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Labor & Employment Alert

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Massachusetts Court Holds That Job Changes Do Not Necessarily Nullify Non-Competition/Non-Solicitation Agreements

Some Massachusetts Superior Court decisions over the past two years have suggested that changes in job responsibilities, such as promotions and demotions, can nullify existing non-competition/non-solicitation agreements, and that employers who want the protection of such restrictive covenants must have their employees sign new agreements every time such changes take place. As noted in our April 5, 2004 client alert, "Recent Massachusetts Court Decisions Highlight the Importance of Careful Drafting and Fact-Specific Analysis in Connection with Enforcement of Non-competition Agreements," a *per se* rule to that effect would appear to be inconsistent with earlier, higher court precedent.

In a recent decision in the case of *Getman, et al. v. USI Holdings Corp., et al.*, Superior Court Judge Ralph Gants rejected such a *per se* rule. Judge Gants held that an employee's promotions were not inconsistent with the agreement he had signed several years before, and did not preclude enforcement of the restrictive covenants contained in that agreement. The decision also provides useful guidance on a number of other issues, including the extent to which a successor employer can enforce its predecessor's restrictive covenants, what constitutes "solicitation" by a former employee, and the enforceability of restrictions on "accepting" business from a former employer's customers or clients.

Case Background

The plaintiff in the *Getman* case, Carl Getman, began working as an insurance agent for the Hastings-Tapley Insurance Agency ("Hastings-Tapley") in 1986. In 1989, while still an agent, Mr. Getman executed an employment agreement with Hastings-Tapley which could be terminated without cause on 60 days notice and which prohibited him, for three years after the termination of his employment, from competing with Hastings-Tapley, from soliciting its clients, or from accepting insurance business from its clients. Subsequently, he was promoted to Senior Account Executive and then to Vice President. In 2003, USI Holdings Corp. ("USI") acquired Hastings-Tapley, and Mr. Getman became a USI insurance agent. Mr. Getman did not sign another employment agreement after the acquisition.

On July 13, 2005, Mr. Getman voluntarily resigned to work for a smaller insurance agency, Cleary Schultz Insurance ("Cleary"). Mr. Getman and Cleary filed suit

seeking a declaratory judgment that the restrictive covenants in Mr. Getman's 1989 employment agreement were unenforceable. USI and Hastings-Tapley responded by moving for an injunction enforcing those contractual restrictions.

Material Changes in Employment Terms

Mr. Getman argued that several "unilateral changes" in the employment relationship made by his employer "materially" affected the terms and conditions of his employment and thus nullified his 1989 employment agreement. To support this argument, he pointed to his promotions, changes in the method of calculating his compensation, turnover on his staff, and changes in the identity of the manager to whom he reported. The court rejected this argument.

Judge Gants concluded, however, that USI's purchase of Hastings-Tapley did constitute a "material change" which impacted, but did not completely nullify, the 1989 agreement. Mr. Getman had agreed not to compete against Hastings-Tapley; he "did not agree not to not compete against a much larger insurance brokerage firm such as USI." Since the scope of the non-compete provision was materially changed with USI's purchase of Hastings-Tapley, the court declined to enforce it against Mr. Getman.

Non-Solicitation Issues

Judge Gants ruled that, while USI's purchase of Hastings-Tapley rendered the non-competition clause unenforceable, it did not affect the agreement's non-solicitation clause, which barred Mr. Getman from soliciting or accepting business from his former clients. The scope of that restriction remained unchanged because Mr. Getman "reasonably would have understood when he signed the 1989 agreement that it would apply to solicitation of his own clients, regardless of whether Hastings-Tapley had merged into or been purchased by a larger firm."

The court next grappled with the issue of "whether the contract provision barring Mr. Getman from soliciting or accepting insurance business from his former clients at USI for three years was unenforceable because it is unreasonable in its time, space, or scope." Similar to a covenant not to compete, a non-solicitation provision generally is enforceable only to the extent that it is necessary to protect the legitimate business interests of the employer. Legitimate business interests include trade secrets, confidential information, and good will. Trade secrets were not an issue. The only "truly important" confidential information was a client list identifying names, addresses, telephone numbers, and current insurance policies, which Judge Gants ordered Mr. Getman to return to USI.

In deciding whether USI had a legitimate interest in enforcing the restrictions against solicitation or acceptance of business, Judge Gants focused on USI's protectable good will. "The good will at stake is the prior history of reliability, integrity, knowledgeability, insurance experience, and prompt service that would cause present insurance clients to renew their existing insurance policies through USI, to procure new policies through USI, and to refer their friends and colleagues looking for insurance brokerage services to USI, as well as USI's reputation in the community,

which may cause other potential clients to come to USI to meet their insurance needs." USI's good will interests, however, extended only so far. The court distinguished between USI's legitimate preservation of its "own good will" and the good will earned by the employee that "fairly belongs to the employee." Judge Gants noted that an employer's good will and an employee's good will are "inevitably intertwined," and that the restrictions on Mr. Getman's future dealings with his former USI clients were reasonable and enforceable only to the extent that they struck a "fair balance between protecting [USI's] confidential information and the good will it earned as a company vs. taking the good will earned by and belonging to Mr. Getman individually."

Noting the difficulty in discerning between good will belonging to the employer and good will belonging to the employee, Judge Gants attempted to craft such a "fair balance" through a careful evaluation of the specific facts in the *Getman* case. In particular, he distinguished the insurance business in question from certain service businesses, "like financial advisors, [where] the product may be handcrafted for the client, as with a stock portfolio, and the client may mistakenly believe that the employee [with whom he deals directly] is also the person primarily responsible for crafting it." In Mr. Getman's case, "the 'products' are not created by the agency; the agency primarily steers the client to the insurance company offering the required policies at the lowest price, assists the client with claims, and makes sure the policies do not expire without the client's … approval." Judge Gants found that in this situation "most, although not all, of the good will belongs to the agent himself." [1]

In balancing the competing good will interests, the court ruled that Mr. Getman could not solicit his former clients for a period of one year (not three), but that he would be allowed to accept their unsolicited business. The court found that one year was sufficient time for USI to convince Mr. Getman's clients that "the service they enjoyed during Mr. Getman's tenure was more the result of the collective efforts of USI's employees than of Mr. Getman's individual efforts" and that they should remain USI clients. The "fair balance" also would allow Mr. Getman to contact USI clients who were not his specific former clients to seek their insurance business for Cleary. "Since [Mr. Getman] never handled these accounts personally, there is no risk that these clients will confuse his good will with that of USI."

The question remained as to what constitutes solicitation. While it acknowledged that, "[a]s a practical matter, the difference between accepting and receiving business is more metaphysical than real,"[2] the court found that Mr. Getman was not engaged in solicitation when he notified his clients that he was leaving USI to join Cleary and provided them with his new contact information. Nor did he engage in solicitation

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[1] The proposition that employees, such as sales representatives, who are hired expressly for the purpose of developing ongoing business relationships for their employer, are entitled to consider those relationships their own, has been the subject of discussion in various trial court decisions, but there is no appellate authority that resolves this question.

[2] On this point, Judge Gants quoted from a Massachusetts Appellate Court decision in *Alexander & Alexander v. Danahy*. In that case, the court enforced an agreement by a former employee (entered into in the context of the sale of a business) not to "solicit . . . or receive" business from customers of the former employer.

when his former clients initiated contact with him and he explained why he left USI and joined Cleary, and described in general terms the work he performed in his new job and the nature of the work performed by Cleary. Judge Gants cautioned, however, that solicitation could occur depending on how such a conversation materialized and exactly what was said, especially if Mr. Getman had praised Cleary or deprecated USI or "otherwise encourage[d] the client to bring his business" to Cleary.

Conclusions

The *Getman* decision is significant in several respects. First, it helps dispel the notion that any significant job change, such as a promotion or a demotion, will vitiate a non-competition/non-solicitation agreement. Second, it provides useful guidance as to what does, or does not, constitute "solicitation." Third, the court's conceptual analysis regarding the ownership of good will between the employer and the employee raises an issue that is likely to provoke further case law developments. The court's finding that the prohibition against accepting business from former clients was unenforceable was limited to the unique nature of the insurance business in the *Getman* case in the context of a request for injunctive relief arising out of a non-compete that was put in place in exchange for a limited commitment to continued employment. It remains to be seen whether appellate courts will follow the good will analysis in *Getman* or whether that analysis will be refined in the fact-specific context that drives the outcome of non-competition litigation.

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