

## One Minute Memo™



### Georgia Court of Appeals Rules that Information on an Electronic Organizer Can Constitute a Trade Secret

On March 28, 2007, the Georgia Court of Appeals held that customer contact information retained in an electronic organizer may constitute a trade secret under Georgia's Uniform Trade Secrets Act. The Court also confirmed that a separate employment agreement executed as part of a sale of a business is subject to strict scrutiny by Georgia courts and will not be blue-penciled.

In *Hilb, Rogal & Hamilton Co. of Atlanta Inc. v. Holley*, Hugh Holley sold his business to Hilb, Rogal & Hamilton ("HRH"). As part of the sale, and on the very same day, Holley executed an "Agreement of Merger" contract as well as an "Employment Agreement and Covenant Not To Compete." In both agreements, Holley agreed not to solicit customers of HRH should he leave his employment with HRH.

Several years later, Holley resigned from HRH and took a position with one of HRH's competitors. After resigning, Holley used a personal electronic organizer that contained HRH's customer information to contact his HRH customers and to communicate that he was moving to a competitor. HRH subsequently brought a number of claims against Holley, including for breach of his restrictive covenants and misappropriation of trade secrets.

In addressing HRH's claims, the Court of Appeals made two particularly notable rulings. First, it held that the client contact information contained in a personal electronic organizer (which could include a PDA, Blackberry, Palm, or even a cell phone) may constitute a tangible customer list and therefore be protected by an employer as a trade secret under Georgia law. Even though the electronic organizer itself did not belong to HRH (it had been a gift from employees), the underlying customer data contained in the organizer did constitute a trade secret and thus could be misappropriated by use.

Second, the Court reiterated that restrictive covenants contained in an employment agreement signed at the same time as a sale of business agreement, but in a different document, are still subject to strict scrutiny. Under the strict scrutiny standard of review, courts will not re-write the parties' agreement. If there is a flaw, it is fatal. To the contrary, if the Court of Appeals had decided that the employment agreement should be treated as part of a sale of business agreement, then the clause would have been subject to lesser scrutiny. Moreover, under those circumstances, the Court can re-write any otherwise unenforceable provisions to make them enforceable. In this case, because the employment agreement was in a separate document, it constituted a separate agreement subject to strict scrutiny.

### *Practical Advice*

The *Holley* case highlights two important pointers for employers to consider in protecting their confidential information and trade secrets. First, employers should pay attention to customer contact information on departing employees' cell phones, Blackberries, Palm Pilots, and PDAs. Most employers know to ask departing employees to return all company property, such as manuals, internal reports, and tangible customer lists, but employers also should require employees to delete customer contact information from their personal communication and data devices before leaving. Indeed, it is becoming more common, cost-effective, and secure, for the employer to provide a cell phone or electronic organizer that clearly is company property and must be returned at the end of employment. As an additional note, when hiring new employees, employers also may want to check that those employees do not have contact information for the clients of their former employers on their cell phones and PDAs.

Second, for those companies engaged in mergers and acquisitions, it is extremely important to preserve their investments by ensuring that key employees of the purchased businesses agree not to compete and to not solicit customers for a specified period of time following the sale. The key employees should make these agreements in the body of a sale-of-business agreement rather than in separate employment agreements. Based on the reasoning of the Court of Appeals in *Holley*, this step increases the likelihood that a Georgia court will enforce the covenant and sustain more significant restrictions on post-employment activity.

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