

Who Owns the Customer Relationship?

Date: November 21, 2016

Original Newsletter(s) this article was published in: Employment Update: November 2016

Typical Fact Situation

As a condition of employment with a travel agency (“Donaldson’s”), Mary was required to sign, and did sign, an employment agreement in which she agreed that *“in the event of termination or resignation she will not solicit or accept business from any corporate accounts or customers that are serviced by Donaldson’s, directly or indirectly.”*

Few would argue that Donaldson’s did not have a legitimate reason for having Mary agree to this covenant. The goodwill generated by Mary with Donaldson’s customers during her employment was financed by the payment of Mary’s wages and expenses. As a result, it would be unfair for Mary to immediately start attacking this customer base following the end of her employment without giving Donaldson’s a reasonable period of time to encourage its customers to maintain their allegiance to Donaldson’s.

After eight years of employment, Mary resigned and took up employment with Goliger’s, a direct competitor of Donaldson’s. She immediately commenced soliciting customers of Donaldson’s to give their travel business to Goliger’s. In response, Donaldson’s sued Mary, Goliger’s and Goliger’s President seeking a court order prohibiting these defendants from soliciting or accepting business from Donaldson’s customers and \$500,000 in damages for having done so.

Was Donaldson’s Successful?

No. Instead, each of the defendants was successful in having the claims against it dismissed by way of summary judgment.

Reasoning of the Trial Judge

1. A restrictive covenant is enforceable if it is reasonable between the parties and with reference to the public interest.

2. In applying this reasonableness test the court will assess:

- did the employer have a proprietary interest entitled to protection?
- are the temporal or spatial features of the covenant too broad?
- is the covenant a prohibition against competition generally and not limited to solicitation of customers?

While the Court seemed to accept that Donaldson's had a legitimate proprietary interest entitled to protection (its customer relationships), the covenant was defective and unenforceable because:

- there was neither a geographic or temporal restriction.
- it was not restricted to accounts and customers serviced by Mary during her employment.
- by prohibiting "accepting business" from customers it constitutes a "non-competition clause", which is only enforceable in exceptional circumstances, which circumstances were absent.

What is the Lesson?

Donaldson's had a legitimate proprietary interest to protect. Had it protected this interest with a covenant which met the standards set out in the case law, the Court would have provided a remedy. Donaldson's, however, "over-reached" by insisting on a covenant which went beyond that to which it is entitled at law. Furthermore, the Court will not "read down" the covenant to what it would have enforced. Instead, the entire covenant is unenforceable.

An employer should resist the urge to impose comprehensive restrictions which go beyond its legitimate right to protect the goodwill in its customer base. Provided it is reasonable in terms of duration, geography and scope (i.e. restricted to those customers with whom the employee had a level of control) and does not prohibit "acceptance of business" the covenant will likely be enforceable.