TRADE REGULATION - RIGHT OF EMPLOYER TO ENJOIN FORMER EMPLOYEE FROM SOLICITING EMPLOYER'S CUSTOMERS

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Antitrust and Trade Regulation Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol37/iss3/28
TRADE REGULATION — RIGHT OF EMPLOYER TO ENJOIN FORMER EMPLOYEE FROM SOLICITING EMPLOYER’S CUSTOMERS — Defendants had formerly been employed as solicitors for the plaintiff, a corporation engaged in the business of selling teas, coffees, spices, and other products at retail. There were no restrictive covenants in the employment contract and within a few months after leaving plaintiff’s employ, defendants entered into a similar business in competition with plaintiff and solicited customers with whom they became acquainted while in plaintiff’s service. Plaintiff appealed from an order sustaining a demurrer to its bill which sought to restrain defendants from such soliciting. Held, order affirmed. In the absence of a contract and where the employee uses no written list of customers obtained by virtue of his employment, the former employer is not entitled to such an injunction. Jewel Tea Co. v. Grissom, (S. D. 1938) 279 N. W. 544.

The majority of jurisdictions follows the rule that in the absence of a special contract, a former employee may not be restrained from merely soliciting or accepting business from the customers of his former employer.1 However,

it is also generally held that a contractually unrestricted former employee may be enjoined from using written lists of customers which he took when he quit, or surreptitiously procured thereafter. Equitable jurisdiction in such cases is variously said to depend upon the violation of a contract implied in law, or misuse of confidential information, or on the violation of property rights. The former two grounds are, in effect, an application of equitable doctrines to prevent fraud or overreaching. The court in the instant case pointed out that if the former employees had taken a written list, then the plaintiff would have been entitled to the injunction. The theory used was that such a list would be the property of the former employer. Although, as pointed out above, this is a familiar ground for making a distinction, it is submitted that it is unsound. In the first place, there is no logical basis for distinguishing between a written and a memorized list. The thing which a former employer wishes to preclude his old employee from using is not the list, but the latter’s knowledge of and acquaintance with the former’s customers. In the second place, the entire property approach begs the question. Even the jurisdictions which use it have not always gone sled-length with the idea. Courts will often consider lists of customers as trade secrets in order to qualify them as property rights, but it is difficult to use this approach without changing older conceptions of trade secrets. It seems that the moving thought in these decisions is an ethical consideration, namely, whether the employee has engaged in a method of competition which is deemed unfair to the former employer. Or, as one writer has put it, “the real grounds behind the decisions find their origin in the fundamental doctrine of equity, most frequently applied in trusts, which requires that a person shall not use a position of advantage naturally arising from the relationship of the parties to profit at the expense of the other.” This theory gains


5 Mackechnie Bread Co. v. Huber, 60 Cal. App. 539, 213 P. 285 (1923);


7 It has been held that a list of laundry route customers is a property right but is not a tangible right which may be transferred like stock, bonds, animals, etc., and it cannot be the subject of an action in conversion and for damages. Olschewski v. Hudson, 87 Cal. App. 282, 262 P. 43 (1927); Adkins v. Model Laundry Co., 92 Cal. App. 575, 268 P. 939 (1928).

8 Todd Protectograph Co. v. Hirschberg, 100 Misc. 418, 165 N. Y. S. 906 (1917).

9 “A trade secret is a plan or process, tool, mechanism, or compound, known only to its owner and those of his employees to whom it is necessary to confide it in order to apply it to the uses for which it is intended.” 63 C. J. 239 (1933).

support from the fact that express covenants against an employee’s competing in a specified place and for a specified time are sometimes not enforced by injunctive decree on the ground that enforcement is not necessary to protect the former employer’s rights. It appears, therefore, that this type of case is another example of “balancing interests or equities.” The court is faced with two conflicting policies. On the one hand, we have the desire to encourage competition and to facilitate the exercise by an individual of all his skill and knowledge, and, on the other hand, there is the wish to give reasonable protection against unfair competition to established businesses. While the result itself in the principal case is correct, the above approach to the problem appears to be more realistic and direct than the one utilized by the court.


12 For cases involving this familiar doctrine of equity, see Cook, Cases on Equity, 2d ed., c. 3, § 4 (1932).

13 Since no written list was used by the defendants, the court was in accord with the weight of authority in denying the injunction. On principle it would also seem that the same result would follow by the application of the equitable principles suggested, because the defendants were merely making use of their acquaintance with old customers without any proof that in so doing they were misrepresenting any facts relative to their former connection with the plaintiff or its products.