FTR Now

Court Finds Tort of Conspiracy in Case of Departed Insurance Producers

Date: November 29, 2011

On October 6, 2011, Justice Stinson released an important decision finding two insurance producers liable for departing and taking a book of business without paying for it. Neither producer had signed written contracts regarding who owned the books of business. Justice Stinson held that one of the producers breached his verbal agreement that he would pay 50% of the fair market value of the book if he took it when he left. He found both producers jointly and severally liable for the tort of civil conspiracy.

This case is important for a number of reasons. First, absent a written or verbal agreement, an independent insurance producer owns his book of business. He or she is at liberty to take his or her book to another brokerage without paying for it and compete. Second, this decision confirms that a verbal contract is enforceable provided that it contains all of the essential terms. The mere fact that the parties contemplated a more formal written agreement does not render the verbal contract incomplete and unenforceable. Third, breach of contract constitutes “unlawful means” to support a claim for conspiracy. It follows that breach of a restrictive covenant, failure to give notice of resignation and misappropriation of confidential information also constitute “unlawful means” to support a conspiracy claim.

This *FTR Now* discusses this decision.

THE DECISION

BACKGROUND FACTS

Two insurance producers, Alan Martina and Peter Diamantouros, worked as insurance producers for Gentech for more than three years. They provided services as independent contractors.

When Mr. Martina joined Gentech, he did not have a book of business. The parties verbally agreed to an arrangement that would allow Mr. Martina to build up a 50% shared equity in a book of business with Gentech’s support. Specifically, Gentech agreed to pay him a guaranteed draw and a higher portion of commissions during the initial years, as well as share with him its expertise, customer product and commissions. If Mr. Martina left and took the book, he agreed to pay 50% of its fair market value to Gentech. If he died or retired, Gentech would buy the book at 50% of fair market value. Since its inception in 1986, Gentech had used this standard agreement with

insurance producers.

No formal written contract was signed. However, two documents were discussed: a) a handwritten spreadsheet illustrating some potential commission income scenarios to maintain Mr. Martina's existing income and potentially improve it while building equity; and b) a draft services agreement which Mr. Martina marked up but never signed.

Mr. Diamantouros' situation was different. He had an existing book of business when Mr. Martina introduced him to Gentech. No draft services agreement was ever shown to Mr. Diamantouros, nor was he asked to sign one. He joined Gentech on the agreement that he would be subject to the standard Gentech agreement meaning he owned 50% of his book of business jointly with Gentech. He stated he just wanted to be treated "like everyone else."

SECRET PLAN TO LEAVE GENTECH

After joining Gentech, these producers worked for the next three years to grow their books of business. In late 2008, however, they secretly began planning their departures from Gentech. They met with Mr. Diamantouros' former brokerage and agreed to join it in the new year. They did not tell Gentech of this plan. For the next six weeks, they renewed at least one client's policy through the new brokerage and told a number of clients they were leaving.

Immediately after Gentech's owner left on an extended vacation overseas, Mr. Diamantouros and Mr. Martina notified Gentech of their intention to leave, effective immediately. Both declined requests from Gentech to delay their departures until the owner returned. They left that day.

Immediately after leaving, Gentech began receiving notices from clients that they were leaving Gentech. They followed Mr. Martina and Mr. Diamantouros to their new brokerage. Gentech lost almost all clients who had dealt with Mr. Martina and Mr. Diamantouros.

Gentech brought an action against these producers for breach of contract and conspiracy, among other causes of action.

FINDINGS

Justice Stinson held that Mr. Martina verbally agreed to joint ownership of his book of business with Gentech. He found that Mr. Martina agreed that if he left and took the book of business, he would pay Gentech 50% of the fair market value of the book. Justice Stinson also found that the parties had agreed to all of the essential terms necessary to form a verbal agreement. He rejected the argument that because the parties contemplated a more formal written agreement, the verbal agreement was incomplete and unenforceable. The fact that Mr. Martina joined Gentech and worked for it for a number of years was evidence that the parties had agreed to all of the essential terms necessary to form a contract. Nothing further was required.

Justice Stinson rejected the Defendants' argument that omitting a protective term of a contract such as a post-purchase no solicit provision rendered the contract unenforceable. He specifically stated that courts should be reluctant to declare a parties' agreement unenforceable because it omitted a term that might benefit one of them.

Justice Stinson held that Mr. Martina was liable for breaching his verbal contract by abruptly resigning and taking the book without paying for it. Conversely, Justice Stinson held that Mr. Diamantouros was free to take his book with him when he left and compete against Gentech. He was not bound by any contract and Gentech had no right of ownership in his book. He was, however, found jointly and severally liable for 50% of the fair market value of Mr. Martina's book because he acted in concert to hurt Gentech by secretly planning his simultaneous departure with Mr. Martina, negotiating an agreement with his new brokerage and then resigning at a time to catch Gentech off guard. The "unlawful means" constituted the breach of the verbal agreement.

Justice Stinson's decision is being appealed by the insurance producers.

Should you require more information about this case or about departing employees generally, please contact Allyson M. Fischer at 416.864.7216, who successfully represented Gentech at trial, or your regular Hicks Morley lawyer.
