Cooley

May 2, 2011

New York common law has long prohibited a seller of the good will of a business from "improper solicitation" of its former clients, on the theory that such solicitation impairs the value of the good will sold—the so-called *Mohawk* doctrine. *See Mohawk Maintenance Co. v. Kessler,* 52 N.Y.2d 276 (1981). In a decision handed down last week, *Bessemer Trust Company v. Branin,* 2011 N.Y. Slip Op. 03307 (April 28, 2011), the New York Court of Appeals, answering a certified question from the Second Circuit, provides guidance on responding to inquiries from a former client, and makes clear that a seller may give active assistance to a new employer's efforts to pitch its business to former clients of the seller.

Francis Branin was a principal of an investment management firm which had sold its assets, including client accounts and goodwill, to Bessemer Trust Company. Their dispute, as relevant here, arose from Branin's role in assisting a new employer, Stein Roe, in a pitch to a long-standing client of Branin's. After contacting Branin and learning of his move, the client requested a meeting with Stein Roe. In response, Branin led a Stein Roe strategy session at which he detailed his former client's approach to investing and provided other background information. He also attended the meeting between the client and Stein Roe executives, although he played a largely passive role.

The Second Circuit found the applicable law unclear, and sought instruction from the New York Court of Appeals on the application of the *Mohawk* doctrine to a seller who, in response to inquiries from the seller's former client, actively develops and participates in a plan by which the seller's new employer will solicit the former client's business. *See Bessemer Trust Company v. Branin,* 618 F.3d 76 (2d Cir. 2010). The New York Court declined to adopt any "hard and fast" rule defining improper solicitation, emphasizing that case-by-case analysis must be sensitive to the underlying principles of the *Mohawk* doctrine and to the industry-specific factors relevant to impairment of the good will conveyed by the seller. Nonetheless, its discussion provides helpful and specific guidance as to actions that will and will not constitute improper solicitation.

Seller may answer factual inquiries from a former client

Bessemer stresses that a seller may neither initiate direct contact with its former clients (such as by targeted mailings or phone calls), nor take advantage of client initiated contacts to tout its new business. However, the client is free to conduct due diligence on the seller's new venture. And, absent a non-compete provision in the sale agreement, the seller remains free to compete for business with the purchaser of its good will. To that end, the seller may answer factual inquiries from a former client concerning the seller's new business. The seller's response may not go beyond the scope of the information requested, and importantly, the seller must refrain from disparaging the business of the purchaser—it may not explain why it believes that its products or services are superior to those of the purchaser.

Seller may assist a new employer to develop a pitch to a former client

Where a former client initiates an inquiry about the seller's new business, the seller may assist a new employer in the "active development of a plan" to respond to the client's inquiries. The seller may provide the new employer with industry appropriate, non-proprietary information about the former client. With specific regard to the financial services industry, that information might include "items such as the client's investment preferences, financial goals, and tolerance of risk." The seller may also assist the new employer to prepare for a "'sales pitch' meeting requested by a former client and may be present when such meeting takes place." So long as the seller's role at such a meeting is "largely passive" and "limited to responses to factual matters," it will not amount to improper solicitation.

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