

Nebraska Decision Reminds: Sometimes There Is No Substitute For A Non-Compete

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[Here](#) is a very human version of a legal story.

In short, an employee left her company (First Express), an Omaha company that sells crop insurance, and took a number of customers with her. At the end of the day, First Express did get some relief against its former employee because of the employee's breach of a contract, but the Nebraska Supreme Court found that the former employer's customer lists were not trade secrets. Why? The Court held that most of the information on the list was readily ascertainable, as more and more things are in our digital age, and therefore the information is not a trade secret.

The effect of the Court's decision was to cut in half (approximately) what had been about a \$650,000 jury award to First Express. I think there are three quick takeaways from this decision:

1. Employers need to identify what information provided to employees is really secret under the law, and take the necessary steps to maximize the likelihood the information can be protected in court.
2. Relying on the protection of trade secrets laws and targeted contractual restrictions like confidentiality agreements and agreements not to solicit customers or employees has some appeal because those narrower restrictions may be more easily enforced, and are an easier sell to applicants. However, after the employee leaves, those measures may require the employer to prove things that are hard to prove – that the information was really secret, that the employee is really using it, etc. A non-compete agreement that prohibits the employee from working in competition may be more effective. If sufficiently narrowly drawn under the appropriate state's law, it may not be necessary to prove the micro-level issues that can trip up employers seeking to stop employees using lesser restrictions.
3. In light of the theory we are hearing these days that [non-competes hurt a state's economy](#), one has to at least consider how the Nebraska story fits into those arguments. Would it be good for the economy not to allow First Express to have a non-compete to protect its investment in its regular customers?

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