MASSACHUSETTS Lawyers Weekly

Insurance brokers enjoined from servicing clients of former employer

Judge says they 'did not appear to understand' obligations in their agreements

By: Eric T. Berkman January 11, 2023

BLS judge grants injunction

A Superior Court judge has held that a non-servicing agreement entered into by shareholders of an insurance brokerage when a larger company acquired their firm was enforceable against them when they left to join a new brokerage seven years later.

When defendant/counterclaim plaintiff Arthur J. Gallagher & Co., or AJG, one of the world's largest insurance brokerage firms, acquired William Gallagher Associates along with its clients and client goodwill in 2015, three plaintiffs/counterclaim defendants — shareholders of William Gallagher Associates who remained employed by AJG — entered agreements that apparently barred them from soliciting, accepting business from, or servicing AJG clients for two years should they ever leave the company.

When the three left AJG in 2022 to join brokerage Newfront Insurance Services and allegedly took confidential information and solicited AJG clients in the process, they brought a declaratory action arguing that their restrictive covenants were unenforceable.

Notably, the three argued that the enforceability of their non-servicing agreements should be analyzed under the stricter, traditional employer/employee framework, as opposed to the more expansive framework used for restrictive covenants arising from the sale of a business. They argued that the clients they allegedly solicited had not been William Gallagher Associates clients and thus were not tied to the goodwill AJG purchased in the acquisition.

Under the employee/employer framework, they contended, their agreements were not enforceable because they were not necessary to protect a legitimate business interest.

But Judge Helene Kazanjian, sitting in the Business Litigation Session, disagreed and granted a preliminary

injunction sought by AJG in a counterclaim, barring the three, along with a fellow counterclaim defendant who joined AJG in 2016 and also jumped to Newfront, from servicing any current AJG clients for the next two years and similarly barring them from servicing any former AJG clients that had moved their business to Newfront since the four departed from AJG.

“[T]he provisions at issue were an integral part of the sale negotiations and should be enforced as such,” Kazanjian wrote.

“This case is further compounded by … substantial evidence that [the counterclaim defendants] have directly solicited Gallagher clients [which] should be prohibited, even under the more stringent employer/employee standard,” Kazanjian continued. “Since [the counterclaim defendants] do not appear to understand their obligations under their agreements, the court finds it necessary to enforce the non-servicing provisions against them in order to protect Gallagher’s legitimate business interests.”

The nine-page decision is *ABD Insurance and Financial Services Inc., et al. v. Arthur J. Gallagher & Co.*, Lawyers Weekly No. 09-112-22.

‘Goodness and light’

Boston lawyers Robert D. Carroll, Louis L. Lobel and Joseph P. Rockers represented the counterclaim defendants. David J. Santeusanio and Douglas R. Sweeney, also of Boston, represented AJG. No one was available for comment prior to deadline.

But Elizabeth C. Inglis of Needham Heights, who handles restrictive covenant disputes, said the case highlights the distinction between the sale-of-business and employer/employee covenants while touching briefly on the potential distinction between non-solicitation and non-servicing provisions.

Still, “what it seems to come down to for the court is the unclean hands of the individual [counterclaim] defendants and the fact that they ‘do not appear to understand their obligations,’” said Inglis, quoting the decision.

> ***“These cases are a balancing of the equities — who’s in the right and who’s in the wrong. As the court noted here, [the counterclaim defendants] didn’t seem to understand their obligations under the agreement.”***
>
> ***— David S. Rubin, Boston***

Boston attorney David S. Rubin zeroed in on the same language, stating that it emphasizes how such cases like, at their core, are claims in equity.

“If you’re looking for an injunction, the court will look to see who has the goodness and light on their side,” Rubin said. “[Kazanjian] seems to be really unhappy with the counterclaim defendants.”

Rubin also said that while non-servicing agreements are common in the insurance and financial services industries, courts often have been hesitant to enforce them, since they go a step beyond noncompetes and non-solicitation agreements in seeking to prevent someone from servicing customers of a prior employer even when the customers seek out that person on their own after learning they have left their prior employer.

“But these cases are a balancing of the equities — who’s in the right and who’s in the wrong,” he said. “As the court noted here, [the counterclaim defendants] didn’t seem to understand their obligations under the agreement, which to me is a strong statement of who the court feels is in the wrong.”

Chuck Rodman, an employment attorney in Newton, said the decision sends a strong message to insurance agents and their counsel to strictly construe the agent’s restrictive covenants rather than assume that, because they arose

from a corporate transaction, such as a merger or acquisition, they will be deemed unenforceable.

“Better to ask for permission than beg for forgiveness under these circumstances,” Rodman said. “The counterclaim defendants could have played it safe and asked the court to first interpret the degree of the restrictions before sending hundreds of communications to clients.”

John R. Bauer of Boston said that while the decision did not surprise him, other judges might have issued a less onerous injunction, at least with respect to counterclaim defendants who had not been shareholders of William Gallagher Associates when AJG acquired it.

“Some judges, maybe many judges, would find that as to those employees, the two-year non-solicitation/non-servicing injunction is unreasonably long,” Bauer said. “Some judges likely would conclude that the second year is a windfall, and enforcement of the restrictions for a second year is not necessary to protect a legitimate business interest.”

Non-servicing agreements

AJG acquired William Gallagher Associates, its clients, and its client goodwill in 2015 for $150 million in cash and equity.

At the time of the acquisition, Louisa Bolick, Michael Talmanson, Brian Kelleher and counterclaim defendant Erika Papadapoulos, a non-shareholder executive of William Gallagher Associates, entered into contracts with AJG that apparently barred them from soliciting, accepting business from, and providing services to AJG clients for two years should they terminate their AJG employment.

Bolick, Talmanson and Kelleher each received substantial cash compensation for their shares and for their retention.

Fellow counterclaim defendant James Ciarleglio joined AJG in 2016 and signed an agreement with similar restrictive covenants. He and the other four individual counterclaim defendants were all highly compensated while working for AJG.

Over a two-week period last summer, each of the counterclaim defendants resigned from AJG to join Newfront. In the weeks leading up to their resignations, Kelleher and Ciarleglio apparently sent more than 100 documents containing what AJG characterizes as confidential information and trade secrets from their AJG email accounts to their personal email accounts.

AJG also presented documentation of communications between Bolick, Talmanson, Kelleher and Ciarleglio and several AJG clients regarding moving their business to Newfront.

According to AJG, the communications went beyond simply notifying AJG clients that they were changing jobs, and 15 AJG clients switched to Newfront following the communications.

On July 25, 2022, the counterclaim defendants brought suit against AJG in Suffolk Superior Court seeking a declaration that their purported non-solicitation and non-servicing agreements were invalid and unenforceable.

In response, AJG filed counterclaims and moved for a preliminary injunction enforcing the restrictive covenants.

ABD Insurance and Financial Services Inc., et al. v. Arthur J. Gallagher & Co.

THE ISSUE: Were non-servicing agreements that shareholders of an insurance brokerage entered into when a larger company acquired their firm enforceable against them when they left to join a new firm seven years later?

DECISION: Yes (Suffolk Superior Court)

LAWYERS: Robert D. Carroll, Louis L. Lobel and Joseph P. Rockers, of Goodwin, Boston (plaintiffs/counterclaim defendants)

David J. Santeusanio and Douglas R. Sweeney, of Holland & Knight, Boston (defense/counterclaim plaintiff)

Lack of understanding?

Addressing the specific covenants in the case, Kazanjian

disagreed with the counterclaim defendants that their agreements did not contain non-solicitation provisions.

“A fair reading of them clearly reflects an agreement not to solicit Gallagher clients for two years following termination from Gallagher [and it is] undisputed that Ciarleglio’s Agreement contains a non-solicitation provision,” the judge said. “There is substantial evidence in the preliminary injunction record that Bolick, Talmanson, Kelleher and Ciarleglio have engaged in solicitation in violation of these agreements. The court will issue a preliminary order prohibiting any further solicitation of Gallagher’s clients.”

Turning to the non-servicing provisions, Kazanjian agreed with AJG that their enforceability as to Bolick, Talmanson and Kelleher should be evaluated under the expansive standard for agreements arising out of the sale of a business as opposed to the more onerous enforceability standard for those arising from employer/employee relationships for which the three argued.

“They base this argument on … the fact that seven years have passed since the acquisition, and … that the clients who Bolick, Talmanson and Kelleher allegedly solicited, were not William Gallagher clients,” said Kazanjian, emphasizing that the provisions were an integral part of sale negotiations and should be enforced accordingly.

Meanwhile, the judge found Ciarleglio’s non-servicing provision enforceable under the employer/employee standard while pointedly emphasizing that the non-servicing agreements of Bolick, Talmanson and Kelleher would be enforceable under that standard as well, given substantial evidence that each of them had solicited AJG clients and that none of the four appeared to understand their obligations under their agreements.

Because AJG had established that absent an injunction it would suffer irreparable harm, Bolick, Talmanson, Kelleher and Ciarleglio should be enjoined from soliciting or servicing AJG clients for two years while Papadapoulos should be enjoined from soliciting them for two years, Kazanjian decided.

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