurance agent from soliciting business from any of his agency's clients for three years after termination of employment with the

(continued...)

No meaningful conclusions can be drawn from split decisions in other states.[13] Out-of-state authority is simply not helpful here.

b. In any event, an employer like Andersen, which was withdrawing from a trade, had no legitimate interest in restraining – narrowly or otherwise – a former employee's ability to continue to work in that trade.

This case demonstrates the insidious nature of prior restraints, narrow or not, on employee mobility. Here, Andersen attempted to use the existence of a noncompetition agreement – overly broad – to extract concessions – many illegal – from departing employees, when Andersen itself had no legitimate concerns about future competition. Andersen was

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[12] (...continued)
agency. The contract would not have prohibited the agent from engaging in his trade, but it would have limited it. Asked to imply a "reasonable restraint" exception to the statute, the court held: "Because of the plain language of the statute, the history of the legislation in North Dakota . . ., and because North Dakota has enacted trade-secrets legislation, we decline to do so." (634 N.W.2d at p. 71.)

[13] Even though the language and context of a sister-state statute are identical to a California statute, if the reasoning of a sister state decision on the statutory provision is unsound, California courts will not follow it. (*Acco Contractors, Inc. v. McNamara & Peepe Lumber Co.* (1976) 63 Cal.App.3d 292, 296.) Moreover, there is "no support for a concept that legislative intent can be determined by the Legislature's presumed knowledge of judicial interpretation of similar statutes in foreign jurisdictions." (*Motors Ins. Corp. v. Division of Fair Employment Practices* (1981) 118 Cal.App.3d 209, 220-221.)

selling off its accounting practice group and getting out of that business. It could not matter to Andersen whether Edwards and all the other departing employees would continue in that business because they would not be in competition with Andersen. In effect, Andersen was using its overbroad noncompetition agreement as leverage to sell its employees to prospective buyers and to limit its clients' future access to those employees' services if they chose not to be sold.

The restraints Andersen sought to impose here would have no meaningful effect other than to limit Edwards' right to engage in his lawful profession, thereby stifling competition in the profession. That is a violation of the letter and spirit of section 16600. That is a wrongful act for purposes of Edwards' cause of action for interference with prospective economic advantage.

D. There Is And Should Be No "Trade Secrets" Exception To Section 16600.

Some California courts have, as a shorthand reference, referred to a "trade secrets exception" to section 16600.[14] This is a misnomer. Trade secrets is an independent body of law, with its own statutory scheme and remedies providing ample protection for employers without mixing it up with non-competition agreements under section 16600.

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[14] For example: *Muggill v. Reuben H. Donnelley Corp.*, *supra*, 62 Cal.2d at p. 242 (section 16600 "invalidates provisions in employment contracts prohibiting an employee from working for a competitor after completion of his employment or imposing a penalty if he does so . . . , unless they are necessary to protect the employer's trade secrets"); *Gordon v. Landau* (1958) 49 Cal.2d 690, 694; *ReadyLink Healthcare v. Cotton* (2005) 126 Cal.App.4th 1006, 1022 ("Misappropriation of trade secret information constitutes an exception to section 16600").

1. Trade secrets are amply protected by other laws enacted after enactment of section 16600.

California adopted the Uniform Trade Secrets Act effective in 1985. (Civ. Code, § 3426 et seq.) The Act provides a veritable arsenal of weapons against trade secrets theft. An actual or threatened misappropriation of a trade secret may be enjoined. Affirmative acts to protect a trade secret may be compelled by court order. (Civ. Code, § 3426.2.) Compensatory and exemplary damages may be imposed (Civ. Code, § 3426.3) and in egregious cases attorney's fees may be awarded (Civ. Code, § 3426.4). In addition, selling an employer's trade secrets may be punished as a crime. (Pen. Code, § 499c.)

When the Legislature adopted the Trade Secrets Act it made no changes to section 16600. It did not add an exception for "trade secrets" to section 16600's prohibition on contracts in restraint of engaging in a lawful profession, trade or business. The Legislature's failure to alter an existing statutory scheme in light of intervening statutory developments reveals an intent to keep that scheme in place according to its original plain language. (*Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1697-1698.)

The Legislature did not have to change section 16600 to accommodate trade secrets concerns because trade secrets law already provides the necessary protection. Moreover, section 16600 already limits its application to contracts that restrain engaging in "a *lawful* profession, trade or business." Misusing trade secrets is not a "lawful profession, trade

or business." No trade secrets exception is required to guarantee lawful conduct.[15]

A former employee's conduct is either proper under trade secrets law or it is not. An employer cannot enforce an illegal restriction on an employee's right to engage in a profession, trade or business under the guise of protecting rights not already protected by trade secrets law. (See *Loral Corp. v. Moyes* (1985) 174 Cal.App.3d 268, 275 ["Generally the law of unfair competition prohibits former employees from disclosing or misusing an employer's trade secrets and confidential information – even in the absence of contractual restrictions"].)

Thus, implying a trade secrets exception to section 16600 would add nothing to the independent body of law of trade secrets law. Cases invoking the "trade secrets exception" to section 16600 are simply applying trade secrets law.

There are good reasons to keep trade secrets law separate from section 16600. Giving judicial cognizance to an unwritten trade secrets exception opens the possibility that there are other unwritten judicial exceptions as well. Employers would keep lobbying for other unwritten exceptions, and employees and the courts would have to keep dealing deal with them. As we have shown, however, the plain terms of section 16600 preclude unwritten exceptions for a narrow restraint or any other kind of restraint not expressly authorized by the Legislature. The statutory

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[15] Similarly no exception is required to prevent other forms of unfair competition. It is already the settled rule that "'the employer will be able to restrain by contract only that conduct of the former employee that would have been subject to judicial restraint under the law of unfair competition, absent the contract.'" (*Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal.App.4th 853, 861, [quoting Hays, *Unfair Competition – Another Decade* (1963) 51 Cal. L.Rev. 51, 69]; *Hollingsworth Solderless Terminal Co. v. Turley* (9th Cir. 1980) 622 F.2d 1324, 1338 [same].)

framework should not be undermined by opening the door to other unauthorized exceptions.

The Legislature separated trade secrets law from the law regulating noncompetition agreements. This Court should keep it that way.

2. In any event, Andersen's noncompetition agreement restricted Edwards' right to work far more than necessary to protect any trade secrets.

Andersen's noncompetition agreement imposed restrictions on Edwards far beyond any even theoretical need to protect trade secrets. Under the agreement, for eighteen months after leaving Andersen, Edwards could not perform professional services of the type he provided Andersen for any client on which he worked during the eighteen months prior to his termination. (7AA 1250, ¶ 8; 1275, Exh. 3.) This was a flat-out, improper restraint on engaging in his profession with clients who wanted his services, without regard whether trade secrets would be compromised.[16] Andersen nevertheless argues this was a legitimate restraint on his trade because Edwards could have found other clients. (OB 41-42) As we have shown, however, the only "legitimate" restraints are those expressly authorized by statute, and this is not one of those exceptions. Moreover, the only California case cited by Andersen in support of the legitimacy of an 18-month restriction on Edwards providing services to former Andersen clients is *Loral Corp. v. Moyes, supra*, 174 Cal.App.3d 268, a case involving a provision against raiding employees from a former employer.

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[16] California courts have rejected the notion of a presumption of "inevitable disclosure" of trade secrets as an excuse to limit employee mobility. (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1458.)

Loral simply does not support Andersen's position regarding a restriction on servicing former clients.

In addition, under Andersen's noncompetition agreement, for twelve months after leaving Andersen, Edwards could not solicit to perform professional services of the type he provided *any* client of the office to which he was assigned during the eighteen months preceding his termination. (7AA 1250, ¶ 8; 1275, Exh. 3.) Again this flat-out restraint on Edwards' ability to practice his profession was without regard to whether it would protect legitimate trade secrets. The only applicable California cases cited in support of the agreement are those involving customer lists that

amount to trade secrets. (OB 45.)[17] A customer list can be a trade secret only if it derives independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use, is the subject of efforts that are reasonable under the circumstances to maintain its secrecy, and disclosure will cause damage to the employer's business. (Civ. Code, § 3426.1, subd. (d); *Reeves v. Hanlon*, *supra*, 33 Cal.4th at p. 1155; *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 300-301.) There is no evidence that is the case here, much less that the noncompetition agreement was narrowly tailored to protect only valid trade secrets.

Andersen's noncompetition agreement was plainly overbroad.

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In sum, contrary to Andersen's assertion, the Court of Appeal did not "ignor[e] a wealth of precedent" (OB 45) in finding Andersen's noncompetition agreement invalid under section 16600.[18] To the contrary, there is no California precedent to validate the agreement. The statute

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[17] The cases cited by Andersen are *Gordon v. Landau*, *supra*, 49 Cal.2d at p. 694 (agreement not to use confidential lists); *Golden State Linen Service, Inc. v. Vidalin*, *supra*, 69 Cal.App.3d at p. 9 (same, but dictum because defendants found not to have done so); and *Loral Corp. v. Moyes*, *supra*, 174 Cal.App.3d at p. 276 (same, but dictum because case involved provision not to raid former employer's employees). See also *Buskuhl v. Family Life Ins. Co.* (1969) 271 Cal.App.2d 514, 522 (contract to protect confidential nature of financial institution customers valid); *Gordon v. Wasserman* (1957) 153 Cal.App.2d 328, 330 (contract to protect confidential customer lists valid).

[18] Andersen complains that the Court of Appeal "adopted a rule that applies to employment contracts only." (OB 15.) In fact, the Court of Appeal "express[ed] no opinion on the operation of section 16600 outside of the context of employee noncompetition agreements." (Slip Opinion, p. 22, fn. 6.)

should be understood by its plain terms and not riddled with imaginary exceptions that undermine its laudable purposes.

II. WHETHER OR NOT IT IS ENFORCEABLE, A RELEASE OF "ANY AND ALL CLAIMS" PURPORTS TO RELEASE EVEN NONWAIVABLE CLAIMS; AN EMPLOYER VIOLATES PUBLIC POLICY BY INSISTING THAT AN EMPLOYEE SIGN SUCH A RELEASE.

A. Andersen Insisted That Edwards Sign A Release Of "Any And All" Claims Against Andersen.

Andersen made it a condition of Edwards obtaining employment with HSBC that Edwards release Andersen from, among many other things, "any and all" claims, including "claims that in any way arise from or out of, are based upon or relate to [Edwards'] employment by, association with or compensation from" Andersen. To the extent that this proffered release encompassed Edwards' statutory rights as Andersen's employee, it violated public policy.

Labor Code section 2802, subdivision (a), provides in pertinent part that an employer "shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties . . . ." The cost of defending a lawsuit arising from an employee's discharge of his or her duties is one such indemnifiable expense (see e.g., *Douglas v. Los Angeles Herald-Examiner*

(1975) 50 Cal.App.3d 449, 461), and Edwards was legitimately concerned such a lawsuit was in the offing.

Labor Code section 2804 provides that any agreement made by any employee to waive the benefits of section 2802 is "null and void." The statute means just that, null and void. (*Liberio v. Vidal* (1966) 240 Cal.App.2d 273, 276, fn. 1.) This reflects a strong public policy to protect employees from bearing the cost of their employers' enterprises. (*Grissom v. Vons Companies, Inc.* (1991) 1 Cal.App.4th 52, 59-60; *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 74, fn. 24.)

Forcing an employee to waive his or her statutory rights as a condition of obtaining employment violates this public policy. (*D'Sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 929-934 [an employer cannot lawfully make the signing of a contract that violates public policy a condition of continued employment]; *Baker Pacific Corp. v. Suttles, supra*, 220 Cal.App.3d at p. 1154 ["requiring prospective employees to sign an illegal agreement as a condition of employment is contrary to law"].) Indeed, the Legislature said so as plainly as possible in Labor Code section 432.5:

> No employer, or agent, manager, superintendent, or officer thereof, shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer, or agent, manager, superintendent, or officer thereof to be prohibited by law.

B. "Any And All" Does Not Mean "Some But Not Others."

Andersen contends that the release it sought to impose on Edwards could not have intended to encompass nonwaivable rights because that would have been wrong. But right or wrong, the release says what it says.

It says "any and all" claims. "Any and all" does not mean "any and all, except those things that could get us in trouble." As *Stewart Title Co. v. Herbert* (1970) 6 Cal.App.3d 957 holds:

> "All" means everyone or the whole number [citation], and it does not "admit of an exception or exclusion not specified" [citation]. The word "all" as defined in 1 Bouviers Law Dictionary, Third Revision, means "Completely, wholly, the whole amount, quantity or number."

(*Id.* at p. 962.)[19]

Andersen's argument that its proffered release did not purport to waive employee indemnity rights because it did not explicitly mention employee indemnity rights (OB 46) is therefore futile. "Any and all" rights necessarily included employee indemnity rights. (See *Bardin v. Lockheed Aeronautical Systems Co.* (1999) 70 Cal.App.4th 494, 505 ["Appellant argues that the release does not expressly release respondents from disseminating false or baseless statements. We do not find that limitation in the language of the release. It broadly and unambiguously releases a former employer '*from any and all liability for damage of whatever kind . . .* " (original emphasis)].)

C. The Release Cannot Be Construed To Mean Anything Other Than What It Says.

Andersen argues that courts can construe executed contracts as valid to the extent permitted by law. Such contracts are not necessarily invalidated in every part just because they are invalid is some part. (OB 59-60.)

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[19] "'Any' and 'all' have been described as the most comprehensive words in the English language." (*North v. Hawkinson* (Mo. 1959) 324 S.W.2d 733, 744 [separate opinion of Presiding Justice Storckman].)

That's true, but that principle has no application here. This case does not involve an executed release for which there was otherwise valid consideration. It involves an employer insisting that an employee execute an invalid release in order to obtain the benefits of future employment. Whether or not a signed release later could have been reformed to comport with the law, Andersen's insistence that an employee sign an unlawful release was itself unlawful. Andersen's argument was made and rejected in *Baker Pacific Corp. v. Suttles, supra*, 220 Cal.App.3d 1148, as "circular and unintelligible." (*Id* at p. 1154.) If a release is unlawful, "it follows that requiring prospective employees to sign an illegal agreement as a condition of employment is contrary to law." (*Ibid*.)

Andersen also argues that its conduct was not unlawful because the Labor Code does not criminalize attempted violations of Labor Code section 2802. (OB 54-55.) But an act does not have to be criminal in order to be unlawful for purposes of a cause of action for interference with economic advantage. The act simply must violate a constitutional, statutory, regulatory, or common law provision that reflects the public policy of this state. (*Reeves v. Hanlon, supra*, 33 Cal.4th at p. 1145.) Andersen violated the public policy of this state by insisting that its employees waive employment rights guaranteed to them, and not subject to waiver, under the Labor Code.

D. This Court Does Not Have To Rule That All Contractual Releases Violate Public Policy In Order To Rule That The Release In This Case Violates Public Policy.

Andersen offers a parade of horrible consequences the world will suffer if the release of employment indemnification rights it insisted Edwards sign is held wrongful. (OB 60-63.) But the vast majority of releases do not involve employment terminations or similar situations that involve overriding public policy concerns and unwaivable statutory rights. Furthermore, how difficult could it be to add the phrase "except as otherwise prohibited by law" to a release?

E. Edwards Gave Andersen The Opportunity To Rewrite The Release To Avoid Invalidity; Andersen Chose Not To Do So.

As between employer and employee, the employer ought to bear the burden of drafting a valid release. In this case, Andersen can't even plead ignorance that the release it tried to force on Edwards would have required him to waive unwaivable rights. Edwards was painfully aware that he was exposed to potential liability by Andersen's marketing of disallowed tax shelters, and he specifically raised the issue of waiver of his indemnification rights when Andersen presented him with the release. Nevertheless, Andersen made no changes and continued to insist that he sign it on a take-it-or-leave-it basis.

Andersen must therefore defend that release on a take-it-or-leave-it basis. Andersen cannot successfully do so because the release is patently overbroad and encompasses employment rights that cannot be released.

CONCLUSION

Contrary to the trial court's conclusion, Edwards has established wrongful acts by Andersen necessary to support his cause of action for intentional interference with prospective economic advantage. The judgment of the Court of Appeal reversing the trial court's judgment should be affirmed.

Dated: March ___, 2007

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204 (c)(1), the attached Answering Brief On The Merits was produced using 13-point Times New Roman type style and contains 9,256 words not including the tables of contents and authorities, caption page, signature blocks, or this Certification page, as counted by the word processing program used to generate it.

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