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the ultimate facts of execution of the policy, loss within its coverage while the policy was in force, and general performance of all conditions. This, if uncontested, would be sufficient to entitle insured to payment under the policy and the right to maintain the action. The insurer, should he wish to contest liability, would then have the burden of pleading specifically any matter by reason of which nonliability is asserted. This would be true whether the matter relates to provisions denominated or interpreted as "conditions," "exclusions" or "exceptions" of whatever kind. Once specifically raised by the insurer, the insured would have the burden of proving facts which show that his recovery should not be barred by the allegations of the insurer, *i.e.*, facts showing specific compliance with the conditions raised by the insurer.⁸⁵

CARL A. BARRINGTON, JR.

Master and Servant—Unfair Use of Customer Lists and Knowledge

In *Henley Paper Co. v. McAllister*,¹ the plaintiff company sought to enjoin a former salesman from working for a competitor, relying upon an employment contract which contained a covenant not to compete. The plaintiff was engaged in a highly competitive business selling paper products and had hired the defendant as a salesman. While working for the plaintiff, the defendant had compiled at his own expense a record of sales and subsequently terminated his service with the plaintiff to work for a competitor, using the record of sales to solicit business for his new employer. The North Carolina Supreme Court affirmed the trial court's decision that the provisions of the covenant not to compete were unreasonable as to time and geography and that the covenant lacked consideration. The view

has the burden of proof to deny it. *Lee v. Chamblee*, 223 N.C. 146, 25 S.E.2d 433 (1943); see also 1 *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE* § 372 (2d ed. 1956).

⁸⁵ Under the rule submitted, which is quite similar to the New York rule, there would be no problem with the definitional decision, as there would be no categorizing of conditions as precedent or subsequent. Nor would the insured, when his allegation of performance of all conditions precedent is met by a general denial, be forced (as he presently is) to carry the burden of proof blindly as to which conditions he must prove to satisfy the burden of proof. The insurer is in a better position to know the policy and exactly which facts or occurrences act as a bar to his liability. The more equitable rule, therefore, would be to place the burden of pleading these facts or occurrences upon the insurer, and by so doing we enable the insured to know exactly what he must prove to secure recovery.

¹ 253 N.C. 529, 117 S.E.2d 431 (1960).

taken in this case seems to be consistent with prior North Carolina decisions² on restrictive covenants which were deemed to be unreasonable.

Although the point was not expressly raised in the principal case, the question arises whether a restraining order to prevent the defendant from soliciting the plaintiff's customers while working for a competitor would have been proper in the absence of a covenant not to compete.³ This question does not appear to have been decided in North Carolina, but other jurisdictions have protected the former employer in this situation.⁴

Jurisdictions which have protected the former employer from competitive solicitation by a former employee usually require a three-fold showing by the plaintiff.⁵ First, he must show that knowledge or a list of the names, addresses and requirements of customers constitute a trade secret. Second, that the defendant, while in a

² *Noe v. McDevitt*, 228 N.C. 242, 45 S.E.2d 121 (1947); *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1943). See generally Note, *Covenants Not To Compete*, 38 N.C.L. REV. 395 (1960).

³ The scope of this note is confined solely to the fact situation where an employee, while working for an employer, compiles a record of sales and subsequently terminates his service with the employer to work for a competitor or to start his own business, using the record of sales to solicit business and to compete with the former employer. The question is not whether the employer can prevent the employee from competing at all, but rather whether the employer can prevent the employee from engaging in certain competitive practices such as soliciting business from customers whose names or addresses he acquired while employed by the former employer.

⁴ See, e.g., *George v. Burdusis*, 21 Cal. 2d 153, 130 P.2d 399 (1942); *Town & Country House & Home Serv., Inc. v. Newbery*, 3 N.Y. 2d 554, 147 N.E.2d 724 (1958). In these cases, two points of view have to be considered. "The names of customers of a business concern, whose trade and patronage have been secured by years of business effort and advertising, and the expenditure of time and money, constituting a part of the good will of a business which enterprise and foresight have built up, should be . . . entitled to the same protection as the secret of compounding some article of manufacture and commerce. *Colonial Laundries, Inc. v. Henry*, 48 R.I. 332, 334, 138 Atl. 47, 49 (1927); and equity will, to the greatest extent, protect the property rights of employers in their trade secrets and otherwise. *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P.2d 646 (Dist. Ct. App. 1955). But the rights and interests of the employee also have to be considered. Sound public policy encourages employees to seek better jobs from other employers and even to go into business for themselves. *Haut v. Rossbach*, 128 N.J. Eq. 77, 15 A.2d 227 (Ct. Ch. 1940), *aff'd*, 128 N.J. Eq. 478, 17 A.2d 165 (Ct. Err. & App. 1941). The employee should not be deprived of the right to pursue a lawful and gainful occupation in a field for which he is equipped. *Levine v. E. A. Johnson & Co.*, 107 Cal. App. 2d 322, 237 P.2d 309 (Dist. Ct. App. 1951).

⁵ *George v. Burdusis*, 21 Cal. 2d 153, 160, 130 P.2d 399, 403 (1942); *J. L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wash. 2d 45, 64, 113 P.2d 845, 854 (1941).

position of trust and confidence with his employer, acquired such knowledge or list. And third, that in violation of this trust and confidence, the defendant is using this knowledge or list to the injury and detriment of the former employer.

It is not a simple matter to determine what customer lists constitute trade secrets. Where the very continuance of a business depends upon keeping secret the names of customers,⁶ and such secret knowledge and lists are an important asset to the business,⁷ then such lists are species of property⁸ and are entitled to protection. Knowledge of customers' addresses, buying habits, requirements and preferences has been held to be confidential⁹ and a trade secret.¹⁰ But where the names of customers are readily ascertainable and are of a class known to the public in general, such as wholesale buyers who are few in number¹¹ or persons listed in public directories or trade publications,¹² knowledge or a list of these customers is not a trade secret.¹³ A list of customers of a simple artless business is not a trade secret,¹⁴ especially where the business relationship with

⁶ *George v. Burdusis*, 21 Cal. 2d 153, 130 P.2d 399 (1942).

⁷ *Brenner v. Stavinsky*, 184 Okla. 509, 511, 88 P.2d 613, 615 (1939).

⁸ *Ibid.*

⁹ *Wallich v. Koren*, 80 Cal. App. 2d 223, 181 P.2d 681 (Dist. Ct. App. 1947), holding that where the business is one of repeated purchases in preference to the products of competitors, such knowledge of these customers is "good will."

¹⁰ *George v. Burdusis*, 21 Cal. 2d 153, 160, 130 P.2d 399, 403 (1942). A list of customers is a trade secret if the owner has confidential knowledge concerning the value of such customers; *Wallich v. Koren*, *supra* note 9.

¹¹ *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P.2d 646 (Dist. Ct. App. 1955).

¹² *J. C. Millett Co. v. Park & Tilford Distillers Corp.*, 123 F. Supp. 484, 496 (N.D. Cal. 1954); *Gloria Ice Cream & Milk Co. v. Cowan*, 2 Cal. 2d 460, 464, 41 P.2d 340, 342 (1935).

¹³ *George v. Burdusis*, 21 Cal. 2d 153, 159, 130 P.2d 399, 403 (1942).

¹⁴ *Abalene Exterminating Co. v. Elges*, 137 N.J. Eq. 1, 3, 43 A.2d 165, 166 (Ct. Ch. 1945). Customers on a fuel oil delivery route are not trade secrets. *Vesuvius Fuel Oil Corp. v. Pirraglia*, 128 N.Y.S.2d 2 (Sup. Ct. 1950); *accord*, as to laundry patrons. *Fulton Grand Laundry Co. v. Johnson*, 140 Md. 359, 117 Atl. 753 (1922). However, the fact that patrons are listed in the telephone directory but are otherwise unknown to the public generally as business value does not prevent a customer list from being valuable. *George v. Burdusis*, *supra* note 13. Confidential records of policy holders' names, addresses and insurance data are trade secrets. *Hoslinger, Theis & Co. v. Holsinger*, 329 Ill. App. 460, 471, 69 N.E.2d 360, 365 (1946); *accord*, *J. L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wash. 2d 45, 113 P.2d 845 (1941). Likewise, customer lists of persons without places of business which would have been accessible to competitors only by investigation are trade secrets. *Nathan Outfitters, Inc. v. Pravder*, 191 Misc. 726, 77 N.Y.S.2d 655 (Sup. Ct. 1948). See for a contrary result concerning the names of general fire

these customers is usually short in duration and often not renewed.¹⁵

The second showing that the plaintiff must make in order to obtain relief is that the employee held a position of trust and confidence when he obtained the information to be protected.¹⁶ The plaintiff must also show that the employee has violated this trust and confidence.¹⁷ The former employee may seek the trade and business of his old employer's customers by fair methods including advertising,¹⁸ but he may not canvass old customers whose identities he learned in confidence and thereby destroy the good will of his former employer.¹⁹ A salesman is privileged to advise the trade that he has changed employment to the house of a rival employer²⁰ or that he has established his own business,²¹ as a notice of termination of employment is not considered solicitation.²² The former employee may solicit old customers to buy a new line of products which are not handled by his old employer.²³

The courts are almost unanimous in ruling, however, that a former employee cannot use written lists,²⁴ business records,²⁵ or

insurance policy holders. *Port Inv. Co. v. Oregon Mut. Fire Ins. Co.*, 163 Ore. 1, 94 P.2d 734 (1939).

¹⁵ *Aetna Bldg. Maintenance Co. v. West*, 39 Cal. 2d 198, 205, 246 P.2d 11, 16 (1952).

¹⁶ Though few cases have turned on or discussed this point at length, the relationship is always evident. The American Law Institute takes particular cognizance of this point, however: "The agent . . . has a duty to the principal . . . not to use or disclose . . . trade secrets, written lists of names, or other similar confidential matter given to him for the principal's use or acquired by the agent in violation of duty. . . ." *RESTATEMENT (Second)*, AGENCY § 396(b) (1958).

¹⁷ *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P.2d 646 (Dist. Ct. App. 1955). The former employee's duty to the principal continues even after termination of employment. *J. L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wash. 2d 45, 53, 113 P.2d 845, 854 (1941).

¹⁸ *J. L. Cooper & Co. v. Anchor Sec. Co.*, *supra* note 17.

¹⁹ *Ibid.*

²⁰ *Wallich v. Koren*, 80 Cal. App. 2d 223, 181 P.2d 682 (Dist. Ct. App. 1947).

²¹ *Aetna Bldg. Maintenance Co. v. West*, 39 Cal. 2d 198, 203, 246 P.2d 11, 14 (1952).

²² *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P.2d 646 (Dist. Ct. App. 1955).

²³ *Ibid. Accord*, where there is no evidence that the employee had a plan or scheme to injure the former employer. *Ice Delivery Co. v. Davis*, 137 Wash. 649, 243 Pac. 842 (1926).

²⁴ *Brenner v. Stavinsky* 184 Okla. 509, 510, 88 P.2d 613, 615 (1939). "It is well settled in California that after an employee who worked on a retail delivery route has left the service of his employer, his use of customer lists to solicit for another person is an unwarranted disclosure of trade secrets." *George v. Burdusis*, 21 Cal. 2d 153, 159, 130 P.2d 399, 402 (1942). A list of milk customers is confidential information and its use will be re-

route books²⁶ to competitively solicit old customers where their requirements and identities are trade secrets and the employee came by them in a position of trust. One reason that the courts will readily restrain the use of written lists is based upon the theory that the employer has a property right in written records²⁷ and if an employee retains a list, he is carrying away something more than mere experience gained in the business.²⁸

Once the identity of the customers and their requirements are classified as confidential and the employee has learned of them in confidential service, many courts say that it makes no difference that the employee retains and uses the list of customers on paper or in his head.²⁹ Most courts recognize the property rights in written records, sometimes even where the names on them are not confidential, and their language in prohibiting the use of written lists appears to be more resolute and certain when they can rely on the property theory.³⁰ However, when courts have restrained a former

strained. *Soeder v. Soeder*, 82 Ohio App. 71, 77 N.E.2d 474 (1947). It is not less confidential because a spy could discover the same. *Colonial Laundries, Inc. v. Henry*, 48 R.I. 332, 337, 138 Atl. 47, 49 (1927). The prohibition against using written records also extends to those lists and records which the employee surreptitiously copies or obtains during his employment and subsequently uses. *Brenner v. Stavinsky*, *supra*.

²⁶ *Jewel Tea Co. v. Grissom*, 66 S.D. 146, 148, 279 N.W. 544, 545 (1938).

²⁹ *Santa Monica Ice & Cold Storage Co. v. Rossier*, 42 Cal. App. 2d 467, 109 P.2d 382 (Dist. Ct. App. 1941).

²⁷ *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P.2d 646 (Dist. Ct. App. 1955).

²⁸ *Di Angeles v. Scauzillo*, 287 Mass. 291, 298, 191 N.E. 426, 429 (1934). Solicitation will be restrained even where the lists are not confidential but the employee carries out a preconceived plan to injure the plaintiff's business by unfair competition. *Gloria Ice Cream & Milk Co. v. Cowan*, 2 Cal. 2d 460, 464, 41 P.2d 340, 342 (1935). Even where a salesman's contract provides for liquidated damages for failure to return secret lists, he is not authorized to turn over these lists to a rival of his employer. *Messenger Pub. Co. v. Mokstad*, 257 Ill. App. 161 (1930). The business competitor who hires the employee will also be restrained from accepting business from customers unfairly solicited by the former employee with the use of written lists. *George Burdusis*, 21 Cal. 2d 153, 163, 130 P.2d 399, 404 (1942), adding that the "employer should also be prohibited from obtaining the benefit of such unfair practices to make the remedy effective and complete."

²⁹ *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P.2d 646 (Dist. Ct. App. 1955); *J. L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wash. 2d 45, 67, 113 P.2d 845, 855 (1941). There were no written lists in *Colonial Laundries, Inc. v. Henry*, 48 R.I. 332, 338, 138 Atl. 47, 49 (1927), but the court stated that it could not see why the employer was entitled to less protection when the names on a list were carried off in the defendant's memory. *Contra*, *American Binder Co. v. Regal & Wade Mfg. Co.*, 278 App. Div. 431, 106 N.Y.S.2d 543 (1951).

³⁰ See discussion in notes 24 and 28 *supra*.

employee from calling upon customers whom he remembers, the courts tend to strictly construe the circumstances.³¹

As previously pointed out, North Carolina has never decided whether equity will restrain a former employee from unfairly soliciting old customers in the absence of a covenant not to compete. But it should be noted that in *Kadis v. Britt*,³² the court cited with approval a portion of the *Restatement of Agency* as follows:

The agent may use general information concerning the business of the principal and the names retained in his memory, if not acquired in violation of his duty as agent. . . . Thus while the agent cannot properly use written memoranda concerning customers entrusted to him, or made by him for use in connection with the principal's business, or copies thereof . . . he is privileged to use in competition with the principal the names retained in his memory as a result with the principal and methods of doing business. . . .³³

North Carolina has approved covenants not to compete. Therefore, if the question is properly presented, it is submitted that the North Carolina court should enjoin unfair competitive solicitation by a former employee using written records in the absence of any covenant not to compete.³⁴ What limitation the court would

³¹ As outlined in *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P.2d 646 (Dist. Ct. App. 1955), the plaintiff has to show that the employee acquired the secret knowledge of the customers during his employment, that this knowledge was not generally known to competitors, that these customers were solicited with intent to injure the plaintiff's business and that these customers whose trade was particularly profitable would usually patronize only one business or concern and would continue to do so unless unfairly hindered.

³² 224 N.C. 154, 162, 29 S.E.2d 543, 548 (1944).

³³ RESTATEMENT, AGENCY § 396 (1933). The court in *Kadis v. Britt*, *supra* note 32, at 162, 29 S.E.2d at 548, also cited with approval a statement from *Peerless Pattern Co. v. Pictorial Review Co.*, 147 App. Div. 715, 717, 132 N.Y. Supp. 37, 39 (1911), where a question of dealing with customers arose but no lists were involved. The New York court stated: "All that clearly appears is that he [the former employee] undertook to use in his new employment the knowledge he had acquired in the old. This, if it involves no breach of confidence, is not unlawful; for equity has no power to compel a man who changes employers to wipe clean the slate of his memory."

³⁴ N.C. GEN. STAT. § 75-4 (1960), provides that "no contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is in writing. . . ." It is submitted that this statute should have no bearing on cases of this nature. As stated in *Colonial Laundries, Inc. v. Henry*, 48 R.I. 332, 334, 138 Atl. 47, 48 (1927), "equitable jurisdiction . . . does not depend on such an express contract. . . . Specific performance of

put on the definition of customer lists and knowledge as trade secrets is unknown. A prior confidential relationship would probably be required. If a narrow view of the dictum in the *Kadis* case is taken, it may be indicative that North Carolina would be reluctant to restrain competitive solicitation where the former employee relies upon memory alone though the door is left open where the names remembered were acquired and used in breach of trust. It should be remembered that there is substantial case authority in other jurisdictions approving the rule that lists remembered are likewise protectable.

DAVID M. CONNOR

Trusts—Rule Against Perpetuities—Class Gifts

In *Parker v. Parker*¹ a testator devised certain property to his son in trust, the rents and profits therefrom to be used for the education of the son's children in such amounts as the trustee in his discretion deemed necessary. The trustee was directed to convey the property to the grandchildren (or grandchild) or to the issue of any deceased grandchild "when" the youngest grandchild reached twenty-eight. The North Carolina Supreme Court held that the latter provision violated the Rule Against Perpetuities.

In North Carolina the Rule Against Perpetuities has been stated as follows: "No devise or grant of a future interest in property is valid unless title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest."² The effect of the

a contract in its true sense is not sought. Prevention of unfair competition is the reason for seeking equitable interference." This statute should be applicable only to express agreements between the parties, not to what the law implicitly recognizes as unfair competition. The parties can agree to reasonably limit the employee from competing if such agreement is reduced to writing and signed by the employee. But the master-servant or agency relationship found in the cases discussed does not limit the employee's right to compete, but merely the methods that he may use.

¹ 252 N.C. 399, 113 S.E.2d 899 (1960).

² *Id.* at 402, 113 S.E.2d at 902. The North Carolina court often has incorrectly stated that the interest must vest in not *less* than twenty-one years. This has not, however, affected any of the decisions. See *Finch v. Honeycutt*, 246 N.C. 91, 97 S.E.2d 478 (1957); *McPherson v. First Citizens Nat'l Bank*, 240 N.C. 1, 80 S.E.2d 386 (1954); *Fuller v. Hedgpeth*, 239 N.C. 370, 80 S.E.2d 18 (1954); *McQueen v. Branch Banking & Trust Co.*, 234 N.C. 737, 68 S.E.2d 831 (1952). The rule is properly stated in the principal case and also in *Clarke v. Clarke*, 253 N.C. 156, 116 S.E.2d 449 (1960).