

QWarterly Chronicles

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You Be the Judge

ePassage entered into an agreement to sell all of its assets to SMS. As a part of the sale, two agreements were executed - a purchase agreement and a consulting agreement. The consulting agreement contained two nonsolicitation promises. One prohibited ePassage from soliciting SMS's employees for one year after termination of the consulting relationship. The other precluded ePassage from soliciting SMS's customers for the same period.

SMS sued ePassage for breach of the nonsolicitation agreements and asked the court to issue an order precluding ePassage from soliciting SMS's customers and employees. The court issued an order granting the relief requested by SMS. ePassage appealed.

In California, public policy favors the right to pursue the occupation of one's choice and this policy is codified in Business and Professions Code §16600. However, a noncompetition provision will be enforced if it is connected to the sale of the goodwill of a

business. The purpose of this exception to the general prohibition against noncompetition provisions is to protect the benefit of the bargain. In other words, the legislature in Business and Professions Code §16601 recognized the unfairness of allowing the seller of the business assets to reap the benefits of the sale and to then turn around and reduce the value of what was sold by enticing the seller's former customers and/or employees away from the buyer.



Under California law, was the order preventing ePassage from soliciting the customers and employees of SMS correct? Should the buyer of a business be able to protect the value of its purchase through an agreement that prevents the seller from competing through its efforts to obtain business from the buyer's customers? Should the seller be able to hire away from the buyer the employees whom the seller had previously employed? How did the appellate court rule?

Please see "Result" on page 6

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Getting To Know All About You

My financially successful girlfriend recently entered the internet dating arena. I was concerned for her, for all of those problems we all fear when people release their personal information to unknown persons surfing the internet. She told me not to worry as she was only posting her first name and telephone number. To demonstrate her exposure, I merely typed her telephone number into the internet and found her last name, the name of her business and business address (she works from home so now the person had her home address as well), an aerial view of her home, the price and date she purchased her home, the current value of her and the other homes in her neighborhood, her prior husband's name and address and the value of his house, and more upsetting, the court file on her divorce and property settlement. This took me about five minutes and was available for free on the internet.

Like or not, from a personal, business or litigation prospective the internet has a wealth of information that can be used to make decisions. Information is power. Whether evaluating a prospective spouse, business partner, or merely confirming

facts supplied to you to evaluate a business proposal, the internet is a useful tool. Irrespective of one's motives, the information you locate can assist in the decision making process. While there are many expensive, proprietary services to which our firm has access for evaluation of a particular business, party, or litigant, there are a number of free, web pages that one can individually use that I would like to share with you.

Your search depends on what type of information you are seeking, and your purpose. You need the basics - a name and an address and/or county area

I merely typed her telephone number into the internet and found her last name, the name of her business and business address, an aerial view of her home, her prior husband's name, and the court file on her divorce and property settlement.

you wish to search. Your inquiry may expand depending upon whether your search also involves a business entity. For Southern California, check the California Department of Corporations which has limited corporate and limited liability company information at: <http://kepler.ss.ca.gov/list.html> For Orange County, you can locate a person's business by checking the fictitious business name filing and Grantor/Grantee records at: <http://cr.ocgov.com/>

fbn/index.asp and <http://cr.ocgov.com/grantorgrantee/index.asp>. The same is true for Riverside at http://www.enetwizard.com/shop/affiliates/11467_01/pre.asp, San Bernardino at <http://acrparis.sbcounty.gov/> and San Diego at: <http://arcc.co.sandiego.ca.us/arcc/services/grantorgrantee/search.aspx>.

For an idea of real estate property values, neighborhoods and comparable sales information, try <http://www.zillow.com/> which is both an amazing and scary data base. For an aerial picture of a specific address try: <http://local.live.com> (which even showed my own car parked on the street in front of my house!).

I have often found that when a person is litigious by nature with others, they will likewise have a greater potential

to be litigious with me, and we all know how expensive it can be in defending one's self in a lawsuit. I have found it very valuable to know who has sued whom in the past, for what types of reasons, and the end result as history has a way of repeating itself. Many courts allow you to search civil court records online using merely a business or person's name. In some counties like Los Angeles, you need the court case number. Just last year, Orange County Superior

Pain and suffering are inevitable but misery is optional.

Business Privacy Law: The Protection of Your Customers' Private Information

Court made this available, and can be located along with the Civil Dockets, hearing dates, party's counsel, etc. at: <http://www.occourts.org/caseinfoapps.asp>. For Los Angeles Superior Court try <https://www.lasuperiorcourt.org/OnlineServices/CivilIndex/index.asp>. Riverside Superior Court is located at <http://www.riverside.courts.ca.gov/pubacc.htm>. San Bernardino Superior Court is at: <http://www.sbcounty.gov/courts/>. Ventura Superior Court is at: http://www.ventura.courts.ca.gov/vent_frameset_puba.htm.

For criminal court information, the online free data bases are a little archaic. You will need the person's date of birth and can access information at the same location for some of the above mentioned counties. In Riverside and Ventura, many of the documents filed with the court are imaged and available online, while in Los Angeles, you need to subscribe to the court's service to obtain hard copies of the online records filed with the court.

Each of the above pages has amazing information that requires a little effort to access but will undoubtedly assist you with what you need to evaluate people and other businesses. Oh, by the way my girlfriend? She no longer initially releases her telephone number and now first asks any new prospective date for his number!

Legislators in California are becoming more and more vigilant in their efforts to protect and secure privacy of personal information in this increasingly digital commercial era. As customers and businesses have increased their use of the internet and credit cards to transact business, the corresponding risk of security breaches, unauthorized access to private information and fraud has also increased. In an attempt to minimize this risk, several laws have been passed over the last 5 years regulating how your business in California maintains and manages private information of consumers in transactions.

When accepting payment by check, the law states that:

1. No person, firm, or business that accepts credit cards for the transaction of business shall do any of the following:

(a) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to write any personal identification information (information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number) upon

the credit card transaction form or otherwise.

(b) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to provide personal identification information which the person, firm, partnership, association, or corporation accepting the credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise.

(c) Utilize, in any credit card transaction, a credit card form which contains preprinted spaces specifically designated for filling in any personal identification information of the cardholder. (*California Civil Code section 1747.08*)

2. No person, firm, or ...business shall print more than the last five digits of the credit or debit card account number or the expiration date upon any receipt provided to the cardholder. This section shall apply only to receipts that are electronically printed and shall not apply to transactions in which the sole means of recording the person's credit or debit card number is by handwriting or by an imprint or copy of the credit or debit card. (*California Civil Code section 1747.09*)

See "Credit Card" on page 4

When someone says, “Do you want my opinion?” - it’s always a negative one.

Limited Liability Company Tax Refund Alert!

“Credit Card”

What does this mean for you? If you are a California business owner, you can play an important role in protecting consumer privacy and preventing the spread of identity theft and fraud by following a simple guide that adheres to the above laws.

When accepting payment by check, do not write down customers’ credit card information. Instead verify the customer’s identity by looking at the customer’s driver license or other picture ID to match not only the picture, but the signature as well.

When accepting payment by credit card, do not write down any personal information of the customer on any documents associated with the transaction or require them to provide any personal information as a condition to the transaction. Instead, verify the customer’s identity by looking at the customer’s driver license or other picture ID to match not only the picture, but the signature of the customer. For credit card transactions completed over the phone or the internet, it may also be a good idea to verify the customer’s identity by matching the consumer’s address and zip code.

Jeffrey G. Gillard, Esq.

Are you a Member of a limited liability company? Have you paid any California limited liability company fees beyond the \$800 minimum tax to the Franchise Tax Board in the last four tax years? If you answer “yes” to both of these questions, then you should consider filing a “protected claim” with the California Franchise Tax Board - soon!

California imposes a minimum \$800 tax on all limited liability companies for the privilege of conducting business in California. The State also imposes an additional “LLC Fee” beyond the \$800 minimum that is based upon the limited liability company’s gross sales receipts from all jurisdictions -

not just the sales that occur in California. This additional LLC Fee is generally capped out at \$11,790, based upon gross receipts of more than \$5 million.

Two recent San Francisco Superior Court cases have held that the California LLC Fee is unconstitutional. Both courts based their decision on a 1977 United States Supreme Court case, *Complete Auto Transit v. Brady*. In *Complete Auto*, the Supreme Court held that a tax levied by a state must be apportioned and limited to sales that actually occurred in that state. Both San Francisco Superior Court judges found that the LLC Fee is such a tax as addressed by the *Complete Auto* decision and as a result, violated the Due Process and Commerce Clauses of the United States Constitution because the LLC Fee does not apportion the tax to sales only occurring in California. Both San Francisco Superior Court Judges ordered the California Franchise Tax Board to refund the LLC Fees above the \$800 minimum that were paid by the taxpayers who filed the two lawsuits. Needless to say, the California Franchise Tax Board immediately appealed both cases, thus placing the order to refund the unconstitutional LLC Fees in abeyance until the appellate review is concluded.

Unfortunately, the appellate process could take a number of

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as a service to clients and friends. This publication is intended for general information and should not be relied upon for any other purpose. QWLLP encourages questions, comments, and ideas for future articles. Please call us; we’d love to hear from you.

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Always remember you're unique, just like everyone else.

Primerus

We are proud to be a member of the Primerus Defense Institute. The Primerus Defense Institute (PDI) is a collaborative endeavor engaging Primerus defense attorneys and corporate defense representatives for the purpose of lowering business litigation costs and reducing exposure to liability. Participating corporate clients are leaders in their respective industries. Participating defense lawyers meet the high standards of excellence required for membership in the International Society of Primerus Law Firms.

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The Primerus Defense Institute is a valuable resource for corporations seeking outside counsel in distant jurisdictions. That's because the PDI alliance is a coast-to-coast network of over 600 of America's finest independent defense lawyers with expertise in nearly every aspect of corporate defense litigation. The Primerus Defense Institute makes it easy to find highly skilled, seasoned litigation counsel across the country.

SPOTLIGHT



WealthCounsel Advisors

WealthCounsel Advisors Forum, LLC (the Advisors Forum). We at QW have always worked closely with our clients' other wealth planning professionals because we believe doing so is the only way we can provide the best and most comprehensive planning for our clients. The advisors forum helps us to help you by teaching strategies and processes that help us work even more effectively with other advisors, including CPAs, financial planners, and insurance professionals. This affiliation helps to ensure that we continue to provide you with the comprehensive estate, financial, and business planning services available. Please contact Rick Quinlivan or Danny Wexler for more information.

years to resolve the issue of the constitutionality of the LLC Fees. During that time, the four-year statute of limitations for requesting a refund of the LLC Fees from the Franchise Tax Board would continue to run and many taxpayers would lose their ability to file claims. But take heart, the California Franchise Tax Board has implemented a claim filing process that will protect claims for any LLC Fees paid above the \$800 minimum tax regardless of how long the appellate process takes. There are a number of requirements to enable a taxpayer to file a "protected claim", but the process is relatively simple. We would be happy to provide you with information regarding the "protected claim" filing process and to assist you in filing a claim, or to assist you in any other business related matters. Please give us a call at 714-241-1919.

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Office Hours:

Our normal office hours are 8:30 a.m. to 5:30 p.m. Monday through Friday, Saturday by appointment only.

Holiday Closures:

Wednesday, July 4th
Monday, September 3rd

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QWLLP QUARTERLY CHRONICLES

About Quinlivan Wexler LLP

Patrick “Rick” C. Quinlivan and **Daniel “Danny” J. Wexler** bring almost 50 years of combined legal experience to Quinlivan Wexler LLP. With careful selection and addition of talented professionals to the firm, QW has grown over the years to the point where we now boast of many specialty areas to suit the needs of our clients.

Located near South Coast Plaza, QW engages in a general civil practice that includes civil litigation, business and corporate law, estate planning, probate, conservatorships and elder law.

The breadth of our litigation experience assures our clients’ representation by lawyers who fully understand the techniques, not only of trial advocacy, but of negotiations and persuasion as well. So, while being very meticulous about doing our homework, planning ahead, and writing precise contracts to prevent litigation, we are also fully prepared to litigate when it is in the best interests of our clients.

“Result”

The ruling in this case illustrates the importance of how broad or narrow the nonsolicitation agreement is drafted. In this instance, the provisions of the consulting agreement were broad enough to prevent the seller from soliciting customers and employees who had not been the customers or employees of the seller. The court found that the provision was too broad and went

beyond what was appropriate to protect the value of the assets that were sold. Even though SMS conceded that the nonsolicitation provision should not restrict the seller from soliciting the customers and employees of the buyer, the court refused to modify the agreement by narrowing the scope of the provisions in the agreement. As a result, the buyer lost the entire benefit of the nonsolicitation provisions.

The obvious lesson here is to make sure the language of a nonsolicitation provision within a stock or asset sale is narrowly drafted so as to be enforceable under Business and Professions Code §16601. If the restriction is not limited to what is necessary to protect the value of what was purchased, it may not be enforced.

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