PULLMAN &COMLEY

Alternative Theories To Address Former Employee Competition Where There Are No Covenants

Working Together

08.01.2014

By Richard Robinson

A recent Connecticut Superior Court case demonstrates that all is not lost for an employer when a former employee without a non-compete or a non-solicitation covenant leaves and competes. *Wentworth, DeAngelis & Kaufman, Inc. v. Nims, 2014 WL 1013479 (Conn. Super.)*. The defendant there joined the plaintiff's insurance agency in 2007 to service certain of its accounts. Shortly thereafter, he was assigned the North American armored vehicle insurance accounts the plaintiff bought from another agency. In May 2013, the defendant left with those accounts. The plaintiff sued.

Its first theory was trade secret violations, the claimed trade secrets being "the skills, knowledge, and client lists" concerning the armored vehicle insurance market. Although the court struck the claim granting the defendant's pre-trial motion, it only did so because the plaintiff failed to plead one of the elements of the cause of action. The plaintiff will re-plead to eliminate the omission and sufficiently state one of the theories employers can use when there are no covenants.

The plaintiff's next theory was tortious interference with business expectancy, the expectancy being the profits the plaintiff would have generated from its relationship with the diverted customers, and the interference being "fraudulently inducing, through the unauthorized use of [plaintiff's] protected trade secrets, policies, policy information and other written materials, a number of armored vehicle clients to change their broker of record from [plaintiff] to [the defendant's new company]." Here too, even though the court concluded that the trade secret claim was deficiently pled, its decision confirms that this is another theory available to employers when they have no covenants to enforce.

The plaintiff also asserted a CUTPA (Connecticut Unfair Trade Practice Act, General Statutes, 42-110b et seq.) claim. In large part, the CUTPA claim relied on the same allegations of wrongdoing as the tortious interference claim, and the court in this regard relied our Supreme Court's thirty year old statement - that it "is difficult to conceive of a situation where tortious interference would be found but a CUTPA violation would not." *Sportsmen's Boating Corp. v. Hensley, 192 Conn. 747, 755 (1984).* Beyond this, the plaintiff also alleged that the defendant after leaving had misrepresented to the plaintiff that he would buy the armored vehicle accounts for $275,000, an offer the plaintiff had accepted subject to "paperwork and payment," which never was forthcoming. The court noted that intentional misrepresentation is another adequate ground for a CUTPA claim – and in many cases yet another theory available when there are no covenants.

PULLMAN & COMLEY

Alternative Theories To Address Former Employee Competition Where There Are No Covenants

Among the other claims the plaintiff asserted was a breach of fiduciary duty claim. Reading the complaint "broadly and realistically," the court deemed the count sufficient. It sufficiently alleged a fiduciary relationship and breach during the course of that relationship; that the former employee continued to have a fiduciary duty to maintain the secrecy of the confidential information even after it left the plaintiff's employ. Here again is another theory available when there are no covenants.

It's always better to have a covenant. But as we've explained, all is not lost for the employer who finds his customers diverted by a former employee.

Tags: CT Superior Court