



California Corporate & Securities Law

Non-Competition Contract Doesn't Vitate Agents' Duty Of Loyalty

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California has codified various legal and equitable maxims in its Civil Code. However, a quick read of some of these maxims leaves one wondering whether the legislature has simply codified the sayings of Yoda.

For example, Civil Code Section 3536 cryptically provides "The greater contains the less" while Section 3538 helpfully adds some certainty by stating: "That is certain which can be made certain."

I've always been puzzled by Section 3537 which oracularly opines "Superfluity does not vitiate". Is this statute necessary or is it simply superfluous? If it is superfluous, does it vitiate?

But patience to prevent that murmur, soon replies that the California courts have not overlooked Section 3537. In *Huong Que, Inc. v. Mui Luu*, 150 Cal. App. 4th (2007), the California Court of Appeal upheld an injunction against the sellers of a small business from engaging in tortious disloyalty. The purchase agreement contained a clause prohibiting the sellers from competing "as an owner". The sellers agreed to act as the buyer's managing agents following the sale. When the buyer discovered evidence that the sellers had taken the buyer's customer list, it brought suit alleging breach of the sellers' fiduciary duty as managing agent. The sellers apparently argued that to find them in breach of a duty of loyalty would conflict the more narrow restriction in the purchase agreement's noncompetition clause.

The Court of Appeal, however, found no logical conflict between the purchase agreement and the additional duty of loyalty arising from the parties' agency relationship. Citing Civil Code Section 3537, the Court found that this superfluity did not vitiate. And so, we see that indeed Section 3537 is not superfluous and, like Thomas the Tank Engine, it is a really useful statute.

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