Courts Side with Non-Solicitation Agreements when Narrowly Defined

CONTRACTS: California has treacherous legal waters.

LAW

ROBERT A. HULL
KEVIN E. REX
SUE M. BENDAVID

You worked hard growing your business and clientele. But now, a trusted employee is working for a competitor and taking customers. You thought you were protected because the employee signed a "non-solicitation" agreement preventing the employee from poaching customers. But will the Court enforce your "non-solicitation" or will the Court strike it as an unreasonable restraint on your employee's ability to work?

Many states permit reasonable, narrow contractual restraints in the practice of a profession, including non-competition and non-solicitation agreements. However, California is not one of them.

In California, "every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void." *Bus. & Prof. Code §16600.* The only statutory exceptions permitting non-compete and non-solicitation covenants involve the continuation of a business after the purchase of the business' goodwill/assets. *Bus. & Prof. Code §§16601, 16602, 16602.5.*

California has simply chosen to favor employees against employers in this area: "The interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change." *Diodes, Inc. v. Franzen (1968).*

Already illegal

This language from Franzen illuminates another area where non-solicitation provisions may be enforceable; namely, if they prohibit already illegal acts, such as the theft of trade secrets. Thus, if the customer list is a "trade secret", the theft of which is illegal under California law, courts may enforce the non-solicitation provision. Courts developed a multi-factor test to determine if a customer list is a protectable trade secret: (i) whether the employer spent significant money/effort developing the list; (ii) whether the employer guarded the list's secrecy; (iii) whether the list is not generally known outside of the business; and, (iv) whether the list can be acquired/duplicated easily, etc.

What use, then, is a non-solicitation clause if it is only valid when the solicitation is already illegal? Is a non-solicitation clause by any other name really just "trade secret" protection? Maybe. The verdict is still out.

In *Dowell v. Biosense Webster (2009)*, the Court voided a non-solicitation clause. The clause prevented employees "for 18 months postemployment from soliciting any business from, selling to, or rendering any service directly or indirectly to any of the accounts, customers or clients with whom they had contact during their last 12 months of employment." The Court found the provision was so broadly worded it restrained competition and was not designed merely to protect the employer's trade secret customer lists.

Broad vs. narrow

In *Retirement Group v. Galante (2009)*, the Court also invalidated a broad non-solicitation provision, while validating a more narrow one. The broad provision prohibited employees from "[d]irectly or indirectly soliciting any current [customers]" of employer to transfer their business away from the former employer." The Court acknowledged the validity of a non-solicitation agreement "if the employee is utilizing trade secret information" to solicit those customers finding "it is not the solicitation of the former employer's customers, but is instead the misuse of trade secret information, that may be enjoined." The Court permitted enforcement of a more limited non-solicitation clause preventing employees "from '[u]sing in any manner [employer] information found solely and exclusively [in] [employer] databases' . . . but expressly exclud[ing] from its ambit the use of '[s]imilar information found on servers, databases and other resources owned and operated by other entities or businesses.'" Though the Court rejected a blanket "trade secret exclusion" which would permit non-solicitation clauses in all such trade secret cases, the language in Galante indicates the Court may enforce a very narrowly-drawn non-solicitation clause.

Despite statutory and case law, many attorneys and/or employers still might be tempted to include broad provisions, in violation of section 16600, to intimidate employees into compliance. But, this practice carries risk. Such violations can form the basis of a claim against the employer under the Unfair Practices Act *(Bus. & Prof. Code §§17200, et seq.)*, which "borrows" violations of other laws, and treats them as independently actionable. For example, in *Application Group, Inc. v. Hunter Group, Inc. (1998)*, the Court noted that a broad non-competition provision could result in a violation of the Unfair Practices Law ("UPL") because the provision violated section 16600. A non-solicitation provision violating section 16600 could also be used as the basis of a UPL claim against the employer. Thus, employers are well-advised to narrowly-tailor any non-solicitation clauses, using the language from Galante as a guideline.

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Hull, Rex and Bendavid are attorneys with Lewitt Hackman Shapiro Marshall and Harlan in Encino.