BEING A GOOD SAMARITAN WITH YOUR COMPETITOR'S CUSTOMERS

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For decades, textile rental service companies have prided themselves in aggressively competing with one another. TRSA members are well aware of the "Antitrust Do's and Don'ts" and know that they cannot allocate customers. They know that they cannot meet with a competitor and agree that they will not service the competitor's accounts. They know that if the competitor has a valid service contract with a customer; they cannot induce that customer to breach the contract but they certainly can offer to provide service at the expiration of the contract term.

At the same time, members of this industry pride themselves in helping a competitor in a time of emergency. If a plant has a fire, a flood, or loses power, it is common for a neighboring competitor to come in and agree to service the damaged plant's accounts until appropriate repairs can be made. As demonstrated by the industry's efforts in the Katrina disaster, members of the textile rental industry will step in and help service a competitor's customers in the case of a disaster. This type of cooperation only enhances the reputation of our industry and provides customers with an assurance that even in the event of some catastrophe, their textile rental services supplier will take steps to ensure that the customer's needs are met.

In most instances where there is a flood, a fire, or an equipment breakdown in the plant, the trucks operated by the damaged company will still be in serviceable condition. The operator of the damaged plant will contact neighboring plants and arrange to have the customer's work processed in the neighboring plants. From the customer's standpoint, the same trucks will deliver the same products and the customer will be invoiced in the same manner as before the plant was damaged. If the customer has special goods that have been placed in service and the plant's inventory of such goods have been damaged, the customer may have to use alternate goods for a short period of time until the special inventory can be replaced. However, most customers are understanding in such circumstances and suppliers will act quickly to replace the damaged inventory.

From a financial standpoint, the operator of the damaged plant will enter into a contract with its competitors to pay for the processing of the goods that were previously processed in the damaged facility. Hopefully, the damage can be repaired quickly and the customers will not experience any noticeable change in service.

But what happens in the event that not only is the plant damaged but the trucks that operate from the plant also have been put out of service. In some cases, the operator of the damaged plant will be able to lease trucks and continue to serve the customer with the leased vehicles. However, in other cases, it may be necessary for the "friendly" competitor to service the

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damaged plant's account with its own trucks and its own route personnel. In such a case, could the competitor enter into an agreement with the operator of the damaged plant that once the damaged plant is operational, it would agree not to service the accounts from the damaged plant that it serviced while the plant was not operational? We believe that such an agreement would be enforceable.

Most courts look at covenants not to compete as a necessary evil. Public policy promotes free enterprise and open competition. A covenant not to compete restricts competition. However, covenants not to compete are often necessary in order to protect the parties to a transaction. If Company A buys the assets and good will of Company B, it is reasonable to require the principals of Company B to agree not to compete for a reasonable amount of time and within a reasonable geographic area, regarding specific products or services covered by the buy/sell agreement. The covenant not to compete is necessary in order to protect the value of what the buyer has purchased.

On a similar theory, the courts have interpreted the antitrust laws as permitting reasonable restraints on trade. The courts have said that every contract binds the parties to certain obligations and thus forms some type of a restraint on trade. However, it would not make sense to outlaw all contracts as antitrust violations. Therefore except for the most pernicious anticompetitive behavior, the antitrust laws view agreements among competitors under the rule of reason.

In this context, let us look at the situation where textile rental Company A has suffered a major disaster and its plant and most of its trucks have been destroyed. Company A enters into a contract with its competitor, Company B. Company B has a plant located approximately 50 miles from the damaged plant. Company B is willing to put on a second shift to service Company A's accounts. Company B has trucks that can be used to service the accounts and is willing to provide the full service necessary until Company A gets back in business.

Company A will pay Company B for processing textiles and for the delivery service. Can Company A require Company B to agree to a covenant not to compete?

We think that under the circumstances set out above, Company A could require Company B to agree not to service any of the accounts of Company A assigned to it while Company A's plant is being repaired, for a period of six months after Company A was able to resume service. The covenant not to compete would be limited to customers actually serviced by Company B. The covenant not to compete would be limited in time to a six-month period. The covenant not to compete would be limited to a specific trade area.

Under the antitrust laws, we think that this type of an agreement would be reasonable.

We then must look at the law with regard to the enforceability of covenants not to compete. Such law varies from state to state. In most states, it appears that such a covenant would be enforceable. If you are considering entering into such a covenant in order to have your customers serviced while your plant is down, you should have your attorney check the laws in the state in which you operate. Hopefully, your attorney will report that a limited covenant not to compete will deemed reasonable by the courts in your state.

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