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LOUISIANA LEGISLATURE OVERRULES *SWAT 24* DECISION

By Carl C. Hanemann, Andrew E. Galloway, III and Amos J. Oelking, III

On June 10, 2003, the Louisiana Legislature passed legislation[1] overruling the Louisiana Supreme Court's decision in *SWAT 24 Shreveport Bossier, Inc. v. Bond*[2] and its progeny, including the April 2003 decision of the Louisiana Fifth Circuit Court of Appeal in *Richard Berry & Associates, Inc. v. John Bryant, et al.*[3]

The *Swat 24* and *Berry* decisions addressed the issue of the enforceability of agreements not to compete under Louisiana law, specifically Louisiana Revised Statutes 23:921. These decisions and the legislation, which is currently before Governor Foster, are summarized below.

The Swat 24 Decision

In *SWAT 24, the Louisiana Supreme Court held* that a non-competition agreement between an employer and an employee, even one that includes the geographical and time limitations required by Louisiana Revised Statutes 23:921, can be enforced only in cases where the employee carries on or engages *in his own business* in competition with the former employer and cannot be enforced in the much more frequently occurring case where the employee becomes *an employee of a business* competing with the former employer. The Louisiana Supreme Court based its holding on the following language in the statute: "Any person…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…." (emphasis added)

The statute contains separate, but similar, provisions for agreements between buyers and sellers of businesses, independent contractors and the parties with which they contract, and parties to partnership and franchise agreements.

The Berry Decision

In *Berry*, the Louisiana Fifth Circuit Court of Appeal voided an agreement not to compete between a real estate marketing firm and each of five of sales agents who had worked for the firm as independent contractors

[1] House Bill No. 1770, authored by Rep. Jack D. Smith (D-Franklin).
[2] 808 So. 2d 294 (La. 2001) (decided June 29, 2001).
[3] 2003 La. App. LEXIS 1222 (La. App. 5th Cir. 2003) (decided April 29, 2003).

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and who had gone to work as sales agents for other, presumably competing, companies. In refusing to grant an injunction in favor of the firm for which the sales agents had formerly worked, the Fifth Circuit, relying on the Louisiana Supreme Court's decision in *SWAT 24,* held that the agreements not to compete were unenforceable under Louisiana Revised Statutes 23:921.

In reaching its holding in the *Berry* case, the Fifth Circuit refused to accept the former employer's argument that the *SWAT 24* decision was applicable only to cases governed by the provision of the statute dealing with agreements between employers and employees and was not applicable to the *Berry* case because it arose under the separate provision of the statute dealing with agreements between independent contractors and the persons with whom they contract. Not surprisingly, the Fifth Circuit rejected this argument on the basis that the language of the statute relied on by the Louisiana Supreme Court in *SWAT 24* (that is, the phrase "carrying on or engaging in a business similar") is identical to the language included in the provision regarding independent contractors.

The same logic would also apply the *SWAT 24* holding to non-competition agreements between sellers and buyers of businesses and parties to partnership agreements and franchise agreements. The result of this would be to limit the enforceability of virtually all non-competition agreements permitted by the statute to those cases where the party agreeing not to compete engages in competition through his own business as opposed to cases where such party engages in competition as an employee of, or in some other capacity for, someone else's business.

The New Legislation

House Bill Number 1770, passed by both the House and the Senate, amends Louisiana Revised Statutes 23:921 to provide that a seller of a business or employee or independent contractor who becomes "employed" by a competing business may be deemed to be "carrying on or engaging in a business similar to that of the party having a contractual right to prevent that person from competing," regardless of whether the seller, employee or independent contractor is an owner of the competing business. The legislation does not directly affect the sections of the statute dealing with partnership agreements, franchise agreements and computer programmers.

Unless vetoed by Governor Foster, the legislation will become effective August 15, 2003. *(Click here to link to the text of House Bill No. 1770 as sent to Governor Foster.)*

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UPDATE REGARDING WEBSITE POSTING OF FORMS 3, 4 AND 5

By Kelly C. Simoneaux and Margaret F. Murphy

As reported in an earlier E*Zine, beginning June 30, 2003, each company that maintains a corporate website will be required to post on its website all Forms 3, 4 and 5 filed with respect to its equity securities by the end of the business day after filing. A company may satisfy the posting requirement by providing a hyperlink to the reports via a third-party service, including the SEC's EDGAR database, if certain conditions are met. The SEC release adopting the final rules on website posting indicates that a company should not rely on a hyperlink that leads to all of its SEC filings, but should instead include an additional link on its website that takes viewers to the company insiders' Section 16 forms only. This additional link should be separately captioned to clearly indicate that it leads to the Section 16 filings. *(Click here to link to our E*Zine discussing the SEC's final rules regarding website posting of Section 16 reports.)*

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NYSE AND NASD PROPOSE ADDITIONAL AMENDMENTS TO PROPOSED ANALYST RULES

By Richard P. Wolfe and James E.A. Slaton

In late May, the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers, Inc. ("NASD") each filed with the SEC a second round of amendments to proposed rule changes originally filed last October regarding research analysts. The purpose of the amendments is to implement provisions of the Sarbanes-Oxley Act of 2002 that are not already contained in current NYSE and NASD rules or the original rule change proposals. Both sets of amendments also propose conforming changes to each organization's proposed rules to harmonize them with one another as well as with the Sarbanes-Oxley Act.

Because the NYSE and NASD amendments both deal with the same issues, they are summarized together below, except where noted.

Restrictions on Relationships with Research Departments

The proposed amendments would extend the existing prohibition in the NYSE and NASD rules on the prepublication review and approval of research reports by investment banking personnel to any non-research personnel associated with the broker or dealer, except legal and compliance staff. Additionally, communications between research and non-research personnel regarding the content of a report (e.g., results of fact checking) must be intermediated through the firm's legal or compliance department.

Prohibition Against Retaliation

The proposed amendments would prohibit retaliation (or threatened retaliation) by a member broker or dealer against any research analyst employed by that broker or dealer or its affiliates as a result of an unfavorable research report or public appearance.

Quiet Periods

In the case of IPOs only, the proposed amendments would impose a 25-day "quiet period" (e.g., prohibition against publishing or otherwise distributing research reports) on members of the underwriting syndicate and dealers who are not managers or co-managers of the offering. NASD and

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NYSE rules currently impose quiet periods — for 40 calendar days following an initial public offering and 10 calendar days following a secondary offering — on underwriting managers and co-managers, but not on other members of the underwriting syndicate or selling group.

Disclosure of Compensation and Client Relationships

The proposals would expand requirements for member firms to disclose in research reports, and for research analysts to disclose in public appearances, whether any compensation has been received by the broker or dealer, or any of its affiliates (including the analyst), from the issuer that is the subject of the report or public appearance. Currently, only compensation for investment banking services received from subject companies must be disclosed.

Additionally, disclosure must be made if the subject issuer is, or has been during the previous year, a client of the broker or dealer and, if so, the types of services provided to the issuer. The disclosure is to be divided into the following three categories: investment banking services; non-investment banking-securities related services; and non-securities services. Currently, disclosure is only required if the subject company is an investment banking client of the member firm. An analyst would only be required to make the disclosures in public appearances if he knows or has reason to know whether the member firm or its affiliates received any compensation from the subject company in the past twelve months.

These disclosure requirements are subject to an exemption to the extent disclosure would reveal material non-public information regarding specific potential future investment banking transactions of the subject company.

Small Firm Exemption

The amendments would exempt certain small firms that engage in limited underwriting activity from so-called “gatekeeper” provisions that prohibit a research analyst from being subject to the supervision or control of any employee of a member’s investment banking department.

The amendments would require members that qualify for this exemption to maintain, for three years, records of any communication that otherwise would be subject to the review and monitoring provisions of the proposed rules.

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Language Changes

The NYSE and NASD are also proposing a uniform definition of the terms “date of the offering” (NYSE term) and “offering date” (NASD term) for purposes of calculating “quiet periods.” The terms are defined as the later of the effective date of a registration statement or the first date on which the security was offered to the public.

In addition, the NASD and NYSE propose to make changes, where applicable, to their current rules by substituting the phrase “publish or otherwise distribute” for current references to “issued,” “published” or similar language, in order to conform to language in the Securities Exchange Act of 1934 added by the Sarbanes-Oxley Act.

Additional Amendments to NYSE Proposals

Interpretive Guidance

Amendments previously filed with the SEC expanded the definition of “public appearance” for purposes of the disclosure required by NYSE Rule 472 (e.g., whether the associated person has a financial interest in or is an officer or director of the subject company). The previous definition of “public appearance” included a research analyst making a recommendation in a newspaper article or similar public medium, thereby requiring the same disclosures as are required in other public appearances.

Representatives of the print media and others complained that extending the definition of “public appearance” to include print media would infringe their First Amendment rights by requiring research analysts to refrain from continued contacts with media outlets that failed to publish the required disclosures. The NYSE proposes to provide written interpretive guidance to address this issue. Under the proposed interpretive guidance, a research analyst that recommends securities in a media appearance would be required to maintain a record of the appearance, including the disclosures provided to the media outlet. The record must be made regardless of whether the media outlet publishes or broadcasts the required disclosures.

The proposed interpretation would not require a research analyst to refrain from further interviews, articles or broadcasts if the media outlet failed to publish or broadcast the required disclosures, so long as the analyst had provided the disclosures to the media outlet.

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Conforming Disclosure

NYSE Rule 472(k)(1)(iii)(a), which requires a member firm or its affiliate to disclose in a research report if it has managed or co-managed a public offering of equity securities for a subject company in the past 12 months, would be amended by deleting the word “equity” from the rule, so as to cover debt offerings as well as equity offerings. This proposed amendment is intended to make NYSE Rule 472(k) consistent with the comparable NASD rule.

Please remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact the head of our Corporate and Securities practice group:

Curtis R. Hearn
Jones Walker
201 St. Charles Ave., 51st Fl.
New Orleans, LA 70170-5100
ph. 504.582.8308
email chearn@joneswalker.com

www.joneswalker.com
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