The California Law of Unfair Competition Takes a Turn--Against the Employer

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Many attorneys, accustomed to identifying unfair competition with some of the better known and more numerous decisions of the federal courts, may be unaware that California has developed a sizable case law of her own dealing with the subject. This is particularly true of litigation arising out of a master-servant relationship formerly existing between the parties. The writer believes there have been recent developments in this field of unusual interest and significance; and that the subject itself is one which will, sooner or later, confront any lawyer engaged in the general practice.

On July 8, 1952, the Supreme Court of California formulated a rule which, it seems reasonable to believe, could make a common type of unfair competition case several times harder for the plaintiff. The situation involved is that of the former employee with an intimate knowledge of his former employer’s customers, business operations and trade secrets, going out to compete with his old boss, and possibly putting him out of business. The case is *Aetna Building Maintenance Co. v. West.* While a portion of the opinion appears to effect a substantial change in what many of us doubtless thought to be the law, and accentuates a trend, it has still another aspect of unusual interest: the opinion incorporates a curious error, or, to be most conservative, an ambiguity which may prove quite troublesome to both bench and bar.

Before considering the *Aetna* case, it should helpful to review the California decisions on unfair competition, as applied to the master-servant relationship, and to observe the methods and rationale which our courts have utilized from time to time in the evolution of this branch of our law.

While unfair competition is frequently identified with the circumstances which were among the first to bring it to the attention of the California courts, the laundry route cases, the problem has since become much more versatile and the attorney may now encounter it in a number of forms; particularly so, if he has clients who conduct relatively small businesses, the success of which is dependent upon the cultivation of patrons whose favor must be won by the charm and effort of sales representatives, and if, in the course of such solicitation and subsequent dealings the client himself has no personal contact with his customers. Then the possibility of involvement in this type of litigation is far from remote, for if the business is such that no massive outlay of capital is required, and the market is attractive, the chances are plainly good that some day an ambitious employee will quit and go into business for himself, or simply accept what he thinks a better opportunity with a rival firm. If the ex-employee yields to the temp-

*Member of the San Francisco Bar.

1 39 A.C. 204, 246 P.2d 11 (1952).
tation to take a few obvious competitive shortcuts, as so many have done, and the competition begins to hurt the former employer, the latter soon looks to his attorney for help. The client’s anxiety is justified, for experience shows that competition from this source and of this character can be disastrous to him. When your competitor holds the advantage of having had the exclusive contact with your customers; of knowing exactly how your prices are determined; where you obtain your materials; how much you pay for them; when your various contracts expire; and all the other basic details of your business operation, you may be lucky to keep the doors open.

One may receive the impression that the former employer suffers merely the difference between profit and less profit. But the injury can be more than relative; it can be crucial. The courts themselves have had to find a point of balance between the property right of the employer and the right of the employee to better himself by change of business affiliation. It must be conceded that the conflict frequently presents a riddle of equity exceedingly difficult to resolve, and all we can ask is that the rules be both fair and realistic. Let us see how they have been developed by the California courts.

The Trend from 1881 to 1932

The decisions under which the law of unfair competition in California began to assume a definite form have probably been reviewed too often, and too ably, to justify detailed repetition. Except for the suit which in 1881, afforded our courts their earliest experience with litigation of this character, Gower v. Andrew, the decisions which charted the rules for some three decades thereafter were typical “route” cases arising in the laundry, dairy, baking and ice businesses.

Gower v. Andrew gave local precedent a shaky start by splitting the court 4-3. Defendant Andrew had assumed—prematurely—that his employers in the warehouse business were not going to seek a renewal of their lease. He then made the mistake of negotiating for the lease himself while still in their service, and did some soliciting of his employer’s customers just to make the launching of his own business a bit easier. But our supreme court took little notice of this solicitation, resting its determination instead on the theory that the servant had shown an unconscionable disregard for the best interests of his master in whetting the appetite of the lessor by some quiet bidding while the employer was still interested in a renewal at possibly a reduced rental. The court made no express reference to the law of unfair competition. Fifty-four years later a cigar store employee in Oakland did exactly what Andrew had attempted, and with judicial approval: he obtained his employer’s lease and acquired the premises. There was one

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2 “This right of a citizen to pursue any calling, business or profession he may choose is a property right to be guarded by equity as zealously as any other form of property.” New Method Laundry Co. v. MacCann, 174 Cal. 26, 31, 161 Pac. 990, 991 (1916).
5 Cohn v. Clare, 6 Cal. App. 2d 504, 44 P.2d 634 (1935).
important difference. He waited until he was out of the employ before making any overtures to the landlord.

This distinction is illustrative of one of the simplest, yet most significant, conclusions to be derived from the cases on unfair competition: if the employee, instead of leaping rashly into direct appropriation of the trade or patronage with which he has become familiar, would proceed in conformity with the elementary rules established by these decisions, he could frequently achieve the identical results without colliding with an injunction. The moral is easily perceptible in the cases that follow.

The California series of retail and wholesale route cases began with Empire Steam Laundry v. Lozier. In situation Empire was typical: the driver on an assigned route switches over to the employe of a rival company and capitalizes on his knowledge of the names and addresses of his old customers by soliciting them away from the former employer. They, figuring that laundry is only laundry, don't especially care who the driver is working for; so his coup is easily accomplished.

Guided by two New York decisions, the California Supreme Court approved the injunction against Lozier and laid the groundwork for our law as follows: a customer list is a trade secret and a valuable property right belonging to the employer; equity will protect him against unwarranted disclosure of trade secrets and confidential communications in the hands of a former employee. Although Empire Steam Laundry's ex-driver had also violated an express contract he signed with Empire, the court made it clear the injunction was being affirmed on principles of equity as well as contract.

The same court demonstrated the secondary importance of an express agreement when, three years later, it applied the Empire doctrine to Cornish v. Dickey, a bakery route situation sans contract.

The over-zealous laundry man showed up again in New Method Laundry Co. v. MacCann. He had not agreed to refrain from taking the old customers with him, but he might as well have, for the injunction stood. The MacCann appeal centered not on the right to relief but on the extent of the relief. Should the ex-employee have been enjoined from receiving as well as soliciting? Although it had implicitly approved a similar injunction in the Empire case, the supreme court decried the imposition of so extreme a restraint.

The route cases were adjudicated in accord with the doctrine of Empire for the next eleven or twelve years. Despite some variations in the measure of the curb to be imposed on the errant but enterprising former servant, the

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6 Provided the compliance is real and not artificial. See Santa Monica Ice Co. v. Rossier, 42 Cal. App. 2d 467, 109 P.2d 382 (1941), discussed in text infra.
7 165 Cal. 95, 130 Pac. 1180 (1913).
9 172 Cal. 120, 155 Pac. 629 (1916).
10 Supra note 2.
11 Supra note 7.
10a The extent of the injunction in unfair competition is of such practical importance, it receives special notice infra.
rule became well settled that equity would prevent the exploitation of confidential information acquired in the course of former employment when such knowledge constituted a trade secret. But how aggressive could the ex-employee be without violating an injunction against solicitation? And what was meant by “solicitation”?

In *Theodore v. Williams* a laundry driver had been called in to show cause why he was not in contempt of an injunction against soliciting, receiving, or taking any work from former patrons. He had driven his truck through the familiar neighborhoods, displaying the placards of his new employer, and had placed newspaper advertising announcing his new affiliation. Admittedly the defendant had not been averse to receiving custom offered him by the friendly housewives whom he had formerly served. To hold this man in contempt, ruled the court, would be going too far. He had a perfect right to drive along any streets he chose and to advertise his new connection. As to his accepting work given him by persons on the *verboten* list, the restriction against “receiving” such trade operated only as to those customers whom he had actually solicited, and since he had done no soliciting of them, he was free to take the work they offered him.

The wholesale distribution of bread has been held to be governed by the precedents of *Empire* and *Cornish v. Dickey*. While the employer may have a property right in a laundry list akin to the goodwill of a business, it is not a property which will support a suit for conversion. Another lesson in the importance of selecting and pleading the proper theory in this type of litigation may be seen in *Adkins v. Model Laundry*. Plaintiff, a former employee, (for a change) pleaded purely a breach of express contract; then discovered that his best chance lay in claim of interference with contractual relationships, of exploitation of confidential information, and of unfair competition. But it was too late. Holding these theories outside the issue, the appellate court bounced the hapless plaintiff from one legal dead-end to another and then threw him back from whence he had come.

**A Few Refinements**

A uniform judicial policy of protecting the former employer against exploitation by an ex-employee of “confidential information” acquired dur-

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12 *44 Cal. App. 34, 185 Pac. 1014 (1919).*
13 *Compare conduct in George v. Burdusis, 21 Cal.2d 153, 130 P.2d 399 (1942), where defendant drove over his old route telling the customers he was no longer working for his brother, and that he would appreciate their business. This was held solicitation. And note the observation of the Supreme Court in denying a hearing of San Francisco Laundry Ass'n v. Ragon, 67 Cal. App. 456, 458, 227 Pac. 686, 687 (1924), that “The wrongful solicitation of business can be accomplished without any express verbal or written request therefor.”* Exoneration of the defendant on this point was facilitated both by the peculiar wording of the injunction against him and by the liberal attitude of the supreme court in New Method Laundry Co. v. MacCann, *supra* note 2, with respect to the mere acceptance of patronage.
15 *Lackechnie Bread Co. v. Huber, 60 Cal. App. 539, 213 Pac. 285 (1923).*
16 *Supra* note 9.
17 *Olschewski v. Hudson, 87 Cal. App. 282, 262 Pac. 43 (1927).*
18 *92 Cal. App. 575, 268 Pac. 939 (1928).*
ing the course of his employment, on the ground this knowledge was a trade secret, had continued for several years without serious deviation. Towards the end of the twenties, a refinement was evolved. Suppose some time had elapsed since defendant had left plaintiff's service, so that plaintiff had had ample opportunity to train replacements and to re-cement his relationship with his customers. Must the former employee continue to avoid solicitation? Or suppose, to refer to an argument often raised by the defendant, the customers were so obvious to anyone walking down the street that there could be nothing secret or confidential about their identities or locations? Would solicitation by the ex-employee still be enjoined? Briefly, yes. In *Pasadena Ice Co. v. Reeder,* it seems practically everyone on the staff of the rival ice company had worked for plaintiff at some time or other. A few, several years before; a few, quite recently. In affirming an injunction against all of them, the supreme court considered that defendants "became personally acquainted with the customers of the respondent, their respective places of residence, their peculiar likes and fancies and other characteristics, a knowledge of which would greatly aid them in securing and retaining the business of said customers." The court was satisfied that the defendants had formed the competing ice company with the direct object and effect of injuring or destroying the business of their former employer. As we shall see, these factors receive strong recognition in later decisions.

Two years later, in a typical milk route case, *Dairy Dale Co. v. Azevedo,* the supreme court quoted its language in the *Pasadena Ice* case about peculiar likes and fancies, and added another element to the list: the value of the "friendly contact" which defendants had with plaintiff's patrons while enjoying the nutrition of his payroll. The argument that the employer had no case because there was nothing whatever secret or confidential about the existence or addresses of the customers thus received a second refutation from the California Supreme Court.

**Unclean Hands**

The defense of unclean hands in an unfair competition case is subject to the rule that the inequitable conduct charged against plaintiff must pertain to the very subject matter involved in the action before the court and affect the equitable relations between the parties.

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19 206 Cal. 697, 275 Pac. 944, rehearing denied, 276 Pac. 995 (1929).
20 Id. at 704, 275 Pac. at 947.
21 Id. at 705, 275 Pac. at 947.
23 211 Cal. 344, 295 Pac. 10 (1931).
24 Germo Mfg. Co. v. McClellan, 107 Cal. App. 532, 290 Pac. 534 (1930), where plaintiff claimed its former branch manager set up a rival company with benefit of plaintiff’s secret formulae, customer information, and several ex-employees. The trial court became so impressed with defendant’s evidence of plaintiff’s addiction to mislabelling, giving rebates to public officials, and infringing patents of other companies, that it dismissed the complaint. Reversed, on ground the complaint made a good case for relief from unfair competition under
An Important Distinction is Born

Coincidental with the approximate nadir of the great depression of the '30's, the district court of appeal rendered a decision which suddenly welded a formidable qualification to the rules which had been serving the employer so well since Empire Steam Laundry v. Lozier. Perhaps it was perceived that precedent was approaching the point where a condition of semifeudal servitude had developed; where an employee who had spent a part of his life doing sales work for one concern might find it impossible to take a job with a competing company for the simple reason there would be so large a percentage of potential patrons barred to his solicitation that his services would be worthless. He could, of course, change his occupation or move out of the community. But this election was not to be forced upon him.

In Avocado Sales Co. v. Wyse, the defendants, while employees of plaintiff, had been selling avocados to fruitstands, groceries, public markets and hotels within certain districts of the city. The "clientele" was rather select and plaintiff had spent sizable sums in cultivating it and in encouraging more people to eat more avocados. Defendants quit plaintiff and began buying and selling avocados for their own account. The break was clean, however; defendants resorted to no deceptive or other reprehensible practices. But they did know the names of some excellent avocado outlets previously contributing to the sustenance of the plaintiff. He asked for an injunction; the trial court refused it.

In view of the line of California cases up to this point, where the only question was, "How broad shall the injunction be?" it must have been a shock to plaintiff's counsel when the appellate court elected to follow two New York decisions. Citing these authorities, and noting the trial court's findings that plaintiff's avocado-consuming patrons did not buy exclusively from him but from peddlers and dealers generally, as price and condition of market dictated, the district court of appeal held that the facts showed no violation of any business secret or trust reposing in defendants because of their former relation for plaintiff. "In all of the California cases cited," the court pointed out, "a trade secret and trust has been violated." Here there was no secret customer list and, as a New York court had said in a familiar epigram, "Equity has no power to compel a man who changes employers to wipe clean the slate of his memory." Plaintiff Avocado Sales Company was further apprised by the California court that the mere fact

the doctrine of Empire Steam Laundry v. Lozier, supra note 7; Cornish v. Dickey, supra note 9, and New Method Laundry Co. v. MacCann, supra note 2; and that the trial court erred in admitting evidence of unclean hands in disregard of the equitable rule referred to in text.

25 122 Cal. App. 627, 10 P.2d 485 (1932); hearing by supreme court denied.
27 Supra note 25 at 632, 10 P.2d at 488.
it had expended large sums in promoting the sale and consumption of avocados did not give it a monopoly\(^2\) (a statement destined to be prized by defendants in similar cases forever after).

Beginning with *Avocado Sales Co.*, a new line of authority took root in the California law of unfair competition. While this qualifying rule was doubtless both sound and necessary, it obviously promised some nice judicial exercise to reconcile the new precept with earlier recognition by the supreme court of the value of the employee's knowledge of customers' "peculiar likes and fancies"\(^3\) and of the "friendly contact"\(^4\) acquired while he was receiving wages from the erstwhile employer. Not surprisingly, subsequent cases began to turn on the question whether the facts were controlled by the doctrine of *Empire Steam Laundry* or by that of *Avocado Sales Co.*

**The Pattern of Relief Broadens**

A somewhat different form of trade secret, the "preferred customers" list, won protection in *Scavengers P. Ass'n v. Serv-U-Garbage Co.*\(^5\) Plaintiff was in the business of collecting refuse and waste for salvage, had its drivers keep detailed information on the quantity of garbage, the collection days, rates, accessibility of refuse, and profitableness of customers. This data was considered secret. When the defendants (former employees of plaintiff) organized a competing company, they promptly solicited the firms whose refuse had the most profitable yield. In resisting the injunction defendants argued that theirs was the same as the avocado situation because everyone in town knew the locations of these outlets and the firms themselves did not release their waste on the basis of personal attachment for any particular scavenger. But the California Supreme Court was not impressed by the alleged parallel. The knowledge of these "preferred customers," it held instead, was a trade secret of great value; defendants had been properly restrained from soliciting these prize patrons of plaintiff, and from receiving refuse already solicited.

The view that injunctive relief may be granted even though the names of the customers do not constitute a trade secret—as where the concerns are well known wholesale dealers—acquired additional support in *Gloria Ice Cream Co. v. Cowan.*\(^6\) Despite the absence of such secrecy, and independently of any express contract between the parties, if the former employee deliberately goes about using information he acquired while working for his old employer, *for the purpose of and with the intent of injuring the former employer's business,* he will be enjoined.\(^7\)

The observation has already been made that if a former employee will but adhere to the simple rules laid down by the decisions, he can often at-

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29 Supra note 25 at 634, 10 P.2d at 488.
30 As in Pasadena Ice Co. v. Reeder, supra note 19.
31 As in Dairy Dale Co. v. Azevedo, supra note 23.
32 218 Cal. 568, 24 P.2d 489 (1933).
33 Supra note 22.
34 Ibid. See other cases cited supra in note 22.
tain the objective he seeks without suffering the handicap of an injunction. An amusing case arose in 1941 where the defendants might have had such a thing in mind but either acted without counsel or with misguided counsel. After leaving the service of an ice company and entering that of a competitor, two drivers simply exchanged routes and each solicited the old customers of the other. To further avoid what they conceived to be the legal pattern of unfair competition, each driver solicited the trade, not for himself, but for the other man or for the new employer; and all deliveries were made by the latter. The defendants were soon disabused of their naivete. Injunction affirmed.\textsuperscript{35}

The sale of an interest in a business, with express reservation of right to compete, will not permit unqualified solicitation by the retiring owner. Notwithstanding his stipulated right to compete, he may not exploit information of a confidential character in his solicitation of the established trade of his former company after he has commenced a competing concern.\textsuperscript{36} This is especially so when the information is being used in a deliberate design to injure or undermine the business of the old company.\textsuperscript{37}

While the majority of these cases in California on unfair competition have arisen at the instance of the former employer, it is clear that the rules work both ways and the employer himself may be enjoined from taking advantage of confidential data acquired from a former employee. Where an insurance broker, for example, engages a man who brings with him his own selective and confidential list of insurance accounts, their names, addresses and particular needs, the broker will not be permitted to exploit his knowledge of that list after its owner has left his employ. He may be restrained from soliciting any of these clients of his former employee; but from selling only to those whom he has actually solicited.\textsuperscript{38}

The same rules also govern relations other than that of master and servant, as where an inventor arranges for the manufacture of a device he has designed and the manufacturer copies it for the purpose of selling the product as his own.\textsuperscript{39} Or where patterns are delivered to a manufacturer by an inventor for the fabrication of castings and the manufacturer begins making castings for the purpose of selling them in competition with those of the inventor and at a lower price.\textsuperscript{40} Any notion that the existence of a

\textsuperscript{35}Santa Monica Ice Co. v. Rossier, \textit{supra} note 6.
\textsuperscript{36}Langendorf United Bakeries v. Phillips, \textit{supra} note 22.
\textsuperscript{38}Foster v. Peters, 47 Cal. App. 2d 204, 117 P.2d 726 (1941).
\textsuperscript{40}Hollywood M. P. Equipment Co. v. Furer, 16 Cal. 2d 184, 105 P.2d 299 (1940), where the court rejected the argument that no cause of action had been stated because there was no allegation the invention was secret; and said that even were the invention in the public domain, defendant had become a \textit{bailee} of the patterns and his use of them to the detriment of plaintiff was conversion. “Where a \textit{bailee} of an article has accepted it under definite terms to hold it and use it for the benefit of the \textit{bailee}, a confidence has been reposed which should remain inviolate.”
creditor relationship changes the rules was summarily dispelled in *Barnes v. Cahill*, another case of attempted piracy.

Speaking of piracy, there was the phonograph needle case, a clean-cut example of deliberate, premeditated trade-secret larceny. Plaintiff had built up a business based upon his discovery of a species of cactus spine suitable for the manufacture of phonograph needles. The location of the cacti was secret; the needle was unique. Defendant entered plaintiff’s employ with the preconceived plan of learning his secrets for use in subsequent competition against him. He then made a deal with one of plaintiff’s rivals, appropriated both the secret and a supply of needles, and began manufacturing them in competition with his former employer. Citing the chain from *Empire Laundry* down to *Hollywood M. P. Equipment Co. v. Furer*, the district court of appeal straightened out one scheming entrepreneur in short order.

George v. Burdusis, *Another Leading Case*

One would think that after the long succession of unhappy experiences laundry, ice and bread company drivers have had in soliciting old customers for a new employer, ever since the *Empire Laundry* case in 1913, the legal ban on this particular impulse of expediency would have become familiar even to the laity, for as to this category of trade secret, the law certainly became clear long ago. But evidently the word had not yet reached Aleck and Tom Burdusis in 1942. *George v. Burdusis*, one of the more important expositions of the California law of unfair competition, not only reviewed most of the controlling precedents in our state, but further defined the limitations upon an express contractual right to compete with former business associates. The decision reiterated the value of the “friendly contact” which the employee had with the old patrons—even though the particular customer list may not be secret—and held that a partner who sells out his interest, reserving the right to solicit “former customers” of the firm, could not exercise this right by using a former driver for the old firm to do the soliciting for the ex-partner’s new business. This additional resort to the use of the ex-driver’s friendly contact with the old customers sufficed to subordinate the defendant’s contractual right of solicitation to the equitable interdiction against unfair competition. Recalling the friendly wave the court had given the defendant in *Theodore v. Williams*, when he advised

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41 56 Cal. App. 2d 780, 133 P.2d 433 (1943). Plaintiff had conceived and developed a business of making weekly newspaper matrices of current news about Hollywood, motion pictures, events and personalities under the title, “Hollywood Today.” Defendant, former employee of plaintiff, having become familiar with the business and plaintiff’s method of conducting it, began producing and selling matrices of the same style and arrangement under the name, “Hollywood Now” and “This Week in Hollywood.” It was also alleged that defendant was using confidential information in his solicitation of plaintiff’s customers. Case remanded for a new trial because injunction had been limited to use of name, “Hollywood Features Syndicate.”


43 *Supra* note 40.

44 *Supra* note 13.

45 *Supra* note 12.
his old patrons of his new affiliation, Tom Burdusis testified: “I walked in the place and told them I was no longer with the Stone Linen Supply Company, I was working for my brother and if they would give me the business I would appreciate it.” This, held the supreme court, was solicitation. The court then narrowed the authority of the avocado case with the statement that “The rule of Avocado Sales Co. v. Wyse has been expressly limited by subsequent decisions of this court.”

A Classic in Ruthlessness

We here indulge in brief note of what must be the most outstanding example of sheer ruthlessness in the entire series of California cases on unfair competition. Whether the case can be classified among those pertaining to competition may be questionable, for when the defendants finally revealed their hand, they had the plaintiff’s business so crippled that he was hardly in a position to compete with anyone. Buxbom v. Smith, therefore, may actually belong more properly in the category of interference with contractual relationships; but it is interesting enough to warrant a glance.

The defendants employed plaintiff, under certain written contracts, to handle publication and distribution of a weekly “shopping news” in the county of Los Angeles. He was already engaged in this type of business but the contracts with defendants called for a much larger circulation, 40,000 copies; so he employed additional help, laid out detailed plans for the new operation, solicited new advertisers, and dropped some of his old accounts in order to better perform these fine new contracts with defendants. Meanwhile the defendants gradually became familiar with the details and method of plaintiff’s business operations, his personnel records, district maps, bookkeeping practices, and mode of distribution. Then the lamb was ready for the shearing, and defendants abruptly cancelled their contracts with plaintiff, took over his staff, and began to publish and distribute the shopping news themselves. (If they claimed any justification for the cancellation, it does not appear in the report.)

When Buxbom filed his complaint, he made the same mistake the plaintiff made in Adkins v. Model Laundry. By pleading causes of action based solely on the written contracts, he presumably excluded recovery of damages on the theory of defendants’ tortious interference with the relationship between himself and his employees, and their deliberate disruption of his business. Fortunately, however, the supreme court—unlike the district court which had penalized Adkins in the honored tradition of common law pleading, and aided by the absence of a demurrer in the record—took a more liberal view of the complaint and affirmed the trial court’s allowance of damages in tort. Again we see exemplified the advisability of proper

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46 Supra note 13 at 162, 130 P.2d at 404.
47 Supra note 13 at 160, 130 P.2d at 403.
49 Supra note 18.
pleading in a suit for unfair competition filed in a state court, although the
attorney's first impulse may be simply to sue upon a written contract.

The Employee's Rights Are Redefined

In 1944 the California Supreme Court wrote perhaps the most defini-
tive opinion in this branch of the law since Empire Steam Laundry v. Loz-
ier. An eminently sound decision, it clarified and strengthened the preroga-
tive of an ex-employee to compete with his former employer and to solicit
the latter's patrons in the absence of express contract or unfair practices.
The case was Continental Car-Na-Var Corp. v. Moseley.50

Plaintiff, an Indiana corporation, had an office at Los Angeles and was
engaged in the business of manufacturing and selling cleaning compounds
and floor wax. Defendant Moseley had been plaintiff's district manager at
Los Angeles for eleven years; defendant Franzus was a chemist who had
worked for plaintiff in Indiana for two years but had more recently been
in the employ of another company, doing the same kind of work. Moseley
quit plaintiff and he and Franzus formed a competing corporation at Los
Angeles. Moseley then notified many of plaintiff's customers of his new
business connection and solicited them. The trial court permanently en-
joined defendants from soliciting or taking away any of plaintiff's custom-
ers in the territory, from using any information about such customers, and
from using or divulging any secrets regarding the composition of plaintiff's
products.

Giving new life to the doctrine of Avocado Sales Co. v. Wyse, the Su-
preme Court said:51

This case is readily distinguishable from the so-called "route" cases,
where the business of serving the customers is based upon regular calls
at definite periods, establishing a business relationship between the cus-
tomer and the company, which, unless interfered with, normally will
continue. Here there is no showing that in the normal course of events,
plaintiff would have continued to sell to any of its customers on the list.
In the "route" cases the services rendered or the products sold were essen-
tially the same, and the quality of the service rendered is similar. In the
case of a salesman in a commercial field, there is no assurance of an order
unless he can satisfy the customer that his merchandise is better, cheaper
or more salable than that of his competitor. The customer usually desires
to examine, inspect and compare merchandise and prices offered to him.
Each sale is a distinct transaction, not necessarily implying that another
will follow."

After reviewing the principal California decisions the court further ob-
served:

1. There was nothing to justify a finding defendants had used or were
about to use any "secret process" or formulae belonging to plaintiff;
2. The names and addresses of the firms using products of the type
sold by plaintiff were well known to the trade and to other salesmen;

51 Id. at 109, 148 P.2d at 12.
3. Plaintiff had been in open competition with other floor wax manufacturers for years and defendant Moseley had been selling such products as he could in an open competitive market; for this reason the list of customers could not be held a trade secret or "confidential information";

4. Defendant Franzus was entitled to make use of his general knowledge of chemistry so long as he exploited no trade secret or secret formulae belonging to plaintiff;

5. Defendant Moseley had not been selling for plaintiff on the basis of a friendly feeling between himself and the customers, nor because of his personal acquaintance with their peculiar likes, fancies or requirements; rather, on his ability to meet or excel, in their judgment, the quality, price and adaptability of similar products offered by his competitors;

6. No such factors existed as were present in George v. Burdusis (use of an ex-employee's friendly contacts on a route); in Gloria Ice Cream Co. v. Cowan (deliberate intent to injure); or in Scavengers P. Ass'n v. Serv-U. Garbage Co. (confidential list of "preferred customers").

Therefore, concluded the court in reversing the judgment, Moseley and Franzus were free to solicit plaintiff's customers without restriction, for they had engaged in no unfair trade practices whatsoever.

The attorney who undertakes representation of an ex-employee, defendant in an unfair competition case, will find it helpful to begin his research by reading Continental Car-Na-Var v. Moseley.

By 1947 a California court having before it a competition dispute between former employer and employee thus faced an inevitable question: was the case governed by the line of authority recently augmented by George v. Burdusis or by the strong—and even more recent authority of Continental Car-Na-Var v. Moseley? True, the two decisions were not inconsistent; but the facts under adjudication could easily overlap, or appear to overlap, either rule. The first effort of an appellate court to essay the distinction is seen in Wallich v. Koren. The opinion in the Wallich case is commendable as an equitable, analytical solution to the facts before the court, and as a guide to other courts having to make a choice of rule.

Wallich had employed Koren, under written contract, to sell first-aid medical supplies over certain routes. Wallich furnished him with a customer list and other information on the accounts. Koren quit Wallich, obtained a stock of first-aid supplies elsewhere, and—but need we describe the routine again? Within five or six weeks Koren's new business had a nice grip on the territory it had taken Wallich seven years to develop. In affirming an injunction against Koren, the district court of appeal stressed the advantage he had had in possessing an intimate acquaintance with plaintiff's customers, a knowledge of their requirements and buying habits; and the value to the defendant of the friendly attitude of these patrons towards

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52 Supra note 13.
53 Supra note 22.
54 Supra note 32.
plaintiff and their partiality towards the products Koren had previously
been selling for plaintiff. Also, the appellate court noted, Koren had
enjoyed an exclusive right to sell plaintiff's products along the particular
routes; he had received from plaintiff valuable information on the accounts
calculated to facilitate sales; and the customers tended to repeat their pur-
chase, so the relationship would normally continue unless disturbed by
some "efficient subversive agency." The effect of the written contract of
employment was held to make the customer list itself clearly a property of
the employer.

Certain of these characterizations by the court of the various aspects
of the business involved might, however, be said purely a matter of opinion,
for, it will be remembered, the Continental Car-Na-Var Company had
made similar claims about the nature of its wax products business and the
similar advantages enjoyed by its former employees when they set up a
competing firm. But Wallich had resorted to certain tactics sufficient to
sustain a conclusion he had formed an intent to injure his former employer.
He had caused his first-aid supplies to be so manufactured and labelled that
they resembled those of Koren; he had purposely lead the trade to believe
he was still working for Koren; he had told one patron he had purchased
the route from Koren but that Koren was still supplying the merchandise.\(^{56}\)
A finding of deliberate intent to injure, it will be recalled, had assisted in
the affirmance of an injunction in the \textit{Gloria Ice Cream} case even though
the supreme court expressly assumed in \textit{Gloria} that no trade secret was
established. And no unfair tactics were proved in either the \textit{Car-Na-Var}
or \textit{Avocado Sales} cases, decisions, up to their time, the most liberal to-
wards competition by former employees.

\textbf{An Unfortunate Inadvertence}

We come now to a decision destined for a negative honor: that of plant-
ing in the law a misleading ambiguity. As we have seen, when \textit{Wallich v. Koren}
came before the district court of appeal\(^{57}\) two lines of authority had
evolved, one represented by the numerous route cases and the other by the
avocado and floor wax cases, and a certain discernment was required to
harmonize and apply the various rules and factors theretofore given rec-
ognition. The moment was thus propitious for an attempt to contrive a
convenient resume which would summarize and yet differentiate these rules.
It materialized in 1948 in \textit{California Intelligence Bureau v. Cunningham}.\(^{58}\)
There the court had before it a clear example of exploitation by a former
employee of confidential information, aggravated by a deliberate, pre-

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\(^{56}\) Tactics which moved the district court of appeal to say: "For the entire course of app-
ellant's conduct the law can offer nothing but censure. Our civilization has passed beyond the
era of cutthroat competition. Not only do business men deprecate practices that deprive one's
neighbor of his rights, but the ethic that abounds among upright men is to let rivals live and,
if a competitor deserves success, so to act as to defeat the piracy of such advantages as he may
honorably acquired."

\(^{57}\) Second District, Division Two.

\(^{58}\) 83 Cal. App. 2d 197, 188 P.2d 303 (1948); Second District, Division Three.
announced intention to injure. Involved was a specialized service to business concerns for screening out solicitations of funds for charities, philanthropic enterprises, and civic campaigns, a service unique in Los Angeles at the time. After learning plaintiff’s *modus operandi*, defendant quit his employ and organized a competing service. Just to let his old colleagues know they would miss him, the defendant had assured them that they would not renew 1% of the accounts he obtained for them; and that he had more than one way of approaching those accounts “without committing slander.” Subsequent cancellations suggested that he knew whereof he spoke.

The district court of appeal affirmed the injunction awarded below, with slight modification, and held that a list of subscribers of a service, built up by ingenuity, time, labor and expense of the owner over a period of many years is property of the employer, a part of the good will of his business and, in some instances, his entire business. Knowledge of such a list, acquired by an employee by reason of his employment, may not be used by an employee as his own property or to his employer’s prejudice. The court likewise noted the presence of the intent to injure.


In the first group of cases it is held that equity, at the instance of a former employer, will enjoin a former employee from using knowledge or information gained while in the employ of the former employer, and by reason of such employment, to the former employer’s detriment, if: (1) the former employee is in possession of trade or business secrets or confidential

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60 *Supra* note 13.
61 *Supra* note 22.
62 *Supra* note 32.
63 *217 Cal. 307, 18 P.2d 950* (1933). Employees of Fidelity Appraisal Company quit and established Federal Appraisal Company—at same address and phone number. The supreme court refused to affirm ban on use of name adopted by defendants but approved, *inter alia*, injunction against their solicitation of appraisal business from any person with whom they had been conducting business, prior to their resignation, on behalf of the company.
64 *Supra* note 19.
65 *Supra* note 7.
66 *Supra* note 42.
67 *Supra* note 55.
68 *Supra* note 50.
69 *Supra* note 12.
70 *Supra* note 25.
71 *Supra* note 5.
72 *Supra* note 58 at 202, 188 P.2d at 306.
information, or the like, not readily accessible to others; (2) the former employee solicits the customers of his former employer in a competing business with intent to injure his former employer's business; (3) the former employee solicits the customers of his former employer, who comprise a list of preferred customers whose trade is profitable to a supplier of a service, knowledge of whom is a trade secret and confidential; (4) one concern is usually patronized by a customer and the lists and names and addresses of the customers are considered secret and have the character of property; (5) there is an established business relationship between the customer and the former employer which, unless interfered with, normally continues.

If the reader has kept in mind the salient features of even half the decisions just previously referred to by the court, he will easily perceive that the five classifications predicated on those decisions are in the nature of a compilation, or composite, of individual situations—each dominated by some conspicuous feature of competition—where an injunction had been affirmed. But the opinion enumerates these five factors, not in the alternative but seriatim, and gives the unmistakable impression (to anyone not familiar with the cases referred to) that all of these elements must be present to warrant injunctive relief. The court doubtless intended no such impression, because none of the cases it so cited contained all five factors. 

*Burdusis* lacks any reference to an intent to injure, or to a list of “preferred customers.” *Gloria Ice Cream* expressly assumed the absence of a trade secret and said nothing about preferred customers. *Scavengers P. Ass'n* made no reference to an intent to injure, nor to the business being such that a customer would ordinarily patronize only one concern, nor to an established business relationship which would normally continue unless interfered with. *Fidelity* said nothing about an intent to injure, about a list of preferred customers, or about a business relationship which would normally continue unless interfered with. *Pasadena Ice Co.* contained no reference to preferred customers whose trade was profitable to a supplier of service. *Empire Steam Laundry* is devoid of reference to intent to injure, or to any list of preferred customers. *Riess v. Sanford* had nothing to do with a secret customer list and made no point of any established business relationship likely to continue. *Wallich* made no mention of “preferred customers.”

On the other hand, *Gloria Ice Cream* made much of the existence of a deliberate, preconceived plan by defendants to injure the plaintiff; *Scavengers P. Ass'n* was the first decision by the supreme court to recognize the peculiar value of knowledge of “preferred customers”; *Empire* (and all the other route cases) concerned an established relationship likely to continue unless interfered with; *Riess v. Sanford* involved a unique trade secret. So it appears evident that by failing to insert an “or” in its fivefold list of factors, the court which decided *California Intelligence Bureau v. Cunningham* made possible an erroneous impression.

The inadvertence is rather compounded by that portion of the opinion
immediately following the language heretofore quoted. Such part of the opinion reads as follows: 72

In the second group of cases it is held that equity will not enjoin a former employee from using knowledge or information gained while in the employ of a former employer, and by reason of such employment, even to the detriment of the former employer, if: (1) the customers solicited (a) do not constitute a trade secret, or confidential information, or a confidential list in which a proprietary interest might be claimed, or (b) are commonly known to the trade and are called upon by salesmen for various companies, or are wholesale buyers whose names appear in directories and are so few in number that anyone might readily discover them, and the list of them is not secret or confidential; (2) the former employer is in open competition with others engaged in similar business, selling in an open, competitive market; (3) the former employee was a salesman of his former employer in a commercial field where there was no assurance of an order unless he could satisfy his customer that his product was better, cheaper, or more salable than that of his competitor, where the customer usually desired to examine, inspect and compare the product and prices offered to him and each sale was a distinct transaction, not necessarily implying that another will follow; (4) no secret or trust reposed in the former employee in the course of his employment is violated and no trade or business secret or confidential information is used by the former employee.

The reason this portion of the opinion adds to the confusion is that the above enumeration (listing the conditions under which an injunction will not be granted) is correctly stated conjunctively and not in the alternative. With minor exception 73 the “second group of cases” to which the court refers (Continental Car-Na-Var Corp. v. Mosely, Theodore v. Williams, Avocado Sales Co. v. Wyse, and Cohn v. Clare) do support a conclusion that if these four factors concur, an injunction will be denied.

Why such concern over a loose statement in the California Intelligence opinion which is probably dicta anyway? Because it has recently acquired considerable dignity by being picked up by the California Supreme Court in Aetna Maintenance Co. v. West, 74 a decision where it no longer looks like dicta.

Before taking up the recent Aetna case, we give brief consideration to two intermediate decisions of the district courts of appeal: DeLuxe Box

72 Id. at 202-203, 188 P.2d at 306.
73 Theodore v. Williams, supra note 12, a laundry route case wherein the former employee had been enjoined from solicitation, was before the appellate court on a proceeding in mandate to compel the superior court to adjudge the defendant employee in contempt for violation of the injunction. Since the question was whether his conduct subsequent to the judgment constituted solicitation, the case would appear to add little or nothing as authority for the proposition for which it is cited.
Cohn v. Clare is the Oakland cigar store case, supra note 5, in which the employee quit and obtained a lease on his former employer’s business premises. Turning on a rather simple situation, the decision contributed little to the more complicated issues here under consideration.
74 Supra note 1.
Lunch & Catering Co. v. Black,75 and Levine v. Johnson & Co.,76 where there was a failure to establish either trade secret, confidential information or fiduciary relation. Neither case involved a trade route, nor solicitation of customers in the usual sense. Both are good illustrations of the practical need for the basic philosophy of Avocado Sales Co. and Continental Car-Na-Var, and in accord therewith: that every man has a right to conduct his own business or to pursue his own calling and, so long as he does so fairly, equity will not interfere. As the court said in the Levine case—where defendant had spent 35 of his 40 years experience in the construction of cooling towers with plaintiffs or their predecessors, "To grant the relief prayed for by appellants would virtually operate to deprive respondents of their right to pursue a gainful and lawful occupation in the field for which they are equipped by virtue of Eskil Johnson’s almost half century in his field. This, equity cannot do."77

The Aetna Case

Aetna was the case, as conjectured at the beginning of this article, which could have the effect of multiplying the difficulties of a plaintiff in litigation of an unfair competition claim arising out of a previous master-servant relationship between the parties. Certainly the decision affords a defendant some formidable language with which to bedevil his adversary and to induce the average trial judge to think twice before he awards an injunction.

West had been employed by Aetna Building Maintenance Co. for some three years as salesman and supervisor in Aetna’s business of janitorial maintenance service when he resigned to go into business for himself. He told three of the establishments which he had been serving for Aetna that he was in business for his own account, one before he left Aetna. He called on one of these firms three times without invitation. He carried forms of proposed contracts practically identical with those used by Aetna. At trial West admitted he was informed of the service requirements of Aetna’s customers but denied that he knew the cost of doing their work. When he

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75 86 Cal. App. 2d 434, 194 P.2d 715 (1948). Plaintiff had been furnishing box lunches to workers at an industrial plant where special permission was required to enter the premises. Defendants, former employees of plaintiff servicing this plant, started their own business, got permission to enter the plant and sell box lunches. Management cancelled plaintiff’s privilege of entry. There was evidence other food vendors had been admitted prior to plaintiff’s term of service and that management and consumers were already dissatisfied with plaintiff’s lunches. Nonsuit affirmed on ground no trade secret or confidential information involved, no unfair competition, no fiduciary relation, no “route case.” The court emphasized plaintiff’s dependency on continuation of management permission for continuation of its right to have contact with the actual customers; and “The mere fact that the establishment of its business required effort and expense does not of itself entitle the employer to the shield of legal monopoly.” Comment: a correct result consistent with previous California decisions, although easily distinguishable from all of them on the facts.

76 107 Cal. App. 2d 322, 237 P.2d 309 (1951). When defendants went into business for themselves they had some of plaintiff’s old blue prints in their possession; but there was nothing secret about the construction of plaintiff’s towers and one defendant had erected them so often he was able to do so without recourse to drawings. Plaintiff failed to prove defendants guilty of any fraud or chicanery in their course of conduct.

77 Id. at 327, 237 P.2d at 312.
quit, he gave back the office records but not personal memoranda he had maintained. Aetna claimed that West’s knowledge of how the company estimated the cost of a job was valuable, confidential information; West testified he had already had 25 years experience as a janitor before joining Aetna. The evidence indicated (according to the report of the case) that contracts for maintenance were cancellable on 30 to 60 days notice, cancellation generally resulting from customer displeasure with the service, and that Aetna, and similar companies spent time and money to maintain good will.

While Aetna had obtained from West, at the outset of his employment, a written agreement expected to discourage competition by an ex-employee, the contract proved too ambiguous to be enforceable and Aetna had to rely on contentions of unfair competition. The trial court gave an injunction and damages. The supreme court, with two justices dissenting, reversed the judgment.

The majority of the court disagreed with the trial court’s findings that West had solicited Aetna’s patrons and that he was using what could properly be considered a trade secret.

The dissenting opinion took the view there was ample evidence that West had engaged in solicitation, and that he had gone beyond the conduct sanctioned in Continental Car-Na-Var Corp. v. Moseley (where defendants had sent out form letters). The minority of the court also believed that the evidence showed a type of business relationship likely to continue with the one concern; a business where the personal contact and knowledge of customers’ requirements was valuable and where defendant’s knowledge of plaintiff’s methods and the actual cost of the jobs he later solicited gave him an unfair advantage. In the opinion of the dissenting justices, the case was governed by Dairy Dale Co. v. Azevedo and Scavengers P. Ass’n v. Serv-U. Garbage Co.

Implications of the Aetna Decision

From what appears in the report, one is tempted to feel that the Supreme Court re-tried Aetna Bldg. Maintenance Co. v. West. The judgment could have been affirmed, on the premises and authorities set forth in the dissenting opinion, without serious question. In disallowing the injunction the majority somewhat extended the liberality of previous California decisions defining the restrictions on competition by a former employee. In the matter of what constitutes solicitation, for instance, the court apparently approved a degree of freedom beyond that sanctioned in either the Williams or the Car-Na-Var case, and far beyond the activity condemned in George v. Burdusis (where defendant had gone around telling his former employer’s customers he would appreciate their business). And if the court’s comment that “There is no evidence whatever of any suggestion to an Aetna customer that it cancel Aetna’s contract and give him the business,”

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78 Theodore v. Williams, supra note 12.
79 Majority opinion, paragraph 1, supra note 74 at 209, 236 P.2d at 14.
plies that the former employee must go to this extent before his conduct amounts to solicitation, he should have no legal difficulty in wooing the clientele of his former employer if he has a dram of ingenuity and a semblance of discretion. With reference to the court’s statement that “Equity 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,” it seems judicious to keep in mind the distinction between receiving business not yet solicited and receiving that which has been. Clearly there is no wrong in the former; but to allow the defendant to receive what he has improperly solicited in the first instance would appear to consolidate a wrong already set in motion.

Another significant aspect of the Aetna decision is that it extended a doctrine previously confined to the sale of a product, such as avocados, floor waxes, and box lunches, to a service, janitorial maintenance. Much had been made of the fact that the public is more concerned with the quality and price of a product than with the personality of the person selling it; that such factors are so important in making the sale that no assurance of future sales exists unless the salesman can satisfy the customer his merchandise is better, cheaper or more salable than that of his competitor. The contrast with a laundry service, for instance, was plain; and the theory that unless the customer began getting back his laundry only half clean he would presumably continue the business relationship, seemed quite reasonable. As a practical matter, however, does not a janitorial service appear far more analogous to that of a laundry route than to the sale of a product such as avocados or floor wax? Indeed, as observed in the dissenting opinion in Aetna, there was evidence that users of the janitorial service contracted for maintenance over a period of time, and that the contracts had a marketable value predicated on their prospect of renewal. Realistically, then, it is difficult to escape the conviction that in this type of business the element of personal contact and the knowledge of a customer’s peculiar requirements and even idiosyncrasies would be extremely important.

Further, “The evidence,” says the majority opinion, “shows that approximately 250,000 business establishments in Los Angeles County use janitor service. Aetna has about 200 customers.” But if knowledge of peculiar likes, fancies and other characteristics of these customers was of no consequence; if there was no likelihood of a continuing business relationship; if there was no advantage of the “friendly contact” between customer and solicitor, why did defendant West immediately seek out the establishments already cultivated by Aetna, a segment comprising only .0008 of the total market?

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80 Majority opinion, paragraph 6, supra note 1 at 210, 246 P.2d at 15.
81 Continental Car-Na-Var Corp. v. Moseley, supra note 50 at 109, 148 P.2d at 12.
82 Supra note 1 at 214; 246 P.2d at 17.
83 Id. at 207, 246 P.2d at 13.
 Apart from the effect of the precedent itself, the portion of the *Aetna* decision which the writer suggests may present a mountainous obstacle to many future plaintiffs in this type of action, particularly in retail delivery route situations, and which appears to make an important alteration in the law, is this:  

(8) The facts of this case do not justify the application of principles governing the rights of the parties in connection with retail delivery routes. Under such circumstances, as stated in *George v. Burdusis, . . .* and other decisions, to obtain relief against a former employee it must be shown:  

(1) The information was confidential and not readily accessible to competitors; (2) The former employee solicited the customers of his former employer with intent to injure him; (3) The former employee sought out certain preferred customers whose trade is particularly profitable and whose identities are not generally known to the trade; (4) The business is such that a customer will ordinarily patronize only one concern; (5) The established business relationship between the customer and the former employer would normally continue unless interfered with. (*California Intelligence Bureau v. Cunningham, . . .*)  

The list of five elements which "must be shown," it will be observed, concludes with a citation of the *California Intelligence Bureau* case. Since the opinion in that case listed five almost identical requirements, and in the same sequence, it seems evident they have thus been adopted almost verbatim by the supreme court in its *Aetna* opinion. The latter continues as follows:  

These factors are here absent. Prospective customers are commonly known to the trade or may easily be discovered through business directories or by observation. (*Avocado Sales Co. v. Wyse, . . .*) There is no evidence that West sought out preferred customers. In any event, the evidence produced by *Aetna* is to the effect that there are no preferred customers in the trade. Accounts are sold upon the open market at flat rates without regard to either their duration or profitableness. The evidence shows that the business is highly competitive and patronage depends upon efficiency of service rather than personal relationship. Contracts are of brief duration and cancellations are frequent. Under such trade conditions, equity will not enjoin the solicitation of the former employer’s customers. (*Continental Car-Na-Var Corp. v. Moseley, . . .*)  

Is it not a fair interpretation of the foregoing language that unless all five "factors" are shown, equity will decline to enjoin solicitation of the former employer’s customers, in accord with the principles expressed in *Continental Car-Na-Var*? "These factors are here absent," the *Aetna* opinion reads, and then points out the absence of three or four of them in the case before the court.

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84 *Id.* at 210-211, 246 P.2d at 15.  
85 *Supra* note 58 at 202, 188 P.2d at 306.  
86 *Supra* note 1 at 211, 246 P.2d at 15.
Possibly an implied qualification arises from the next paragraph of the opinion:

(9) Equitable protection may be invoked against the subsequent use by a former employee of knowledge of the “peculiar likes and fancies and other characteristics” of the former employer’s customers where such knowledge will aid him in securing and retaining their business. (George v. Burdulis, ...; Dairy Dale Co. v. Azevedo, ...; Pasadena Ice Co. v. Reeder, ...). This rule applies where friendly contact with customers is important to solicitors, a circumstance typical of the so-called “trade route” cases. It has also been applied to situations involving a knowledge of the customer’s desire for specialized information, his preference for certain products, and his buying habits. (California Intelligence Bureau v. Cunningham, ...; Wallich v. Koren, ...). However, where, as here, superiority of product or service, rather than personal relationships or a secret specialty, is the basis for patronage, a knowledge of the customer’s requirements is not sufficient reason for an injunction. (Continental Car-Na-Var Corp. v. Moseley, ...; DeLuxe Box Lunch & Catering Co. v. Black, ...). Under circumstances of open competition, such knowledge is readily available to all in the trade.

The court thus reiterates the rule, inter alia, that subsequent use by a former employee of knowledge of the peculiar likes and fancies and other characteristics of the former employer’s customers will be enjoined where such knowledge will aid him in securing and retaining their business, as where friendly contact between solicitor and customer is important, “a circumstance,” notes the court, “typical of the so-called ‘route’ cases.” But the court had just said (in Paragraph 8) “in connection with retail delivery routes,” that five other factors need be shown to obtain relief against the former employee. How, then, does one reconcile this part of Paragraph 9 with that of Paragraph 8?

The rule, adds the court in Paragraph 9, “has also been applied to situations involving a knowledge of the customer’s desire for specialized information, his preference for certain products, and his buying habits (citing California Intelligence Bureau and Wallich v. Koren). Wallich, it will be recalled, was the case of the first-aid supply service—perhaps not a typical trade route, but very close to it. Does the supreme court mean that this circumstance (knowledge of customer’s preference and his buying habits) will alone suffice for an injunction; or does it mean it will suffice provided all the other factors are likewise present?

Needed—A Clarification

Suppose it has been proved that defendant, former employee, has been (1) using confidential information not readily accessible to competitors or plaintiff and (2) soliciting plaintiff’s customers with intent to injure him. Should an injunction be granted? Citing Aetna and California Intelligence Bureau, defendant argues that there is no proof whatsoever of three of the

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requirements those decisions held were necessary, to-wit, seeking out preferred customers; existence of established relationship which would normally continue unless interfered with; and that the business is such a customer will ordinarily patronize only one concern. Plaintiff then refers to the portion of the Aetna opinion concerning equitable protection of knowledge of peculiar likes and fancies and other characteristics of customers, their buying habits, etc., and points to evidence of these elements before the court. What is the answer?

Perhaps that is what makes a lawsuit; but it also may be said that the present state of the law leaves the trial court in a position of uncertainty, and will encourage appeals.

The simple solution would be for the supreme court to clarify both California Intelligence and Aetna by indicating that there should have been an “or” before the fifth factor listed in Paragraph 8 of the Aetna opinion. This, it is submitted, will make the statement therein contained consistent with other parts of the opinion, and with previous decisions of the supreme court and the district courts of appeal.

The Scope of the Injunction Against a Former Employee

Assuming a case made for injunctive relief against the former employee, how far can the injunction go? With respect to duration, the California courts have ostensibly made the restraint perpetual in that no limitation as to time is expressed in the judgment. Thus far the losing parties do not appear to have retained a sufficient interest in the patrons barred to them to fight for a necessarily remote expiration date, nor to have the stomach for the contempt proceedings which might reward them if they resumed activities on the claim the court did not intend the restraint to last forever.

In Fidelity Co. v. Federal Co.88 the supreme court, in considering the provisions of an injunction typically unlimited as to duration, did volunteer the following: “We do not understand the decree means to forever enjoin the defendants from soliciting business from persons who were the former patrons of plaintiff, but merely enjoins them from taking advantage of any secret information the defendants, as former employees, may have gained by reason of their employment. This injunction applies to the solicitation of persons with whom negotiations with plaintiff were pending or with prospective patrons specifically identified at the time defendants left the employ of plaintiff.” But the Fidelity case arose under curious and unusual circumstances.

The other features of an injunction against this type of unfair competition have been well defined:

Solicitation. This is usually the primary and minimum relief granted. In the leading case of Empire Steam Laundry v. Lozier, defendants were perpetually enjoined from soliciting work from any of the persons who were on a certain date customers of plaintiff along the route assigned to defendant while he was in the employment of plaintiff, with a designation

88 Supra note 62.
of the route. A simple reference to all of plaintiff’s customers on a certain
date might be satisfactory where there is a standard as explicit as a route
list; but later decisions wisely particularized the restriction by confining
it to the customers with whom defendant had become acquainted, or whose
identity he had learned as a result of his employment with the plaintiff.
The phraseology of the ban on solicitation is, of course, detailed and should
be carefully considered.

Receiving. Often an injunction against mere solicitation would be worth-
less; the defendant may have completed his canvass of plaintiff’s patrons.
While there is authority for prohibition against the receiving of trade from
any of the customers solicitation of whom has been banned, the later and
doubtless better, practice has been to forbid the receiving of business only
from those customers who have already been wrongfully solicited.

Accepting. The injunction may prohibit the acceptance of trade from
customers who have been solicited by defendant, when such solicitation
was improper.

Supplying. The defendant may be prohibited from supplying any of
plaintiff’s customers wrongfully solicited.

Selling. The injunction may include selling to any of the persons who
were customers of plaintiff served by defendant while in the employ of
plaintiff.

Manufacturing. Defendant may be enjoined from manufacturing (or
selling) the product based on plaintiff’s trade secret.

Inducing. It seems common practice to include a restriction against
“inducing” plaintiff’s customers to withdraw their trade from him and to
give it to defendant.

Imparting names, etc. The imparting or revealing of identity, names or
addresses of customers may be forbidden to defendant.

Entering into or executing a future contract. In Fidelity Co. v. Federal
Co., defendants were enjoined from entering into, executing or carrying
out any future contract for appraisal service with patrons with whom de-
fendants had been conducting business on behalf of plaintiff prior to their
resignation, and which negotiations were then uncompleted, including any
person known to defendants to have been solicited on behalf of plaintiff,
unless such patron, existing or potential, should voluntarily offer his busi-
ness to defendants.

80 Supra note 7.
81 E.g., Scavengers P. Ass’n v. Serv-U. Garbage Co., supra note 32; New Method Laundry
Co. v. MacCann, supra note 2.
82 George v. Burdulys, supra note 13.
83 Golden State Milk Prod. Co. v. Brown, 217 Cal. 570, 20 P.2d 657 (1933); Pasadena
Ice Co. v. Reeder, supra note 19.
84 Riess v. Sanford, supra note 42; Holley v. Hunt, supra note 39.
85 As was done in Wallich v. Koren, supra note 55; and in New Method Laundry Co. v.
MacCann, supra note 2.
86 California Intelligence Bureau v. Cunningham, supra note 58; Wallich v. Koren, supra
note 55; Scavengers P. Ass’n v. Serv-U. Garbage Co., supra note 32; Fidelity Co. v. Federal
Co., supra note 62.
Imitating. The imitation of plaintiff's name and news format was forbidden in Barnes v. Cahill. 97

Using information. Use of plaintiff's confidential information by defendant may be prohibited. 98

The new employer. The injunction may run against defendant's new employer as well. 99 It may be prudent to provide for any such person, firm or company even though defendant has not yet entered the employ of someone else; and should he do so, to take immediate steps to put such employer or associates on notice as to the terms of the injunction. Obviously provision should be made for agents, employees, etc., of the defendant.

Conclusions

The trend of California decisions, culminating in the West case, has manifestly been in the direction of a more liberal view towards competition by the former employee. Certainly he now has more precedent in his favor than he had prior to 1944. While the portion of the West opinion which the writer believes to contain a misleading summation may cause difficulties in the trial court and possibly in the district courts of appeal, in time this inadvertence will doubtless be rectified and the pattern of principle once against relatively clear and consistent. Even apart from this flaw in West, however, it is well to remember that the decision itself extends the latitude previously allowed the ex-employee. And yet there are enough California decisions condemning solicitation under specified circumstances, that freedom to compete with the former employer is still subject to some definite equitable bounds.

Any attempt to generalize the conditions under which an injunction against solicitation, etc., will be granted would probably be imperfect. Perhaps the sine qua non suggested most often by the appellate courts of California has been the presence of a trade secret or trust. But malicious or otherwise reprehensible conduct of the departed employee, directed to the injury of his former employer, may suffice in lieu of either of these elements. Next to an incontrovertible trade secret, the classic trade route still appears to embody the surest claim for protection. At the other end, the minimum likelihood of restraint exists where the ex-employee has deported himself with common decency and is engaged in selling a product or service, public acceptance of which depends almost entirely on the price or superiority of that product or service as compared with what is being offered elsewhere on the market, and not upon the friendly contact or relationship cultivated by the salesman while working for plaintiff. Few people, for instance, would continue buying poor avocados, or an overpriced floor wax, or a revolting box lunch, just because the merchandise was being offered by a sales repre-
sentative of unusual personal charm, who had been con...g around for a long time.

In the absence, then, of an express contract against competition (still an effective precaution where possible)\textsuperscript{100} and in the absence of reprehensible trade practices, the key question may be this: is the former employee exploiting confidential information or an established relationship with the old customers either of which he acquired during the course of his former employment,\textsuperscript{101} and which is the principal asset in the sale of the particular product or service? If so, he may hold an unfair advantage in competing with the employer whose investment enabled him to gain this decisive edge. And if the former employee has been guilty of a breach of express contract or of conduct inherently repugnant to equity, the case is somewhat simpler.

\textsuperscript{100} As in Matzen v. Horwitz, 102 Cal. App. 2d 884, 228 P.2d 841 (1951), where there was an express contract regulating the rights of the parties in a medical practice. And see Wallich v. Koren, \textit{supra} note 55.

\textsuperscript{101} \textsc{Cal. Lab. Code}, \S 2860, reads as follows: "Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment."