**TA 193** **October 29, 2001**

**SUBJECT:** **Louisiana Supreme Court Rules on Noncompete Agreements**

**BACKGROUND:** Insurance agencies and brokers, like many other sales organizations, often include a noncompete agreement in their employment contracts.

Louisiana first enacted statutes addressing noncompete agreements in 1934. The current statute, 23:921, has been amended numerous times over the years. In addition, Louisiana courts have offered conflicting interpretations on the scope and enforceability of noncompete agreements.

In an attempt to resolve prior interpretive differences between various appellate circuits, the Louisiana Supreme Court recently made a definitive ruling on noncompete agreements, in the case of *SWAT 24 Shreveport-Bossier, Inc., v. Robbie Bond.*

**MAIN POINTS:** To understand the context of the issues raised in the *SWAT 24 v. Bond* case, here are key provisions of the current Louisiana statute, 23:921:

*23:921. Restraint of business prohibited;*

A. *Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade or business of any kind, except as provided in this Section, shall be null and void.*

*B.* *Any person, including a corporation and the individual shareholders or such corporation, who sells the goodwill of a business may agree with the buyer that the seller will refrain from carrying on or engaging in a business similar to the business being sold or from soliciting customers of the business being sold within a specified parish or parishes, or municipality or municipalities, or parts thereof, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, not to exceed a period of two years from the date of the sale.*

*C.* *Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment. An independent contractor, whose work is performed pursuant to a written contract, may enter into an agreement to refrain from carrying on or engaging in a business similar to the business of the person with whom the independent contractor has contracted, on the same basis as if the independent contractor were an employee, for a period not to*

*exceed two years from the date of the last work performed under written contract.*

Of particular importance is the first subsection, 23:921.A. This sets the basic framework for the statute, nullifying any contract or agreement that restricts a person's ability to work or earn a living, except as allowed in Subparagraphs B. and C. As the Supreme Court noted in its opinion, "Louisiana has long had a strong public policy disfavoring noncompetition agreements between employers and employees. Thus, the longstanding public policy of Louisiana has been to prohibit or severely restrict such agreements." This philosophy was present in the initial Louisiana statute passed in 1934, and even in court cases predating the statute.

As to what exceptions are allowed in 23:921.C., numerous court cases arose over the years, with varying results. While business owners sought to protect their interests when employees left and joined a competitor, the courts have been forced to balance the employer's rights with an employee's right to work and earn a living.

The key language in 23:921.C. that has been the subject of much litigation and disagreement is the following phrase, *"Any person…may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer…"*

Two interpretations are possible. First, the employee could agree under an employment contract not to engage in a similar type of business (for two years), whether as an employee of another, or in his own business. The other interpretation is that the employee is only barred from starting his own business of a similar type (for two years), but is not prohibited from employment by another.

It is this critical interpretive difference, reached by different appellate circuits, which brought the *SWAT 24 v. Bond* case to the Louisiana Supreme Court.

In its ruling, the Supreme Court decided that the latter interpretation was correct, and that the only exception allowed in a noncompete agreement is the prohibition against the departing employee starting his own business of a type similar to that of his former employer. Thus, a noncompete agreement that bars the departing employee from mere employment in a similar type of business is null and void, as stipulated in 23:921.A. In its decision, the Supreme Court said, "An agreement that restrains an employee from carrying on or engaging in a competing business as the employee of another does not fall within the exception provided for by LRS 23:921.A., and, instead, would be null and void pursuant to Subsection A."

However, while this decision severely restricts traditional noncompetes, 23:921.C. does recognize as a proper inclusion in employment contracts the prohibition of "*soliciting customers of the employer…*" Often referred to as "nonpiracy" or "nonsolicitation" agreements, these are less onerous than noncompete agreements. These agreements prohibit the departing employee from taking customer lists, expiration lists, and similar information with them to another job and "stealing" the customers from their former employer. Yet there is no attempt to bar the departing employee from future employment, which was the case in *SWAT 24 v. Bond,* and is common in traditional noncompete agreements.

While nonsolicitation was not an issued raised by the parties in the *SWAT 24 v. Bond* case, the Supreme Court did address the matter in its decision, apparently since 23:921.C. contains a reference to such agreements. In upholding the validity of nonsolicitation agreements, the Supreme Court said, "Thus, an employee whose noncompetition agreement comports with the requirements of La. R.S. 23:921.C. may be validly restricted from carrying on or engaging in his own competing business and from soliciting customers of the employer for his own competing business or the competing business of another."

In summary, noncompete agreements are valid and enforceable only against an employee who leaves and starts his own business similar to that of his former employer. However, nonsolicitation or nonpiracy agreements appear to be valid, so long as they conform to the restrictions of 23:921.C.

IIAL has discussed this court decision with the Louisiana Association of Business and Industry (LABI). The business community will most likely try to clarify or strengthen these statutes in future legislative sessions.

**NECESSARY ACTION:** This Technical Advisory should be reviewed by appropriate management staff, in consultation with agency's legal counsel.