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'First contact' does not bar solicitation lawsuit

By Eric T. Berkman

A rare appellate decision addressing the enforceability of non-solicitation agreements in employment contracts shows that such provisions will be broadly construed in Massachusetts, according to attorneys who practice in the field.

In a 25-page opinion, the 1st U.S. Circuit Court of Appeals ruled that an information technology company could enforce a non-solicitation provision against a salesman who began working with clients of his former employer after joining a rival company, even though the customers initiated first contact with him.

The clients in question apparently contacted the defendant salesman in response to an email blast that his new employer sent announcing his new position.

The 1st Circuit rejected the defendant salesman's argument that once his former employer's clients reached out to him, he was free to deal with them without being guilty of solicitation.

"In the employment context, restrictive covenants are meant to afford the original employer bargained-for protection of its accrued good will," Judge Bruce M. Selya wrote for the court. "According decretory significance to who makes the first contact would undermine this protection. … [B]ecause initial contact can easily be manipulated — say, by a targeted announcement that piques customers' curiosity — a per se rule would deprive the employer of its bargained-for protection."

Plaintiff's counsel Kevin J. O'Connor of Hinckley Allen in Boston called the case "a reminder that non-solicitation and confidentiality agreements remain alive and well in Massachusetts" by recognizing the "teeth" in such provisions.

C. Max Perlman, an employment lawyer at Hirsch, Roberts, Weinstein in Boston, added that the decision is particularly noteworthy because it is unusual for the 1st Circuit to involve itself in non-solicitation cases, which are typically resolved at the preliminary injunction stage.

"The amount of appellate authority on non-solicitation and non-compete cases is just not there," said Perlman, who was not involved in the suit. "So when a court like the 1st Circuit weighs in on one of these cases, those of us who practice in this area stand up and take note. It serves as an authoritative guideline for these cases, and there's a lot of them out there."

Kevin J. O'Connor
Hinckley Allen

Michele A. Whitham of Foley Hoag in Boston represented the defendants. She declined to comment through the firm's spokesperson.

The full text of the ruling, *Corporate Technologies, Inc. v. Harnett, et al.*, Lawyers Weekly No. 01-244-13, can be found at masslawyersweekly.com.

Reasonable construction

O'Connor said the decision should have positive implications for employers and employees alike.

First, by construing non-solicitation agreements reasonably rather than in an overly technical manner, the 1st Circuit has given employers comfort that they will be protected adequately by such agreements, O'Connor said.

Meanwhile, the ruling benefits employees because fewer employers will feel the need to resort to the more draconian step of insisting on a non-compete agreement, he said.

"If the court had construed the non-solicitation agreement in the narrow manner advocated by the defendants, the inevitable result would have been [employers demanding an inflated] level of protection in the post-employment context," O'Connor said.

Boston attorney Lee T. Gesmer, who handles non-solicitation disputes, said the decision will make it more difficult for employees to try to work around a non-solicitation agreement without being held accountable.

"There's not going to be a per se standard where the question is simply who made the first contact," the Gesmer & Updegrove lawyer said. "Instead, the courts will have to look at the setting in which the case arises, what the new employer did, what kinds of contacts there were between the parties following that first contact, how many meetings, how many phone calls, and so on."

Trial court judges have long been skeptical of the first-contact argument the defendants made in *Harnett*, Gesmer added.

"Experienced lawyers realize you can't walk into a state or federal court and say, 'Your honor, my client didn't make the first contact and that's all you need to look at,'" he said. "So this decision isn't a shocking change in the law, but it's a more persuasive exposition of the law than we've had in the past."

Perlman said the ruling highlights certain practice pointers for attorneys. For example, the case shows it is worth considering naming the new employer as a defendant in addition to the employee, as plaintiff's counsel did in *Harnett*.

"The injunction in this case — which not only enforces the non-solicitation clause but also requires the new employer to withdraw all the bids it made to customers with which the employee had any prior involvement — is a dream," he said. "They wouldn't have gotten an injunction like that, which stops deals that were already in the works, unless they had the new employer in this case."

The ruling also sends a message to employers to beef up their non-solicitation language by explicitly prohibiting types of activities beyond direct solicitation of former clients that they wish to prevent, Perlman said.

"[The decision] might even suggest that you should define 'solicitation' to include things like announcing your employment with a competitor, like the email blast at issue in this case," he said. "The case should at the very least make us all look at the agreements our clients have and ask whether it's the kind of clause the 1st Circuit would have enforced."

CASE: *Corporate Technologies, Inc. v. Harnett, et al.,* Lawyers Weekly No. 01-244-13

COURT: 1st U.S. Circuit Court of Appeals

ISSUE: Was a non-solicitation agreement in an employment contract enforceable against a salesman who jumped to a competitor and began working with his former employer's customers after the customers made initial contact with him?

DECISION: Yes

New company, old clients

Defendant Brian Harnett worked as a salesman for plaintiff Corporate Technologies, Inc., a provider of customized IT solutions to sophisticated customers, from February 2003 until October 2012.

When Harnett came on board, CTI insisted that he sign a non-disclosure and non-solicitation agreement that, for a year following his departure from the company, prevented him from divulging confidential information he learned while employed at CTI, from soliciting CTI customers, and from diverting business from CTI 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 new employer 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.

The plaintiff also sought a preliminary injunction, which U.S. District Court Judge Douglas P. Woodlock granted. The injunction barred Harnett from engaging in any marketing or sales efforts on behalf of the former CTI customers for 12 months. It also required the OnX from withdrawing any bids that Harnett had helped develop.

The defendants appealed.

Policy considerations

On appeal, the 1st Circuit noted that the Supreme Judicial Court had directly addressed the significance of initial contact in determining whether a non-solicitation agreement has been broken.

But relying on policy considerations, the court found that the SJC, if confronted with the issue, would determine that a per se "initial contact" rule is not appropriate.

First, Selya said, restrictive covenants in the employment context are intended to afford an employer bargained-for protection of good will that has been built up over the years.

Giving undue significance to which party makes the initial contact would undercut such considerations, Selya said, explaining that multiple other factors can determine whether an ex-employee has engaged in solicitation and that "initial contact" can be manipulated.

Additionally, whether or not there has been solicitation can depend on the context of the particular case and industry, Selya said.

"In an industry in which a defendant subject to a non-solicitation agreement is peddling fungible, off-the-shelf goods, initial contact might weigh heavily," the judge said. "In contrast, where the sales process is complex and the products are customized [like in this case], initial contact is usually at a considerable remove from a closed sale. In such a situation, initial contact is likely to weigh far less heavily."

Finally, Selya said, the identity of the party making initial contact is just one of many factors that a trial court should consider when drawing a line between solicitation and mere acceptance of business.

"Thus, we decline the defendants' invitation to assign talismanic importance to initial contact," the judge said.

Accordingly the 1st Circuit upheld the preliminary injunction, concluding that Woodlock did not abuse his discretion by finding that the plaintiff would likely succeed on the merits of its case. MLW