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Judge: 'solicitation' doesn't rest on who initiated contact

By Brandon Gee
brandon.gee@lawyersweekly.com

A plaintiff information technology company can enforce a non-solicitation provision in the employment contract of a salesman who left to work for a competitor, even though the plaintiff's clients initiated first contact with him, a U.S. District Court judge has ruled.

The defendant salesman did not dispute that he had been competing with the plaintiff for the business of clients he worked with while employed by the plaintiff, but argued that such dealings did not violate the non-solicitation agreement if the clients made first contact.

But Judge Douglas P. Woodlock disagreed, finding that it is the nature of the communications — not who initiated them — that determines whether solicitation has occurred.

The defendant and co-defendant competitor drew an "artificial distinction in order to argue that [salesman Brian] Harnett's admitted and open business dealings with his former … clients do not constitute solicitation and do not implicate the confidential information he learned while working at [plaintiff Corporate Technologies Inc.]. They argue that as long as the client was the first to contact Harnett, any business he conducts cannot constitute solicitation. Neither the Agreement nor the law, however, draws such a distinction," Woodlock wrote, granting the plaintiff's request for a preliminary injunction to enforce the non-solicitation and non-disclosure provisions in the employment contract.

The 33-page decision is *Corporate Technologies Inc. v. Harnett, et al.*, Lawyers Weekly No. 02-208-13. The full text of the ruling can be found at masslawyersweekly.com.

Clarity

Plaintiff's counsel Kevin J. O'Connor of Hinckley, Allen & Snyder in Boston said Woodlock's ruling is "very significant" and will provide clarity for employers and employees alike — and their lawyers.

"There was some uncertainty in the legal community as to whether a non-solicitation agreement meant simply that a former employee could just not make the initial contact," O'Connor said, noting that such a rule would be too simple, if not arbitrary. "The court focused on the nature of the contact between the customer and the former employee, not the first to contact. That's a sound ruling that is very well-founded in existing Massachusetts caselaw."

Kevin J. O'Connor
Hinckley Allen

Joseph J. Laferrera, a partner at Gesmer Updegrove in Boston, called Woodlock's order "more evolutionary than revolutionary" and a common-sense approach to address a casual, but flawed, assumption.

"I think people have often assumed that non-solicitation agreements are really limited to scenarios where the person subject to the covenant reaches out first. Once the phone rings, they're off the hook," Laferrera said. "I don't think that's advice lawyers are going to be able to give in light of this decision, and probably advice they shouldn't have given in the first place."

Sanford F. Remz, a lawyer at Yurko, Salvesen & Remz in Boston, said he was not surprised by Woodlock's decision, which he called "practical." Remz said the first-to-contact argument was a weak one for the defendants to make.

"When the former employee is actually participating in an effort to get business, who contacted who is not a serious question," Remz said. "The concern is not so much who made the first call, but whether Harnett was really involved in the effort to pursue the business, or whether the customer was acquired independent of Harnett's efforts."

While Woodlock's decision can rightly be viewed as a win for employers, O'Connor, Laferrera and Remz agreed that, in the long run, it will benefit employees, too. If employers are confident that a non-solicitation clause will not have its teeth knocked out based on a first-to-contact technicality, they will be less likely to insist on broader, more restrictive non-competition agreements, the lawyers said.

"If it only means the employee can't be the first to contact, then the market would inevitably react by moving toward non-competition, rather than non-solicitation, agreements," O'Connor said. "Every employment lawyer would be saying, 'A non-solicitation contract isn't really worth very much, so you have to get employees to sign non-competition agreements.'"

Laferrera said non-competes are "too big a club," whereas non-solicitation agreements can be focused. The lesson of Woodlock's ruling for employees, Laferrera said, is to recognize that the narrower agreements can still be powerful and will limit them if and when they decide to leave the company.

But the more narrowly tailored the agreement is, Remz said, the less of an obstacle it might be for employers in recruiting or retaining talent.

The defendants are being represented by Dale Worrall of Harris Beach in New York and a team of Foley Hoag attorneys in Boston. Worrall did not respond to phone and email messages. A representative for lead attorney Michele A. Whitham at Foley Hoag said she would not comment on a pending case.

Offer declined, then accepted

Harnett was a salesman for CTI from February 2003 until October 2012. He signed a non-disclosure and non-solicitation agreement that, for one year following his departure from CTI, prevented him from divulging confidential information he learned while employed at CTI and from soliciting business from CTI's customers.

OnX Enterprise Solutions made a job offer to

Harnett in August 2012 that he declined. He accepted a second offer two months later that promised not only more money, but also to indemnify him fully for any disputes with CTI over breach of the non-disclosure and non-solicitation agreement.

On Harnett's first day at OnX, the company sent out an announcement to more than 100 potential clients — including eight of Harnett's largest and most active CTI clients — notifying them of the hire. Four of Harnett's former CTI clients responded to the announcement and later met with him. One of the former clients, Demandware, entered into a contract with OnX for services similar to those it previously received from CTI.

CTI sued Harnett and OnX in state court in December 2012. The defendants removed the case to federal court and countersued for intentional interference with an advantageous business relationship and unfair business practices.

Definition of solicitation

Woodlock's ruling addressed the plaintiff's request for a preliminary injunction to prevent Harnett from doing business with clients he worked with while at CTI, and the defendants' motion to prevent CTI from falsely characterizing its agreement with Harnett as a non-competition agreement.

Citing two Massachusetts cases that interpreted the term "solicitation" broadly, Woodlock wrote that Harnett's behavior fell within the established definition of solicitation and that he was not convinced by the first-to-contact defense raised by Harnett and OnX.

Woodlock also ruled that "the Agreement itself provides that Harnett may not 'solicit, divert or entice away'" CTI's customers.

"Neither the plain meaning of the word solicit, nor the plain meaning of the word entice, requires some kind of first contact," Woodlock said.

The judge noted that such agreements cannot bind third parties and that OnX was not prevented from merely "receiving" business from Harnett's former clients.

"However, this narrow carve-out from a non-solicitation agreement for *receiving* business does not allow a salesman to take active steps to persuade the client and actually solicit his business," Woodlock said. "In this case, Harnett and OnX have done more than simply receive business."

Even if a bright-line, first-contact rule shielded the defendants from liability for breaching the non-solicitation agreement, it could not shield them "from liability on the breach of contract claim for violation of the non-disclosure provision," the judge wrote.

"Given the similarity of Harnett's position at both companies, he cannot simply forget the confidential information he has learned about his clients while employed with CTI, and he will inevitably call on this information in any dealings with those former clients during the course of his employment with OnX," Woodlock said.

Finding that CTI would suffer irreparable harm and that the balance of hardships weighed in CTI's favor, Woodlock granted the plaintiff's request for a preliminary injunction.

"Under the injunction, Harnett may solicit business from any company or university within his territory other than the few listed in the injunction for which he was responsible while employed at CTI," Woodlock said. "The injunction will not prevent OnX as an entity from doing business with *any* slice of the market at all as long as it does not involve Harnett in that business initiative. … To enjoin OnX, as an entity, from conducting business with Harnett's former CTI clients would effectively prevent those third parties from choosing their preferred provider or IT solutions, contrary to public policy."

Meanwhile, Woodlock denied the defendants' motion for a temporary injunction.

Though he noted a likelihood that CTI "purposefully and improperly" interfered with Harnett's relationship with vendors by contacting those third parties and falsely stating that the salesman was bound by a non-competition agreement, Woodlock said Harnett could not "demonstrate a likelihood of *future* irreparable harm."

"Although any future mischaracterizations of his agreement would likely constitute tortious interference, an injunction would be inappropriate in the absence of evidence of some present threat of future harm," the judge concluded.

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CASE: *Corporate Technologies Inc. v. Harnett, et al.*, Lawyers Weekly No. 02-208-13

COURT: U.S. District Court

ISSUE: Should a plaintiff's preliminary injunction to enforce non-solicitation and non-disclosure provisions in the employment contract of an employee who left to work for a co-defendant competitor be granted despite the defendants' contention that the non-solicitation clause did not apply to any of the plaintiff's clients who initiated first contact with the defendants?

DECISION: Yes

Injunction vs. entry-level salesmen overturned

In another decision that helps define the parameters of restrictive covenants in employment contracts, a single justice of the Appeals Court overturned a preliminary injunction that prevented two salesmen "from engaging in various services in furtherance of their employment by" their co-defendant employer, Handa Travel Student Trip.

The salesmen, Daniel Moreno and Nicholas Blaszczyk, previously worked for plaintiff StudentCity.com, which, like Handa, is a travel agency. Both defendants signed a non-competition agreement with StudentCity.com.

But Judge Mark V. Green said it was inappropriate for the Superior Court judge to enjoin the defendants. Green wrote that he was skeptical the entry-level salesmen were truly privy to confidential information and business strategies and that "widely-known marketing techniques, such as in-person solicitation and outreach through social media," can hardly be considered a proprietary business strategy.

"Blaszczyk and Moreno joined StudentCity as entry-level sales and marketing employees with no previous experience in the industry," Green wrote. "There is no evidence that either was promoted at any point. In light of their entry-level status, StudentCity's assertion that that they were involved in 'strategic business planning and development,' is implausible."

— Brandon Gee