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99

The Parameters of "Solicitation" in an Era of Non-Solicitation Covenants

By David L. Johnson*

I. Introduction

"I didn't solicit them; they approached me." That is a common defense invoked by someone accused of violating a non-solicitation covenant. In addition to requiring employees to be bound by non-compete and non-disclosure covenants, employers routinely require employees to be bound by covenants precluding them from soliciting customers or co-workers. As courts have become increasingly reluctant to enforce non-compete provisions, the scope and enforceability of non-solicitation provisions, in turn, have become increasingly significant.[1]

Litigants frequently debate whether a former employee has breached a non-solicitation covenant by accepting business from a customer, or by hiring a former co-worker, in instances when the former employee does not initiate the contact. Often, an agreement will prohibit employees from "soliciting" customers or co-workers without defining the term "solicit." In such instances, courts typically will defer to the common meaning of the term "solicit" as defined in dictionaries, and will take into account public policy considerations. Employers may avoid the potential for uncertainty by defining the term "solicit" or by specifying in the agreement that an employee may not accept business from the employer's customers or hire the employer's other employees. However, courts in many jurisdictions will not enforce such broad restrictions on free enterprise.

Part II of this article describes cases from across the country in which courts have enforced non-solicitation agreements when former

*David L. Johnson is a member in the Nashville, Tennessee office of Butler, Snow, O'Mara, Stevens, and Cannada, PLLC, where he practices labor and employment law, representing management. Mr. Johnson is active in the American Bar Association's Labor and Employment Law Section and currently serves as a co-chair of the Section's Government Fellows Program.

1. Non-solicitation covenants typically are more narrow than non-compete covenants. Unlike a non-compete covenant, which generally entails an employee agreeing not to compete in any capacity with the employer within a certain geographic area during a specified period of time, a non-solicitation covenant generally allows a former employee to engage freely in a competing business, but the former employee must simply agree not to solicit certain of the former employer's customers or employees.

employees accepted business from prior customers. Part III discusses cases in which the non-solicitation agreements at issue did not specifically preclude the acceptance of business from prior customers, and courts' refusals to construe the agreements as including such a prohibition. In Part IV, this article provides cases in which courts refused to enforce non-solicitation covenants that did in fact prohibit former employees from accepting business from former customers. Part V distinguishes between former employees actively soliciting business from prior customers and former employees that receive such business without solicitation, and analyzes the legal ramifications for such distinctions. Part VI goes outside of the solicitation of business context to an analysis of cases in which the agreements at issue preclude the solicitation of former co-workers. Part VII looks at agreements that outright prohibit former employees from hiring a former employer's employees. Lastly, Part VIII concludes the article.

II. Decisions Enforcing Non-Acceptance of Business Covenants

By including language in an employment agreement preventing a former employee from accepting business from the employer's customers, the employer may be able to avoid a debate about whether the former employee actually solicited a customer's business. In jurisdictions where courts would enforce a reasonable non-compete covenant based on the circumstances, it should come as no surprise that a court would also enforce a provision restricting an employee from either soliciting or accepting competing business from the former employer's customers. It is relatively common for employment agreements to include such a "non-acceptance of business" covenant in lieu of a non-compete covenant (the geographic range of the employer's customers effectively serves as a substitute for the geographic scope of a non-compete covenant). As explained by a Connecticut court, "[a]n antisales restriction [limited to the employer's customers], as opposed to an anticompetitive restriction, is by its nature limited to a definite geographic area," as the "geographic area affected by an antisales covenant is limited to that area in which the customers of the former employer are located."[2]

In many instances, courts have enforced covenants precluding a former employee from accepting business from or servicing the former employer's clients. For example, in *Perry v. Moran*,[3] the plaintiff accounting firm required the defendant accountant to sign an employment agreement precluding her from "provid[ing] services" to any of the firm's clients for a five-year period after termination of

2. New Haven Tobacco Co. v. Perrelli, 559 A.2d 715, 717 (Conn. App. Ct. 1989).
3. 748 P.2d 224 (Wash. 1987).

employment.[4] Under a liquidated damages provision, the firm was entitled to fifty percent of fees billed by the accountant to any of its clients during the restrictive period.[5] The following year, the accountant resigned and, during a seventeen-month period, billed approximately $80,000 to the firm's clients.[6] The trial court dismissed the firm's claims on the basis that the accountant did not solicit any of these client accounts,[7] and the firm appealed.

The Washington Supreme Court reversed, determining that the restrictive covenant was "proper, reasonable and enforceable."[8] The court found that the firm had a "legitimate interest in protecting its existing client base from depletion" and a "justifiable expectation that if it provided employment to an accountant, that employee would not take its customers."[9] Thus, the court concluded that a "covenant prohibiting the former employee from providing accounting services to the firm's clients for a reasonable time is a fair means of protecting that client base," and that "[s]uch covenants encourage employment of accountants by accounting firms and they discourage the taking of the employer's clients without preventing the employee from engaging in the profession."[10]

On many other occasions, courts have enforced non-solicitation covenants that also preclude the former employee from accepting business from the former employer's clients.[11] One can expect that courts

4. *Id.* at 225.
5. *Id.*
6. *Id.* at 226.
7. *Id.*
8. *Id.* at 229.
9. *Id.*
10. *Id.*; *see also* Holloway v. Faw, Casson & Co., 572 A.2d 510, 520 (Md. Ct. App. 1990) (similar provision applicable to accountants with liquidated damages provision held enforceable).
11. *See, e.g.*, Curtis 1000, Inc. v. Martin, 197 F. App'x 412, 423 (6th Cir. 2006) (Tennessee law applied to uphold district court's preliminary injunction enforcing covenant precluding individual from accepting unsolicited business from his former employer); USI Ins. Serv., LLC v. Miner, 801 F. Supp. 2d 175, 188 (S.D.N.Y. 2011) (enforcing covenant precluding employee from accepting business from former employer's clients); Pulse Techs., Inc. v. Dodrill, No. CV-07-65-ST, 2007 WL 789434, at *12 (D. Or. Mar. 14, 2007) (preliminary injunction prohibiting former employee from accepting business from plaintiff's customers); Ecolab, Inc. v. K.P. Laundry Mach., Inc., 656 F. Supp. 894, 897 (S.D.N.Y. 1987) (preliminary injunction entered after finding that former employee violated covenant by accepting unsolicited orders); Clark v. Liberty Nat'l Life Ins. Co., 592 So. 2d 564 (Ala. 1992) (insurance agent breached covenant precluding him from soliciting or otherwise doing business with former employer's customers); Federated Mut. Ins. Co. v. Bennett, 818 S.W.2d 596 (Ark. App. Ct. 1991) (covenant prohibiting former employee from accepting any business from plaintiff's customers found overbroad only to the extent that it prohibited former employee from selling lines of insurance that plaintiff did not offer); Spitz, Sullivan, Wachtel & Falcetta v. Murphy, No. CV-86-0322422, 1991 WL 112718, at *6 (Conn. Super. Ct. June 13, 1991) (covenant prohibiting defendant employee from servicing former employer's clients enforced as court noted that "defendant has cited no Connecticut precedent which renders such an agreement unenforceable merely because it prohibits a defecting professional employee from servicing unsolicited

that scrutinize restrictive covenants less strictly in the context of a business sale would also be more inclined to enforce a covenant contained in any business sale transactional documents precluding the acceptance of business from customers. Under New York law, for instance, a lenient "reasonableness" standard applies to a restrictive covenant included in business purchase documents.[12] Thus, in *Kraft Agency, Inc. v. Del Monico*,[13] the court reversed the trial court's summary judgment decision and found that a covenant in business purchase documents precluding servicing of customers' accounts "may be reasonable and necessary" depending on the proof presented at trial.[14] Similarly, under Illinois law, "courts are less likely to declare invalid a restrictive covenant ancillary to the sale of a business than they would be to invalidate a restraint based on an employer/employee relationship."[15] In *Howard Johnson & Co. v. Feinstein*,[16] a non-solicitation covenant included in sale-of-business documents precluded the defendants from soliciting or accepting competing business from the plaintiff's clients.[17] The Appellate Court of Illinois rejected the defendants' argument that the agreement was unreasonably broad to the extent that it precluded the defendants from merely accepting unsolicited business.[18]

In one instance, a court has construed a covenant precluding a former employee from soliciting customers also to preclude acceptance of unsolicited competing business from any customers, given other evidence that indicated the parties intended for the employee to be bound by a broader non-compete covenant. In *Manuel Lujan Insurance,*

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clients of his former employer"); Envtl. Servs., Inc. v. Carter, 9 So. 3d 1258, 1266 (Fla. Dist. Ct. App. 2009) (employer was entitled to temporary injunctive relief preventing former employee from performing services for employer's customers); McRand, Inc. v. Van Beelen, 486 N.E.2d 1306 (Ill. App. Ct. 1985) (covenant preventing former employee from servicing plaintiff's customers upheld to the extent that defendant interacted with the customers while employed by plaintiff); Alexander & Alexander, Inc. v. Danahy, 488 N.E.2d 22, 30 (Mass. App. Ct. 1986) (reservations expressed about covenant preventing acceptance of business from plaintiff's customers but preliminary injunction upheld nevertheless); Tuttle v. Riggs-Warfield-Roloson, Inc., 246 A.2d 588, 590 (Md. 1968); Hebb v. Stump, Harvey & Cook, Inc., 334 A.2d 563, 566 (Md. Ct. Spec. App. 1975); Mills v. Murray, 472 S.W.2d 6, 9 (Mo. Ct. App. 1971) (provision that prevented former employee from "render[ing] the same or similar services" to the employer's customers enforced); Am. Pamcor, Inc. v. Klote, 438 S.W.2d 287, 291 (Mo. Ct. App. 1969) (injunction issued to prevent former employee from "accept[ing] business" from employer's customers in violation of non-solicitation covenant); Uniform Rental Div., Inc. v. Moreno, 83 A.D.2d 629 (N.Y. App. Div. 1981); Bates Chevrolet Corp. v. Haven Chevrolet, Inc., 13 A.D.2d 27 (N.Y. App. Div. 1961) (injunction issued to prevent former employee from "accept[ing] business" from employer's customers in violation of employment covenant).

12. Kraft Agency, Inc. v. Del Monico, 110 A.D.2d 177, 181 (N.Y. App. Div. 1985).
13. *Id.*
14. *Id.* at 185.
15. Howard Johnson & Co. v. Feinstein, 609 N.E.2d 930, 934 (Ill. App. Ct. 1993).
16. *Id.*
17. *Id.*
18. *Id.* at 935.

Inc. v. Jordan,[19] the plaintiff insurance company employed the defendant as a manager in its bond department.[20] As a condition of his employment, the manager agreed that he would "not for a period of two (2) years from the date of termination of employment solicit the customers (policyholders) of the Company, either directly or indirectly."[21] The agreement further specified that "[t]he purpose of this paragraph is to ensure that the [e]mployee for the periods set out herein, will not in any manner directly or indirectly enter into competition with the Company or the customers of the Company as of date of termination."[22] Thereafter, the manager resigned and began performing bonding transactions with the insurance company's customers.[23] The trial court enjoined the manager from soliciting or accepting business from the company's customers, and the manager appealed.[24]

The Supreme Court of New Mexico noted that "there is some doubt as to the intention of the parties" concerning whether the agreement would preclude the manager from accepting unsolicited work from the company's customers:

> For example, it is not clear whether the word "solicit" should be narrowly interpreted as precluding only solicitation but allowing [the defendant] to accept the unsolicited business of [the company's] customers. On the other hand, inclusion of the non-competition provision in the second sentence may be viewed as including prohibitions against any acceptance of, or competition for, the customers of [the company].[25]

Based on this ambiguity, the court determined that it was appropriate to consider parol evidence.[26] Evidence presented showed that while the parties negotiated the agreement, the company's president verbally stated that the customer accounts belonged to the company and that the manager should not compete for them.[27] Moreover, the manager attempted to negotiate for a clause that would have allowed him to perform business for the company's customers, and the company refused to include the clause.[28] In fact, after the manager resigned, the company rejected his requests to purchase the right to service the customers.[29] Based on the totality of the wording of the agreement and these circumstances, the court concluded that "it

19. 673 P.2d 1306 (N.M. 1983).
20. *Id.*
21. *Id.* at 1308.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 1309.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

becomes apparent that the parties intended that [the manager] be restricted from competing by not soliciting or accepting business from [the company's] customers," and that "[t]he parties thus contemplated a comprehensive ban on acceptance, not merely a narrow promise not to solicit."[30]

III. Decisions Declining to Construe Non-Solicitation Covenants to Preclude the Acceptance of Business

Notwithstanding the unique circumstances presented in *Manuel Lujan Insurance*, in the vast majority of instances when a non-solicitation covenant does not specifically preclude the acceptance of unsolicited business, courts have not construed such a covenant to prevent a former employee from accepting unsolicited business—even if the covenant includes the term "indirectly." Often underlying this stance are widely recognized principles that restrictive covenants are a restraint of trade, that they are generally disfavored, and that any ambiguities are construed against the drafter and in favor of free enterprise.[31] Courts have frequently relied on the common definition of "solicitation" in dictionaries and have concluded that the term connotes that some active measures must be taken to pursue a business opportunity. The definition of "solicitation" set forth in the current edition of *Black's Law Dictionary* defines the term as "[t]he act or an instance of requesting or seeking to obtain something" and "[a]n attempt or effort to gain business."[32] Thus, passive acceptance of business without more typically would not be considered a solicitation under such a definition.

Courts in Georgia have addressed this issue on multiple occasions. In *Akron Pest Control v. Radar Exterminating Co.*,[33] Donald Sellers entered into a stock redemption agreement with his former employer.[34] As part of the agreement, Sellers agreed "not to solicit, either directly or indirectly any current or past customers" of his employer for a two-year period.[35] Thereafter, Sellers started his own competing business.[36] His employer's successor, Radar Exterminating Company (Radar), brought suit against Sellers and his new business after Radar discovered that Sellers was doing business with Radar's customers.[37]

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30. *Id.*

31. *See, e.g.*, Emergency Assoc. of Tampa, P.A. v. Sassano, 664 So. 2d 1000, 1002 (Fla. Dist. Ct. App. 1995); Bishop v. Lakeland Animal Hosp., P.C., 644 N.E.2d 33, 35–36 (Ill. App. Ct. 1994); Allright Auto Parks, Inc. v. Berry, 409 S.W.2d 361, 363 (Tenn. 1966); Simmons v. Miller, 544 S.E.2d 666, 678 (Va. 2001).

32. BLACK'S LAW DICTIONARY 1520 (9th ed. 2009).

33. 455 S.E.2d 601 (Ga. Ct. App. 1995).

34. *Id.* at 602.

35. *Id.*

36. *Id.*

37. *Id.*

Sellers moved for summary judgment, arguing that he did not breach the contract because neither he nor his new business solicited any of Radar's customers.[38] Instead, the undisputed evidence demonstrated that all of these customers approached Sellers.[39] Focusing on the covenant's inclusion of the term "indirectly," Radar responded that the contract must be construed to require Sellers to decline business from Radar's customers.[40] The trial court rejected Radar's interpretation and dismissed its claims.[41]

Noting that the contract did not define the term "solicit," the Georgia Court of Appeals turned to the definition of that term as set forth in standard dictionaries.[42] *Webster's New International Dictionary* defined "solicit" as "to entreat, importune . . . , to endeavor to obtain by asking or pleading . . . to urge."[43] The court also noted that the edition of *Black's Law Dictionary* applicable at that time defined the term as follows:

> To appeal for something; to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain; and though the word implies a serious request, it requires no particular degree of importunity, entreaty, imploration, or supplication. To awake or incite to action by acts or conduct intended to and calculated to incite the act of giving. The term implies personal petition and importunity addressed to a particular individual to do some particular thing.[44]

The court rejected Radar's argument that the term "solicit" should be interpreted more broadly because the contract also included the term "indirectly."[45] The court found:

> For Sellers to violate the written non-solicitation agreement at issue would require some affirmative action on his part that could be considered a solicitation in the broadest possible sense. . . . Merely *accepting* business that Sellers was forbidden otherwise to seek out for a period of time does not in any sense constitute a solicitation of that business.[46]

Therefore, the court affirmed the trial court's dismissal of Radar's breach of contract claims.[47]

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38. *Id.*
39. *Id.*
40. *Id.* at 603.
41. *Id.*
42. *Id.* at 602.
43. *Id.* (quoting Mgmt. Comp. Grp. v. United Sec. Emp. Programs, 389 S.E.2d 525, 528 (Ga. Ct. App. 1989) (quoting WEBSTER'S NEW INT'L DICTIONARY (2d ed. 1956)).
44. *Id.* at 602–03 (citations omitted) (quoting BLACK'S LAW DICTIONARY 1392 (6th ed. 1990)).
45. *Id.* at 603.
46. *Id.*
47. *Id.*; *cf.* J.E. Hangar, Inc. v. Scussel, 937 F. Supp. 1546, 1554 (M.D. Ala. 1996) (Georgia law applied to find that agreement not to "solicit any customer" did not prohibit

Other courts have reached similar conclusions. A New York court found that "the plain meaning of the term 'solicit' connotes the act of requesting or seeking a particular object or end," and "[t]hus, in order for the non-solicitation clause to be violated, it must be shown that [the former employee] initiated contact with [the customer] regarding direct sales."[48]

In *Mona Electric Group, Inc. v. Truland Service Corp.*,[49] an employee agreed not to "solicit any of the employer's customers."[50] Applying Maryland law, the Fourth Circuit determined that the former employee did not breach the agreement by submitting estimates in response to unsolicited requests from his former employer's customers.[51] The court found that "the plain meaning of 'solicit' requires the initiation of contact," and that if the employer intended to prevent its former employee "from conducting business with its customers it could have easily stated that in the agreement."[52]

Similarly, in *Resource Associates Grant Writing & Evaluation Services, LLC v. Maberry*,[53] the plaintiff company brought suit against the defendant consultants, who had agreed not to "directly or indirectly, approach any customers."[54] Rejecting the company's argument that this language precluded the consultants from passively accepting business from its customers, a New Mexico federal district court noted that the term "'[a]pproach' is an active concept,"[55] and that "[t]o hold that the Consulting Agreement bars [the consultants] from accepting business from [the plaintiff's] customers and providers, would require the Court to insert terms into the Consulting Agreement that are not there."[56]

In *J.K.R., Inc. v. Triple Check Tax Service, Inc.*,[57] two employees agreed not to "call upon, solicit, divert or take away" their employer's clients.[58] The Florida District Court of Appeal found that this covenant precluded the employees from "taking proactive steps to obtain [their

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the former employee "from doing business with new customers or those customers who initiate contact").

48. Bajan Grp., Inc. v. Consumers Interstate Corp., No. 1099-07, 2010 WL 3341456, at *6 (N.Y. Sup. Ct. Aug. 12, 2010) (citing BLACK'S LAW DICTIONARY (8th ed. 2004)).

49. 56 F. App'x 108 (4th Cir. 2003).

50. *Id.* at 109.

51. *Id.* at 110.

52. *Id.* at 110–11; *see also* Gen. Parts Distrib., LLC v. St. Clair, No. 11-cv-03556-JFM, 2011 WL 6296746, at *3 (D. Md. Dec. 14, 2011) (citing the same proposition).

53. Res. Assoc. Grant Writing & Eval. Serv., LLC v. Maberry, No. CIV-08-0552, 2009 WL 1232133 (D. N.M. Apr. 23, 2009); Res. Assoc. Grant Writing & Eval. Serv., LLC v. Maberry, No. CIV-08-0552, 2009 WL 1232181 (D.N.M. Apr. 28, 2009).

54. *Res. Assoc.*, 2009 WL 1232133, at *11.

55. *Res. Assoc.*, 2009 WL 1232181, at *4.

56. *Id.* at *11.

57. 736 So. 2d 43 (Fla. Dist. Ct. App. 1999).

58. *Id.* at 43.

former employer's] clients, but [did] not disallow them from accepting former clients who actively seek their assistance."[59] Courts in Massachusetts and New Jersey have reached similar determinations.[60]

IV. Decisions Declining to Enforce Non-Acceptance of Business Covenants

These cases do not directly address whether the courts would have ruled differently had the employers worded the agreements more broadly to preclude employees from both soliciting and accepting business from their former employer's customers. In 1952, the Supreme Court of California refused to enforce strictly a contract that stated that an employee could not "solicit, serve and/or cater to" any of the employer's customers.[61] The court found that "[e]quity will not enjoin a former employee from receiving business from the customers of his former employer, even though the circumstances be such that he should be prohibited from soliciting such business."[62] After that decision, the California legislature enacted a statute that generally voided non-compete covenants as against public policy.[63] Although reasonable non-solicitation covenants may be enforced in California, courts have continued to find that a covenant precluding an employee from merely accepting business from the former employer's customers is unenforceable.[64]

After *Akron Pest Control*,[65] Georgia courts have repeatedly held that a non-solicitation covenant that precludes acceptance of business from unsolicited customers is unenforceable. For instance, in *Waldeck v.*

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59. *Id.* at 44; *see also* Coastal Loading, Inc. v. Tile Roof Loading, Inc., 908 So. 2d 609, 612 (Fla. Dist. Ct. App. 2005) (defendant did not violate agreement not to "call on or solicit" plaintiff's customers by accepting unsolicited business); Advantage Digital Sys., Inc. v. Digital Imaging Serv., Inc., 870 So. 2d 111, 115 (Fla. Dist. Ct. App. 2003) (if former employee is approached by employer's customer "that is not solicitation").

60. *See* ING Life Ins. & Annuity Co. v. Gitterman, No. 10-4076, 2010 WL 3283526, at *4 (D.N.J. Aug. 18, 2010) ("Merely being in contact with former clients does not constitute solicitation."); Oceanair, Inc. v. Katzman, No. 003343BLS, 2002 WL 532475, at *6 (Mass. Super. Ct. Jan. 22, 2002) (responding to a request for information did not amount to a "solicitation," based on definition set forth in *Black's Law Dictionary*); Rubel & Jensen Corp. v. Rubel, 203 A.2d 625, 628–29 (N.J. Sup. Ct. App. Div. 1964) (contractual provision precluding employee from "solicit[ing], directly or indirectly" employer's customers did not preclude employee from servicing customers who brought "business to him of their own accord").

61. Aetna Bldg. Maint. Co. v. West, 246 P.2d 11, 13 (Cal. 1952).

62. *Id.* at 15.

63. CAL. BUSINESS & PROF. CODE § 16600 (West 2012) ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.").

64. *See, e.g.*, Robert Half Int'l, Inc. v. Murray, No. CV-F-07-0799, 2008 WL 2625857, at *8–9 (E.D. Cal. June 25, 2008); John F. Matull & Assoc., Inc. v. Cloutier, 240 Cal. Rptr. 211 (Cal. Ct. App. 1987).

65. Akron Pest Control v. Radar Exterminating Co., 455 S.E.2d 601 (Ga. Ct. App. 1995).

Curtis 1000, Inc.,[66] Waldeck's employer required him to sign a non-solicitation covenant precluding him from "effect[ing] the sale" or "accept[ing] any offer from" any of the employer's customers.[67] Reversing the trial court's injunction, the Georgia Court of Appeals found as follows:

> While a prohibition involving some *affirmative* act on the part of the former employee, such as solicitation, diversion, or contact of clients, may be reasonable, a covenant prohibiting a former employee from merely accepting business, without any solicitation, is not reasonable. The non-solicitation covenant in this case prohibits not only solicitation of Waldeck's former clients, but also the acceptance of business from unsolicited former clients, regardless of who initiated the contact. This is an unreasonable restraint.[68]

A number of other courts have reached similar determinations.[69]

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66. 583 S.E.2d 266 (Ga. Ct. App. 2003).

67. *Id.* at 267.

68. *Id.* at 268 (citations omitted); *see also* Curtis 1000, Inc. v. Martin, 197 F. App'x 412, 421–22 (6th Cir. 2006) (Georgia law applied to find that similar covenant was unenforceable); Fine v. Commc'n Trends, Inc., 699 S.E.2d 623, 632 (Ga. Ct. App. 2010) (agreement prohibiting employee "from 'otherwise' communicating with the former clients to accept business, without solicitation and regardless of who initiated the contact" found to be overbroad); Pregler v. C&Z, Inc., 575 S.E.2d 915, 916 (Ga. Ct. App. 2003) ("The non-solicitation clause contained in the agreement is unenforceable because it prevents [the employee] from accepting business from *unsolicited* former clients."); *cf.* Murphree v. Yancey Bros. Co., 716 S.E.2d 824, 828 (Ga. Ct. App. 2011) (non-solicitation covenant was reasonable because it merely prohibited the employee "from initiating affirmative action to compete with [the employer] by contacting former customers" and did not preclude him from accepting unsolicited business).

69. *See, e.g.*, New England Ins. Agency, Inc. v. Miller, No. CV-89-0285030-S, 1991 WL 65766, at *12 (Conn. Super. Ct. Apr. 16, 1991) (covenant preventing employee from "solicit[ing] or accept[ing] any insurance business" within a twenty-five-mile radius was found to be "oppressive and unreasonable"); Oceanair, Inc. v. Katzman, No. 003343BLS, 2002 WL 532475, at *10 (Mass. Super. Ct. 2002) (covenant that prohibited acceptance of business denied enforcement); Diamond Match Div. of Diamond Int'l Corp. v. Bernstein, 243 N.W.2d 764, 767 (Neb. 1976) (employer failed to meet burden of demonstrating justification to enforce covenant prohibiting former employee from accepting orders from employer's customers for two years); Deloitte & Touche, LLP v. Chiampou, 222 A.D.2d 1026, 1027 (N.Y. App. Div. 1995) ("[The lower court] properly exempted from the preliminary injunction six of plaintiff's former clients who had voluntarily and without solicitation sought out defendants after defendants left plaintiff's employ."); Cardiovascular Surg. Specialists, Corp. v. Mammana, 61 P.3d 210, 214 (Okla. 2002) (covenant precluding physician from accepting referrals, including patients who specifically requested physician, was unenforceable); Bayly, Martin & Fay, Inc. v. Pickard, 780 P.2d 1168, 1175 (Okla. 1989) ("Where no active solicitation has occurred, restraint on an insurance agent's dealings with former clients is unenforceable."); Inergy Propane, LLC v. Lundy, 219 P.3d 547, 560 (Okla. Civ. App. 2008) ("[T]o the extent [covenant precluding] diversion of business could be interpreted to mean accepting unsolicited business, it is not enforceable."); Pac. Am. Title Ins. & Escrow, Inc. v. Anderson, No. 98-019-0010, 1999 WL 33992416, at *4 (N. Mar. I. 1999) (affirming trial court's finding at preliminary injunction stage that covenant stating that employee could not "solicit, divert, or take away" employer's customers only precluded employee from "actively soliciting" customers and not from accepting business from those customers), *overruled by* Friends of Marpi v. Commonwealth Gov't, No. 2011-SCC-0015-CIV, 2012 WL 3609958, at *5 (N. Mar. I. Aug. 21, 2012).

One factor influencing the *Waldeck* court's conclusion was that precluding an employee from accepting business also unreasonably impairs "the public's ability to choose the business it prefers."[70] Other courts have expressed similar concerns. In *Abbott-Interfast Corp. v. Harkabus*,[71] the defendant employee agreed not to "solicit, divert, take away, accept orders, or interfere with" the plaintiff employer's customers.[72] The Appellate Court of Illinois stated that "it is more difficult for an employer to justify prohibiting its former employees from accepting orders from the employer's clients than merely prohibiting its employee from soliciting such clients."[73] Noting that "hardship to the public is one of the factors relevant to whether a restriction on trade is reasonable," the court also found that "[p]rohibiting a former employee from accepting orders or doing business with a customer places restrictions on that customer even though it is not a party to the noncompetition agreement."[74] Nevertheless, the court found that "such a restriction can be reasonable where there are a large number of other competitors with which the general public is free to do business."[75]

In *New Haven Tobacco Co. v. Perrelli*,[76] the defendant employee agreed not to "sell products similar to those of the Employer" to any of the employer's customers for a two-year period after his termination of employment.[77] The employee resigned, started a competing

70. *Waldeck*, 583 S.E.2d at 268.

71. 619 N.E.2d 1337 (Ill. App. Ct. 1993).

72. *Id.* at 1339.

73. *Id.* at 1343.

74. *Id.* at 1342–43.

75. *Id.* at 1343. Ultimately, the court held that the trial court erred in entering judgment on the pleadings in the defendant employee's favor and concluded that, without more information, "we are not convinced that plaintiff could prove no set of facts which would entitle it to relief." *Id.*; *see also* Hay Grp., Inc. v. Bassick, No. 02-C-8194, 2005 WL 2420415, at *6 (N.D. Ill. Sept. 29, 2005) (citing *Abbott-Interfast Corp.*, 619 N.E.2d 1337) ("[A] prohibition on solicitation alone is more likely to be upheld than one prohibiting a former employee from doing any business at all (even at the client's behest) with the employer's clients, as that prohibition would restrict the rights of the client without its consent."); Evans Labs., Inc. v. Melder, 562 S.W.2d 62, 64 (Ark. 1978) (covenant precluding pest control servicemen from accepting business from their former employer's customers was an "unreasonable restraint of trade" because it led to an "undue interference with the interests of the public's right to the availability of a serviceman it prefers to use"); Vanguard Envtl., Inc. v. Curler, 190 P.3d 1158, 1167 (Okla. Civ. App. 2008) ("[T]o the extent [the restrictive covenant] is intended to limit the economic choices of third parties, it would be unenforceable."); 1st Am. Sys., Inc. v. Rezatto, 311 N.W.2d 51, 59 (S.D. 1981) (covenant precluding insurance agent from accepting business from former employer's customers was "overbroad" and placed an "undue burden" on both the former employee and the public). *But see* Girard v. Rebsamen Ins. Co., 685 S.W.2d 526, 529 (Ark. 1985) ("We do not read *Melder* to invalidate all non-competition agreements that prohibit an employee from accepting—as opposed to soliciting—former employer customers," and "each contract and set of facts must be considered to determine the contract's reasonableness relative to the parties' and public's interests.").

76. 528 A.2d 865 (Conn. App. Ct. 1987).

77. *Id.* at 866.

business, and sold competing products to the employer's customers in contravention of the agreement.[78] The trial court invalidated the agreement on the basis that it unduly interfered with the public's right to an open marketplace, and the employer appealed.[79]

Noting that "the burden inflicted on the public interest by the use of an 'antisales' clause is greater than the one imposed by an 'antisolicitation' clause," the Appellate Court of Connecticut found that "the determinant is not whether the public's freedom to trade has been restricted in any sense, but rather whether that freedom has been restricted unreasonably."[80] The court identified factors to be considered as part of that analysis: "(1) the scope and severity of the covenant's effect on the public interest; (2) the probability of the restriction creating or maintaining an unfair monopoly in the area of trade; and (3) the interest sought to be protected by the employer."[81] The court remanded the case to the trial court to apply these principles. The trial court determined that the covenant unreasonably interfered with the public interest and it dismissed the employer's claims. The case was appealed again to the Appellate Court of Connecticut, which reversed and found that the covenant was enforceable.[82]

A Connecticut trial court applied the *New Haven Tobacco* framework in *Webster Insurance, Inc. v. Levine*.[83] The defendant in that case served as a manager for the plaintiff insurance company and specialized in the Native American gaming and hospitality industry. The manager signed a non-solicitation covenant precluding him from "accepting" or "servicing" accounts of the company's customers. The manager resigned and began servicing his same customers on behalf of a competitor of the company. Consequently, the company brought suit and sought preliminary injunctive relief. Distinguishing the circumstances from *New Haven Tobacco*, the court found that the covenant was unreasonable because the company admitted it had no other employees capable of servicing the Native American gaming and hospitality accounts.[84] Because the company was "effectively attempting to prohibit [the manager] from providing clients with a product that [the company] itself [could not] provide," the court declined to issue an injunction and concluded that "[i]t is unreasonable to bar these clients from doing business with someone who actually has the particular expertise they need."[85]

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78. *Id.*
79. *Id.* at 867.
80. *Id.*
81. *Id.* at 868.
82. New Haven Tobacco Co. v. Perrelli, 559 A.2d 715, 719 (Conn. App. Ct. 1989).
83. No. NNH-CV-074026861S, 2007 WL 4733105 (Conn. Super. Ct. Dec. 21, 2007).
84. *Id.* at *7.
85. *Id.* Nevertheless, the case was assigned to a new judge before trial who declined to award summary judgment in favor of the employee. Webster Fin. Corp. v.

Courts have suggested that a customer's interest is particularly pronounced in instances when "[p]ersonal trust and confidence pervades" the relationship, such as an attorney-client or physician-patient relationship.[86] The American Bar Association's Model Rules of Professional Responsibility and Model Rules of Professional Conduct preclude agreements that restrict the ability of attorneys to practice law.[87] Similarly recognizing the public interest in allowing patients to choose their physician, several state courts and legislatures have prohibited or limited agreements that restrict the ability of physicians to practice medicine.[88] In *Prudential Securities, Inc. v. Plunkett*,[89] a Virginia federal district court found that financial brokers have a special relationship with their clients such that "[c]lients should be free to deal with the broker of their choosing and not subjected to the turnover of their accounts to brokers associated with the firm but unfamiliar with the client, unless the client gives informed consent to the turnover."[90]

Levine, No. X06-CV-074016194S, 2009 WL 1056564 (Conn. Super. Ct. Mar. 24, 2009). The court found that the employee could be precluded from servicing clients he never solicited, that it was unclear whether the employer was incapable of hiring someone else to service the needs of the clients that had left, and that "some degree of interference with the public's rights to an accessible market place and a multifarious workforce is allowed." *Id.* at *3 (quoting *New Haven Tobacco Co.*, 528 A.2d 865).

86. Morgan Stanley DW, Inc. v. Frisby, 163 F. Supp. 2d 1371, 1382 (N.D. Ga. 2001).

87. MODEL RULES OF PROF'L CONDUCT R. 5.6 (2011); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-108(A) (1980). These rules create an exception for agreements pertaining to retirement benefits. Most courts have broadly construed these rules as precluding any type of covenant that restricts competition. *See, e.g.*, Pettingell v. Morrison, Mahoney & Miller, 687 N.E.2d 1237, 1239 (Mass. 1997); Elaine Marie Tomko, Annotation, *Enforceability of Agreement Restricting Right of Attorney to Compete with Former Law Firm*, 28 A.L.R.5th 420 (1995). A small number of states, however, have construed these rules more narrowly so that certain types of restrictive covenants involving attorneys can be enforceable. *See, e.g.*, Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C., 138 P.3d 723, 724 (Ariz. 2006) (en banc); Howard v. Babcock, 863 P.2d 150, 160 (Cal. 1993).

88. *See, e.g.*, COLO. REV. STAT. § 8-2-113(3) (2012); DEL. CODE ANN. tit. 6, § 2707 (2005); MASS. GEN. LAWS ch. 112, § 12X (2004); TENN. CODE ANN. § 63-6-204 (2010); Valley Med. Specialists v. Farber, 982 P.2d 1277, 1278 (Ariz. 1999) (en banc); Iredell Digestive Disease Clinic v. Petrozza, 373 S.E.2d 449, 455 (N.C. Ct. App. 1988); Ohio Urology, Inc. v. Poll, 594 N.E.2d 1027, 1033 (Ohio Ct. App. 1991); Murfreesboro Med. Clinic, P.A. v. Udom, 166 S.W.3d 674, 683–84 (Tenn. 2005); *see generally* Ferdinand S. Tinio, Annotation, *Validity and Construction of Contractual Restrictions on Right of Medical Practitioner to Practice, Incident to Employment Agreement*, 62 A.L.R.3d 1014 (1975). The American Medical Association's ethical code strongly discourages covenants that restrict the practice of medicine. AMA CODE OF MED. ETHICS § 9.02 (1998).

89. 8 F. Supp. 2d 514 (E.D. Va. 1998).

90. *Id.* at 520; *see also* Am. Express Fin. Advisors, Inc. v. Hazlewood, No. 4:05CV00936 GTE, 2005 WL 4655136, at *8–9 (E.D. Ark. July 19, 2005) (a financial advisor's relationship with customers is similar to that of attorneys and physicians and the "public interest weighs against" enjoining the defendant from breaching a covenant that would preclude him from providing services to customers); Leon M. Reimer & Co. v. Cipolla, 929 F. Supp. 154, 158 (S.D.N.Y. 1996) (covenant precluding accountant from servicing unsolicited clients is unreasonable when it "overprotects [plaintiff's] interests, and unreasonably limits [defendant's] and former [plaintiff] clients' ability to choose professional services"); Singer v. Habif, Arogeti & Wynne, P.C., 297 S.E.2d 473, 475 (Ga. 1982)

Courts, however, have been less receptive to finding that a customer has a meaningful interest in doing business with the customer's chosen insurance agent. For instance, in *Field v. Alexander & Alexander of Indiana, Inc.*,[91] the Indiana Court of Appeals determined that the "public's freedom of trade is not meaningfully restricted" by enforcement of a covenant precluding an insurance salesman from "accept[ing] or receiv[ing]" business from the former employer's customers.[92] The court noted that the customers could still do business with the salesperson's new employer.[93] Moreover, the court stated that unlike accountants and other professionals who often develop relationships of an "intimate nature" with clients, an insurance salesperson "is not in a comparable position of offering a product to the customer different from that of other employees of the same agency."[94]

Similarly, in *Hilb Rogal & Hobbs of Florida, Inc. v. Grimmel*,[95] the defendant entered into an agreement with his employer, an insurance broker, that precluded him from soliciting or accepting business from his employer's customers.[96] The employer brought suit after the defendant resigned and started a competing insurance broker business servicing the employer's customers. After initially entering a temporary injunction, the trial court dissolved it, finding that the employer did not have a legitimate business interest in precluding the defendant from accepting business from the customers. The Florida District Court of Appeal reversed and found that the employer had a legitimate business interest that justified the covenant.[97] The court further stated that "[t]he fact that the customers will have to use a different insurance broker does not make the enforcement of this agreement against public policy."[98]

V. The Thin Line Between Solicited and Unsolicited Business

Even when a customer initiates contact with the former employee, there often is a cloud of uncertainty about whether the former

(covenant precluding accountant from accepting unsolicited business from his former employer's customers is an "unreasonable restraint of trade as it overprotects [former employer's] interests and unreasonably impacts [the former employee] and on the public's ability to choose the professional services it prefers"). *But see* Spitz, Sullivan, Wachtel & Falcetta v. Murphy, No. CV-86-0322422, 1991 WL 112718, at *6 (Conn. Super. Ct. June 13, 1991) (covenant precluding accountant from servicing unsolicited clients of his former employer enforced with the court not finding "any unreasonable restriction on the public's ability to obtain professional accounting services").

91. 503 N.E.2d 627 (Ind. Ct. App. 1987).
92. *Id.* at 635.
93. *Id.*
94. *Id.* n.8.
95. 48 So. 3d 957 (Fla. Dist. Ct. App. 2010).
96. *Id.* at 958.
97. *Id.* at 961.
98. *Id.* at 962.

employee has, nevertheless, indirectly solicited the customer.[99] Even if a former employee initiates contact, for instance by announcing the employee's departure, it may be unclear if such actions should be deemed a solicitation. As expressed by the Appeals Court of Massachusetts, "[a]s a practical matter, the difference between accepting and receiving business, on the one hand, and indirectly soliciting on the other, may be more metaphysical than real."[100] In a similar observation a Delaware court stated, "[t]here are circumstances in which it may be hard to determine whether a client's invitation to perform services is 'solicited' or 'unsolicited,'" and "what may appear to be an unsolicited invitation may be the product of a course of action or publicity designed to elicit such an invitation."[101] While courts typically do not consider generalized public advertisements to be solicitations, a former employee's announcement to former customers of acceptance of a new job can be much more problematic.[102] Such an announcement is often "actually intended as a first step in the solicitation of that customer."[103]

The Supreme Court of California addressed this issue in *Aetna Building Maintenance Co. v. West.*[104] The court adopted the following definition of "solicit":

> Solicit is defined as: To ask for with earnestness, to make petition to, to endeavor to obtain, to awake or excite to action, to appeal to, or to invite. It implies *personal* petition and importunity addressed to a particular individual to do some particular thing. It means: To appeal to (for something); to apply to for obtaining something, to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain.[105]

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99. *See generally* K.H. Larsen, Annotation, *Former Employee's Duty, in Absence of Express Contract, Not to Solicit Former Employer's Customers or Otherwise Use His Knowledge of Customer Lists Acquired in Earlier Employment*, 28 A.L.R.3d 7, § 6 (1969).

100. Alexander & Alexander, Inc. v. Danahy, 488 N.E.2d 22, 30 (Mass. App. Ct. 1986).

101. KPMG Peat Marwick LLP v. Fernandez, 709 A.2d 1160, 1163 (Del. Ch. 1998).

102. *See, e.g.*, Alpha Tax Servs., Inc. v. Stuart, 761 P.2d 1073, 1076 (Ariz. Ct. App. 1988) (although "newspaper advertisements were not solicitations because they were not personal petitions addressed to particular individuals," mailings targeted to plaintiff's customers that contained an announcement of the defendant's new business and discount coupons were improper solicitations); Lotenfoe v. Pahk, 747 So. 2d 422, 424 (Fla. Dist. Ct. App. 1999) (physician's newspaper advertisement that he was accepting new patients with his new practice was not a "solicitation" of his former practice's customers); Smith, Waters, Kuehn, Burnett & Hughes, Ltd. v. Burnett, 548 N.E.2d 1331, 1336 (Ill. App. Ct. 1989); Res. Assoc. Grant Writing & Evaluation Serv., LLC v. Maberry, No. CIV-08-0552, 2009 WL 1232181, at *8 (D.N.M. Apr. 23, 2009) (using a website as a marketing tool is not a solicitation).

103. Ecolab, Inc. v. K.P. Laundry Mach., Inc., 656 F. Supp. 894, 896 (S.D.N.Y. 1987).

104. 246 P.2d 11 (Cal. 1952).

105. *Id.* at 15 (citations and quotation marks omitted).

Based on this definition, the court found that "[m]erely informing customers of one's former employer of a change of employment, without more, is not solicitation," nor does "willingness to discuss business upon invitation of another party."[106]

After that decision, the California Court of Appeal reaffirmed that "the right to announce a new affiliation, even to trade secret clients of a former employer, is basic to an individual's right to engage in fair competition."[107] However, an announcement crosses the line into prohibited solicitation when it "personally petitions, importunes and entreats . . . customers to call . . . at any time for information about the better [products or services the departing employee's new employer] can provide and for assistance during the . . . transition period."[108]

In *Getman v. USI Holdings Corp.*,[109] a Massachusetts trial court held that when a client contacts a former employee bound by a non-solicitation covenant, "there is a thin line between him explaining that he has [changed jobs] and him subtly encouraging the client to transfer his business" to the new employer.[110] Finding that it is not "solicitation" for a former employee (an insurance agent in that case) to announce the employee's departure to the clients previously serviced, and to provide them with new contact information, the court stated:

> Nor, if a former client initiates contact with the insurance agent, is it solicitation for the agent to explain in summary terms why he left his former employment and joined his current employer. Nor is it solicitation to describe in general terms the type of work that he will do in his new job and the nature of the work performed by his new company. Such a discussion, however, whether oral or in writing, may potentially constitute solicitation if the insurance agent, not the client, were to initiate this discussion. Moreover, even if the client initiates the discussion, it may be solicitation for the insurance agent to deprecate his former employer so as to diminish the good will it would otherwise enjoy, or praise his new employer or otherwise encourage the client to bring his business there.[111]

In contrast, Illinois courts have interpreted "solicitation" more broadly, such that announcements of new employment are more likely to be deemed improper solicitations. The Appellate Court of Illinois has found that "[w]hether a particular client contact constitutes a

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106. *Id.*

107. Am. Credit Indem. Co. v. Sacks, 262 Cal. Rptr. 92, 100 (Cal. Ct. App. 1989); *see also* New England Ins. Agency, Inc. v. Miller, No. CV-89-0285030-S, 1991 WL 65766, at *11 (Conn. Super. Ct. Apr. 16, 1991).

108. *Am. Credit Indem. Co.*, 262 Cal. Rptr. at 100; *see also* Robert Half Int'l, Inc. v. Murray, No. CV-F-07-0799, 2008 WL 2625857, at *6 (E.D. Cal. June 25, 2008) (quoting *Am. Credit Indem. Co.*, 262 Cal. Rptr. at 100).

109. No. 05-3286-BLS2, 2005 WL 2183159 (Mass. Super. Ct. 2005).

110. *Id.* at *4.

111. *Id.*

solicitation, depends upon the method employed and the intent of the solicitor to target a specific client in need of his services."[112] Noting that "[t]he law generally deems a person to have intended the natural and probable consequences of her actions," an Illinois federal district court found that "if a recipient would have understood a particular contact as a solicitation for business, that suffices to show solicitation."[113]

In another Illinois case, *YCA, LLC v. Berry*,[114] a former employee was contractually prohibited from soliciting any of the employer's clients.[115] After the employer brought suit against the former employee for soliciting a client in breach of the contract, the former employee moved for summary judgment, arguing that the client came to him and that he did not solicit the client. Although the evidence was undisputed that the client first contacted the former employee, there was evidence that the former employee notified the client that he was changing jobs, contacted the client on numerous occasions, and prepared a list setting forth the probability of his new firm servicing certain of his former employer's other clients.[116] Applying Illinois law, an Illinois federal district court found that the former employee's behavior could be deemed a violation of the non-solicitation covenant and denied his summary judgment motion.[117] Similarly, in *McRand, Inc. v. Beelen*,[118] the Appellate Court of Illinois held that a preliminary injunction should have been issued against a former employee for violating a non-solicitation covenant because the evidence demonstrated that he targeted the prior employer's customers with a mailing notifying them of his new business, and prepared proposals and performed services for certain customers.[119]

Although it is in a different context, the New York Court of Appeals' 2011 decision in *Bessemer Trust Co., N.A. v. Branin*[120] is insightful. In that case, the defendant investment portfolio manager sold his shares of his investment management firm to the plaintiff. Although the manager was not subject to a non-solicitation covenant, under New York law, the seller of a business owes an implied common law duty not to solicit former customers actively (but the seller can accept unsolicited business).[121] Two years later, the manager resigned and joined a competitor. Thereafter, several customers sought out the man-

112. Tomei v. Tomei, 602 N.E.2d 23, 26 (Ill. App. Ct. 1992).
113. Henry v. O'Keefe, No. 01-C-8698, 2002 WL 31324049, at *5 (N.D. Ill. Oct. 18, 2002).
114. No. 03-C-3116, 2004 WL 1093385 (N.D. Ill. May 7, 2004).
115. *Id.* at *1.
116. *Id.* at *10–11.
117. *Id.* at *11.
118. 486 N.E.2d 1306 (Ill. App. Ct. 1985).
119. *Id.* at 1313.
120. 949 N.E.2d 462 (N.Y. 2011).
121. *Id.* at 468.

ager and his new business. The manager attended at least one meeting in which his new employer conducted a sales pitch to a customer, and he assisted his new employer in preparing for that meeting.[122]

The Second Circuit certified to the New York Court of Appeals the question of what level of participation constitutes improper solicitation. Although the New York court declined to adopt a "hard and fast rule," it stated that a seller must not take "affirmative steps" to attract a client.[123] As further guidance, the court indicated that a seller may generally advertise to the public, but the seller cannot target specific former clients with mailings or phone calls about a new business venture.[124] The court, however, warned that a seller "is not free to tout his new business venture simply because a former client has fortuitously communicated with him first."[125]

Recognizing that a customer is entitled to gather information to make an informed decision, the court also found that a seller "may answer the factual inquiries of a former client, so long as such responses do not go beyond the scope of the specific information sought."[126] This does not mean that a seller may respond to all questions from a customer. The court held that the seller may not explain why products or services may be superior and may not make disparaging statements, even if prompted by the customer.[127] The court also found that a seller may assist a new employer "in preparing for a 'sales pitch' meeting requested by a former client and may be present when such meeting takes place," as long as the seller takes a passive role and responds only to factual inquiries.[128] Since *Bessemer Trust*, New York courts have also applied this analysis in cases involving explicit non-solicitation covenants.[129]

Courts have struggled with several cases when a former employee takes proactive action in response to a customer's unsolicited invitation. In *Kennedy v. Metropolitan Life Insurance Co.*,[130] Phillip Kennedy worked as a life insurance agent for Metropolitan Life Insurance Company (Met Life).[131] Kennedy agreed not to "directly or indirectly

122. *Id.* at 465–67.
123. *Id.* at 469.
124. *Id.*
125. *Id.*
126. *Id.* at 469–70.
127. *Id.* at 470.
128. *Id.*
129. *See, e.g.*, USI Ins. Serv. LLC v. Miner, 801 F. Supp. 2d 175, 192–93 (S.D.N.Y. 2011) (employee solicited customers by sending a targeted e-mail announcing his job transition and promoting his new employer). *But see* Ecolab, Inc. v. K.P. Laundry Mach., Inc., 656 F. Supp. 894, 897 (S.D.N.Y. 1987) (decided before *Bessemer Trust*; former employee breached non-solicitation covenant precluding assisting others in solicitation by being present on sales pitches with co-worker).
130. 759 So. 2d 362 (Miss. 2000).
131. *Id.* at 363–64.

perform any act . . . which would tend to divert" any business from his Met Life customers or otherwise induce any customer to diminish its business with Met Life. After Kennedy resigned, joined a competitor, and began accepting business from Met Life's customers, Met Life brought suit. At trial, Kennedy argued that he did not breach the covenant because he did not solicit the customers, but instead, the customers chose by their own volition to transition their business to Kennedy's new employer in the absence of his encouragement.[132] Met Life responded that Kennedy's actions nevertheless diverted business from Met Life. The evidence demonstrated that once a customer contacted Kennedy, he prepared a premium quotation, an application for coverage, and a replacement coverage notice; he then delivered the new policies and collected premiums.[133] The trial court held that Kennedy breached the agreement by diverting business from Met Life, and Kennedy appealed.[134]

The Mississippi Supreme Court reversed the trial court's findings and determined that Kennedy acted in proper accord with what he reasonably believed the agreement proscribed. Noting that the agreement did not explicitly preclude Kennedy from accepting business from Met Life's customers, the court found that the agreement was ambiguous.[135] The court stressed that "[g]iven the unfavored status of non-competition agreements in the eyes of the law, the burden properly falls on the employer to draft a non-competition agreement which clearly delineates the scope of the employee's permissible business activities following the termination of employment."[136] The court concluded that Met Life failed to draft such an agreement and, therefore, it "should bear the burdens of the agreement's ambiguities."[137]

Another non-solicitation covenant was construed against the employer-drafter in *Prudential Securities, Inc. v. Plunkett*.[138] The defendant financial advisor, Plunkett, agreed not to solicit the plaintiff employer's clients for a six-month period after his employment. Plunkett resigned and joined a competitor. After many of the employer's clients transferred their accounts to Plunkett's new employer, the employer brought suit and sought preliminary injunctive relief.[139] Applying New York law, a Virginia federal district court declined to issue a preliminary injunction:

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132. *Id.* at 365.
133. *Id.* at 366.
134. *Id.* at 364.
135. *Id.* at 367.
136. *Id.* at 367–68.
137. *Id.* at 368.
138. 8 F. Supp. 2d 514 (E.D. Va. 1998).
139. *Id.* at 516.

> The court is concerned that the . . . Agreement does not define the term "solicitation," although that term is crucial to its interpretation. While the plaintiff urges the Court to use the common dictionary meaning of "solicitation," the known facts contain many intricacies that require a more precise definition than the alternatives provided by the dictionary. The Court is concerned that a bright line cannot be drawn between what constitutes mere contact as opposed to solicitation. For example, Plunkett may receive a call from a former client, perhaps a family member, to discuss personal issues. If Plunkett mentions that he has changed employment and the family member delves further, is Plunkett prohibited from further discussing the issue under the . . . Agreement? Such questions would potentially require individual and repeated fact finding by the Court because of the use of the undefined term "solicitation." Because ambiguities in a contract must be construed against the drafter . . . the Court finds that the term "solicitation" as used in the . . . Agreement is ambiguous and its meaning must be construed against the drafter, [the employer].[140]

On the other hand, in *Wachovia Insurance Services, Inc. v. Hinds*,[141] the defendant employee insurance benefits consultant Hinds was bound by an agreement not to solicit her former employer's customers.[142] Hinds resigned and joined a competitor. Thereafter, Arent Fox, LLP, one of the plaintiff's clients that Hinds had serviced, contacted Hinds about the possibility of her continuing to service its account. In response, Hinds and her new employer conducted a presentation that touted her past service for Arent Fox and her contemplated continued personal involvement if Arent Fox elected to do business with her new employer. Hinds' former employer brought suit and sought injunctive relief. A Maryland federal district court found that "[e]ven if Hinds did not initiate contact with Arent Fox, she may have actively solicited them to move" to her new employer by virtue of her actions.[143] The court issued a temporary injunction to enjoin Hinds from making further communications with her former employer's clients.[144]

In *American Family Mutual Insurance Co. v. Hollander*,[145] the defendant insurance agent Hollander agreed not to "directly or indirectly induce [or] attempt to induce" any of the a former employer's customers

140. *Id.* at 518 (citation and footnote omitted); *see also* KPMG Peat Marwick LLP v. Fernandez, 709 A.2d 1160, 1163 (Del. Ch. 1998) (consultants did not solicit business from their former employer's clients simply by making a presentation and pursuing a business opportunity in response to a client's invitation).

141. No. WDQ-07-2114, 2007 WL 6624661 (D. Md. Aug. 30, 2007).

142. *Id.* at *1.

143. *Id.* at *6.

144. *Id.* at *1, 9; *see also* Paulson, Inc. v. Bromar, Inc., 808 F. Supp. 736, 741 (D. Haw. 1992) ("the court will not hold as a matter of law that merely discussing business at the invitation of another is not solicitation" and the court deferred to the jury as to whether a solicitation took place).

145. No. C-08-1039, 2009 WL 535990 (N.D. Iowa Mar. 3, 2009).

to cancel their policies.[146] An Iowa federal district court found that "induce" is broader than "solicit" and that "[o]ne can 'induce' action without regard to who initiates the contact."[147] The court concluded that Hollander indirectly induced his former employer's customers to cancel their policies by responding to customer inquiries, offering quotes to customers, and helping others to complete cancellation forms.[148]

As suggested in *Bessemer Trust*, a former employee's comparison of a new employer's products or services with that of a former employer's can be particularly problematic.[149] For example, in *FCE Benefit Administrators, Inc. v. George Washington University*,[150] Miller entered into an agency agreement with the plaintiff, FCE, an insurance benefits plan administrator, whereby she agreed not to "call on, solicit, [or] take away" FCE's customers for a two-year period after the agreement was terminated.[151] Thereafter, FCE brought suit against Miller and others, accusing Miller of breaching the non-solicitation provision. Following a bench trial, the district court rejected Miller's argument that she merely played a passive role in accepting business from Melwood, one of FCE's customers:

> Even though she was initially contacted by Melwood and asked to provide rates for HMO plans, she assumed an active role in Melwood's decision-making process. By her own admission, she solicited alternative price quotes, she met repeatedly with Melwood's benefits committee, and she prepared numerous spreadsheets, including comparisons of the current FCE plan with the GWUHP and an analysis of FCE's costs to Melwood. Furthermore, she admitted that she was involved in discussions over whether to change plans, and provided information about alternatives to help Melwood to decide whether to make a change, and that her intent in performing these actions was to sell a health benefit insurance plan other than the FCE plan to Melwood. Finally, Miller had an obvious financial motive for these efforts, since she realized a commission (i.e., 25% of the commission paid by Melwood to PSA) from Melwood's decision to terminate FCE.[152]

The court concluded that Miller breached the agreement because she engaged in "affirmative action," rather than mere passive conduct.[153]

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146. *Id.* at *17.

147. *Id.*

148. *Id. But see* Am. Family Mut. Ins. Co. v. Gustafson, No. 08-cv-02772, 2012 WL 426636, at *3 (D. Colo. Feb. 10, 2012) (Iowa court's decision found "unpersuasive" concerning construction of identical contractual provisions in part because the court did not cite any dictionary or other source for its interpretation of "induce"); *see also* Am. Family Mut. Ins. Co. v. Gustafson, No. 08-cv-02772, 2011 WL 782574, at *7–9 (D. Colo. Feb. 25, 2011).

149. Bessemer Trust Co., N.A. v. Branin, 949 N.E.2d 462, 470 (N.Y. 2011).

150. 209 F. Supp. 2d 232 (D.D.C. 2002).

151. *Id.* at 234.

152. *Id.* at 239–40 (citations omitted).

153. *Id.* at 240.

Similarly, in *Scarbrough v. Liberty National Life Insurance Co.*,[154] Scarbrough, a life insurance agent, agreed not to solicit customers from his former employer for eighteen months after the termination of his employment.[155] Thereafter, Scarbrough left and was hired by a competitor. Appealing from the trial court's issuance of a temporary injunction, Scarbrough argued that he could not be deemed in breach of the covenant when customers first approached him. Quoting the definition of "solicitation" set forth in *Black's Law Dictionary*, the Florida District Court of Appeal found that "[i]t reasonably appears from the above definition that a person may, in appropriate circumstances, solicit another's business regardless of who initiates the meeting."[156] The court upheld the trial court's finding that "even if the former client had initiated the contact with Scarbrough, a solicitation could nonetheless occur if, as the evidence disclosed, Scarbrough made a comparison for the client between the benefits and premiums afforded by the two insurance companies."[157]

In a few cases, courts have addressed whether a former employee may violate a non-solicitation covenant by preparing a bid in response to a customer's request. In *Al's Cabinets, Inc. v. Thurk*,[158] the defendant salesperson Thurk agreed not to "divert or entice away" or "attempt to sell or market any products" to his former employer's customers for an eighteen-month period after termination of employment.[159] Thereafter, Thurk resigned and became a salesperson for a competitor, and the plaintiff brought suit after Thurk accepted orders from his former employer's customers, including customers who asked Thurk to submit a bid. Although Thurk admitted that he had accepted orders from the employer's customers, he argued that he did not breach the non-solicitation covenant because the customers had initiated the contacts.

The Minnesota Court of Appeals determined that Thurk breached the covenant by submitting a bid to one of the employer's customers that contained prices related to a specific project, thereby reflecting Thurk's intent to induce the customer to divert business away from the employer.[160] The court found that the covenant prohibited this conduct, regardless of whether the customer approached Thurk and requested the bid.[161] Noting that "[p]roduct pricing is an important aspect of inducing a customer to enter into a contract," the court

154. 872 So. 2d 283 (Fla. Dist. Ct. App. 2004).
155. *Id.* at 284.
156. *Id.* at 285 (citing BLACK'S LAW DICTIONARY 1398 (7th ed. 1999)).
157. *Id.*
158. No. C9-02-1348, 2003 WL 891419 (Minn. Ct. App. Mar. 4, 2003).
159. *Id.* at *1.
160. *Id.* at *3.
161. *Id.* at *4.

concluded that "regardless of who initiates the contact, it would be unreasonable to construe the preparation of a bid for a potential customer in connection with a specific project as anything other than an "attempt to sell a product."[162]

In *Digitel Corp. v. DeltaCom, Inc.*,[163] an Alabama federal district court found that an employee may breach a non-solicitation covenant by passing leads to new co-workers and by assisting his or her new employer with bid proposals.[164] Responding to the former employees' argument, that they did not violate the covenants because they did not initiate the contacts, the court found this "somewhat unconvincing in a circumstance where [the former employees], in response to a customer's request, provided a quote or prepared a bid in order to obtain a former . . . customer's business."[165]

VI. Non-Solicitation of Employee Covenants

In addition to recognizing an employer's legitimate business interest in protecting relationships with their customers, courts have also acknowledged an employer's legitimate interest in protecting relationships with their employees. Arguably, courts have displayed a tendency to be slightly more receptive to enforcing the strict language of non-solicitation of employee covenants than non-solicitation of client covenants. The Colorado Court of Appeals has drawn a sharp distinction between such covenants, finding that, "[i]n order to make a living, the former employee needs to be free to solicit (actively or passively) former customers, as long as he or she does not use the employer's trade secrets to do so," and that "[i]n contrast an agreement not to solicit employees would not impair the former employee's ability to make a living."[166] Nevertheless, courts that have addressed non-solicitation covenants have generally focused on several of the same key issues at play in non-solicitation of customer cases, such as who made the initial contact and whether the former employee's communications were proactive.

In several cases, courts have addressed whether a party breaches a covenant precluding the solicitation of employees merely by extending a job offer to an employee. In *International Security Management Group, Inc. v. Sawyer*,[167] Sawyer agreed that he would not "solicit" any co-worker to "terminate that person's employment [with the plaintiff]

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162. *Id.*

163. 953 F. Supp. 1486 (M.D. Ala. 1996).

164. *Id.* at 1497.

165. *Id.* n.10.

166. Phoenix Capital, Inc. v. Dowell, 176 P.3d 835, 844 (Colo. App. 2007). In *Phoenix Capital*, the court found that non-solicitation of customer covenants are unenforceable to the same extent that non-compete covenants are generally unenforceable, with narrow exceptions, as a matter of Colorado public policy. *Id.* at 842–44.

167. No. 3:06CV0456, 2006 WL 1638537 (M.D. Tenn. June 6, 2006).

and to accept employment with" a competitor.[168] Sawyer resigned and started a competing business, and placed a newspaper advertisement for job openings. Several of the plaintiff's employees responded to the advertisement and were interviewed by Sawyer. In the meantime, the employer sought a preliminary injunction to preclude Sawyer, among other things, from breaching his non-solicitation covenant.

A Tennessee federal district court granted injunctions and found that "[t]he extension of a job offer alone would qualify as solicitation, as it constitutes 'an instance of requesting or seeking to obtain something,'" as set forth in *Black's Law Dictionary*.[169] The court also noted that "[w]hile merely placing a neutral advertisement in the newspaper, requesting applications, does not in and of itself fit the definitions of 'solicit' . . . , conducting an interview after potential candidates respond to the ad might well constitute solicitation."[170] According to the court, "depending upon how Sawyer went about describing the benefits of working for [his new company] and in particular whether any unfavorable comparisons with [the plaintiff] were made, the interviews conducted by Sawyer might conceivably be characterized as solicitation regardless of whether a job offer was extended."[171]

Most courts, however, have not construed "solicitation" this broadly to encompass the extension of a job offer or conducting an interview when the defendant does not initiate the contact. Interestingly, much of this litigation has been in the context of non-solicitation covenants contained in business partner agreements rather than in employment agreements. In *Enhanced Network Solutions Group, Inc. v. Hypersonic Technologies Corp.*,[172] the plaintiff entered into a contract with the defendant to provide software engineering services.[173] Under the agreement, the parties were precluded from "soliciting or inducing, or attempting to solicit or induce, any employee of the other Party in any manner that may reasonably be expected to bring about the termination of said employee toward that end."[174] Thereafter, the defendant posted a job opening on its LinkedIn web portal. Dobson, one of the plaintiff's employees, noticed the posting and told the defendant that he was interested in applying for a position. Dobson met with the defendant's officers, at which time he expressed his inter-

168. *Id.* at *3.
169. *Id.* at *17 (citing BLACK'S LAW DICTIONARY 1427 (8th ed. 2004)).
170. *Id.*
171. *Id.*; *see also* Grand Vehicle Works Holdings Corp. v. Frey, No. 03-C-7948, 2005 WL 1139312, at *9 (N.D. Ill. May 11, 2005) (there was a genuine issue of material fact concerning whether defendants had solicited the plaintiff's employees given defendants' actions in notifying the employees of job openings and their active involvement in the hiring process).
172. 961 N.E.2d 265 (Ind. Ct. App. 2011).
173. *Id.* at 266.
174. *Id.* at 267.

ests further and relayed what he would expect in terms of compensation. In response, the defendant offered employment consistent with Dobson's requests, and Dobson accepted. Consequently, the plaintiff sued the defendant for breach of the non-solicitation covenant.

The Indiana Court of Appeals affirmed the trial court's determination that the defendant did not breach the covenant. Noting that the agreement did not define "solicit" or "induce," the court relied on the ordinary meaning of those terms set forth in *Black's Law Dictionary* and found that the defendant could "receiv[e] and consider" applications for employment from the plaintiff's employees provided that it did not solicit such applications.[175] Finding that "[t]he record clearly supports that Dobson made the initial contact" after noticing the job posting, the court stated: "In other words, Dobson solicited [the defendant]."[176] The court further found that "all major steps were initiated and taken by Dobson," and that the defendant "merely followed where Dobson led."[177]

Most courts have also refused to preclude a party from offering to hire an employee in such instances, even if the non-solicitation covenant includes the term "indirectly." In *Atmel Corp. v. Vitesse Semiconductor Corp.*,[178] the plaintiff required its employees to agree not to "directly or indirectly . . . solicit, recruit or attempt to persuade any person to terminate such person's employment" with the plaintiff.[179] The trial court entered a preliminary injunction precluding certain former employees from participating in any aspect of the hiring process with respect to the plaintiff's employees, and the defendants appealed. Citing the definition of "solicit," "recruit," and "persuade" set forth in a common dictionary, the Colorado Court of Appeals found that "[t]hese definitions all imply actively initiated contact."[180] The court rejected the plaintiff's argument that the injunction was not overbroad because the agreement included the term "indirectly." The court found that the term "indirectly" must be construed narrowly because the plaintiff drafted the agreement, and that "the preclusion of any and all participation in the hiring process is too expansive a remedy."[181]

In *Slicex, Inc. v. Aeroflex Colorado Springs, Inc.*,[182] the plaintiff entered into written agreements to perform various projects for the defendant.[183] Under the agreements, the defendant agreed not to

175. *Id.* at 268 (citing BLACK'S LAW DICTIONARY 799, 1427 (8th ed. 2004)).
176. *Id.*
177. *Id.* at 269.
178. 30 P.3d 789 (Colo. App. 2001), *abrogated by* Ingold v. AIMCO/Bluffs, LLC Apartments, 159 P.3d 116, 124 (Colo. 2007).
179. *Id.* at 793.
180. *Id.* (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 1687, 1899, 2169 (1986)).
181. *Id.*
182. No. 2:04-CV-615, 2006 WL 2088282 (D. Utah July 25, 2006).
183. *Id.*

"directly or indirectly . . . solicit or take away" the plaintiff's employees.[184] Thereafter, several of the plaintiff's employees responded to the defendant's online job posting, and the defendant hired some of these employees. After the plaintiff filed suit, the defendant argued that it could not be deemed to have breached the contracts by hiring employees who had approached them.[185]

Following a bench trial, a Utah federal district court dismissed the plaintiff's breach of contract claims. Because the agreements did not define "solicit" or "take away," the court relied on the definition of "solicit" set forth in *Black's Law Dictionary*.[186] As for "take away," the court found that it "must be interpreted as requiring Defendant to take a specific, directed action to hire away one of Plaintiff's employees," and "[i]t must be an action which is focused on Plaintiff's employee, and not to the public generally."[187] The court determined that the language in the covenants could not be construed as precluding the defendant from merely hiring the plaintiff's employees.[188] In fact, the court found that the agreement would likely be "void as against public policy" if it were construed that broadly, reasoning that it would effectively "punish" the plaintiff's employees, who "should not be deprived of an opportunity to seek more gainful employment merely because they were victims of Plaintiff's business incompetence."[189]

Applying the facts to its interpretation of the agreement, the *Slicex* court concluded that there was no evidence that the defendant "took any proactive step to obtain" the plaintiff's employees.[190] Rejecting the argument that posting a job opening on the Internet constituted a proactive step, the court stated that "[i]f the Court were to find that this action was sufficient to show a breach of the non-solicitation agreement, it would cripple an employer's ability to advertise positions and seek out employees, as well as an employee's ability to obtain work."[191]

In *Wolverine Proctor & Schwartz, Inc. v. Aeroglide Corp.*,[192] the parties entered into a confidentiality agreement containing a clause whereby the defendant, Aeroglide, agreed not to, "directly or indirectly, solicit any employees employed by" the plaintiff.[193] The clause, however, created an exception for employees "who contact [Aeroglide] without solicitation" by Aeroglide.[194] One of the plaintiff's employees,

184. *Id.* at *1–2.
185. *Id.*
186. *Id.* at *3 (citing BLACK'S LAW DICTIONARY 1392 (6th ed. 1991)).
187. *Id.*
188. *Id.* at *4.
189. *Id.* In fact, the plaintiff at times had failed to make payroll. *Id.* at *5.
190. *Id.* at *6.
191. *Id.*
192. 402 F. Supp. 2d 365 (D. Mass. 2005).
193. *Id.* at 367.
194. *Id.*

Shields, mentioned to a friend that he was interested in pursuing another career opportunity. Shields' friend contacted an Aeroglide manager, who responded that Aeroglide would be interested in considering his resume. Thereafter, Shields contacted Aeroglide, who encouraged him to apply for a job if he decided to resign his employment with the plaintiff. Shortly thereafter, Shields submitted a resume and an application, Aeroglide interviewed Shields, and Aeroglide decided to hire him.

Rejecting the plaintiff's argument that the defendant indirectly solicited Shields in breach of the contract, a Massachusetts federal district court found that, "[w]here, as here, [Shields' friend] and then Shields initiated the contact with Aeroglide, and [Aeroglide] merely responded to the contacts and, even then, did not attempt to persuade Shields to join Aeroglide, there was no effort by Aeroglide to solicit Shields' services, either directly or indirectly."[195] The court noted that its finding was bolstered by the language in the non-solicitation covenant creating an exception for instances in which the plaintiff's employees contacted Aeroglide.[196]

In *Inland American Winston Hotels, Inc. v. Crockett*,[197] the defendants agreed not to directly or indirectly "solicit, recruit, or induce for employment" the plaintiff's employees.[198] The North Carolina Court of Appeals said that the common "definitions of 'solicit, recruit or induce' are similar in that they involve active persuasion, request or petition."[199] The court rejected the plaintiff's argument that the defendants breached this covenant merely by extending job offers to the plaintiff's employees and affirmed the trial court's award of summary judgment to the defendants.[200]

VII. Non-Hiring Restrictions

A Pennsylvania federal district court has suggested that an employer may be able to preclude a former employee from hiring its employees by bargaining for that as part of the non-solicitation covenant. In *Meyer-Chatfield v. Century Business Servicing, Inc.*,[201] a former employee agreed not to "directly or indirectly . . . solicit" any of the plaintiff's employees, and his new employer agreed not to "solicit any personnel" of the plaintiff.[202] Relying on the definition of "solicit" set forth in common dictionaries, the court found that the language was

195. *Id.* at 371.
196. *Id.*
197. 712 S.E.2d 366 (N.C. Ct. App. 2011).
198. *Id.* at 367.
199. *Id.* at 369–70 (citing BLACK'S LAW DICTIONARY 845, 1520 (8th ed. 2009); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 637, 1041, 1187 (11th ed. 2005)).
200. *Id.* at 368–72.
201. 732 F. Supp. 2d 514 (E.D. Pa. 2010).
202. *Id.* at 517.

unambiguous and that parol evidence should not be considered to determine whether the parties contemplated that the defendants would be precluded from hiring the plaintiff's employees.[203] The court determined that "the term 'solicit' as such is not ambiguous, and cannot be defined to include mere hiring," and that "the parties could have easily stipulated that Defendants could not 'solicit or hire' Plaintiff employees, but instead used only the word 'solicit.' "[204]

A Virginia federal district court enforced a non-hire covenant in *ProTherapy Associates, LLC v. AFS of Bastian, Inc.*[205] The nursing home defendants, all operated by the same company, entered into written agreements for the plaintiff to provide therapy services. The agreements contained a non-solicitation covenant precluding the defendants not only from directly or indirectly soliciting the plaintiff's employees but also from directly or indirectly "employ[ing] or us[ing] as an independent contractor" any of the plaintiff's employees for a one-year period after termination of the agreement.[206] Shortly after the defendants terminated the agreements, they engaged a new therapy services provider, Reliant, who hired fifty-seven of the plaintiff's employees to service the defendants' facilities. Defendants argued that they should not be deemed to have violated the covenants because they did not solicit any of the employees, and that it was beyond their control whom Reliant hired.

Applying Florida law, the court found that it was unnecessary to address whether the defendants solicited the plaintiff's employees because the covenants also unambiguously precluded the defendants from using as independent contractors any of the plaintiff's employees.[207] Rejecting the defendants' argument that Reliant's conduct in hiring those persons was beyond the defendants' control, the court noted that the defendants could have insulated themselves by including language in their agreement with Reliant that prohibited Reliant from utilizing any of the plaintiff's personnel.[208]

Not all jurisdictions, however, would enforce a non-solicitation covenant precluding a party from hiring the other party's employees, regardless of who initiated the contact. In *Loral Corp. v. Moyes*,[209] Moyes agreed in a severance agreement that he would not "raid" the plaintiff's employees.[210] Thereafter, Moyes accepted employment

203. *Id.* at 520–22 (citing BLACK'S LAW DICTIONARY 1392 (6th ed. 1990); WEBSTER'S NEW INT'L DICTIONARY (2d ed. 1956)).

204. *Id.* at 521–22.

205. 782 F. Supp. 2d 206 (W.D. Va. 2011), *aff'd*, No. 11-1189, 2012 WL 2511175 (4th Cir. July 2, 2012).

206. *Id.* at 211.

207. *Id.* at 212.

208. *Id.* at 213.

209. 219 Cal. Rptr. 836 (Cal. Ct. App. 1985).

210. *Id.* at 838.

with another company and induced two of the plaintiff's key employees to join his new employer. The California Court of Appeal was charged with determining "whether a noninterference agreement not to solicit former co-workers to leave the employer is more like a non-competition agreement which is invalid [under California law], or a non-disclosure or non-solicitation agreement which may be valid."[211] The court concluded that such a covenant would fall within the ambit of the latter. Noting that the plaintiff's employees "are not hampered from seeking employment [with Moyes' new employer] nor from contacting Moyes," the court found that "[a]ll they lose is the option of being contacted by Moyes first" and that the covenant does not preclude them from working for Moyes' new employer.[212]

Although the court found that Moyes could be deemed to have violated the covenant by soliciting his former co-workers, the California court also held that "[e]quity will not enjoin a former employee from receiving and considering applications from employees of his former employer, even though the circumstances be such that he should be enjoined from soliciting their applications."[213] A Georgia court has also found that a covenant that precludes unsolicited contact with employees is unenforceable.[214]

VIII. Conclusion

In sum, courts have typically construed the term "solicitation" in non-solicitation covenants narrowly, so that a party's mere passive response to unsolicited inquiries by a customer or co-worker is not deemed to violate the covenant. When drafting a non-solicitation covenant, counsel for employers should consider explicitly defining "solicitation" or even broadening the language so that it includes a prohibition against both the solicitation and acceptance of business from customers and a prohibition against both the solicitation and hiring of the employer's employees. Such language should be omitted, however, in jurisdictions that would not enforce such broad restrictions—particularly if it is a jurisdiction that does not "blue-pencil" overly broad covenants. Regardless of the jurisdiction, if such broad language is included in a covenant, the employer should be prepared to explain why it has a protectable business interest in precluding a response to unsolicited actions, why the broad scope of the restriction is reasonably tailored to protect that interest, and why enforcement of the restriction does not unduly impact the interests of the public.

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211. *Id.* at 841.

212. *Id.* at 844.

213. *Id.*; *see also* Cap Gemini Am., Inc. v. Judd, 597 N.E.2d 1272, 1287 (Ind. Ct. App. 1992) (applying California law and finding the same result).

214. Cox v. Altus Healthcare & Hospice, Inc., 706 S.E.2d 660, 664 (Ga. Ct. App. 2011).