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South Dakota Supreme Court Limits Enforceability of Non-Solicitation Clause in Non-Compete Agreement

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Whenever possible, restrictive covenants should be carefully worded to track the language of applicable law in the jurisdiction where they will be enforced. The South Dakota Supreme Court's recent decision in [Farm Bureau Life Insurance Co. v. Dolly](#) provides a strong reminder of this lesson. The case concerned an action by Farm Bureau to enforce a restrictive covenant against Ryan Dolly who had worked for Farm Bureau as a captive life insurance agent. Dolly's contract with Farm Bureau contained a restrictive covenant providing that Dolly would "neither sell nor solicit, directly or indirectly...any insurance or annuity product, with respect to any policyholder of [Farm Bureau]... for a period of eighteen (18) months following the termination of" his contract.

When Dolly started selling insurance for a different issuer, Farm Bureau sought an injunction prohibiting Dolly from *soliciting or selling* to Farm Bureau policyholders. The Trial Court enjoined Dolly from *soliciting* Farm Bureau policyholders but declined to prohibit him from *selling* to Farm Bureau policyholders who reached out to him directly.

After consulting the South Dakota statute governing contracts with captive insurance agents ([SDCL 53-9-12](#)), the South Dakota Supreme Court affirmed. The Court interpreted SDCL 53-9-12 to prohibit all restrictive covenants between life insurance companies and captive agents except agreements (a) not to solicit existing customers of the insurer within a specified area; and (b) not to engage directly or indirectly in the same business or profession as that of the insurer. The Court ruled that the agreement not to sell to existing customers was neither an agreement not to solicit, nor an agreement to refrain from the business altogether and was therefore invalid under South Dakota law.

Failure to track the precise language of the statute prevented Farm Bureau from enjoining conduct which it otherwise could have prevented had it tracked the statutory language more closely.

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Article By [Daniel J. Green](#)
[Judah L. Rosenblatt](#)
[Epstein Becker & Green, P.C.](#)
[Trade Secrets and Noncompete Blog](#)
[Labor & Employment](#)
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[South Dakota](#)