

EMPLOYMENT LAW UPDATE

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Thompson v. Impaxx, Inc.
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Unenforceable Covenant Against Solicitation Of Employer's Customers Supports Wrongful Termination Claim.

By Juan C. Araneda and Jason A. Geller

Daniel Thompson worked for Pac-West Labels. In September of 2000, Impaxx, Inc. bought Pac-West and asked Thompson to sign a covenant which read, "For a period of one (1) year following the termination of employment, I will not call on, solicit, or take away any of Pac-West Label's customers or potential customers with whom I have had any dealings as a result of my employment by Pac-West Label." Thompson refused, and was fired for that reason.

He sued for wrongful termination on the grounds that termination of an employee for refusal to sign an unenforceable covenant not to compete is a wrongful termination in violation of public policy. Thompson's complaint also alleged that the identity of Impaxx's customers and potential customers were not trade secrets, that Impaxx had not made any effort to keep the names of customers and potential customers secret, that scores of customer names were on Impaxx's website and that Impaxx provided samples of their work, from

which customer names could easily be deduced, on request.

The Second District Court of Appeal observed that although there is a general prohibition against covenants not to compete under Business and Professions Code 16600 and against anti-solicitation covenants under case law, information about customers may be protected if it is confidential, proprietary, and/or a trade secret.

Courts are reluctant to protect customer lists to the extent they embody information which is readily ascertainable through public sources, such as business directories. On the other hand, where the employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit former employees from using this information to capture a share of the market. As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely

a court will find that such information constitutes a trade secret. Unfortunately for Impaxx, it did not establish that the information it sought to protect through its covenant not to solicit met these requirements.

Therefore, the court found that in the absence of a protectable trade secret, the right to compete fairly outweighs the employer's right to protect clients against competition from former employees and reversed the lower court's ruling granting Impaxx's judgment on the pleadings.

Accordingly, employers requiring employees to sign anti-solicitation covenants should be careful to narrowly draft such covenants to assure that the information to be protected is confidential, proprietary and/or a trade secret. However, employers should also be aware that merely labeling information as such does not conclusively establish that the information fits the description. The question of whether the information constitutes a trade secret or is confidential is a question of fact to be established by the employer.

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