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Civil LITIGATION

Court gives guidance on improper solicitation of clients

In a unanimous decision, the New York State Court of Appeals ruled that, under certain circumstances, a business seller may give active assistance to a new employer's efforts to pitch its business to former clients without incurring liability for improperly soliciting business. *Bessemer Trust Co. N.A. v. Branin*, no. 63, 2011 NY Slip Op. 3307 (Apr. 28).

Under common law, the seller of the good will of a business cannot actively solicit former clients, as it would deprive the buyer of the value of the bargain. The seller can, however, compete with the buyer in the same business and even accept his former client's business if he is not otherwise bound by any express restrictive covenants.

By JENNIFER A. MEREAU
Daily Record Columnist

Background

Plaintiff Bessemer Trust Company N.A. is a privately owned wealth management and investment advisory firm that provides services to high net-worth individuals, families and institutional clients. The defendant, Branin, was a principal at investment management firm Brundage, which was sold by purchase agreement to Bessemer in 2000 for $75 million. Branin, the largest Brundage shareholder, received more than $9 million personally.

The purchase agreement between Bessemer and Brundage imposed no express restrictive covenants on the Brundage principals. Branin continued to work for Brundage after the sale, but left in 2002 to work for a competing wealth management firm. Although he did not directly solicit his former clients, many of them (including his largest client) contacted him after his departure and followed him to his new place of business.

Shortly thereafter, Bessemer commenced an action alleging that Branin had breached his duty of loyalty to Bessemer under the theory that Branin improperly solicited his former clients to join him at his new place of business, thereby impairing the good will that Branin had sold to Bessemer.

After a bench trial in the Southern District of New York, Branin was found to have improperly induced his largest client to leave Bessemer. On appeal, the U.S. Court of Appeals for the Second Circuit certified a question seeking guidance in determining what actions under New York law constitute improper solicitation.

The New York State Court of Appeals

In answering the certified question, the Court of Appeals reiterated that New York Common Law has long prohibited a seller of a business from improper solicitation of its former clients because such solicitation impairs the value of the good will sold.

However, the seller of "good will," absent a non-compete agreement, may compete with a purchaser. Bessemer answered questions about how a seller of good will, who is no longer working for the purchaser, may respond to former clients who inquire about the seller's current employer or business.

The *Bessemer* court recognized that there is always a risk on the part of the purchaser of a business that customers will decide to go elsewhere as a result of the change in ownership. The court restated that a seller may not initiate direct contact with its former clients.

However, for situations where the client initiates the contact, the court declined to provide a bright line rule and instead declared that the trier of fact must weigh the facts on a case-by-case basis as it applies to the industry involved.

The court provided guidance in making the determination. While there are certain barriers on a seller's conduct, there is no prohibition on a former customer or client from gathering information about the seller. The seller, the court said, may not take advantage of client-initiated contacts to disparage the purchaser of its former business or tout its new business, but can respond to factual inquiries from the client about his new venture.

As such, a seller of good will may answer the factual inquiries of a former client so long as the response does not go beyond the

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scope of the specific information sought. In responding to the inquiry, the seller may not explain why he believes the products or services of the new venture are superior to those offered by the purchaser of the business.

Further, the seller may not send targeted mailings or make individualized phone calls to former clients, but, absent a covenant not to compete, may advertise to the public if the advertisements are general in nature.

Where a former client initiates the inquiry, a seller may even go so far as to assist a new employer in the active development of a plan to respond to the client's inquiries. The seller may provide the employer with industry appropriate, nonproprietary information about the former client.

The seller may also assist the new employer to prepare for a sales pitch meeting requested by the former client and may be present during the meeting. The seller's role at the meeting, however, must remain largely passive.

Warning to purchasers

The *Bessemer* decision accentuates the importance of utilizing noncompete and nonsolicitation agreements to protect the value of a business purchase. In its decision, the court reminded prospects that "a purchaser is free to negotiate an express covenant, reasonably restricting ... a seller's right to compete in a particular geographical area or field of endeavor."

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