**FTR Now**

# Court of Appeal Finds Insurance Producer Breached Agreement to Pay for his Book of Business

**Date:** September 19, 2012

In a recent decision, the Ontario Court of Appeal found that an insurance producer breached his oral agreement with his brokerage that he would pay 50 percent of the fair market value of the book of business if he took it with him when departing. The Court ordered that the producer pay the broker for its half interest in the book of business.

The Court of Appeal's decision is important for two reasons. First, an oral agreement between a broker and a producer for an equal commission and equity split in a book of business carries with it an implicit agreement that if the producer leaves with the clients, he must pay the broker 50 percent of the fair market value of these clients. Second, where the producer has the option to buy the book of business, the producer must purchase it from the brokerage or leave it behind.

This *FTR Now* discusses this decision.

## BACKGROUND

The case arose out of a dispute between two insurance producers and Gentech, the insurance brokerage under which the two producers worked as independent contractors. Both producers came to an oral agreement with Gentech. Martina agreed to work as a producer with a commission split and a 50/50 shared equity interest in his book of business. If Martina left and took the book, he agreed to pay 50 percent of its fair market value to Gentech. Otherwise, Gentech would buy back his book at 50 percent of the fair market value, for example, if he retired. Martina and Gentech discussed a spreadsheet that valued the book at two times annual gross commissions.

The other producer, Diamantouros, brought a book of business to Gentech and agreed to a 50/50 commission split on his book. He did not have an agreement relating to a 50/50 equity split.

More than three years later, Martina and Diamantouros left Gentech without notice, taking their books of business with them to another brokerage. Clients from Martina's and Diamantouros' books of business immediately began to send notices to Gentech that they had changed their broker of record and were following the two departing producers. Over 97 percent of the clients from the two producers' books of business left Gentech. As a result, Gentech sued Martina and Diamantouros for breach of contract and the tort of civil conspiracy.

The trial judge concluded that although the producers did not sign written contracts regarding who owned their books of business, one producer verbally agreed to joint ownership with the brokerage—and breached this agreement when he abruptly resigned and took the book without paying for it. Ultimately, both producers were found jointly and severally liable for $209,590 in damages based on the tort of civil conspiracy. A summary of that decision can be found in our *FTR Now* of November 29, 2011.

## THE COURT OF APPEAL'S DECISION

The Ontario Court of Appeal considered whether the parties had agreed as to what would happen if the two producers left Gentech, and whether either of the two producers were liable for the tort of civil conspiracy.

The Court found that there was an agreement between Martina and Gentech. If Martina chose to leave Gentech and take his

book of business with him, he was required to purchase Gentech's 50 percent interest at fair market value. Alternatively, if he wished to leave without his book of business, Gentech would purchase his 50 percent interest based on the same fair market value. The Court rejected Martina's argument that he had an option to leave Gentech with his book of business without paying Gentech for it and in that case, Gentech had to sue him for breach of his non-solicitation agreement.

The fair market value of the book of business was held to be two times the annual gross commission, based on a commission spreadsheet the parties had discussed at the outset of their business relationship.

The two important takeaways from the decision are: (1) if a broker and producer agree to an equity split in the book of business at a certain price, the courts will hold the producer liable to pay the agreed upon price for the book if and when the producer leaves and takes the clients with him; and, (2) an option to buy a book of business is binding. The producer must pay for the book or leave it behind with the broker.

On the issue of civil conspiracy, the Court found that Diamantouros was not liable. The Court held that unlawful conduct conspiracy requires that each conspirator must individually either engage in unlawful conduct or intend to harm the broker.

The Court found that Diamantouros owned his book of business and was entitled to leave without notice. He had engaged in no unlawful conduct and was therefore not liable for the tort of civil conspiracy. The lesson to learn here is that a non-employee who owns his book of business is free to leave without notice (subject to an agreement which states otherwise). Another lesson is that if a team of producers leaves and takes their clients with them, the courts may find them liable based on the tort of civil conspiracy, if all of the producers act together and each one of them commits an unlawful act (such as taking confidential information, resigning without notice, breaching their contractual duties or violating their duties under RIBO).

Should you require more information about this case or the rights of a broker to protect its clients from departing producers, please contact Allyson M. Fischer at 416.864.7216, who represented Gentech at trial and at the Court of Appeal.

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