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The Tangled Exodus of a Tech Executive: Lessons To Be Learned

By John Yates, Special To LTW

Editor's note: John Yates, who chairs the Technology Group of the law firm Morris, Manning & Martin, LLP, writes a weekly column for LTW.

ATLANTA - The recent departure of a high profile executive from BellSouth to join Sprint highlights several significant issues for technology executives – and their ability to be mobile.

Gary Forsee was a senior executive at BellSouth and chairman of the board of Cingular. He joined them after previously leaving a senior position at Sprint.

Recently, Forsee received an offer to rejoin Sprint as its CEO. Sprint's former CEO was ousted after becoming embroiled in a personal tax arrangement that turned sour.

There were several significant problems facing Mr. Forsee in his decision to leave BellSouth for Sprint, a competitor:

- Forsee signed a non-competition agreement that precluded his competing with BellSouth.
- His agreement with BellSouth also included other restrictive covenants that precluded him from going after BellSouth customers.
- As an executive at one of the highest levels in BellSouth, Mr. Forsee had unique knowledge about the business operations at BellSouth, including confidential information.

Forsee has now joined Sprint as its CEO, but the legal battles continue on several fronts. To date, there are several important lessons to be learned from the Forsee matter.

Resolve your disputes quickly: Where senior executives are involved, the parties often want to resolve their differences as quickly as possible. When a CEO or senior officer announces a decision to leave, the current employer (soon to be former employer) is likely to transfer power to another senior officer. If you can't talk the executive into staying, then it's probably best to move the executive out of an operating role – and out of the company quickly. After all, why continue to pay the executive's salary when you've stripped power from him.

Similarly, the executive will want to make a quick getaway. The executive will be looking ahead to the next opportunity, rather than focusing on the current employer. Plus, any actions taken on behalf of the current employer may expose the soon-to-be departed executive to further liability through greater exposure to trade secrets of the current employer.

Consider arbitration as a conflict resolution method: Since these employment decisions must be made quickly, arbitration may be the preferred method for resolving conflicts between employer and departing employee. Arbitration is possible if the parties have included a clause requiring it as part of an employment agreement.

Alternatively, the parties may agree to arbitration after the schism occurs between the parties.

Arbitration is generally a binding method of resolving a dispute. In other words, the parties agree to follow the decision of the arbitrator and to forego further legal action. In the case of employment matters, the arbitrator is often an individual with significant judicial or litigation experience, like a retired judge.

In the Forsee matter, the arbitrator was William H. Webster, a partner with a major law firm and the former head of both the CIA and FBI.

In other situations, arbitration often includes multiple arbitrators, usually three. However, if speed is important, one arbitrator is the preferred method for reaching a quick decision.

Be aware of new employment remedies and sanctions: The order of the arbitrator in the Forsee matter was unique in several respects. Understandably, BellSouth was concerned with protecting its trade secrets and confidential information, especially since Forsee was going to work for a competitor. The arbitrator recognized these concerns and crafted some unique remedies:

- Forsee cannot participate in planning sessions about Sprint competing with BellSouth or Cingular.
- He can't disclose confidential information from his former employer.
- Every three months for the next eighteen months, he must give his former employer a sworn affidavit saying he's complied with the confidentiality provisions of his employment agreement.
- For the next 12 months, he's prohibited from participating in discussions about potential mergers, acquisitions or sales of assets involving certain companies.
- Also, he is precluded from making sales calls on certain BellSouth customers.

In short, the arbitrator's ruling results in Forsee's business activities at Sprint being circumscribed.

Understand the difficulties with non-competes: Interestingly, the Forsee arbitrator did not address the issue of the non-competition covenant included in Forsee's employment agreement. Earlier, a judge had ruled that this covenant was unenforceable and limited the review by the arbitrator to other restrictive covenants in the agreement.

The case highlights the difficulty of enforcing non-competition covenants in Georgia and other states. Aside from a few states (most notably, California), non-compete clauses can be enforced where properly drafted. California specifically precludes non-competition covenants by statute, although a clause preventing the solicitation of customers and employees after employment can be enforced.

Georgia and many other Southeastern states permit non-competes in employment agreements. Such covenants must be narrowly drafted, especially with respect to duration, geography and scope of restricted activities. Unless these three factors are reasonably addressed in the non-competition clause, the courts, especially in Georgia, will strike the non-compete provision.

Rely on non-solicitation provisions: As a result of the difficulties in enforcing non-competes, a trend has emerged in executive employment agreements. Many such agreements don't include non-compete provisions. Instead, the employer relies on two forms of non-solicitation clauses.

First, the employee is prevented from soliciting fellow employees after leaving the job. Second, the employee is prohibited from going after customers or prospects of the former employer. Even these non-solicitation clauses must be reasonably drafted in order to withstand legal attack. For example, many states require customer non-solicitation clauses to be narrowed to prevent going after *only* those customers with whom the former employee actually had *contact* in the course of his job.

Consider crafting new contract remedies: The arbitrator's order in the Forsee case suggests an interesting approach to drafting executive employment agreements.

We can expect that future executive agreements may include specific remedies in the situation where a former executive leaves to work for a competitor. Rather than the former employer trying to enjoin the executive from going to work for the competitor, these remedies may be fashioned along the lines of the Forsee arbitrator's opinion.

These remedies could include a required affidavit from the former employee affirming compliance with the restrictive covenants, limits on participation by the ex-employee in strategic planning discussions with the new competitor-employer, and a specific list of customers that cannot be contacted by the ex-employee. Still, questions arise as to the ability of the ex-employer to enforce these remedies. Also, what damages will exist if the ex-employee breaches one of these requirements?

Need for uniformity: There is a desperate need for uniformity among the states with regard to restrictive covenants and their enforceability. In the absence of uniformity, expect to experience uncertainty and growing litigation as executives become more mobile in our challenging economy.

From an employer's perspective, consider drafting restrictive covenants as narrow as possible, even though they may not protect all of your concerns. As an employee (or former employee) recognize the ways to attack these covenants – but understand that there is a wide variation in interpreting these clauses from state to state.

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