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NONCOMPETE NEWS

Noncompete News: Non-Solicit Relating To Former Customers Found Unenforceable

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Less is more. That is the theme of this month's *Noncompete News*, which addresses a decision by the Georgia Court of Appeals rendered just a few weeks ago. An insurance company entered into a written "confidentiality and non-solicitation agreement" with one of its executives. A few years later, the executive decided to resign and form his own business. The executive informed the company that he was resigning and planned to open a competing business, but assured the company that he would honor his non-solicitation agreement. A few months after he left the insurance company to start his own business, the insurance company sued the former executive for, among other things, violation of the non-solicitation of customers provision.

The executive agreed, "for two years after the termination of [his] employment with the company," not to "solicit or divert away, or attempt to solicit or divert away, any Customer (as defined below) of the company or any of its affiliates for the purpose of selling or providing Competitive Services as defined below) . . . ." The non-solicitation provision defined "Customer" as "(i.) any individual or entity that has purchased an insurance contract through the company (ii.) with whom or with which the employee personally had, alone or in conjunction with others, material contact during the two years immediately prior to the termination of the employee's employment with the company or any of its affiliates."

The employee asserted that the non-solicit provision was overly broad because it could be read to preclude the employee from soliciting clients who had already severed their relationship with the company. The Court of Appeals agreed because the agreement defined "Customers" as meaning "any individual or entity that *has purchased* an insurance contract through the company."

What is so interesting about this case is that the company would have been able to enforce this provision had it left undefined the word "Customer." For example, in *Palmer & Cay v. Lofton Companies*, a 2006 Georgia Supreme Court decision, the Court addressed a non-solicit of customers provision that did not limit the prohibited customers to those with which the employee had contact during a limited period prior to the termination of the employee's employment (the present case had such a limitation). That non-solicitation of customers provision, however, also did **not** define the term "Customer." The *Palmer & Cay* court enforced the non-solicitation of customers and, in so doing, held that the term "Customer," when left undefined, is presumed to relate only to those *current* customers of the company. Therefore, the *Palmer & Cay* court held that the non-solicitation of customers was appropriately restricted, even though it didn't limit the prohibited customers to those serviced by the employee during a limited period of time before the end of his employment.

So, what lesson can a drafter of Georgia non-solicit of customers provisions learn from this recent decision? Keep it simple, and realize that the drafting of restrictive covenants in Georgia is incredibly nuanced and not necessarily logical.

If you have any questions regarding this decision or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work or the author of the *Noncompete News,* Jeff Mokotoff, jmokotoff@fordharrison.com or 404-888-3804.