



## POST-TERMINATION CUSTOMER NON-SOLICITATION AGREEMENT RULED UNLAWFUL

(December 11, 2003)

### Summary

On Monday, the Court of Appeal ruled in [Thompson v. Impaxx, Inc.](#) that a post-termination customer non-solicitation agreement violated California law, because the employee would not need to rely on confidential information in order to solicit his former customers.

### Details

The facts of the case are simple. The plaintiff, Daniel Thompson, worked for Pac-West Labels. Impaxx, Inc. bought Pac-West and asked Thompson to sign a covenant which read "For a period of one year following the termination of employment, I will not call on, solicit, or take away any of Pac-West Label's customers or potential customers with whom I have had any dealings as a result of my employment by Pac-West Label." Pac-West fired Thompson because he refused to sign the agreement. He sued for wrongful termination under the rule that termination of an employee for refusal to sign an unenforceable covenant not to compete is a wrongful termination in violation of public policy. Although the trial court found the provision to be enforceable, the Court of Appeal reversed the judgment for the company, finding that the provision violated California law.

### Analysis

California Business and Professions Code section 16600 declares covenants not to compete to be unlawful. Many cases recognize that section 16600 and California public policy strongly favor an employee's right to compete with a former employer. Although there are a number of cases upholding customer non-solicitation clauses similar to the clause at issue in this case, those cases involved situations where the former employee would have to rely on non-public, confidential information in order to solicit former customers. In the *Thompson* case, the Court assumed for purposes of its decision that the employee would not have to rely on confidential information in order to compete. Therefore, the clause at issue was broader than necessary to protect the employer's trade secrets, and this violated section 16600.

This decision underscores the dangers to employers who attempt to go too far with post-termination covenants. In most cases, an overly broad non-solicitation agreement results only in the clause being unenforceable. However, where, as in the *Thompson* case, an employer requests an employee to sign a non-solicitation agreement, it must consider the consequences of the employee's refusal to sign the agreement. In this case, the employer fired the employee for refusing to sign the agreement, and thereby exposed itself to substantial damages (including tort damages) for a wrongful discharge in violation of public policy.

### What this means

Employers should review their confidentiality agreements and forms to insure that any customer non-solicitation provision is not merely an attempt to thwart competition, but is justified as an effort to prevent the use of confidential information. In addition, employers should review their internal practices for maintaining confidentiality of customer-related information to insure they are taking all

reasonable steps to protect the confidentiality of their trade secrets.

If you have any questions about this or any other topic, please contact [Fred Plevin](#) at (619) 237-5200 at [Paul, Plevin, Sullivan & Connaughton](#).

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