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When It Comes to Non-Compete Agreements, It's Best to Know Exactly What Your Company Is Acquiring

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Restrictive covenants such as non-compete and non-solicitation agreements are frequently used in connection with acquisitions to protect the underlying value of the transaction. After all, an acquiring company typically values the target company based in part on the revenue it generates from its stable of customers. Therefore, the acquiring company often requires the target company's employees to execute restrictive covenants that limit their ability to "jump ship" after the acquisition closes and erode the value of the transaction by luring away customers. Recently, the United States Court of Appeals for the First Circuit issued a decision which underscores the importance of carefully examining and understanding any restrictive covenant that may be acquired through a transaction.

In *OfficeMax, Inc. v. Levesque, et al.*, Case No. 10-2423 (1st Cir. 2011), a company called LS&H had required employees to execute restrictive covenants in 1996 just before it was acquired by Boise Cascade. The agreements provided that the restrictive covenants would continue for "12 months after termination of…employment with LS&H." Under the agreements, the employees also agreed that they would sign restrictive covenants in "substantially the same form" if requested by Boise Cascade after the acquisition. After the transaction closed, Boise Cascade did in fact request that the employees execute restrictive covenants in "substantially the same form," but they refused. When OfficeMax later acquired Boise Cascade, OfficeMax too requested that the employees execute new restrictive covenants, but again they refused. In 2009 and 2010, two employees who had executed the restrictive covenants with LS&H terminated their employment with OfficeMax. OfficeMax sued them and obtained a preliminary injunction based on those agreements from the trial court. On appeal, however, the First Circuit vacated that injunction. The Court observed that the plain language of the agreements did not state that they ran for "12 months after termination of…employment with LS&H or any of its successors or assigns." Furthermore, the Court explained that there would be no reason for the agreements to require that the employees sign substantially similar agreements with the successor if the restrictive covenants were already designed to run from 12 months after the employees separated employment with that successor. As a result, the Court concluded that the restrictive covenant period ended 12 months after Boise Cascade's acquisition of LS&H in 1996, and had already expired by the time the employees left OfficeMax in 2009 and 2010.

The opinion thus serves as a cautionary tale for companies to make sure that they review the language and structure of restrictive covenants that they may be purchasing as part of an acquisition.