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Contracts Prohibiting Solicitation Of Customers Post-Employment In Jeopardy

Recently, in *Thompson v. Impaxx, Inc.*, the Second Appellate District held that an employee who was fired for refusing to sign an agreement prohibiting him from soliciting customers with whom he had dealt for one year post-employment could sue his former employer for wrongful termination.

The court explained that antisolicitation covenants are void as unlawful business restraints except where their enforcement is necessary to protect trade secrets. Agreements designed to protect an employer's proprietary information do not violate state anti-compete laws because they constitute a trade secret. But courts are reluctant to protect customer lists to the extent that they embody information which is readily ascertainable through public sources, such as business directories. Only where the employer has expended time and effort identifying customers with particular needs or characteristics, and taken reasonable steps to keep this information confidential, will courts prohibit former employees from using this information. As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, then it is more likely a court will find such information constitutes a trade secret.

In this case, the company's customer lists were available to employees and the general public on their website. Further, the company provided samples of their work, from which customer names could easily be deduced, on request and made no effort to keep the names of customers and potential customers secret. Absent a protectable trade secret, the right to compete fairly outweighs the employer's right to protect clients against competition from their former employees.

Many employers have their employees sign agreements similar to the one involved in this case. Therefore, this case is a warning to employers not to either enforce these agreements or terminate employees who refuse to sign such agreements --- without first determining that their customer lists will be treated as trade secrets as a matter of law. Prudent employers will want to consult with their legal counsel if these issues apply to them.

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